

SOUTH AFRICA / JUDGMENT

S v S (71/2015) [2016] ZAFSHC 202 (15 December 2016)

[2016] ZAFSHC 202**COURT**

Free State High Court, Bloemfontein

BEFORE

E K Tsatsi

CASE / FILE NUMBER

71/2015

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****Number: 71/2015****Reportable:**

No

Of

interest to other judges: No

Revised.

In

the matter between: V I

S Plaintiff

and

M

A

S Defendant

HEARD

ON: 28 OCTOBER 2016

JUDGMENT

BY: TSATSI, AJ

DELIVERED ON: 15 DECEMBER 2016

INTRODUCTION

- [1] This is an exception in terms of Rule 23 (1) of the Uniform Rules of Court (“the Rules”) brought by the plaintiff against the defendant (“the parties”) on the basis that the defendant’s amended plea lacked the averments which are necessary to sustain a defence and also that the averments were bad in law. The defendant delivered a counter notice in response to the exception.
- [2] The plaintiff has instituted a divorce action against the defendant. The divorce is founded on the basis that the marriage relationship between the parties has irretrievably broken down and has reached such a state of disintegration that there is no reasonable prospect of the reconciliation or the restoration of a normal marriage relationship. For the sake of convenience the parties will be addressed as plaintiff and defendant.

FACTS

- [3] The defendant’s amended plea raised among others the following

issues:

“6. *Ad paragraph 6:*

The marriage officer who was also a magistrate in Phuthaditjhaba magistrate court solemnized the alleged “marriage” under the Black Administration Act 38 of 1927 section 22(6). The Magistrate asked the parties whether do they want to get “married” In or Out of Community of Property. The Plaintiff answered that the parties have agreed to get “married” Out of Community of Property. The declaration was then written down in the Marriage Register and the parties, two witnesses and the magistrate signed. The Defendant and two witnesses were also made to sign a declaration that : ”there is no customary union subsisting between me and any woman”. The two documents were stamped with the Department of Justice stamp dated 9 May 1996.

In the Plaintiff’s Combined summons, Case No. 71/2015 stamped 8th January 2015, the Plaintiff instituted a ‘divorce action” against the Defendant and claimed that the parties were “married” to each other In Community of Property on the 9th May 1996. The parties conducted themselves in accordance of their “agreement” (OUT OF COMMUNITY OF PROPERTY) as stipulated in the Marriage Register K373551.

Both the Plaintiff and Defendant bought their assets separately”.

[4] Plaintiff raised five exceptions which were as follows:

“1.1 Plaintiff instituted a divorce action against the Defendant and claim that the parties were married to each other in community of property on the 9th May 1996;

1.2 Section 22 (6) of the Black Administration Act, 38 of 1927 has been repealed by the Marriage and Matrimonial Property Law Amendment Act, 3 of 1988 with the result that civil marriages entered into between a man and a woman after 2 December 1988, the date of which Act 3 of 1988 came into operation will be governed by the Matrimonial Property Act.

1.3 The Plaintiff and the Defendant did not enter into an antenuptial contract and therefore the marriage regime applicable on the parties marriage is that of in community of property and in accordance with the Matrimonial Property Act.

1.4 Therefore the marriage is not null and void.

1.5 The Defendant did not join the Department of home Affairs and The State in the matter, therefore the plea constitute a non-joinder”.

ISSUES

[5] The issue was to determine whether or not the amended plea lacked the averments which were necessary to sustain a defence and whether or not the said averments were bad in law. The other issue was whether or not the plaintiff has discharged the required onus of proof for this Court to uphold the exception.

SUBMISSIONS

[6] Counsel for the plaintiff, Adv Els, submitted that the parties are married in community of property not out of community of property as submitted by the defendant. He further submitted that no facts outside pleadings can be brought into the issues. He argued that the defendant's amended plea did not make mention of the Constitutional rights. He referred me to paragraph 3.3 of his heads where he argued that “in order to succeed an excipient has the duty to persuade the Court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this the exception ought not to be upheld”. He further submitted that an exception provides a useful mechanism for weeding out cases without legal merit. His argument was that if a pleading is bad in law, the answer is to except.

[7] The submission on behalf of the plaintiff was that the defendant failed to file the amended pages. The amended pages were only filed on 8 August 2016. Counsel for the plaintiff further submitted that the defendant should have joined the Magistrate and the Department of Home Affairs. He argued that the amended plea constituted a non-joinder.

