

SOUTH AFRICA / JUDGMENT

B v B (15073/210) [2011]

ZAGPJHC 132 (8 September 2011)

[2011] ZAGPJHC 132

COURT

South Gauteng High Court, Johannesburg

CASE / FILE NUMBER

15073/210

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IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 15073/210

DATE: 2011-09-07

REPORTABLE

(In the electronic reports only)

In the matter between

B B.....Plaintiff

and

G M BDefendant

J U D G M E N T

[1] This is an action for the decree of divorce and certain ancillary relief. The action has been defended. The matter was set down for trial this morning.

[2] Until yesterday evening at 18:30 the defendant had the benefit of being represented by Advocate Beverley Fourie SC, who is one of the most experienced counsel especially in matrimonial matters and a counsel who had been well known to me for almost 30 years. Beverley Fourie appeared, representing the defendant, at the pre-trial conference that was held on 8 August 2011 in her Chambers.

- [3] This morning, the defendant appeared in person and said that she wants a postponement. The reason she wanted the postponement was the one that she had no counsel and also that she wished to claim for spousal maintenance. Ex facie the pleadings the defendant is a qualified radiologist. She was born in 1962. Accordingly, she is in the ripe years of her income earning capacity. It also appears from bank statements of hers that has been placed before the court that she earns in her practice as a radiologist earns revenues in excess of R3-million a year.
- [4] Having regard to the fact that the claim for maintenance had never been raised during the course of the proceedings until today, I made it quite clear earlier today that the defendant as a highly skilled person, capable of earning well, was most unlikely to succeed in a claim for maintenance from her present husband and that this was not a reason to grant the postponement.
- [5] From the pre-trial conference that was held on 8 August 2011, it appears that all it was in dispute as far as the defendant was concerned, was whether there had been an irretrievable breakdown of the marriage. It is significant that the summons was issued in this matter in April 2010 and was served in May 2010.
- [6] The evidence of Dr B, the plaintiff, later in the day was that the parties had been separated, or not living together as man and wife, for at least a year. The fact that parties have not been able to live together as husband and wife for over a year is in itself a ground for divorce in terms of the Divorce Act.
- [7] I informed the defendant that having regard to the issues in dispute and the dates upon which summons had been issued and served, I could see no reason to grant a postponement and I advised her from the bench that she had no reason or prospect of successfully resisting a divorce on the basis that there had not been an irretrievable breakdown of the marriage.
- [8] It appeared from the minutes of the pre-trial conference that the defendant would not persist in the claim that the children reside with her and that it was also agreed insofar as the division of the estate to determine accrual upon divorce that the way to proceed would be to appoint a receiver to deal with the matter, even though there was a dispute about the commencement values for purposes of computing the accrual values.
- [9] At approximately 12:00 noon I made it clear that the court would be proceeding with the trial action for divorce today. I indicated that the matter would proceed at 14:00 and, unless she had a counsel with whom some kind of settlement or agreement could be negotiated with the other side, she would be expected to proceed.
- [10] At 14:00 this afternoon I arrived at court this afternoon. There was no appearance by the defendant. Ms Woodward SC, who appears for the plaintiff, and who also had been known to me for almost 30 years, informed the court that she had seen the defendant outside a few moments before I came in.

- [11] I was surprised that the defendant was not in court. Mr Greenstein, the plaintiff's attorney, was asked by me to go outside and find out if she was there, but he came back and reported to his counsel that he was unable to locate her. I then asked Ms Woodward what she wished to do and she said that her client wish to proceed with application for a divorce.
- [12] Mr Greenstein, the plaintiff's attorney, testified that he had gone to look for the defendant, but he had been unsuccessful. He described how he even gone to the woman's toilets on the floor and asked the security guard to see whether the defendant was there. On that basis I decided to proceed and the plaintiff testified.
- [13] The plaintiff is an anaesthetist. He confirmed that the marriage between himself and the defendant had taken in Manila in the Philippines on 16 December 1990 by a duly authorized marriage officer. He confirmed that the parties were both subject to the jurisdiction of the court, that they had not lived together as husband and wife for more than a year and that the marriage had irretrievably broken down. He confirmed that the three children born in the marriage were living with him, that generous arrangements were made for the defendant to have regular rights of access.
- [14] The plaintiff confirmed that he and the defendant had jointly agreed that a clinical psychologist Ms Robyn Fasser should make an assessment of the children and also, and also make recommendations. That report had been put before me and it had been endorsed by Bagotla Johannes Mogotlha, the family advocate. Although Fasser has recommended a share residency,
- he plaintiff he explained that this would not work in this case and in any event it appears from the minutes of the pre-trial conference that the defendant herself agreed that shared residency for the children would not be viable.
- [15] Save for some very minor details, a tender in regard to settlement of this matter insofar as it relates to access and custody has been accepted by the defendant. This appears from the minute of the pre-trial conference. The tender is broadly consistent with the report and recommendations of Robyn Fasser, save that that the primary residence of the children will be with the plaintiff. This aspect has been conceded by the defendant as well. This also appears from the minute of the pre-trial conference.
- [16] It is also clear that from the pre-trial conference that the parties were unable to on the patrimonial consequences of the settlement of the matter consequent upon of the divorce. It is clear that both parties are highly qualified medical professionals. I have omitted to mention that the plaintiff is himself an anaesthetist. It is certainly clear from a few common cause facts

