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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 10/3/2017

CASE NO: 4081/2013

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

In the matter between:

K. K. T.

Plaintiff

and

M. S. R.

Defendant

JUDGMENT

DAVIS, AJ:

[1] NATURE OF THE ACTION:

1.1 This is a divorce action wherein the Plaintiff is the wife and the Defendant the husband. There is one child born of the marriage, a boy currently 4½ years old.

1.2 The issue as to whether the parties were married in accordance with the tenets of customary law as contemplated in Section 3 of the Recognition of Customary Marriages Act, 120 of 1998, was dealt with as a separated issue in terms of Rule 33(4) in a 7-day trial before Makgoka J who found on 4 April 2014 that a customary marriage had indeed been

concluded between the parties on 2 May 2011.

1.3 As to the proprietary consequences of the marriage and the parties' impending divorce, Kollapen J on 10 August 2016 in terms of yet another separated issue in terms of Rule 33(4) found that the Plaintiff forfeited all the patrimonial benefits of the marriage in favour of the Defendant except those arising out of a certain immovable property which the Plaintiff had owned prior to the marriage and in respect of which she remained entitled to 50% of the nett value thereof. This judgment has subsequently been reported as **KT v MR** 2017(1) SA 97 (GP).

[2] **OUTSTANDING DISPUTES:**

2.1 After some debate and, with reference to the pleadings and the various pre-trial minutes, the following issues remained in dispute and required adjudication:

2.1.1 The amount of maintenance payable by the Defendant in respect of the parties' minor child;

2.1.2 Whether the Plaintiff was entitled to rehabilitative maintenance and, if so;

2.1.3 The amount of such maintenance.

2.2 The issues of the incidence of primary residence and the rights of contact with the minor child were no longer in dispute and the terms thereof are reflected in the order made at the end of this judgment.

2.3 There was also, at the inception of the trial, a separate application for an "*anti-dissipation interdict*" pending finalisation of the appeal processes initiated by the Plaintiff against the forfeiture order referred to in paragraph 1.3 above. This application was separately argued and written Heads of Argument were submitted on behalf of the parties after the conclusion of the trial and the outcome thereof is dealt with in a separate

judgment.

[3] **SUMMARY OF FACTS:**

3.1 Only the Plaintiff testified. During the examination of her evidence, reference was made to affidavits filed in a prior application in terms of Rule 43 and an interim settlement agreement reached between the parties and made an order of court.

3.2 Much was made at the inception of the trial as to the Plaintiff's lack of proper discovery for this final portion of the trial. The Plaintiff was also challenged in cross-examination to produce documents in respect of certain aspects of her evidence, bundles of which were produced on the second day of the trial. In the end not much turned on this.

3.3 The relevant parts of the Plaintiffs evidence can be summarised as follows:

- She has a Bachelor's degree in communication and an Honours degree in psychology.
- At the time of her marriage to the Defendant she was a director in the Department of Public Works with an own home (bonded), a Z4 BMW motor vehicle and a nett monthly income of R30 000,00 and with an own medical aid.
- She had a daughter from a previous marriage which was cared for by the child's father.
- Upon her becoming pregnant with her child with the Defendant, she resigned from her employment and became a housewife (this was either by agreement with the Defendant or at his insistence. The Defendant also undertook to pay her a monthly equivalent of her previous nett income and to retain her on his medical aid, which he did during the period that they lived together as husband and wife).

- The Plaintiff and the Defendant lived together as husband and wife from date of the marriage until January 2013 when the Defendant moved out of the common home.
- The Plaintiff and the child remained living in the common home where they are still living to date.
- After the parties' separation the Plaintiff, with the assistance of her mother, departed to the United States of America where she attended a post-graduate school of psychology in order to obtain her Masters' degree and qualify as a forensic psychologist. She explained that, although there were many clinical psychologists practising in South Africa with South African qualifications, forensic psychology is a rare and sought after qualification (only obtainable in Europe and the United States) and which would not only result in self-improvement and ambition fulfilment, but also increase her chances of obtaining employment or even establishing an own practice.
- She returned to South Africa during semester breaks and was ultimately unable to complete the qualification as she had run out of funds needed to sustain herself for purposes of completing the practical requirements of the degree in the United States.
- During the time that she was absent the child was looked after by a helper and her mother, lastmentioned who was a doctor in English at North West University at its Mafikeng campus
- The various litigation between the parties as referred to in the earlier part of this judgment left the Plaintiff's funds depleted to such an extent that she had to sell

her house (with the necessary consent of the Defendant). She also lost all her policies and investments.

