



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Not reportable  
Case No: 199/13

In the matter between:

**TSHIAENEO SYBIL RAMATSHIMBILA**

**APPELLANT**

and

**DR NKHELEBENI PHASWANA**

**RESPONDENT**

**Neutral citation:** *Ramatshimbila v Phaswana* (199/13) [2014] ZASCA 117 (19 September 2014)

**Coram:** Cachalia, Willis, Saldulker, Zondi JJA and Gorven AJA

**Heard:** 4 September 2014

**Delivered:** 19 September 2014

**Summary:** Appeal – Against order upholding exception that plaintiff’s particulars of claim discloses no cause of action – leave to amend granted – plaintiff contending that the order is final in effect because it is unable to amend – decision not appealable.

Practice – non-joinder can be raised by way of exception – two forms of

relief sought in particulars of claim — exception upheld *pro tanto*.

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## ORDER

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**On appeal from:** Limpopo High Court, Thohoyandou (Makhafola J sitting as court of first instance):

1 The appeal succeeds in part and the order of the high court is set aside and in its place the following order is substituted:

‘(a) The exception to claim one is upheld with costs. The plaintiff’s particulars of claim in the main claim, is set aside and she is given leave, if so advised, to file amended particulars of claim by 31 October 2014.

(b) The exception to the alternative claim is dismissed with costs.’

2 Each party is ordered to pay his or her own costs of appeal in this Court as well as the costs of the application for leave to appeal to this Court.

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## JUDGMENT

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**Zondi JA (Cachalia, Willis, Saldulker JJA and Gorven AJA concurring):**

[1] This is an appeal against an order of the high court, Limpopo (Makhafola J) upholding with costs an exception taken by the respondent (the defendant) to the appellant’s (the plaintiff) particulars of claim on the ground that it discloses no cause of action and granting the plaintiff leave to amend her particulars of claim if she so wishes.

[2] In her particulars of claim the plaintiff seeks as her main relief an order for: (a) dissolution of the putative marriage; (b) equal division of the joint estate; (c) a declaratory order that a partnership existed between the parties in equal shares in respect of several businesses and (d) an order dissolving the partnership and the distribution of assets of the businesses in equal shares.

[3] In the alternative and in the event of a putative marriage not being proved, the plaintiff seeks an order for payment in the amount of R3 000 000 for false representation by the defendant which caused her to suffer damages. The high court upheld the exception to both the main and alternative claims, but its order does not distinguish between them. It simply states that the exception is upheld and the plaintiff is given the opportunity to amend her papers if she so wishes. No time periods within which the papers are to be amended are specified.

[4] The first issue is whether the order of the court below is appealable. On the face of it, it seems not as the court below granted the plaintiff leave to amend her particulars of claim. The plaintiff however contended that the true basis for the court's decision was that her particulars of claim failed to disclose a cause of action and therefore was final in effect. That contention would only have been valid if the court a quo did not grant the plaintiff leave to amend her particulars of claim, because when an exception is upheld on the ground that a plaintiff's particulars of claim fails to disclose a cause of action, the order is fatal to the claims pleaded and therefore final in its effect.<sup>1</sup> However, when an exception is upheld on the ground that the particulars of claim does not disclose a cause of action and the plaintiff is granted leave to amend, whether or not that order is final would depend on whether it is capable of being amended.<sup>2</sup>

[5] The plaintiff's complaint is that it is unclear from the court's judgment what must be amended and therefore it is final in effect — a rather odd submission. Properly understood, the plaintiff's submission is that it is not clear from the judgment or order what the basis of the order was, and therefore the pleadings are not capable of being amended.

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<sup>1</sup> *Liquidators Myburgh Kroon & Co Ltd v Standard Bank of South Africa Ltd & another* 1924 AD 226 at 229.

