

SOUTH AFRICA / JUDGMENT

H.A v M.R (EL845/2011, ECD1278/2011) [2017] ZAECELLC 11 (15 May 2017)

[2017] ZAECELLC 11

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL845/2011, ECD1278/2011

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IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: EL 845/2011

ECD 1278/2011

In the matter between

H. A.

Applicant

and

M. R.

Respondent

JUDGMENT

HARTLE J

1. The applicant seeks an order amending her particulars of claim in her divorce action against the respondent in accordance with a rule 28 (1) notice delivered by her on 29 September 2016. She seeks a further order for the costs of the application. (She however tenders payment of the respondent's costs of delivering a consequentially amended plea in the event that she is permitted to amend and effect the amendment which she proposes by her notice of intention to amend.)
2. Initially in her particulars of claim she pleaded that she was married to the respondent "in community of property". It is common cause that the parties were married on 25 March 2002 at B., in the Head Siege of the Municipality, in the People's Democratic Republic of Algeria. This allegation, that the marriage between the parties was in effect one in community of property justifying a prayer for a division of the joint estate was made, according to the applicant, in the belief that it was of such effect. Indeed, so did the respondent, who did not join issue with her in his original plea that the effect was of a combined estate.
3. He later amended his plea and claim in reconvention however to plead that he and the applicant were married to one another in accordance with Islamic Law wherein the parties have retained separate estates and financial independence and on the basis that they did not enter into a mutual agreement regulating the proprietary consequences of their marriage, meaning that the default position of separate estates applies.
4. The applicant says that this does not accord with their stance adopted at the time of the conclusion of their marriage that they agreed to have a joint estate. Unfortunately however they did not record this agreement in the marriage certificate or in any subsequently authenticated certificate, whereas Article 37 of the Algerian Family Code requires an agreement to have a joint estate to be recorded in the marriage certificate or in a subsequently authenticated certificate.
5. Given the respondent's stance indicated above, and upon seeking legal advice, she proposed to amend her particulars of claim by the introduction of two alternative claims which would ameliorate the position if the court were to find in favour of the respondent on the basis that the patrimonial consequences are not as contended for by him.
6. By the first alternative claim the applicant hopes to plead the existence of a universal partnership between them in the event that they are found not to have had a joint estate, and the second alternative claim is for the repayment of certain monies which she says she paid to the respondent during the marriage in the event that it is found that no universal partnership or community of property existed between them.

7. The respondent has objected to the amendment. The first ground on which he opposes the proposed amendment is that the introduction of a claim for the existence of a universal partnership will render the applicant's particulars of claim vague and embarrassing because a universal partnership has no application to the matrimonial regime governing the marriage relationship between them.
8. The second objection is that the introduction of a claim for repayment of money "unnecessarily clouds the current issue", and that it is a device as it were to delay the action and will cause prejudice to the respondent because he will have to plead to the claim. He proposes that the applicant should issue out a separate action for such a claim.
9. The applicant avers to the contrary that, if allowed to amend as proposed, it ought to promote a proper ventilation of the dispute between them and to have the true issues between them the subject of determination, rather than obfuscating those.
10. If one cuts through the lengthy answering affidavit of the respondent, his real objection appears to relate to his perception, which is somewhat fatuous, that the applicant is attempting to alter the matrimonial consequences of their marriage to "attempt to obtain some sort of financial advantage, to which (she) is not entitled, in accordance with the matrimonial regime applicable to (their) marriage". He repeats this concern twice in his answering affidavit. This is somewhat ironic in the context of his own amendment to his plea and claim in reconvention, whereas the parties originally appeared to be *ad idem* that the effect of their marriage, albeit a foreign one, was one of a joint estate.
11. As an aside, the parties have changed legal representatives and those advising them have obviously brought a different perspective to the question of the applicable matrimonial regime and how this bears on the patrimonial consequences which will pertain upon the anticipated divorce, necessitating an amendment on both sides.
12. A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially. The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs, and where appropriate, a postponement. The prejudice in this context embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of a pleading and the prejudice to the other party's rights. It is further trite that the fact that an amendment may cause the other party to "lose his case" against the party seeking the amendment is not of itself prejudice of the sort which will dissuade the court from granting it.[1]

13. As indicated above, it appears to be the respondent's refrain that the applicant hopes by her proposed amendment to extract a financial advantage from him to which she is not entitled. Without saying so, the concern is that he will lose the case as it were if the applicant is allowed to rely on a different cause of action (which opens up the possibility for her to ensure a just and equitable division of the marriage assets) than the one pleaded. This is self-evidently not a reason to disallow the amendment.
14. Further, the alternative claim, which seeks to advance the existence of a universal partnership is in my view not vague and embarrassing in its content or its substance. The existence of a marriage, under any proprietary regime other than one in community of property, does not, as a matter of law, preclude such a claim.
15. In addition, the introduction of a claim for the repayment of monies paid to the respondent during the marriage can cause no prejudice to the respondent. Indeed it is most convenient that all issues between the parties arising out of their marriage be determined at a single trial. This is as indicated above exactly the objective of allowing an amendment.
16. Both the alternative claims raise triable issues in my opinion and will conduce to a proper and full ventilation of all the disputes as to the proprietary consequences of the parties' marriage and their conduct during the marriage. The respondent will simply plead to the amendment and the parties will be able to get on with the action. A trial date has not yet been allocated, so there can be no prejudice on this score. The only delay I see is that occasioned by the proposed amendment being held in limbo.
17. I am further satisfied that the application by the applicant is bona fide and fully explained.
18. In the result I find that the respondent's opposition to the application, especially after his own amendment to his pleadings, was both unnecessary and obstructive.
19. The applicant has made out a proper and adequate case in my view for an order granting her leave to amend her particulars of claim in accordance with her notice in terms of rule 28 (1) dated 29 September 2016.
20. I issue the following order:
 1. The applicant is granted leave to amend her particulars of claim in accordance with her rule 28 (1) notice dated 29 September 2016;
 2. The respondent is directed to pay the costs of the application.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 2 February 2017

DATE OF JUDGMENT: 15 May 2017

Appearances:

For the applicant: Mr. Wood instructed by Bax Kaplan Russell Inc, 2 Clevedon Road, Selbourne, East London, ref. Mr. Clark). (Heads of Argument prepared by Mr D De La Harpe.)

For the first respondent: Mr. Maseti of Yazbek Attorneys, 18 Vincent Road, Vincent, East London, ref. J Fraser/R17.

- [1] See Generally Erasmus, Superior Court Practice, at B1 178 – 184C on the principles guiding a court in an application to amend where an objection to the proposed amendment is offered up.
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