

SOUTH AFRICA / JUDGMENT

L v L (14656/2015) [2016] ZAGPPHC 683 (22 July 2016) [2016] ZAGPPHC 683

COURT

North Gauteng High Court, Pretoria

BEFORE

A.P. Ledwaba

CASE / FILE NUMBER

14656/2015

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case Number: 14656/15**

DATE:

22 JULY 2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

N

L.....PLAINTIFF

AND

JML.....DEFENDANT

JUDGMENT

1.

The plaintiff, Mrs N L L, instituted a divorce action against the defendant, Mr J M L. The following facts are common cause:

1.1 Both parties are domiciled within in the jurisdiction of this court.

1.2 The parties were married to each other in community of property at [A p], in Gauteng on 11 March 2000.

1.3 Two minor children were born from the marriage relationship between the parties, now aged between 12 years and 7 years respectively.

1.4 It is clear from the submissions made by both parties' legal representatives and from the evidence adduced that the marriage

relationship between the parties has irretrievable broken down and that there are no reasonable prospects of a reconciliation.

1.5 The joint parental rights and responsibilities in respect of the two minor children should be awarded to the parties jointly.

1.6 Primary residence of the two minor children would be with the plaintiff and the defendant would have reasonable rights of contact.

1.7 The joint estate of the parties is to be divided equally between them.

1.8 The parties are not claiming personal maintenance against each other.

1.9 The only issue between the parties is that the payment of the maintenance of the minor children by the defendant.

2.

In the summons the plaintiff is claiming against the defendant:

2.1 An amount of R11 000.00 (eleven thousand rand) per month for the two minor children.

2.2 That defendant retains the minor children on his medical aid scheme and that he pays all reasonable medical expenses for the two minor children.

2.3 An order that the defendant pays all scholastic expenses in respect of the minor children, including pre-primary and secondary school fees (in a private school) and all cost associated therewith, including school clothes, book fees, hostel fees and all the costs associated with or occasioned by the extramural activities of the minor children (which includes sporting equipment, clothes and costs involved for school tours of the minor children). 2.4 An order that the Defendant pays all tertiary expenses of the minor children including all expenses associated

with or occasioned by the minor children attending any university or technikon, including book and hostel fees.

3.

Regarding the maintenance of the children the, defendant seeks that the court should order that the maintenance payable for the two minor children be referred to the Maintenance Court having jurisdiction.

4.

In summarising the parties' evidence I will mainly deal with the aspects relevant to the issue of maintenance for the minor children. The plaintiff and defendant in their evidence are ad idem that the defendant left the common home in July 2015 and has since then contributed a cash amount of about R10 000.00 for the minor children, he continue to pay the instalment of the bond for the house. The children and the Plaintiff were retained as members and the beneficiaries of his medical scheme. The defendant continued to pay for the school fees of the minor children and both parties contributed for the minor children's necessary extra expenses.

5.

The plaintiff's and defendant's monthly salary is about R25 000.00 and R75 000.00, respectively. When the plaintiff testified she mentioned her the monthly expenses. Initially in her testimony she stated that she needs maintenance in amount of R13 000.00 per month for the minor children and the defendant should further contribute financially for the extra medical expenses and the school fees. She further said she wants the defendant to retain her on his medical aid scheme.

6.

The defendant also testify about his monthly expenses and stated that he can contribute an amount of R10 000.00 per month for the two minor children, he would retain the minor children on his medical aid scheme and will contribute 50% (fifty present) of the minor children's school fees, uniforms and necessary school expenses. Before evidence was led, the Adv. Kgariya, representing the defendant in her opening remarks submitted that the issue of maintenance for the minor children should be referred to the Maintenance Court. The reason why she submitted that the issue of maintenance of the minor children referred to the Maintenance Court was that there was no guarantee that the defendant's contract of employment terminating on October 2016 would be extended. She later submitted that the defendant can only afford the sum of R2 000.00 for each minor child.

7.

The submissions made by Adv. Kgariya were contradicted by what the defendant said when he testified.

8.

In my view, there is no valid reason why the defendant cannot continue to maintain his children. There is no justification for me to order that the maintenance for the minor children should be referred to the Maintenance Court. Such an order would not be in the best interest of the minor children. The proceedings in the Maintenance Court may take some months before they are finalised and the minor children would not be receiving any contribution from the defendant. The defendant stated in his evidence that he is aware that should he be unemployed and cannot afford to pay maintenance for the minor children he can approach the Maintenance Court for the variation of the maintenance order.

9.

I need to record that on the evidence of the defendant, if there was proper consultation and the defendant was given proper legal advice the matter could have been finalised on the first day of the hearing.

10.