- [8] It was submitted on behalf of the plaintiff that counter notice of the defendant should be disregarded. He further submitted that a conclusion that the defendant made was not a defence. This conclusion by the defendant was that the marriage was null and void. Further submission on behalf of the plaintiff was that at the time when the parties got married the Black Administrative Act, 1927 (Act No. 38 of 1927) (BAA), was repealed. Counsel for the plaintiff further submitted that argument by the defendant that the signing of section 22 (6) of the Black Administration Act is inconsistent with the supremacy of the Constitution and that the Black Administration Act cannot be law, was bad in law. Counsel for the plaintiff urged me to uphold the exception with costs, struck out the defendant's amended plea as set out on paragraph six and order the defendant to pay the costs of the exception.
- [9] Mr S. represented himself. He argued his own case. He submitted that as far as he was concerned the marriage was null and void. He further submitted that the Court could not compel him to be married in community of property. He referred me to page six of his heads which stated that the defendant's submission was that on the 2nd of December 1988 the alleged unlawful "marriage" did not exist at the time at which the repeal took effect. It was further submitted that section 12 (2) (b) did not result in the continued existence of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927). The defendant's further submission was that section 22(6) of the Black Administration Act did not regain the force of law on the 9th of May 1996 and therefore its reference in the Matrimonial Property Act 88 of 1984 as amended and Divorce Act 70 of 1979 as amended respectively, refers to marriage entered into before the commencement of Matrimonial Property Act 88 of 1984 as amended. Mr S. relied on a document (annexure "B") which was a copy of the original, certified as a true copy of the original as indicated on the stamp of the Director General of home Affairs dated 11 February 2015. This document, purported to be a marriage certificate with the Department of Justice (dated 1996) and Home Affairs' (dated 11 February 2015) official stamps. The full date on the document was not legible. The said document is titled "Marriage Register".
- [10] He further submitted that his constitutional rights have been infringed especially his right to dignity and respect. He has been labouring under the impression that he was married out of community of property only to discover after eighteen (18) years that he was allegedly married in community of property. He argued that during the marriage with his wife they conducted their marriage as if they were married out of community of property not in community of property. They both have been keeping their assets and property separately. He urged me to dismiss the plaintiff's exception with costs, uphold paragraph six of his amended plea and then submitted that the plaintiff should pay the costs of the exception.

THE LAW

[11] Rule 23 (1) provides as follows: “Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading,

deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception”.

[12] Rule 18 (4) of the Uniform Rules of Court provides as follows: “Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”.

[13] The object of pleadings is to define the issues. In *Imprefed (Pty) Ltd v National Transport Commission, Kumleben JA and Nienaber JA* referred with approval to *Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 22nd ed at 113 and stated the fundamental principle of pleadings as follows:

“The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision[1]”.

[14] In *Benson and Simpson v Robison* 1917 WLD 126, the general principles of pleading were explained by Wessels J - “The plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations.”

[15] Beck’s : *Theory and Principles of Pleading in Civil Actions* at page 46 sets the position as follows:-

“Although pleadings must be carefully drawn and be well turned out, the court ought not to read them pedantically. The rules do not require that pleadings be drawn up in perfect language, but that the allegations of the parties should be clearly cognisable. Thus the court will not hold that a pleading is bad in law provided that such pleading shows the other party what the claim or defence, as the case may be, is, with reasonable clarity even though there may be allegations in such pleading which are unnecessary (though not prejudicial to the opposite party) and even though such pleading may not be elegant.” At page 47 it continues as follows: The fundamental principles which governs all pleadings can be summarized as follows:

(a) Pleadings must be brief and concise and couched in summary form. ...

- (b) Pleadings should state facts and facts only, that is to say they should not contain statements of either law or the evidence required to establish the facts.”

[16] In *Jowell v Bramwell Jones* 1998

- (1) SA 836 (W) at 898 the Court emphasised that an exception will not be upheld where it is directed at a particular paragraph within a cause of action. At 902-3, Heher J stated the following:

"Furthermore, in approaching these exceptions, I shall bear in mind the following general principles:

- (a) minor blemishes are irrelevant;
- (b) pleadings must be read as a whole; no paragraph can be read in isolation;
- (c) a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations.

Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;

- (d) only facts need be pleaded; conclusions of law need not be pleaded;
- (e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations

and the pleading must be so read: cf *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982

- (4) SA 371 (D) at 377, 379B, 379G--H.”

[17] As indicated in *Absa Bank v Boksburg TLC* (Government of the Republic of South Africa, third party) [2], a pleading will not be excipiable where the party knows adequately what the plaintiff's case is and its attorneys are able to take instructions and record a meaningful response to such pleading. The defendant bears the onus of persuading the Court that on every interpretation no cause of action has been revealed. See *Francis v Sharp* 2004

- (3) SA 230 (C) at 237D-I.

