

SOUTH AFRICA / JUDGMENT

S v S (347/2015) [2016] ZAFSHC 77 (19 May 2016) [2016] ZAFSHC 77

COURT

Free State High Court, Bloemfontein

BEFORE

Moloi

CASE / FILE NUMBER

347/2015

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 347/2015

In the matter between:-

D. J. S.

PLAINTIFF

and

A. E. S.

DEFENDANT

CORAM:

MOLOI, ADJP

HEARD ON: 22 APRIL 2016

DELIVERED ON: 19 MAY 2016

MOLOI, ADJP

[1] In this matter the plaintiff and the first defendant are married to each other out of community of property with the exclusion of accrual. The plaintiff instituted divorce proceedings in this court. The action is defended by the first defendant. After pleading to the Summons the first defendant applied to this court to join the second defendant to the action. The second defendant is a company of which the plaintiff is the sole director. The application for joinder was granted.

[2] The first defendant filed an amended counterclaim wherein she seeks a declarator of universal partnership between herself and the plaintiff in so far as the assets belonging to the company, the second defendant, wherein she claims equal share. The first defendant claims in her counterclaim that a further company called Orambamba 47 (Edms) Bpk was registered and was made up of certain trusts named EDS Trust and Enslin S. Trust in which she and the plaintiff were equal shareholders. The latter company also acquired fixed property.

[3] The plaintiff took an exception to the certain portions of the amended counterclaim more specifically to where the first defendant

claims the existence of a quasi partnership with reference to Orambamba 47 (Edms) Bpk on the ground that in law the concept of a quasi partnership is foreign and unknown and that the parties' trusts in a company offends the provisions of section 12 of the Trust Property Control Act No 57 of 1988; that the plaintiff bought a farm Gottenburg in the name of the second defendant and that the farm thus belongs to the Gottenburg partnership and that a claim relating to the alleged Implement Partnerships is, in fact, disclosing or referring to a stipulatio alteri and, if that was the case, the motive could not have been profit-making for which a partnership can be established, but is clearly meant to be for the benefit of third parties, namely the sons born out of the previous marriages of the parties.

[4] Upon proper reading of the exceptions it appears that they are based on legal technicalities than the essence of the first defendant's

claim, viz universal partnership. The concept of universal partnership is a vexed one and often can properly be resolved by resorting to evidence. The exceptions, if properly understood, do not therefore go to the heart of the first defendant's counterclaim but

for how it is phrased.

[5] The purpose or object of a pleading is to best inform the opponent what case to meet with sufficient detail. If the claim is

identifiable and legally recognisable, it is triable and evidence can fill in the gaps and consequently the cause of action is disclosed. An exception on the grounds of not disclosing a cause of action applies to a situation where, for instance, a claim is bad in law and cannot be identified. The purpose of an exception to such a claim is therefore to dispose of a claim or a portion thereof expeditiously without leading unnecessary evidence: Erasmus, Superior Court Practice, B-152; Miller v Miller 1965

[4] SA 458 (c) at 468; Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd 1976 (1) SA 100 (W) at 1070.

[6] On reading the counterclaim one can identify the first defendant's claim based on universal partnership. How that was phrased and the diction used may be vague and might embarrass the opponent. To my mind the best course to take would have been to require the removal of the complaint on notice as envisaged in Rule 23 (1). This has, however, not been done. In the interest of justice and in fairness to all the parties, I am of the view that the first defendant be given an opportunity to remove the cause of the complaint.

[7] Consequently the following orders are made:

- (a) The exception is dismissed.
- (b) The first defendant is given twenty (20) days to remove the cause of the complaint raised against the relevant paragraphs of her Amended Counterclaim dated 21 January 2016.
- (c) The costs of the exception shall be

On behalf of the plaintiff:

Adv P.A. Van Niekerk S.C

Instructed by

HONEY ATTORNEYS

BLOEMFONTEIN

On behalf of the defendant:

Adv Zietsman

KRAMER WEIHMANN & JOUBERT

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Prepared on 14 October 2026 · Esheria