such as the parties resided at Athol in Sandton that these are affluent people. I can also refer to the bank statements of the defendant. In the absence of some kind of settlement, it is altogether better that a receiver be appointed and that is to divide up the estate of the parties, and then the parties cannot agree on who should be appointed as receiver,] the Chairperson of the Bar Council of Johannesburg, should make the selection.

- [17] As I had indicated to the defendant personally, before I adjourned the court, the fact that the parties have been separated for more than a year was, in itself, a ground of irretrievable breakdown of the marriage between the parties. It therefore seems to me, if one has regard to the evidence of the plaintiff, together with the admitted documents, the facts that are common cause, the minutes of the pre-trial conference, and the recommendation of Robyn Fasser, that should be a decree of divorce. There should be an order relating to access that grants the defendant liberal access but that ensures the children have their primary residence with the plaintiff. Insofar as the patrimonial consequences of divorce are concerned, a receiver should be appointed to take control of the division of assets between the parties. This will save agonising and hugely expensive days in court, fighting over assets.
- [18] Earlier today, I indicated to Ms Woodward that I would deliver a short judgment and that a draft order marked X would be made an order of court. I also indicated that the draft order would have to be polished in my Chambers to reflect the tendered agreement of settlement which the reference was made in evidence as well as an ANNEXURE A relating to the appointment of a receiver. The documents need minor revisions to reflect the court's intentions in the light of the proceedings. These we shall do in Chambers when I adjourn.
- [19] I was about to give judgment a breathless Advocate Masie Ferreira, hotly pursued by the defendant, arrived in court. Ms Ferreira informed me that she understood that the matter was to proceed before Judge Boruchowitz and that she has been in his court. Advocate Ferreira was not here this morning. I wish to make it clear that there could have been no doubt whatsoever that the matter was to proceed before me in my court at 14:00.
- [20] Furthermore, the fact that the defendant was in the corridors of this building just before 14:00, has been seen there by counsel for the plaintiff and her attorney, means that she could have been in no doubt whatsoever that a Judge from the High Court, who has lots of important litigation to hear in the course of the week, was ready, willing and available to attend to her matter at 14:00. It was acceptable that she was not here.
- [21] I nevertheless agreed, after Ms Ferreira's arrival here at about 14:30 this afternoon, to stand the matter down until 15:00 in order to afford the parties a last opportunity to settle the matter. Counsel for the plaintiff, together with Ms Ferreira, accompanied by her instructing attorney, Mr Craig Bailey came to see me in Chambers. Ms Ferreira and Mr Bailey explained that that they were under the impression that they were to argue for a postponement only. They protested that they were in no position to deal with the merits of the matter.

