

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: **2023-066211**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

In the matter between :

N[...] A[...] T[...]

Applicant

And

T[...] M[...] M[...]

Respondent

JUDGMENT

VON LUDWIG AJ

[1] The parties are husband and wife embroiled in divorce proceeding under a separate case number (66211/2023).

[2] Applicant (who is the Plaintiff in the divorce action) applies this Court for what she terms the “interlocutory” relief of :

[2.1] Staying the divorce action until this application is resolved;

[2.2] Declaring there exists a “valid and effective” Ante Nuptial Contract entered into on 28 January 2021;

[2.3] Declaring there exists a valid civil marriage out of community of property in terms of an Ante Nuptial Contract between applicant and respondent which marriage was entered into on 02 April 2021;

[2.4] Declaring that the registration of the marriage by the Department of Home Affairs (cited as Second Respondent) is “valid and persists to date”

[2.5] First Respondent “herein referred to as “Respondent”) to pay the costs

[2.6] Ordering referral to oral evidence “only in respect of a genuine material dispute of fact, If any”

[3] Respondent raised the Points in Limine that :

[3.1] Applicant seeks to ventilate material disputes of fact through the mechanism of motion proceedings;

[3.2] a dispute of fact has directly emerged which the court would not be able to decide on the papers

[3.3] the request for referral to oral evidence is an abuse of the process and an irregular process because this is to be dealt with by the trial court.

[4] He points out that this is all the more egregious by virtue of the fact that the divorce is already at pre-trial stage.

[5] The Applicant’s basis for approaching this court is essentially that “It is not clear on a proper reading of the particulars of claim which marriage regime is applicable between the parties. Our pleadings are as a result all over the place”.

[6] it is noteworthy that she is the Plaintiff and this court observes that if it is “not clear on a proper reading” of her own document what the basis of her case is, then it is she who has a problem. If she means to say that it is not clear on a conspectus of all the pleadings which marriage regime is applicable between the parties, it seems that is the very meat of a Divorce Trial and a very basic material dispute of fact.

[7] My confusion was not cleared up when I read the submission in Applicant’s Heads of Argument that on the divorce pleadings the Defendant “is not arguing in its

plea or counterclaim for the recognition of the customary marriage” and the “question on the validity of the antenuptial contract or the civil marriage is not before the divorce court”

[8] I have not been able to gain access to the divorce pleadings, but have had sight of some of the R43 papers misfiled in this file, and of the Defendant’s FDF, from all of which it is evident that he refers to them being married in community of property and she labels it as out of community of property.

[9] It seems further that the Defendant has pursued or will pursue a spousal maintenance claim, which is relevant to what I say below about rights flowing from a declaratory order.

[10] Whether or not there is a dispute on the divorce pleadings about the date of the marriage itself and the validity and effect of the Ante Nuptial Contract concluded between the parties, there is a very clear and material dispute of fact on the papers before me herein.

[11] The basic dispute is that on 29 February 2020 there took place what Respondent contends was a customary marriage, but what Applicant contends in her Replying Affidavit was the “initial marriage stage”.

[12] It appears to be common cause that on 28 January 2021 the parties signed a document in the form of an Ante Nuptial Contract and that on 02 April 2021 the parties concluded a civil marriage. It is these latter in respect of which Applicant seeks a declaratory order.

[13] Whether the marriage was concluded on 29 February 2020 and was thus in community of property, or on 02 April 2021 after signature of the ANC and thus out of community of property excluding accrual obviously affects the manner in which the assets and liabilities of the parties are to be dealt with on divorce, a consequence of which may well be, in part at least, whether or not the Defendant has a spousal maintenance claim. It is thus a material issue.

[14] If this Court were to give a declaratory order as to the existence of a “valid and effective” ANC and a “valid civil marriage in terms of that ANC on 02 April 2021 and the registration of that marriage to be “valid and persistent” the result would be to ignore what the Respondent has said in his papers herein, to deny him any opportunity to lead any evidence about the “first” customary marriage and its validity, and to address the subsequent intentions in and consequences of the signing of the Ante Nuptial Contract and the conclusion of the civil wedding.

[15] The consequences of him not having an opportunity to ventilate these issues and of making the declaratory order sought would mean that any claim he has to any assets is automatically disposed of. If it is indeed correct that he has not made out any such claims in the divorce pleadings does not mean that he may not and might not amend his papers to do so, even at this late stage. None of that is for this court to deal with or be affected by.

[16] all I can and must examine is can I make a declaratory order as sought and/or may I proceed with this application when there is a clear material dispute of fact on the papers before me.

[17] I am going to deal with both of these aspects, even though each individually can be dispositive of this application.

[18] I begin with the Respondent’s Point in Limine in which he contends that there is a material dispute of fact which cannot be adjudicated on motion proceedings.

[19] It seems to me that Applicant herself leads with this at the beginning of her own Founding Affidavit where she states that “it is not clear on a proper reading of the Particulars of Claim which marriage regime is applicable between the parties. Our pleadings are as a result all over the place.” If this is not an obvious statement that we have a material dispute of fact then I don’t know what is. That she is the Plaintiff, the author of those particulars of claim, makes her launching of this application even more inexplicable.