[18] On 2 December 1988, section 22 of the BAA was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. A civil marriage concluded in contravention of this section did not dissolve the customary union. As the amendment was not retroactive, the position before 2 December 1988 was left unchanged. Section 22 in its amended form was ultimately repealed by Recognition of Customary Amendment Act (“RCMA”) (Bakker & Heaton 2012 TSAR 586 587). The Marriage and Matrimonial Property Law Amendment Act, 1988 (MMPLAA) provides as follows:

18.1 Amendment of section 7 of Act 70 of 1979 as amended by section 36 of act 88 of 1984 provides that: (2) Section 7 (3) of the Divorce Act 1979 provides that “ (3) A court granting a decree of divorce in respect of a marriage out of community of property--- (a) entered into before the commencement of the Matrimonial Property Act,1984, in terms of an antenuptial contract by which community of property community, community of profit and loss and accrual sharing in any form are excluded or (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the

Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and

Matrimonial Property Law Amendment Act, 1988, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party”.

18.2 Amendment of section 21 of Act 88 of 1984 as amended by section 1 of Act 91 of 1986 provides that:

- (3) Section 21 of the Matrimonial Property Amendment Act 1988 was amended as follows: “(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to the marriage out of community of property----- (i) entered into before the commencement of this Act in terms of an antenuptial contract by which community of property and community of profit and loss are excluded; or (ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act,1988, in terms of section 22(6) of the Black Administration Act, 1927(Act No. 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988, may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after [that] the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act1988, as the case maybe, or such longer period, but not less than six months determined by the Minister by notice in the Gazette of a notarial contract to that effect”.

18.3 Amendment of section 25 of Act 88 of 1984 as amended by section 2 of Act 91 of 1986 provides that:

“4. Section 25 of the Matrimonial Property Act is amended as follows: “(2) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage [other than a marriage contemplated in subsection (1)] entered into before the commencement of this Act and in respect of which matrimonial property system was not governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may----- (a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or (b)if they

are married out of community of property and the wife is subject to the marital power of the husband [was not excluded in terms of the antenuptial contract concerned], cause the provisions of Chapter II of this Act

to apply to their marriage, by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract concerned was so registered”; and by the addition of the following subsection: “(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may----- (a) if they are married in community of property, cause the provisions of Chapter II and III of this Act to apply to their marriage; or (b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract concerned was so registered”.

[19] In *Moola & others v Aulsebrook NO & others*[3] the court summarised the requirements of a putative marriage was as follows:

‘(a) there must be bona fides in the sense that both or one of the parties must have been ignorant of the impediment to the marriage;

(b) the marriage must be duly solemnised;

(c) the marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the bona fides.’

[20] In *Ngubane v Ngubane* 1983 (2) SA 770 (T) [16] at 773, 774 a requirement for the law’s recognition of a putative marriage was said to be a “marriage ceremony performed by a marriage officer”. The Court in *Ngubane* (supra) may have doubted whether the decisions relied upon in [*Ramayee v Vandiyar* 1977 (3) SA 77 (D)] ought to have been convincing. It is convenient to distinguish three levels of protecting the . . . bona fides of parties. These are:

(a) The parties may do everything required by law to create a valid marriage but despite proper solemnising thereof, the marriage is a prohibited one.

(b) Parties equally do whatever the law requires . . . but find that their efforts were in vain. Thus although the marriage is permissible, their best efforts could not achieve the desired result because the purported marriage officer was not authorised to act as such.

(c) The parties make no attempt to comply with the civil law. They may even, as I understand the present case, make no attempt to establish what those requirements are.

[21] As regards the mis-joinder the matter is regulated by Rule 10, the relevant portion of which provides:

“10(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or any alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

[22] The test to determine whether or not there is a mis-joinder is whether or not the party has a direct and substantial interest in the subject matter of the action that is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the Court[4].

[23] An objection of misjoinder of causes of action will be well-founded only where all three of the following requirements are satisfied: (1) The defendants are separate and distinct (meaning that there are no common defendants); (2) each cause of action is separate and distinct and (3) there is no question of law or fact that is common to the separate causes of action. Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 4th ed at 189 and the reference therein to *Ackermann v Pasquali and Montagu Divisional Council* 1913 CPD 296. Rule 10(3) requires that the questions of law and fact upon which the right to relief depends must be “substantially” the same. This means that the questions of law and fact must “in the main” or in their “principal essentials” be “essentially” the same. *Dreyer and Others v Tucker’s Land and Development Corporation (Pty) Ltd* 1981

(1) SA 1219 (T) at 1224F-1225B.