- [21] I quickly disabused them of any such imagination. There is no question that we were not here this afternoon to consider a postponement. The matter stood down in order for the possibility of there being some kind of potential settlement to be further explored. Clearly there has been no such settlement. For this reason I came back to court and started to deliver this brief judgment. I have, in the meantime, excused Ms Ferreira and Mr Bailey from further attendance in this matter.
- [22] To summarise, everything that is before me indicates that it would be highly inappropriate to grant a postponement. In fact, the application amounts to an abuse of Court proceedings. This court simply cannot tolerate that it be treated this way. We have important conferences on access to judgment in this country. The Courts deliver access to justice to the people if litigants are free to waste the Courts' time as this particular defendant seems to think she is entitled to do
- [23] Most importantly, the evidence, not only of the plaintiff himself but also from the facts which are common cause from the pleadings, clearly has shown that there has been an irretrievable breakdown of the marriage between the parties. The evidence furthermore has shown that it definitely is in the best interest of the children that their primary residence should be with the plaintiff.
- [24] That the defendant should have liberal rights to access to the children is also clear. It is also clear and that the financial, patrimonial consequences of the dissolution of the marriage should be determined by an independent, competent expert. The court is in no position to make a divide up the assets of the parties. It would be inappropriate to postpone the agony of divorce because the court is in no position to divide up these assets.
- [25] The plaintiff has not sought any order for costs against the defendant even though there have been three applications where the parties have squabbled in court over issues relating to their divorce. All three the applications were brought by the defendant. In all three instances costs were reserved, but the plaintiff does not seek an order for costs against he defendant.
- [26] Accordingly the following order is made:
1. A decree of divorce is granted.
 2. The draft order marked "X" is made an order of court.
- [27] The court will now adjourn. The draft order will be slightly amended by myself in Chambers and initialled by me marked "X." The court will adjourn. Ms Woodward, please arrange with your attorney for him to bring the court file to my chambers.

COURT ADJOURNS

POSTEA:

- [28] An order has been made terms of the draft marked "X". It reads as follows:

A decree of divorce is granted.

The parties shall remain co-holders of full parental rights and responsibilities in respect of the minor children, CLC ("C") who was born on 3 January 1995, MLFC ("M") who was born on 18 February 1999, and NYC ("N") who was born on 17 January 2000, as provided in section 18 of the Children's Act, No. 38 of 2005, subject to the following:-

The primary residence of the children shall vest with the plaintiff.

The Defendant shall be entitled to reasonable rights of contact with the children as more fully set out in paragraph 3 below.

In exercising their parental responsibilities and rights the Plaintiff and the Defendant shall have appropriate regard to the views and wishes of the children as provided for in section 31 of the Children's Act.

The Defendant shall have all reasonable rights of contact with the children having regard to their social, educational, religious and health needs and where appropriate the views and wishes of the children, such contact to include:-

In weeks 1 and 3 of every four week cycle, every alternate weekend from Friday after school until Sunday 18h00.

In weeks 2 and 4 of every four week cycle, every Thursday evening from 18h00 to 20h00 for dinner.

One half of every school holiday and every alternate mid-term break subject to the proviso that Christmas and Easter should alternate each year between the parties. The parties shall endeavour in conjunction with the case manager to prepare a schedule of holiday contact at the commencement of each year so that the children are availed of a predictable and stable holiday timetable.

Mother's Day from 09h00 until 18h00. The Plaintiff shall be entitled to have the children with him on Father's Day from 09h00 until 18h00.

One half of the day on each child's birthday should such birthday not be on a school day and if on a school day, a period of at least two hours. Should the children be with the Defendant on their birthdays the Plaintiff will be afforded one half of each child's birthday if not on a school day and at least two hours if such birthday falls on a school day.

A reasonable period of time on the Defendant's birthday not less than three hours in duration in the event that the Defendant's birthday falls on a weekday and for the entire day in the event that her birthday falls on a weekend. Should the children be with the Defendant on the Plaintiff's birthday the Plaintiff shall be entitled to have the children with him for a period of not less than three hours in duration in the event that the Plaintiff's birthday falls on a weekday and for the entire day in the event that it falls on a weekend.

Reasonable telephonic and electronic contact at all times.

Each party shall have reasonable telephonic contact with the children when they are in the care of the other party.

Braam Beetge is appointed as a case manager to assist the parties in the exercise by them of their parental rights and responsibilities and to protect the children's best interests.

In the event of Braam Beetge not acting as a case manager or resigning the parties shall endeavour to agree upon the identity of a psychologist or social worker of not less than 10 years' standing and in the absence of such agreement the parties shall refer the matter to FAMSA (Family and Marriage Society of South Africa – Family Life Centre) to identify and appoint a case manager to assist in the resolution of the dispute.

The decision of the case manager shall not be final and binding on the parties who shall at all times not be precluded from seeking relief in the High Court of South Africa or any other Court of competent jurisdiction.

The costs of the case manager shall be paid in equal shares by the parties unless the case manager orders otherwise in appropriate circumstances.

