

SOUTH AFRICA / JUDGMENT

L.M.G (born L) v L.J (45637/2014) [2019] ZAGPPHC 409 (30 August 2019)

[2019] ZAGPPHC 409**COURT**

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

45637/2014

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

Case no: 45637/2014

30/8/2019

L[....]

M[....] G[....] (born

L[....])

Applicant

and

L[....]

J[....]

Respondent

JUDGMENT

MNGQIBISA-THUSI J:

- [1] The plaintiff, Mrs M[...] G[...] L[...], and the defendant, Mr J[...] L[...], were married in community of property on 31 August 2002. Out of the marriage two minor children were born, L[...] T[...] D[...] L[...] (born on 27 June 2001) and M[...] T[...] A[...] L[...] (born on 27 April 2006).
- [2] On 20 June 2014 the plaintiff instituted divorce proceedings. The parties have made common cause with regard to the irretrievable break down of their marriage.
- [3] In the summons the plaintiff sought the division of the joint estate, inclusive of her entitlement to 50% of the defendant's pension fund benefits.
- [4] The defendant, although conceding that the marriage has irretrievably broken down, instituted a claim in reconvention in which he seeks a forfeiture order in terms of which the plaintiff is divested of her claim to:
- 4.2 a 50% share in the defendant's pension benefits;
- 4.3 her 50% share of the immovable property situated at [...]; and
- 4.4 all movable assets at the defendant's residence[1].
- [5] In their pleadings the parties accuse each other of having extra marital affairs during the currency of their marriage, leading to the irretrievable breakdown of the marriage. Further, the plaintiff alleges that the defendant was emotionally and physically abusive to her with the result that she obtained a protection order against the defendant.
- [6] On 12 August 2014, the plaintiff obtained a decree of divorce by default inclusive of the following

orders:

- 6.1 that the joint estate be divided;
- 6.2 that the primary residence of the two minor children is awarded to the plaintiff;
- 6.3 that the defendant contribute an amount of RS,000.00 per month as maintenance for the minor children;
- 6.4 that the defendant be responsible for all reasonable medical and educational expenses of the two minor children; and
- 6.5 that the plaintiff is entitled to a 50% share of the defendant's accrued pension benefits up to the date of the divorce order.

[7] On 25 February 2015 the divorce order was, however, rescinded.

[8] The only outstanding issues to be determined are the following:

8.1 the permanent residence of the minor children[2];

8.2 the division of the joint estate, in particular, the immovable property jointly owned by the parties.

[9] At the time of the hearing of the matter, the eldest child, who is now a major, was living with the defendant since September 2013 and the youngest with the plaintiff. However, at the hearing of this matter, it appeared that the eldest child was now also living with the plaintiff.

[10] The plaintiffs evidence is as follows. For the first five years of their marriage they were happy until the defendant started to drink alcohol heavily, physically assaulting her and having adulterous relationship. At one stage she found the defendant sleeping with another woman in his car. Further that as time progressed the fights between them escalated and occurred in front of the minor children. The defendant accused her of having extra-marital affairs, being a witch and of having married him only for his house. On several occasions she had to call the police in order to intervene and ended up obtaining a restraining order against the defendant. With regard to the abuse by the defendant, the plaintiff testified further that the defendant had on several occasions pulled out his service firearm threatening to shoot her.

[11] The plaintiff further testified that as a result of the physical and emotional assaults the defendant inflicted on her, she decided to leave the common home after the defendant refused to leave. She went to stay in Kempton Park with the youngest child whom she registered at the Halfway House primary school. After the defendant took the car she was using, she moved the child to the M[...] primary school as the previous school was far and the child had to take a taxi in the morning and afternoon. The plaintiff at one stage found their eldest child outside her garage after the defendant had inquired from her if the child was with her. The child informed her that he left his father's house as he found the father sleeping with a woman in the parental bedroom. The eldest child stayed with them for a week but as his school was far, he decided to return to his father's house.

[12] The plaintiff denied having extra-marital affairs or abusing the defendant either physically or emotionally. Further plaintiff has admitted that whilst still living at the common home she used to go out to parties and on outings with her friends but denied that any men were involved in those activities with her. The plaintiff disputed the defendant's allegation that she had an extra-marital affair which resulted in the wife of her alleged lover sending her a letter that she should keep away from her husband.

[13] She further denied that she had ever assaulted the defendant or tried to run him over with a motor vehicle.