On careful consideration of the income and expenses of the parties I am satisfied that the plaintiff has proved and it would be in the best interest of the minor children that I should order that the defendant should continue to pay maintenance for the children.

11.

The plaintiff did not ask for personal maintenance in her particulars of claim and her request that she retains on the defendant's medical aid scheme for 9 months will not be granted. However, the defendant stated that he is willing to retain her on the medical aid scheme for 3 months.

12.

I need to emphasise that Adv Kgariya in my view, did not execute her profession duties as required from an officer of the Court. She was argumentative and did not properly prepare herself for the trial. She was not clear about the interim order that was made by the Court in the Rule 43 application. Her conduct in Court is strongly deprecated I rule that she is not entitled to claim any legal fees for professional services rendered on 2 July 2016 and for attending the trial on the 2 July 2016. The plaintiff had to unnecessarily incur legal costs of the trial in the second day.

13.

Having considering all the evidence in particular their income and expenses I make the following order:

13.1 A decree of divorce is granted.

13.2 The parties shall remain co-holders of parental responsibilities and rights in respect of the minor children born of the marriage between the parties, namely [P L], a minor daughter born on 13 January 2004, currently 12 years old, and the minor son [M M L], born on 7 November 2008 and currently 7 years old and hereinafter referred to as the "minor children".

13.3 The parties shall act as co-guardians of the minor children as provided for in Sections 18(2) (c), 18(3), 18(4) and 18(5) of the Children's Act, Act 38 of 2005 (herein "the Children Act")

13.4 The parties remain co-holders of parental responsibilities and rights with regards to care of and contact to the minor children, as envisaged in Sections 18(2)(a) and 18(2)(b) of the Children's Act, subject to the provisions set out below.

The minor children shall reside primarily with the Plaintiff who shall be their primary caregiver.

13.6 The Defendant shall be entitled to reasonable contact with the minor children as follows:

13.6.1 Every alternate weekend from the Friday at 17h00, where the defendant will collect the minor children at the Plaintiff's residence, until 17h00 on the Sunday where the Defendant will return the minor children to the Plaintiff's residence. Should any such weekend be preceded or succeeded by a public holiday, then such public holiday shall be included in the contact weekend which

shall commence or terminate one day earlier or later as the case may be.

13.6.2 The minor children will spend Mother's day and the Plaintiff's birthday with the Plaintiff and Father's day and Defendant's birthday with the Defendant (from 8h00 - 17h00), on condition that these days do not fall within a holiday period that the children

spend with the other party.

13.6.3 The defendant shall have reasonable telephonic access to the minor children during weekdays and weekends when the minor children are not in his care, which contact he will be entitled to exercise to the minor children between 18h00 and 20h00 at night,

whilst also being at liberty to contact the eldest daughter at all reasonable times.

13.6.4 The defendant will be entitled to have the minor children with him for one half of their school holidays, where the children will spend the other half of the said holiday with the Plaintiff, the Defendant to collect the minor children at the Plaintiff's

residence and to return them to the Plaintiff's place of residence. The parties are at liberty to agree to share a Christmas holiday.

13.6.5 Neither party shall remove the children from the Republic of South Africa without the other party's written consent.

13.6.6 Access to and contact with the minor children shall be exercised in their best interest, with a minimum degree of disturbance to their routine, education and schooling activities. The Defendant's right of reasonable contact to the minor children is subject to the children's educational, sporting, social and religious activities.

The Defendant shall pay the following maintenance toward the minor children:

14.1 The defendant shall retain the minor children as dependent members on his current medical aid and benefit plan until they become self-supportive. The defendant shall pay the membership fees relating to the minor children in full. The defendant shall further pay two thirds (66.66%) of all reasonable medical aid.

14.2 The defendant shall pay to the Plaintiff as maintenance for the minor children, an amount of R6 500.00 (SIX THOUSAND FIVE HUNDRED RAND) per month per child on or before the 1st day of each month, the first payment to be made on or before the 1st day of the following month until the minor children become self-supportive. The aforementioned maintenance is to increase yearly in accordance with CPI on each anniversary of the date of divorce.

14.3 The defendant shall pay the primary and secondary school fees of the minor children in a private school or such other school as agreed between the parties, and two thirds (66.66%) of all further costs associated with the schooling and education of the minor children, including school clothes, book fees, hostel fees, school tours and the cost associated with or occasioned by the extra mural activities of the minor children (which includes sporting equipment, clothes and costs involved for school tours of the minor children).

