

SOUTH AFRICA / JUDGMENT

S v S (5888/09) [2014] ZAFSHC 222 (4 December 2014)

[2014] ZAFSHC 222**COURT**

Free State High Court, Bloemfontein

BEFORE

L.B.J. Moeng

CASE / FILE NUMBER

5888/09

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****No: 5888/09****DATE:**

04 DECEMBER 2014

In

the matter between:-

[A.....]

[M....]

[S....].....Plaintiff

And

[K....]

[T....] [S.....].....Defendant

CORAM:

MOENG, AJ

JUDGMENT**BY: MOENG, AJ****HEARD ON: 11 and 14 November 2014****DELIVERED ON: 4 December 2014**

INTRODUCTION

- [1] These are divorce proceedings. Plaintiff issued summons against defendant on 27 November 2009 and served same on 7 December 2009. Defendant filed and served a notice of intention to defend the action on 10 December 2009 and filed his plea on 4 March 2010. A counterclaim was later filed and served on 24 March 2010. Plaintiff did not file a plea to the counterclaim and was resultantly barred on 28 July 2013.
- [2] The parties were married to each other in community of property on 18 January 2001 in Bloemfontein and the marriage still subsists. Two children were born out of the pre-marital relationship between the parties. They were subsequently legitimised by the marriage of the parties. Both children have attained the age of majority. I should however pause to state that the second child was still a minor when summons was issued but has since attained majority on 8 June 2013. It appears from the particulars of claim and counterclaim that both parties agree, albeit on different grounds, that their marriage relationship has irretrievably broken down.
- [3] The plaintiff prays for a decree of divorce. She secondary thereto prays for division of the joint estate, an order for maintenance in respect of both children and an order whereby she is declared to be entitled to half of the value of the defendant's pension

interest calculated at date of divorce. The defendant likewise prays for a decree of divorce and subject thereto a forfeiture of

matrimonial benefits alternatively division of the joint estate. He further in the main seeks an order that each party retain his or her pension interest.

BACKGROUND

- [4] This matter has a long history which culminated in a refusal for a further postponement on 11 November 2014. The course of events

leading to the refusal of the postponement can in short be summarised as follows:

- [5] Due to plaintiff's inaction to set the matter down for trial, defendant filed a notice of set down for the 18th and 19th March
2014. Four days before the trial date, the plaintiff consulted Dr S. Brook, a specialist psychiatrist on 14 March 2014 and was declared unfit to work from 14 to 20 March 2014 due to major depression.
- [6] The matter was again set down for trial on 9 April 2014 and the plaintiff again consulted Dr Brook on 8 April 2014, a day before the trial, and he recommended that the proceedings be postponed for a period of 6 months for plaintiff's recovery from depression.

- [7] The matter was then set down for 14 and 15 October 2014. The plaintiff consulted Dr Brook on 13 October 2014. It appears from the report that the plaintiff reported of feeling anxious, depressed and was not coping. She however appeared before me on 14 October 2014 and applied for a postponement due to her depressive state.
- [8] It also appeared from the record that her erstwhile attorney JG Botha, withdrew as an attorney from record on 17 October 2011. The attorney that purportedly appeared on her behalf never filed a notice of his appearance for the plaintiff and did not appear on the date of trial.
- [9] Plaintiff however indicated her willingness to apply for legal aid and was referred to Legal Aid South Africa for assistance. Ms. Oosthuisen was appointed on her behalf and the matter was postponed to 11 and 14 November 2014 for trial. She however again on 6 November 2014 consulted a medical practitioner and was declared unfit for work from 6 to 21 November 2014.
- [10] Mr. Steyn instructed by legal aid South Africa applied for the matter to be postponed or alternatively removed from the roll. He indicated that plaintiff failed to honour her consultation with him and that she is incapacitated due to major depression. Mr. Khang opposed the postponement citing the trend that plaintiff has followed in ensuring that the trial does not reach finality.

THE POSTPONEMENT

- [11] The court has a discretion, which must be exercised in a judicial manner as to whether an application for a postponement should be granted or refused. An applicant for a postponement seeks an indulgence and where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case, a postponement may be granted.
- [12] The course of events painted above is indicative of such delaying tactics. A trend of depression, before each trial date, is created. The medical certificate dated 8 April 2014 recommended that the trial be postponed for six months to enable the plaintiff to recover and proceed with the trial. The matter was indeed postponed for six months.
- [13] The next report dated 13 October 2014 did not recommend that sick leave be granted. This report recommended that plaintiff continue with intensive psychiatric treatment and be admitted to hospital should her mental condition deteriorate. Plaintiff however insisted on the court appearance, dated 14 October 2014 that her mental condition did not allow her to proceed with the case. A legal representative was assigned to her to take instructions but she did not honour her consultation appointment.