- [14] With regard to the minor children plaintiff insisted that the primary residence and care of the children should be awarded to her as the children related well and had a good relationship with her. A family advocate's report prepared by XXXX recommends that although the children had a good relationship with both parents. the children should not be separated and should have their primary residence with the plaintiff who appears to be better inclined to attend to their emotional needs.
- [15] After the plaintiff closed her case, the defendant also testified. In his testimony the defendant alleged that his marriage to the plaintiff had irretrievably broken down because of the plaintiffs abusive conduct towards him and her extra-marital affairs. The defendant testified that at one stage he caught the plaintiff with a man who was driving the car she was using hence he took the car back. The defendant further testified that whilst living with the plaintiff interfered with his work and falsely accused him
- of having extra-marital affairs when he was either on night duty or away from home attending official courses. He denied having
- extra-marital affairs or assaulting the plaintiff.
- [16] With regard to the woman he was found with sleeping in his car, the defendant testified that the woman was a colleague and that on the relevant day they had attended a party organised at work. As he was tired he went to his car to rest and the woman came and requested to sit in his car as she wanted to eat the food she had. He denied that he was found sleeping with his colleague. Further with regard to the eldest child running away from home because it is alleged that he found him with a woman in his bedroom, the defendant testified that after receiving summons, and after informing his eldest son that his mother was divorcing him, the son had agreed that he could have a girlfriend and he was surprised by his son's reaction.
- [17] With regard to the protection order obtained by the plaintiff, the defendant testified that he was in court when the interim order was made final but that the magistrate had decided to confirm the interim order after requesting him that, even though he had not assaulted the plaintiff, he should agree to the order being made final.
- [18] It is not in dispute that the marriage between the parties has irretrievably broken down. What is at issue is the primary residence of the children and the proprietary consequences of the divorce.
- [19] With regard to the children, and having taken into consideration the evidence of both parties and the report of the family advocate, I am of the view that it is undesirable to separate siblings after a divorce. The evidence before me is that both children have a good relationship with the plaintiff and the defendant and there is no evidence that either of the parties is a bad parent. Taking into account that the defendant sometimes has to work in the evenings and taking into account the age of the youngest child, I am of the view that it would be in the best interest of the younger child if the primary residence resides with the plaintiff.

As

I have already alluded to the fact that it is not desirable for siblings to be separated, I am of the view that the plaintiff should

be awarded primary residence of both children.

[20] The plaintiff seeks the division of the joint estate whilst on the other hand the defendant seeks a forfeiture of the benefits of a marriage in community of property against the plaintiff. The versions of the plaintiff and the defendant as to the cause of the irretrievable breakdown of the marriage are mutually destructive. Each party blames the other for the breakdown of the marriage. On probabilities, I am of the view that the version of the plaintiff with regard to the defendant assaulting her and having extra-marital affairs is more probable. The allegation by the defendant that the interim protection order was made final merely because, despite not having physically assaulted the plaintiff, he had agreed with the magistrate to make the order final, is not plausible. Further, the defendant could not give a coherent explanation as to why his official firearm was taken away if he had not threatened to shoot the plaintiff.

[21] Further, the defendant's version about the woman he was found with in his car is not probable. The defendant was not a credible witness throughout his testimony particularly when one takes into account his evidence with regard to the letter sent by the wife of the man he alleges the plaintiff had an affair with and how he came about to know about the letter.

[22] In terms of s 9(1) of the Divorce Act, the court granting a divorce may also make an order for the forfeiture of benefits where the parties are married in community of property. S 9(1) provides that:

"When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order is not made, the one party will in relation to the other be unduly benefited".

[23] In *Wijker v Wijker*[3] the court held that the factors listed in s 9(1) of the divorce Act need not all be proven for a forfeiture order to be granted.

[24] However, before a court can decide on whether there is an undue benefit, the party seeking the forfeiture order has to prove the nature and extent of the benefit[4].

[25] The defendant seeks to deprive the plaintiff of the benefits of their matrimonial regime on the ground that the plaintiff's conduct was the cause of the irretrievable breakdown of their marriage. In particular, the defendant does not want the plaintiff to get her share of the immovable the defendant apparently brought into the marriage and in the accrued value of

his pension fund. As I have mentioned before, there is no convincing evidence before me that the plaintiff was involved in extra-marital affairs during the marriage. In fact the plaintiff's version of the defendant's abusive conduct towards her and evidence of the defendant's extra-marital affairs is more probable. The plaintiff's evidence was cogent and convincing. The defendant was not convincing in his allegations about the plaintiff's alleged extra-marital affairs. I am therefore of the view that the defendant has not shown,

on a balance of probabilities, that the plaintiff substantially misconducted herself during the marriage. I therefore see no reason

why the plaintiff should be denied the benefits of the marriage in community of property.

[26] In the result the following orders are made:

1. A decree of divorce is granted;
2. That the defendant's claim in reconvention is dismissed.
3. That there should be a division of the joint estate;
4. That the plaintiff is entitled to a 50% share of the defendant's accrued pension benefits in the Government's Pension Fund up to the date of the divorce order;
5. That the primary residence of the two children born from the marriage is awarded to the plaintiff subject to the defendant's reasonable

contact and that both parties retain full parental rights and responsibilities in respect of the minor child;

6. That the defendant contribute an amount of RS,000.00 per month as maintenance for the youngest child and the eldest child so long as he is still a dependant;
7. That the defendant be responsible for all reasonable medical and educational expenses of the two children; and
8. That each party to pay its own costs.

N P MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For the Plaintiff: Adv IS Ferreira (instructed by Makokga Sebei Inc)

For the Defendant: Adv D Moodliyar (instructed by Moodliyar & Bedhesi Inc)

[1] The parties have been living separately since 2013.

[2] The eldest child has since turned 18 years in June 2018.

[3] 1993 (4) SA 720 (A).

[4] Engelbrecht v Engelbrecht 1989 (1) SA 597 (C).

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