[24] Convenience is a further relevant consideration. At common law a number of defendants may be joined whenever convenience so requires. *Morgan and Another v Salisbury Municipality* 1935 AD 167 at 171; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* 1980

(3) SA 415 (W) at 419E-F.

APPLICATION OF THE LAW TO FACTS

[25] An excipient must clearly and concisely state the grounds upon which the exception is taken, and is bad in law. In casu the purpose of the exception was that the defendant’s amended plea was bad in law. Defendant’s contention was that the marriage between him and the plaintiff is null and void as the marriage took place under the BAA whilst the said Act was repealed.

There is no reason why that defence is bad in law. This is a very important fact that should be considered by this Court. The second

ground on which the exception was based, was that the amended plea did not disclose a cause of action, the third ground was that the defendant failed to join the Department of Home Affairs and the Magistrate who was the Marriage Officer. The non-joinder point is not valid. This is a divorce matter which is a personal and intimate relationship between two parties. The defence is not bad in law on the grounds stated in the exception and because of the effect of marriage under BAA which was repealed at the time may have far reaching legal consequences for the parties.

- [26] In any exception application prejudice to the excipient is the ultimate test. An exception will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. In casu the plaintiff omitted to mention in her pleadings that the parties got married under the Black Administration Act, out of community of property even though the said Act was repealed. Both parties will be prejudiced if the exception is upheld.
- [27] I am of the view that the amended plea, though not elegant and badly drawn as it was supposedly drafted by Mr S. himself, disclosed what the defence was. Thus this Court cannot hold that the amended plea was bad in law. The amended plea showed the plaintiff what the cause of action was, with reasonable clarity even though there may be allegations which were unnecessary. The plaintiff knew what the defendant's defence was. In order to succeed, the plaintiff had the duty to persuade the Court that upon every interpretation which the pleading in question could reasonably bear, no cause of action was disclosed by the defendant, failing this, the exception ought not to be upheld.
- [28] Black persons' marriage who married in terms of the Black Administration Act, the marriage was contracted out of community of property by virtue of the provisions of section 22(6) of the Black Administration Act, No. 38 of 1927 (BAA) which was repealed on 2 December 1988 by section 1(e) of the Marriage and Matrimonial Property Act, No. 3 of 1988. In terms of section 22(6) of the BAA, marriages between black persons were deemed to be, and were automatically out of community of property. If the prospective

parties to a marriage covered by the Act chose to be married in community of property, such parties were required to make a joint

declaration of their intention to be married in community of property to a magistrate, commissioner or marriage officer, thirty days prior to the marriage. With the repeal of the BAA, the Legislator could never have intended that marriages out of community of property would automatically be rendered in community of property. Marriage being a private matter between two people in love, founded on consent, would require that those two people decide on their own to change their matrimonial property. I am of the view that it was not the intention of the persons who were married out community of property under the BAA, and who chose to be so married, suddenly found themselves married in community of property through the unilateral action by the State, after 1988. In casu it was long after the BAA was repealed. There are clear commercial, economical, emotional and psychological considerations which militate against the aforesaid interpretation favoured by the plaintiff.

28.1 The interesting part is that Counsel for the plaintiff argued and conceded on pages five to six on paragraph 4.1 in his heads that:

“A marriage between Blacks contracted after the commencement of the Black Administration Act shall not produce the legal consequences of the marriage in community of property between the spouses, provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any other woman other than the wife, it shall be competent for the intending spouses to declare jointly before any magistrate that it is their intention and desire that community of property and profit and loss shall result in their marriage, except as regards any land in a allocation held under quitrants tenure, such land shall be excluded from such community”.

In casu the parties did not declare jointly before any magistrate that it was their intention and desire that community of property and

profit and loss shall result in their marriage. Therefore it is clear that the parties are still married out of community of property.

The only problem is that in casu the marriage was not contracted after the commencement of the BAA but after its repeal.

[29] According to section 21 (1) of the Matrimonial Property Act married persons who wished to change their matrimonial property system, including the marital power whether married before or after the commencement of the Matrimonial Property Act may jointly apply to court for leave to change the matrimonial property system, including the marital power, which applies to their marriage. The court may grant the order, if satisfied that the reasons given are sound, sufficient notice is given to the creditors and no person will be prejudice. In casu no such application took place so the parties are still married out of community of property. There is no basis in law or fact upon which I can find for the plaintiff.