[23] The summary she herself gives the court of the matter in itself raises a veritable list of disputes of fact each of which could not be more material.

[24] Ex facie the papers there are a number of very obvious disputes of fact which need to be dealt with thoroughly on evidence. Purporting to determine what amounts to the very meat of the Divorce Trial in this Court on motion is a basic ignoring of the basic principle of *audi alterem partem* in a situation where the Respondent has set out, herein, what on the face of it is a material dispute of fact.

[25] I am therefore already of the view that this is a matter sought to be dealt with on Motion, but where there is on the papers before me enough to support the contention that there is a material dispute of fact which precludes me from granting the relief sought herein.

[26] Further, the relief is sought by way of a declaratory order and I must enquire as whether this is something Applicant may secure in this application.

[27] For that we turn to s21(1) (c) of the Superior Courts Act

21. Persons over whom and matters in relation to which Divisions have jurisdiction

(1) *A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—*

(a) *to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*

(b) *to review the proceedings of all such courts;*

(c) *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”*

[28] In essence the purpose of a declarator is to confirm a legal position against a backdrop of common cause facts.

[29] Even on Applicant's version the facts are not common cause. I was advised in submissions by counsel that the Applicant does not challenge the validity of the customary marriage, but says that it does not exist. Even if the Court accepts that it exists, the question is to which marriage is applicable now, which Applicant contends is a question of law. I disagree that it is that simple and that I can infer a background of common cause facts.

[30] Even if I am able to find that there is a background of common cause facts (which I do not), I am fortunate to have a discretion herein and in the responsible exercise thereof I address the following. I am of the view that there is simply no principle of justice or fairness to be served, and there are a number of basic principles of law which would be wrongly ignored and improperly dealt with if I were to give a declaratory order. The intention of the legislature in allowing a court to grant declaratory relief can never have been to circumvent a party's right to a proper hearing. This must be particularly applicable when the parties have already reached pre-trial stage of a civil matter.

[31] I am sure that the Applicant's claim for a referral to oral evidence is intended to fill any loopholes which may be found when dealing with possible disputes of fact, and to achieve time and cost savings which I am going to trust that this application was designed to achieve, contending that any "minor" issues can be dealt with by a simple referral. However, the very inclusion of this relief damns the Applicant in that it cannot but be seen as a limited concession that there is indeed not an absolute commonality of cause.

[32] This is a complex matter and, aside from the issue which the Applicant seeks to have disposed of by way of declaratory relief, or heard by referral to limited oral evidence, there will be Parental Responsibilities and Rights issues in respect of a child born of the marriage, and may well be a spousal maintenance claim. Even if the

issues before me are disposed of by way of this application, the entire matter will not be finalised.

[33] The case is already far advanced in its process to Trial and indeed I am of the view that Trial (not just oral evidence), with all its attached processes of discovery, is the correct process and forum for this matter.

[34] The Applicant has not even attempted to illustrate why, as the Plaintiff in the trial and the author of the very pleading which she contends is “all over the place” she now, at this late stage of the process, considers it correct in law for her to proceed as she has herein. It is obvious that when a Defendant disagrees with what is set out in Particulars of Claim he will plead his own version and it will differ from that of the Plaintiff. If the pleadings are indeed “all over the place” it is up to the parties to except, amend or proceed and stand or fall thereby. However if by “all over the place” the Applicant means that there is a serious and complicated dispute of fact, that is exactly why she ought to have left the matter to be adjudicated by the Trial Court and to have known that there is a material dispute of fact which cannot be addressed herein most especially by way of a declaratory order.

[35] On the papers before me I find that there is a material dispute of fact such that I cannot deal with this matter on motion proceedings. That in itself disposes hereof. Further, however, the fact that there is a material dispute of fact goes to whether this is relief which can be awarded by way of declaratory order and which the applicant ought to have sought in such manner. It is self-evident that there is no backdrop of common cause facts against which I can grant an order. Further, the issues in this matter militate against the exercise of a discretion I favour of granting the order sought by the Applicant.

[36] There is nothing on the papers to assist me unequivocally in determining whether this application has been brought by the Applicant in a genuine attempt to save time and costs and deal with the issue which are common cause, or to avoid the hearing of evidence and to obtain an order which might not be achieved by the full ventilating of all issues by way of proper evidence and cross examination. Likewise, whether the Defendant has a genuine case for a first, customary, marriage

and legal argument as to the consequences of the subsequent events, or is simply seeking to drag out the process for his own reasons, is all for the Trial Court to know, and to address by way of its own costs orders. There is not enough before me to make any form of extraordinary costs order.

[37] I therefore make the following order :

Order

[1] The Application is dismissed.

[2] Costs will follow the result and as such the Respondent will pay the Applicant's costs on a party and party scale to be taxed on Scale B and to include the costs of counsel.

[2] Costs will follow the result and as such the Applicant is to pay the Respondent's costs, including the costs of counsel, on the party and party scale, to be taxed on Scale B.

C VON LUDWIG

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Judgment 22 July 2025

Date of Hearing 27 March 2025

For Applicant : Adv R Ralikhuvhana
Instructed by Katlego Ralikhuvhana Mokgola Inc

For Respondent : Adv T Loabile-Rantao
Instructed by Nkotosoe Inc