14.4 The defendant shall pay two thirds (66.66%) of the tertiary cost related to the minor children, should the minor children study towards a formal degree, diploma or higher certificate, which costs shall include, but not be limited to, all expenses in respect of training and academic fees, boarding / hostel fees (if applicable), the costs of all textbooks and all additional expenses reasonably incurred in respect of such tertiary education. The responsibility to pay for the tertiary education is subject thereto that the minor children's progress is successful and satisfactory.

With regards to the additional expenses indicated in paragraphs 14.1, 14.3 and 14.4, the Plaintiff shall before the 25th of each month provide the defendant with a list of all the expenses to be paid in terms of paragraphs 7.1, 7.3 and 7.4, and in which it is indicated the portion for which the defendant is liable in terms of these stated paragraphs. The defendant will, simultaneously when he pays to the plaintiff the monthly maintenance mentioned in paragraph 14.2 supra, pay his contribution towards these expenses to the Plaintiff. His contribution towards these expenses are payable in addition to the maintenance payable in terms of paragraph 14.2 supra. 15. The defendant shall at his costs retain the Plaintiff as a dependant member on his current medical aid and benefit plan for a

period of 3 (THREE) months from the date of the divorce order.

16. Division of the joint estate as at date of this Order is ordered, and as follows:

16.1 The plaintiff is a registered member of the Old Mutual Superfund Pension Fund with member number [S0..] and with sub-fund name: NIMSA and sub- fund number [R00..] as well as a Retirement Annuity Builder with Liberty Life with contract number [1310...].

16.2 The defendant is a registered member of the Government Employees Pension Fund with member number [983...] and a Retirement

Annuity Builder with Liberty Life with contract number [202...].

16.3 Such pension fund and annuities as stipulated in paragraphs 16.1 and 16.2 will form part of the joint estate. 16.4 Should it transpire that any party had any interest / further interest in any pension fund or annuity which existed on date of divorce, such will also form part of the joint estate.

16.5 The parties will within 3 (THREE) months from date of this Order attempt to equally divide the joint estate between them by agreement and in writing. In order to so divide the joint estate, the parties must provide the other party's attorney within 14 (FOURTEEN) days from date of this Order with full details pertaining to all the assets (including pension benefits and annuities) and liabilities as on date of divorce which that party deems to form part of the joint estate, which shall include statements of all creditors, indicating the amounts payable to these creditors as on date of divorce.

16.6 Should the parties fail to reach an agreement in writing with regards to the division of the joint estate within 3 (THREE) months after date of this Order, a liquidator is appointed to divide the joint estate of the parties, and as follows:

16.6.1 The parties will within 10 (TEN) days thereafter agree upon the identity of a liquidator, failing which the President of the Law Society of the Northern Province will nominate a suitable person with suitable experience as such a liquidator and such a nomination will be final.

16.6.2 The powers of the liquidator are those as set out in ANNEXURE "A" hereto. The liquidator shall determine the extent of the joint estate by taking into account all the assets and liabilities of the parties, including the moveable and immoveable property and the parties' respective pension benefits, annuities and investments.

17. Until the division of the joint estate is finalised, the defendant will be liable for the payment of the bond instalment payable in respect of the bond account held by the parties at Standard Bank under account number [218...], which bond instalment the defendant shall promptly pay each month, until the joint estate has been divided between them. In addition thereto, the defendant will also be liable for the payment of two thirds (66.66%) of all rates and taxes, all expenses incurred of the maintenance of

the immovable property and the water and electricity supply to the immovable property owned by the parties until the joint estate has been divided between the parties.

18. The defendant is ordered to pay the costs of the action whereof such costs will not form part of the joint estate.

A.P. LEDWABA

DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH
COURT, PRETORIA

ANNEXURE "A"

1. The liquidator shall take control over the joint estate of the parties and shall enjoy all the powers as administrator thereof.

Without derogating from the generality of the foregoing, the liquidator shall also be entitled:-

1.1 to accumulate details of all the assets, movable or immovable, tangible or intangible which form part of the joint estate as on date of divorce;

1.2 to accumulate details of all liabilities of the joint estate as on date of divorce;

1.3 to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets and liabilities of the joint estate as on date of divorce;

1.4 to obtain information regarding the financial affairs of the parties from bank managers and/or managers of any other financial

institution with regard to the assets and liabilities of the joint estate as on date of divorce;

1.5 to obtain information from all the auditors or any other people who may have knowledge of the financial affairs of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest as on date of divorce;

1.6 to obtain copies of the financial statements of any and all companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest as on date of divorce;

1.7 to inspect the books of accounts of any companies, close corporations, trusts or businesses in which the Plaintiff, the

Defendant and/or the joint estate of the parties may have an interest as on date of divorce;

1.8 to physically inspect the assets of the joint estate and to compile a full inventory of all assets referred to in paragraph 1.1 above;