- The Plaintiff testified as to the costs of maintaining the child. She maintained that the child was "*difficult*" and hyper allergic and in need of special diet and medication. Some dispute between the parties existed as to whether the child was maintained on the Defendant's medical fund at all times and it appears that there was some hiatus of some six months in this regard when the Defendant switched medical funds.

- Be that as it may, at the inception of this part of the trial before me the Defendant tendered payment of all items claimed by Plaintiff in her Particulars of Claim regarding the maintenance of the minor child. Despite this tender, the Plaintiff's counsel indicated that the Plaintiff would still claim a higher amount as to the cash portion of the amount claimed as maintenance for the child. This would be done without an amendment to the

- Particulars of Claim and in a plea to the court to exercise its discretion as upper guardian of minors. The Plaintiff very emotionally testified as to the child's needs but in cross examination had to concede that if the Defendant indeed paid the amounts claimed and as tendered, that the child would no longer be in need of further maintenance.

- The Plaintiff gave no evidence as to the breakdown of the amount of R100 000,00 per month claimed by her as rehabilitative maintenance. She did testify as to some of her expenses but none came close to this amount. At the conclusion of the trial Mr Khela submitted on the Plaintiff's behalf that the R100 000,00 was made up of the R30 000,00 per month which the Defendant had previously paid in lieu of

her income plus a further R40 000,00 or R50 000,00 per month which he at that time paid in respect of expenses incurred by the Plaintiff on her credit card (but which, it must immediately be noted, also included expenses regarding the common home) and that the balance of the amount is made up by "*inflation*". The main thrust of the argument on behalf of the Plaintiff was that she was accustomed to these payments during the period when the parties were still living together and in fact remained entitled thereto during the remainder of the marriage.

– During cross-examination it emerged that pursuant to the settlement of the Rule 43 application referred to previously, the Defendant retained the Plaintiff on his medical aid and paid (in addition to some maintenance for the child which was less than that now later claimed by the Plaintiff in her action and subsequently tendered by the Defendant as set out above) the monthly amount of R6 000,00 for a helper and R400,00 for swimming pool maintenance for a period of 6 months. He also agreed to be liable for the payment of the bond, levy and rates and taxes payments for the common home (but also limited for a period of 6 months).

– As to the 6 month period, the Plaintiff testified that this was but an interim measure to maintain the *status quo* at the time and so as to tide her over until the first part of the then contested part of the trial pertaining to the recognition of the customary union had been determined. In the end, the period of 6 months was far exceeded and although the payments to the Plaintiff stopped, the payments by the Defendant regarding the bond and levy and rates and taxes payments of the common home continued to this day.

– The Plaintiff's attitude during cross-examination was this: She came into the marriage with a house and she intended staying in the common home indefinitely or

until an alternate house is provided for her since she had lost her own. She had lost her investments and policies and wished to recover same by way of the rehabilitative maintenance.

[4] **THE APPLICABLE LAW:**

4.1 It is an accepted principle of South African law that neither spouse has a right to maintenance upon divorce and the reciprocal duty of support which is one of the invariable consequences of marriage comes to an end when the marriage terminates. (cf. **Botha v Botha** 2009(3) SA 89 (WLD))

4.2 Post-divorce maintenance between spouses is on a different footing than the obligation to maintain children and is a creature of statute. Section 7 of the Divorce Act, 70 of 1979, is clearly discretionary and an ex-spouse has no right to maintenance as such. The factors to be taken into account by a court in making a maintenance order include the existing or prospective means of each of the parties, their respective earning capacities, their financial needs and obligations, their age, the duration of the marriage, their standard of living prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage, an order for the division of assets and any other factor which in the court's opinion should be taken into account. None of these factors are individually dominant.