- [14] Plaintiff is dominis litis and defendant was hauled to court to defend this action. Summons was served on 7 December 2009 and no action was taken by plaintiff to have the matter reach finality. Defendant initiated the finality of this matter and set it down for trial on four different occasions, only to be met with applications for postponement due to depression. This is in my view prejudicial to the defendant who not only has to incur legal costs but is also entangled in a marriage that plaintiff admittedly regards as having been irretrievably broken down. Plaintiff further failed to honour her appointment for a consultation with her attorney. This is indicative of her lack of interest in seeing this matter reach finality. The prejudice suffered by defendant can in my view not be compensated by an appropriate order of costs.
- [15] All these medical certificates were obtained days before the respective trial dates and defendant never obtained proper notice of the intended applications for postponement. A pattern is created whereby she consults doctors' days before the trial. It does not appear that her condition is so serious that it warranted hospitalisation. These certificates, except for the one dated 8 April 2014, do not specify that the plaintiff is not in a position to conduct her case.
- [16] Having regard to her long history of illness and postponements, I would have expected her to produce evidence and not merely rely on unsworn certificates. (See *Hanson, Tomkin and Finkelstein v Dbn investments (Pty) Ltd* 1951 (3) SA 769 (N). Illness will usually be regarded as an adequate ground for postponement. Proper medical evidence must be produced, directly and positively to the effect that a party cannot attend, and disclosing the nature of his illness and the date when he will probably be able to appear. This should be preceded by a formal application so as to afford the opponent the opportunity to oppose the application and lead evidence in rebuttal.
- [17] The contents of these medical certificates are untested and may be regarded as hearsay, in the absence of the testimony of the doctor that examined the patient. Plaintiff was under the misapprehension that the mere submission of medical certificates would warrant postponements. An applicant for a postponement seeks an indulgence and a postponement does follow as a matter of course.
- [18] In *Joshua v Joshua* 1961 (1) SA 455 (GW), the defendant applied for a postponement of a trial on the ground of his ill-health. The application was opposed by the plaintiff who pointed out that no formal notice of motion of the application for a postponement had been given and that no costs had been tendered. Defendant's counsel asked for leave to hand in a doctor's certificate from the Bar. It appeared that the defendant's attorneys had been aware for a week prior to the application for the postponement being made of the defendant's alleged ill-health. In refusing the postponement *De Vos Hugo J* stated as follows at 457A–C:

"I can see no reason why the defendant could not have given proper notice of her intended application and produced evidence in the

proper manner to support the application. In the exceptional circumstances which existed in Hanson, Tomkin and Finkelstein's

case, supra, I can agree that a doctor's certificate can be handed in from the Bar but where there is time enough to prove such a certificate in the correct manner it should be done and the certificate cannot be accepted from the Bar. The result is,

therefore, that there is no proper proof of ill-health to justify a postponement."

[19] I was of the view that the application for postponement be refused. Mr. Steyn requested to be excused due to lack of instructions and the matter proceeded on an unopposed basis.

SUMMARY OF EVIDENCE

[20] The defendant testified that he is married to the plaintiff and that the marriage still subsists. Two children, both at an age of majority, were born out the marriage and that he is paying maintenance for both based on a maintenance order granted by the magistrates' court.

[21] The marriage between the parties has irretrievably broken down due to the infidelity of the plaintiff. They have been living apart for the past four years. The house that the parties lived in was auctioned due to plaintiff's failure to pay the bond. He regularly sent her money to pay but she failed to. The defendant is still burdened with the outstanding balance of the bond.

[22] The plaintiff was employed by two different Government departments but she resigned. He did not share in her pension benefits. He considers it fair to retain his pension benefits and that the court should not order that she be entitled to half of the value of his pension interest calculated as at the date of divorce. The plaintiff left with the household furniture and he would consider it just if the court orders that each party keep what is in their possession.

THE

ISSUES

[23] The marriage between the parties has admittedly irretrievably broken down. The only issue relates to the division of the estate and whether plaintiff is entitled to half of the value of the defendant's pension interest calculated at date of divorce.

[24] Defendant contends that each party keep what is in his or her possession. This is however contrary to the counterclaim wherein he prayed for an order of forfeiture of matrimonial benefits alternatively, division of the joint estate. Defendant did not plead

the necessary facts to support his claim for forfeiture in the pleadings. He in my view correctly did not persist with this prayer

but in turn contended that each party keep what is in his or her possession.

- [25] Where the parties are married in community of property, their joint estate will be divided equally between them, provided there is no forfeiture order. Such division is based on the principle that the parties to a marriage in community of property are co-owners in undivided shares of the joint estate. There is further no written agreement between the parties as contemplated by section 7(1) of the Divorce Act 70 of 1979 with regard to the division of their assets. In the absence of such an agreement, a court cannot, at the behest of one of the parties, order a division of their assets contrary to the marital regime in community of property.
- [26] The difficulty of granting such an order is further fortified by the fact that these are default proceedings and save for the ipse dixit of the defendant that the plaintiff left with some of the furniture, there is no evidence as to what property is in the defendant's possession. Such an order would in my view be contrary to the marital regime under which the marriage of the parties resorts and I am inclined not to accede to making such an order.
- [27] The second issue relates to whether plaintiff is entitled to half of the value of the defendant's pension interest calculated as at date of divorce. The legal position concerning a spouse's claim to pension benefits of the other spouse is that such interest does not automatically fall within the ambit of the division of the joint estate. Plaintiff is in default and I was requested to dismiss the main claim and grant judgment in terms of the counterclaim. In his counterclaim, defendant prayed in the main for an order that each party keep his or her own pension interest. I am persuaded to grant the prayer in the absence of evidence to the contrary.
- [28] I am satisfied, on the version of the defendant, that the marriage relationship between the parties has irretrievably broken down and that there exists no reasonable prospects of restoring it to a normal marriage relationship. The defendant contended that each party pay his or her own costs in spite of the history of this matter. I will accede to this request.

[29] In the result I make the following order:

1. The plaintiff's claim is dismissed;
2. The decree of divorce is granted.
3. The joint estate shall be divided.
4. Each party is to pay his/her own costs.

L.B.J. MOENG, AJ

On behalf of the plaintiff: No appearance

On behalf of the defendant: Attorney M. Khang

Instructed by: Mphafi Khang Attorneys

BLOEMFONTEIN

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