1.9 to obtain sworn valuations of all the assets referred to in paragraph 1.1 above;

1.10 to interrogate or interview the Plaintiff and the Defendant and any other person in order to give effect to paragraphs 1.1 and 1.2 above;

1.11 to subpoena the Plaintiff, the Defendant and witnesses out of the above Honourable Court for purposes of interviewing and/or interrogating such persons at a date, place and time to be determined by the Liquidator and to ensure that the proceedings in terms hereof are recorded in order to give effect to paragraphs 1.1 and 1.2 above;

1.12 to inspect all books, vouchers, cheques, deposit slips, bank statements and, in general, all documents in possession of any person, for the purposes of giving effect to paragraphs 1.1 and 1.2 above;

1.13 to make and retain copies, at his discretion, of all the documents and books referred to in paragraph 1.12 above;

1.14 to submit, after completion of his duties referred to in paragraphs 1.1 and 1.13 above, a full report of his investigations

to both the Plaintiff and the Defendant;

1.15 to distribute the nett assets of the joint estate in accordance with paragraphs 2 and 3 hereunder between the Plaintiff and the Defendant on such basis as may be agreed upon between them, alternatively if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty (the Plaintiff and the Defendant having a right also to bid) and there upon to divide the nett proceeds between the Plaintiff and the Defendant in accordance with paragraphs 2 and 3 hereunder;

1.16 to engage the services of any suitable qualified person or persons to assist him in determining the proper value or whereabouts of any of the assets of the joint estate and to pay such person or persons the reasonable fees which may be charged by him;

1.17 to afford both the Plaintiff and the Defendant personally the opportunity to make recommendations to him about any matter relevant to his duties and to this order and to the identity of any purchaser as well as the purchase price of any asset, including,

but not necessarily limited to: -

1.17.1 the time and/or manner in which any assets shall be realised;

1.17.2 the price for which any assets should be realised;

1.17.3 the sequence in which any assets should be realised;

1.18 to give due consideration to the wishes of the parties pursuant to the representations made by them and make such decisions in respect thereof as he may deem fit;

1.19 to sell any assets to either the Plaintiff or the Defendant for a price that he deems to be the true market price of such assets;

1.20 to sign any documents as may be necessary to effect the transfer of any assets sold from the person in whose name it is registered to the purchaser thereof;

1.21 not to realise any movable assets excluding shares, unit trusts and insurance policies without giving both Plaintiff and Defendant ten day's notice of his intention to do so;

1.22 to give both parties a first right to purchase any assets as envisaged in paragraph 1.21, in the case of sale by treaty at the

same price he is able to obtain from a bona fide third party, or in the case of a public auction, at a better price than that

offered by a bona fide third party;

1.23 to apply to this Court for any further directions as he shall or may consider necessary;

1.24 to institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever Court it shall be appropriate to bring such proceedings;

1.25 to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the purposes of obtaining delivery of any assets alleged to be vested in the joint estate and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the joint estate in accordance with the principals enounced in *Muller v The Master and Others*. 1992 (4) SA 277 (T);

1.26 to collect debts due to the joint estate unless the same be disposed of by sale;

1.27 to defend any action launched against the joint estate;

1.28 to pay the liabilities of the joint estate;

1.29 to pay his reasonable fees (5% of the gross value of the estate) and to apportion such fees between the parties in the same proportion as they are entitled to the assets of the joint estate;

1.30 to obtain full particulars of all the Plaintiff's and the Defendant's insurance policies including life policies, endowment policies, annuity policies and retirement annuity policies from the underwriters thereof, alternatively from such underwriter's duly authorised agents and to deal with such policies in his discretion in order to enable the Liquidator to give effect to the provisions of paragraphs 2 and 3 below;

1.31 to instruct banks and/or financial institutions to deal with the investments and bank accounts as the Liquidator may in his discretion deem necessary in order to protect the rights of one of the parties or both parties in order to give effect to the provisions of paragraphs 2 and 3 below;

1.32 to allocate, in his discretion, both assets and liabilities between the parties.

2 The division of the nett assets referred to in paragraph 1.15 above shall be subject to the protection of the rights and claims of secured and preferent creditors of the joint estate.

3 The division of the nett assets referred to in paragraph 1.15 above shall be in equal proportions between the Plaintiff and the

Defendant but subject to paragraph 4 below.

4 Any losses suffered by the joint estate as 3 result of the wrongful behaviour of the parties in dissipating the joint estate's assets, shall be borne exclusively by such party and a distribution and division of the assets of the joint estate or the proceeds

thereof, as the case may be, shall accordingly be subject to adjustment in accordance with the Liquidator's discretion.

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