[5] **APPLICATION OF THE LAW TO THE FACTS:**

5.1 Insofar as the existing or prospective means of each of the parties is concerned, it was never the Defendant's case that he was unable to maintain the Plaintiff or even to pay the amount claimed. No evidence was led in this regard and there was not even such a suggestion made to the Plaintiff in cross-examination.

5.2 The Plaintiff testified that prior to the marriage, she was the owner of a house

worth R2 million and with bond payments of some R12 000,00 but in respect of which she subsequently obtained a rental income of R 10 000,00. She had the aforementioned BMW Z4 motor vehicle, funeral policies, various clothing accounts, her own medical aid and investments and policies. She was able to pay all these expenses and maintain the investments as well as paying the levies and the rates and taxes on her house.

5.3 The BMW Z4 motor vehicle has subsequently made way for a cheaper vehicle with lower monthly instalments. She currently has an overdrawn credit card and has lost all her investments. Substantial legal fees had been incurred which was partially paid by the proceeds of the sale of her immovable property, leaving her still with an outstanding debt of some R245 000,00. She also has the obligation to repay her mother for the R500 000,00 loan which her mother took to assist her overseas studies. There is some dispute whether the Defendant had previously timeously paid for hospitalisation and other medical procedures for the minor child and whether the Plaintiff had to pay shortfalls on the medical aid fund as well as the fact as to whether any maintenance was paid in respect of the minor child for December 2016 and January and February 2017. Apart from the Plaintiff's say-so, this was not corroborated by any documentary evidence but neither was any proof of payment produced by the Defendant.

5.4 Be that as it may, it appears that the Plaintiff has very little assets, if any, to maintain herself and as she is currently unemployed, has no means to otherwise support herself or to make good her outstanding liabilities and debts.

5.5 During this cross-examination of the Plaintiff, counsel for the Defendant accused the Plaintiff of being the author of the increased legal costs incurred by herself. He put it to the Plaintiff that this was particularly so due to her proceeding with the claim for

division of the joint estate and the opposition to the Defendant's counterclaim for forfeiture despite having been forewarned by Makgoka J that her victory in the proving of the marriage might be a hollow one.

5.6 At the time when the accusation was levelled, I was not in possession of the relevant judgment (I was told that it was reported and that the reference would be furnished. This was incorrect, it was not reported and in fact it was a judgment of Kollapen J referred to above which had been reported.) Upon receipt of the judgment of Makgoka J after the conclusion of the trial and upon a reading of it, his "*warning*" appears not to be one after all. The sole reference to costs in his judgment is the following:

"[64] In summary, I find that the Plaintiff has discharged her case on a balance of probabilities that a customary marriage was concluded between herself and the Defendant. The requirements of the Act have been met. There was consent, the marriage was negotiated and celebrated in accordance with customary law. She is thus entitled to a declaratory order she seeks. With regard to costs, I am of the view that costs should be decided with the determination of the remaining issues. This should be so, especially in view of the Defendant's counterclaims. Should, for example, his forfeiture counterclaim succeed, the Plaintiff's victory in this part of the case would be hollow and a costs order in her favour would not be equitable and fair."

5.7 The abovementioned findings can hardly be a "*warning*" to the Plaintiff to desist from exercising her constitutional rights of access to a court and neither was any opinion expressed regarding the merits of the counterclaim. In fact, the Plaintiff's evidence before me to the effect that the Defendant's audacity in denying the customary union and his defence of that issue was astounding, was echoed in the judgment of Makgoka J. The

Defendant was found to be a poor and unsatisfactory witness and to having been garrulous, argumentative, obtuse and evasive. He was found to have failed to directly answer simple questions instead electing to pick up unnecessary and idle philosophical arguments with counsel. His two corroborating witnesses were also found not to be credible. Having regard to the largely discretionary nature and the multitude of possibilities concerning the forfeiture issue, balanced by the Plaintiff's own claim for division of a joint estate, she was well within her rights to proceed with her action which she described as an attempt to at least come out of the marriage with as much as she went into it.

5.8 The criticism of the Plaintiff regarding the incurring of legal costs was therefore misplaced and unwarranted. The depletion of her funds and assets due to the incurrence of legal costs did however leave her with scant resources and negatively impacted on her ability to maintain herself and this is a factor which should be taken into account.