The minor children shall continue receiving such therapy until such time as such treatment is deemed unnecessary by their respective therapists.

The parties are married subject to the accrual system as provided for in Chapter 1 of the Matrimonial Property Act, No. 88 of 1984.

The parties have not reached agreement on the commencement values of their estates at the time of the marriage. The Defendant asserts that the commencement value of each party's estate at the time of marriage is deemed to be nil. The Plaintiff asserts that the commencement value of his estate is R1,390,000.00 and the commencement value of the Defendant R50,000.00 as recorded in the Notarial Contract entered into between the parties.

Within four weeks from date of signature of this agreement the parties and their legal representatives shall exchange an account of their respective assets and values, duly supported by documentary proof. Thereafter the parties shall debate the accounts provided and shall endeavour to reach agreement as to the nett value of each party's respective estate at the time of divorce.

Should the parties fail to reach agreement as provided for above, then the parties shall appoint a referee in terms of section 19 (bis) of the Supreme Court Act, No. 59 of 1959, as amended, in order to determine the nett value of each party's respective estate at the date of divorce.

In the absence of the parties being able to agree on the identity of a referee, the Chairperson of the Johannesburg Bar Council shall be called upon to nominate a duly qualified chartered accountant in private practice with not less than 10 years' experience to act as referee.

The powers of the referee in addition to those referred to in section 19 (bis) of the Supreme Court Act, No. 59 of 1959, shall be those set out in annexure “A” hereto.

The referee shall not determine the dispute between the parties relating to the commencement values of their respective estates. Should the parties not be able to reach agreement regarding the commencement values of their respective estates, then either party may set the matter down for trial on this issue only.

The referee shall furnish a report to the parties in regard to:

the assets of each of the parties on the date of divorce;

the liabilities of each of the parties on the date of divorce.

The referee’s report and determination shall be final and binding on the parties.

Each party shall pay his or her own legal costs including the costs that were reserved under the following case numbers:

10/15073

11/13062

10/27601

10/48543

10/48713

ANNEXURE “A” TO THE DRAFT MARKED “X”

Appointment of receiver to determine the values of each party’s estate

The appointed receiver, is to be agreed to between the parties or alternatively in the absence of an agreement between the parties is to be a person nominated by the Chairperson of the Johannesburg Bar Council (hereinafter referred to as “the receiver”) is appointed to:

determine the identity of the assets comprising the estate of each party as at 07 September 2011 (“the effective date”);

determine the value of each asset as at the effective date and to determine the liabilities which form part of each party’s estate as at the effective date;

prepare a final account between the parties which reflects the nett asset value of each of their respective estates as at the effective date.

The receiver shall have the following powers:

The right to make all investigations and to obtain all information from each party and any third party regarding their assets and any liabilities;

The right to inspect all documents of the parties and any third party relating to the existence of any asset and any liability;

The right to make a physical inspection of assets;

The right to question the parties and any third party and to obtain explanations necessary for the purpose of identifying assets and liabilities with the right to issue subpoenas calling for the attendance of any such person before him to provide explanations and to produce documents;

Without limitation of the foregoing, the rights which are conferred upon a trustee in terms of the provisions of the Insolvency Act No. 24 of 1936 and in particular the right to call meetings and to interrogate the parties and any third party;

To obtain sworn valuations in respect of any asset and to engage the services of any suitably qualified person or persons to assist him in determining the proper value of any assets, such costs to be paid by the parties in equal shares;

To afford both parties personally the opportunity to make such representations to him about any matter relevant to his duties and to identify any asset and/or the existence of any liability included but not limited to:

the time and/or manner in which the asset was acquired;

the price for which such asset was acquired and/or valued at the effective date;

To give due consideration to the representations of the parties and to make such decisions in respect thereof as he may deem fit;

To apply to this Court on notice to the parties for any further directions as he shall or may consider necessary;

To institute legal proceedings against any person for the delivery to him of any documents in whatever court it shall be appropriate to bring such proceedings;

To be paid his reasonable fees and apportion such fees between the parties equally.

Counsel for the plaintiff: Ms J.A. Woodward SC

Attorneys for the plaintiff: Greensteins

Defendant in person

Date of hearing: 7 September, 2011

Date of judgment: 7 September, 2011

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Prepared on 9 October 2026 · Esheria