<sup>2</sup> *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) at 270F; *Group Five Building Ltd v Government of the*

[6] In order to succeed, an excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed; failing this, the exception ought not to be upheld. Turning to the plaintiff's particulars of claim, the two claims were formulated as follows. In claim one the plaintiff alleged both that the relationship is a putative marriage and that a universal partnership existed between herself and the defendant and sought relief which is set out in para 2 above. The plaintiff's claim for a division of the joint estate is based on the allegations contained in paras 4 to 10 of the particulars of claim. First, that an unregistered customary marriage between her and the defendant is a marriage to which s 7(2) of the Recognition of Customary Marriages Act 120 of 1998 applies;<sup>3</sup> secondly, that when she entered into the customary marriage with the defendant on 16 August 2008 she was unaware that the defendant was a partner to an existing civil marriage; and thirdly, that she bona fide believed that her customary marriage to the defendant was valid. In the circumstances the plaintiff claimed that the marriage between herself and the defendant is a putative marriage. In *Moola & others v Aulsebrook NO & others*<sup>4</sup> the court summarised the requirements of a putative marriage 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.’

In my view, the plaintiff's averments do reveal a cause of action for a putative marriage.

[7] The plaintiff claims further that the intention of the parties was to create a universal partnership. The allegations in support of this claim are contained in paras 7,

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*Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D.

<sup>3</sup> Section 7(2) provides:

‘A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.’ But see *Gumede v President of Republic of South Africa & others* 2009 (3) SA 152 (CC) para 49 on how this section was interpreted.

<sup>4</sup> *Moola & others v Aulsebrook NO & others* 1983 (1) SA 687 (N) at 690H.

12 and 14 of the particulars of claim. What the plaintiff seeks to rely on under this claim is 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.<sup>5</sup> Although the plaintiff did not specifically allege that the universal partnership between her and the defendant came into existence by tacit agreement, it is apparent from the averments in paras 12 — 14 of her particulars of claim that that was the case which she sought to advance.<sup>6</sup>

[8] The difficulty with the plaintiff's main claim is that it contains two causes of action which are mutually inconsistent as the legal consequences flowing from a putative marriage and universal partnership are different. They cannot be rolled up into a single claim, and are not pleaded in the alternative. Moreover the defendant's wife, by virtue of her marriage in community of property to the defendant, should have been joined as a party as she has a substantial interest in the joint estate, considering that all assets, save for those expressly excluded therefrom, form part of the joint estate and each spouse enjoys an equal undivided share of such joint estate in a marriage in community of property. During the subsistence of the marriage the spouses thereto cannot by virtue of an agreement divide the estate in such a way that their assets become the separate property of the individual spouses nor can one of the parties transfer his or her undivided half-share of the estate.<sup>7</sup> The exception to the particulars of claim on the ground that the defendant's wife was not joined, was in the circumstances well-taken and correctly upheld.<sup>8</sup>

[9] Although claim one was formulated badly it is capable of being amended. The part of the order that relates to this part of that claim is ordinarily not appealable, but given the fact that the order rolled up the two claims into one, the plaintiff had no option

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<sup>5</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) para 11.

<sup>6</sup> However, her failure to in terms of Rule 18(6) set out the material facts on which she relies, with sufficient particularity may result in her particulars being deemed an irregular step in the proceedings.

<sup>7</sup> *Zulu v Zulu* 2008 (4) SA 12 (D) at 15F.

but to appeal against it. I turn to consider the alternative claim.

[10] The alternative claim is a delictual claim formulated on the basis of the defendant having allegedly made false representations during their customary marriage negotiations to the effect that he was unmarried when in fact he was already married to someone else, and that in consequence, she suffered damages. In brief the claim is pleaded as follows:

10.1 The defendant made representations to induce the plaintiff to enter into a customary marriage;

10.2 the parties concluded the marriage and lobola was paid;

10.3 the representations were false;

10.4 as a result the plaintiff suffered the following damages:

(a) R1 000 000 for diminished prospects of a future marriage;

(b) R500 000 for loss of social standing;

(c) R2 000 000 for loss of income — in that she left her employment in contemplation of marriage; and

(d) R500 000 for discomfort and contumelia.