5.9 The fact that, if the forfeiture order stands, there would be no division of assets is also a factor which should be taken into account.

5.10 On behalf of the Plaintiff much was made of the conduct of the Defendant and it was argued that this was also a factor to be taken into account in the Plaintiff's favour. Apart from accusations regarding a lack of sufficient interest in the wellbeing of his child and the understandable reaction of the Plaintiff regarding her changed circumstances for which she blames the Defendant, little else was testified in this part of the trial regarding the conduct of the Defendant other than his conduct in denying that a marriage had in fact taken place as already referred to above. The circumstances which led to an irretrievable breakdown of the marriage relationship between the parties were dealt with in the reported judgment of Kollapen J referred to above and although much has been said in various cases regarding the extent to which disapproved conduct should go before it

can justify a maintenance order or the increase thereof, I am of the view that it is not the case here.

5.11 A factor which is, in the context of this case, more determinative, is the fact that the Defendant had no difficulty or objection in maintaining the Plaintiff during the period that the parties still lived together as husband and wife by substituting her income from his own pocket. Even when he terminated this when the co-habitation ceased, he had no objection against further contributing to the Plaintiff's maintenance by providing a roof over her head (albeit it for her and the minor child) by paying the bond payments on the common home (I interpose to state that the Defendant has two other immovable properties apart from various other assets and business interests). At least the Plaintiff was accustomed to that part of her expenses or maintenance being paid during the existence of the marriage.

5.12 The Plaintiff's ability to maintain herself is dependent on her obtaining gainful employment. She had, for a period of six months since the termination of the co-habitation with the Defendant, been employed at ANN7 as a mentor for upcoming filmmakers. The employment was however project-dependent and terminated after six months. She has not been able to obtain employment since but was criticised for her lack of attempts at seeking gainful employment and the fact that she was not prepared to work for less than she had previously earned. There is some merit in this criticism but, to my mind, having regard to the current unemployment rate prevalent in South Africa, not to the extent that the Plaintiff should be deprived of all relief. There was no evidence that alternate employment had been available which she had not availed herself of or that her placing herself on job listings and scrutinising advertisements and the like should mean that she should not be afforded a further period of rehabilitative maintenance.

5.13 The Plaintiff is still relatively young, and presented herself in court as an attractive, stylish and well-groomed lady with a post-graduate qualification and prior work experience at a directorate level. Where she had claimed rehabilitative maintenance for a period of 2 years, a bit more than half of that period has already expired since her permanent return from the United States of America.

5.14 Taking everything into consideration, I am of the view that the Plaintiff is entitled to rehabilitative maintenance in an amount equal to what the Defendant had paid her in lieu of her income during the period of co-habitation between the parties for the remaining period of her initially claimed or envisaged 2 year period of rehabilitation, being a period of not less than a year. She has not satisfied the onus on her to prove a need or requirement for a larger amount and neither can her claim for maintenance as a measure to recompense her for whatever she may have lost during the course of the marriage. That is an issue which is proprietary in nature and which formed or should have formed part of the enquiry concerning division of the estate or the forfeiture of benefits.

[6] **COSTS:**

As is apparent from the portion of the judgment of Makgoka J quoted above, costs of that part of the trial were reserved. As is further apparent from the reported judgment of Kollapen J referred to above, the learned judge exercised the discretion vested in him by finding that it would be just and equitable for each party to bear their own costs of the part of the proceedings regarding the division of the joint estate and the forfeiture of the benefits thereof. I have weighed up all the facts of the case. These include the fact that the Plaintiff's success in claiming rehabilitative maintenance was substantially less than that which she had insisted on, the fact that the Defendant had, albeit at a late stage, made a full tender of whatever was claimed in respect of the minor child (which tender was not