[30] The marriage between the plaintiff and the defendant complies with the requirements of a putative marriage as described above. There are bona fides between the parties in the sense that both of them have been ignorant of the fact that when they married the BAA was repealed and therefore they could not have married under the BAA. They were unaware of this impediment to the marriage. Secondly their marriage was duly solemnized by the magistrate. Thirdly they bona fide believed that their marriage was valid. In my view, the defendant's averments do reveal a cause of action for a putative marriage.

[31] In this matter it is common cause that both parties in good faith believed that they were lawfully married, the plaintiff believed that the marriage was in community of property whereas the defendant believed that the marriage was out of community of property. If the plaintiff indeed acted and succeeded in changing their matrimonial property regime, from out of community of property to in community of property she ought to have been in possession of some reliable documentary proof that their matrimonial property regime had been amended. Besides she could not have acted alone excluding the defendant in changing their matrimonial property. The Act is very clear, parties must act jointly not unilaterally. In

the absence of such proof, the veracity of the plaintiff's version of how they are married in community of property is highly questionable. What the plaintiff may be seeking to rely on was a remedy derived from the law of partnership. Hence for her claim to succeed she has to establish that she and the defendant were not only living together as husband and wife, but that they were partners[5]. Although the plaintiff did not specifically allege that the universal partnership between her and the defendant came into existence by tacit agreement, from the averments in her particulars of claim, she appears to rely on universal partnership to ground her claim against the defendant although not specifically pleaded. This is despite the fact that she alleged that the marriage was in community of property. Where a party claims universal partnership she must allege and prove that the contracting parties agreed to put in common all their property both future or existing (universorum bonorum) or that they contracted that whatever they acquire during the marriage, from any kind of commerce will be property of the partnership

(universorum quae ex quaestu veniunt). But prior to an examination of the averments of the party relying on universal partnership, the antenuptial contract that governs the marriage of the parties needs be examined[6].

[32] There was a copy of the marriage certificate in the file from Department of Home Affairs that was issued on 23 June 2000. The

defendant produced a detailed marriage register that purported to be a marriage certificate issued by the Phuthaditjhaba Magistrate Court. What is written in section E is "Out of community of property", indicating that the parties are married out of community of property. Attached to the said marriage register was another document titled, "Declaration under section 22 (3) of the Black Administration Act, 1927(Act 38 of 1927) as amended". Below the said document was a clause which provided that:

"This form must accompany the marriage register and copy of the register when those documents are forwarded to the relevant regional

office/district office of the Department of home Affairs."

[33] This exception can be readily disposed of. What falls to be considered is whether it is competent for the defendant to join the Department of Home Affairs and the Magistrate. I do not agree with counsel for the plaintiff that these two parties should be joined for now. The argument places the cart before the horse. The putative marriage as it stands is prejudicial to the parties. I agree with counsel for the plaintiff that Mr S. raised issues of his constitutional rights at the hearing of this exception, which were not in his amended plea. Mr S. was bound by what was contained in his amended plea. He cannot be allowed to raise issues outside his amended plea.

[34] Counsel for the plaintiff did not refer me to specific authority that he relied on to argue that the plaintiff changed the marriage from out of community of property to in community of property. There is no such authority as both parties needed to make a joint application to

court for leave to change their matrimonial property system. I am of the view that the marriage between the parties is not null and void but is putative. I am satisfied that the amended plea disclosed an adequate defence and that such a defence was not bad in law. I am not persuaded that the plaintiff discharged the required onus of proof for this Court to uphold the exception.

[35] In the circumstances, the exception must fail.

[36] I hereby give the following order:

36.1 The exception is dismissed.

36.2 The defendant is granted leave to amend the plea

36.3 The defendant is ordered to file his amended plea within ten days from the date of this order.

36.4 The costs are reserved for decision by the trial Court.

_____ E. K. TSATSI, AJ

On behalf of the plaintiff: Adv J Els

Instructed by: Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant: Mr. M.A. S. (Represented himself) BLOEMFONTEIN[1] 1993 (3) SA 94 (AD) at 107D

[2] 1997

(2) SA 415 (W) at 422C-D

[3] 1983

(1) SA 687 (N) at 690H.

[4] Henri Viljoen Pty (Ltd) Awerbunch Brothers 1953 (2) SA 151 (O) at 168 - 170.

[5] Butters v Mncora 2012

(4) SA 1 (SCA) para 11.

[6] Wiid v Wiid [2011] JOL 27572 (NCK).

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