While the present action may resemble a breach of promise claim it is not; it is only a single claim in delict. In the present action, the plaintiff seeks damages for fraudulent misrepresentation, and hence she can recover the delictual measure of damages the object of which is to place the ‘innocent’ party in the position he or she would have been in if the misrepresentation had not been made.<sup>9</sup> She may be compensated for her proved actual losses and in addition a discretionary award for sentimental damages for contumelia (insult). It seems that the relief sought in (a), (b) and (d) relates to contumelia — even though they have been awkwardly separated — and the amount claimed in (c) relates to actual losses. If this is so, while inelegantly pleaded, it would sustain a cause of action.

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<sup>8</sup> *Anirudh v Samdei & others* 1975 (2) SA 706 (A) at 708C-709A.

<sup>9</sup> *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) at 41C—E.

[11] An excipient must clearly and concisely state the grounds upon which the exception is taken. The exception regarding the alternative claim has two legs: The first ground on which the exception is taken is that the alternative claim is based on a bigamous marriage between the parties, and is bad in law. That is not the plaintiff's case. The effect of the pleading is that the plaintiff was fraudulently induced to enter into what was in effect an invalid marriage as a result of which she suffered damages. There is no reason why that claim is bad in law. In addition, the reasoning of the court below in para 7 of the judgment, that the alternative claim in para 6 of the particulars of claim did not disclose the terms of the contract is not understood as the plaintiff's case is that she was induced to enter into an invalid customary marriage. The second ground on which the exception is based, is that the particulars of claim does not disclose a cause of action on the basis that the plaintiff failed to join the defendant's wife. The non-joinder point is not valid at all in relation to the alternative claim. It is a delictual claim which, if proved, the defendant would be liable and not the joint estate. In any event in terms of s 19 of the Matrimonial Property Act 88 of 1984, when a spouse is liable for the payment of damages by reason of a delict committed by him such damages are recoverable from the separate property, if any, of that spouse and only insofar as he has no separate property, from the joint estate. And if such damages are recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be.

[12] The alternative claim is not bad in law on the grounds stated in the exception and because the effect of the part of the order is final in effect, it is appealable. The appeal ought to be upheld on this aspect.

[13] I should perhaps say something about the high court's judgment. It treated the two claims as if it was dealing with a single claim and upheld the exception *in toto*. It should have analysed the grounds stated in the exception specifically in relation to the two claims so that the plaintiff was left in no doubt about what she needed to do to rectify

the pleadings. This is so, because where an exception is taken to the particulars of claim in which two forms of relief are sought and where such particulars reveal a cause of action for one of the forms of relief but not for the other, the court may uphold the exception *pro tanto*.<sup>10</sup>

[14] Given the fact that the pleadings were badly drawn, and the grounds of exception were not clearly and succinctly stated, the judgment being unclear as to what was required of the plaintiff, it seems fair to order each party to pay his or her own costs.

[15] In the circumstances the following order is made:

1 The appeal succeeds in part and the order of the high court is set aside and in its place the following order is substituted:

‘(a) The exception to claim one is upheld with costs. The plaintiff’s particulars of claim in the main claim, is set aside and she is given leave, if so advised, to file amended particulars of claim by 31 October 2014.

(b) The exception to the alternative claim is dismissed with costs.’

2 Each party is ordered to pay his or her own costs of appeal in this Court as well as the costs of the application for leave to appeal to this Court.

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**D H Zondi**

**Judge of Appeal**

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<sup>10</sup> *Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A)* at 945A–H.





## Appearances

For the Appellant: M S Sikhwari  
Instructed by:  
Mathobo, Rambau & Sigogo Inc, Thohoyandou  
c/o Matsepes Inc, Bloemfontein

For the Respondent: A D Ramagalela  
Instructed by:  
Madala Phillip Attorneys, Thohoyandou  
c/o Lovius Block, Bloemfontein