accepted by the Plaintiff) the fact that the Plaintiff had insisted on pursuing a claim for purposes of recovering assets or expenditures by way of a maintenance order, which is not legally permissible, but by taking into account the various parties' financial positions and means. In the exercise of my discretion, I view it just and equitable that each party bear his or her own costs for this part of the trial. The same does not apply in respect of the costs reserved by Makgoka J. Nothing of the latter parts of the trial, including the forfeiture order, detracts from the fact that the Plaintiff was substantially successful in the trial before Makgoka J in proving the marriage between the parties. Her success therein enabled her to proceed with her claim for maintenance as well as seeking to enforce the rights of the parties' minor child from his father as her then soon to be ex-spouse. For purposes of exercising my discretion I also took into account the nature of the Defendant's opposition in the trial before Makgoka J as well as the credibility findings made by the learned judge. Despite his comments regarding costs quoted above, I do not find those comments as indicating that those costs should be costs in the cause or of necessity follow later costs orders. Had this been what was intended, the learned judge would have said so. The fact of the matter is further that the issues before Kollapen J were separated from the remainder of the disputes. I do not find compelling reasons for deviating from the customary principle that costs should follow the event in respect of the costs of the trial before Makgoka, J.

[7] **THE ORDER:**

Having considered all the aforementioned factors and in the exercise of my discretion regarding the issue of rehabilitative maintenance and taking into account all the issues which were common cause between the parties and/or which were tendered by the Defendant, I make an order as follows:

1. A decree of divorce is granted.

2. The parental responsibilities and rights to the minor child born of the marriage between the parties as set out in Section 18(2) of the Children's Act, 33 of 2005, are awarded to the Plaintiff which parental responsibilities include:

- (a) the primary care of the minor child;
- (b) the choice of primary place of residence of the minor child;
- (c) the decisions pertaining to the day-to-day care of the minor child, including decisions in respect of the education and schooling of the minor child.

3. The specific parental responsibilities as referred to in Section 18(2)(5) of the Children's Act with reference to contact with the minor child are awarded to the Defendant, lastmentioned contact which may be exercised as follows:

3.1.1 Until the child reaches the age of 6 years:

- (a) every Wednesday afternoon for a period of 2½ hours;
- (b) every alternate weekend from a Saturday evening from 17:00 until Sunday 14:00;
- (c) telephonic contact every day between the hours of 18:00 and 18:30.

3.1.2 From the age of 6 years:

- (a) from Friday afternoon at 17:00 to Sunday 17:00;
- (b) every alternative long and short school holiday, Christmas to rotate between the parties;
- (c) telephonic contact at all reasonable times.

3.1.3 Contact will be exercised in such a manner that it will not unreasonably interfere with the minor child's extramural, scholastic and religious activities.

4. The parental responsibilities and rights to the minor child as set out in Section 18(2) of the Children's Act, 33 of 2005, pertaining to guardianship of the minor child are awarded to the parties jointly.

5. The Defendant shall pay rehabilitative maintenance to the Plaintiff in the amount of R30 000,00 per month for a period of one year, payable at the end of each month, commencing on 31 March 2017 and for the same period retain the Plaintiff on his medical aid and pay all reasonable medical expenses not covered by the medical aid.

6. In respect of maintenance of the minor child, the Defendant is ordered to pay the following:

6.1 Maintenance in the amount of R 10 000,00 per month which amount will escalate at the rate of 10% annually and which amount is payable to the Plaintiff on or before the 3rd day of each and every month, commencing on 3 April 2017, until such time as the child is self-supporting;

6.2 Payment of all creche and school fees, inclusive of registration and books, stationery, and the like, direct to the relevant institution which will be a private school or equivalent thereof;

6.3 Payment of all costs in respect of extramural activities and extra classes, including the costs relating to the requirements and equipment for such activities and classes;

6.4 Tertiary schooling and training which will include university fees, lecturing

fees, expenses in respect of books, stationery and fees for attending residential institutions at the university, if applicable, until such time as the child becomes self-supporting;

6.5 The Defendant is ordered to retain the child on his medical aid and to pay all medical expenses not covered by the medical aid.

7. The Defendant is ordered to pay the Plaintiff's costs of the proceedings and the trial before Makgoka J.

8. Save as aforesaid, each party shall pay his or her own costs of the present proceedings.

N DAVIS

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 6 and 7 March 2017

Judgment delivered: 10 March 2017

Counsel for Plaintiff: Adv Z Kela

Attorneys for Plaintiff: Ndumiso Voyi Incorporated

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