



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 5890/06

DATE: 27/8/2009

J.B.K.

PLAINTIFF

V

M.M.K.

DEFENDANT

Civil Trial:

Makhafola AJ

JUDGMENT

MAKHAFOLA AJ:

INTRODUCTION:

1. This is an opposed divorce matter where there is no deed of settlement. The plaintiff filed divorce papers on 23 February 2006 for the following relief:

(1) a decree of divorce;

(2) an order that the custody of the three minor children born between the parties be awarded to the plaintiff;

- (3) an order that the defendant pay maintenance in respect of the three minor children at the rate of R750.00 (seven hundred and fifty rand) per month per child;
- (4) an order that the defendant forfeit the entire patrimonial benefits arising out of the marriage in community of property in favour of the plaintiff;
- (5) and that the defendant be ordered to transfer his half share of the immovable property situated at [.....] into the name of the plaintiff and to sign all necessary documentation on demand for this purpose, failing which the Sheriff for the district of Pretoria South West be and is hereby authorised to sign such documentation on the defendant;
- (6) costs of suit;
- (7) further and/or alternative relief.

2. From the court file it shows that subsequent to the divorce proceedings a Rule 43 application was launched on 26 March 2006. An order relating to the application was granted in favour of the defendant who has opposed the application. It was submitted on behalf of the plaintiff that the order was obtained by default. The defendant did not dispute that.

3. It was further submitted that there is a rescission application against the default judgment and that it is opposed by the defendant. The rescission application is still pending. References were made to the affidavits relating to the Rule 43 application and further to the affidavit resisting rescission.
4. Apart from the facts in dispute relating to the breakdown of the marriage and other concomitant considerations, the main and crucial dispute to be decided is the care, protection and wellbeing of the children born during the subsistence of the marriage of the parties, including their residence and maintenance.
5. From the evidence of the plaintiff it is clear that she has created comfortable circumstances for all the children by securing accommodation that can house all the children and herself. The dwelling is not far from where Koketso and Sechaba live with the defendant. Further, from her evidence the plaintiff was hindered to visit the two minor children. She is in gainful employment, she pays for the school fees, medical aid, transport for the children and she is capable to maintain all the children including her eldest daughter without the assistance of the defendant.
6. She works overtime to earn more money for the maintenance of the family. She is a professional nurse with

sufficient Qualifications in a secured employment in the Department of Health. She has kept steadfast in her *viva voce* evidence as in her particulars of claim and Rule 43 application, her claim to have the care and residence of all the minor children.

7. The plaintiff is the biological mother of all her children including her first-born daughter. The consideration to keep these children together and not separate them is conducive to interaction and the children knowing each other. The sons born of the marriage between the plaintiff and the defendant, require to be closer to their half-sister to know her better and *vice versa*.
8. There is no evidence that the plaintiff is an unfit mother to care for the children. She was never engaged in any criminality that could have in the past embarrassed her own children.
9. On the other hand, the plaintiff has corroborated the evidence of the defendant that he is a good father to the children. They are always clean and he personally cares for them. He has claimed in his plea and counter-claim that he is unemployed. At paragraph 8 of the counter-claim he has alleged to have been unemployed for 15 years with no prospects of finding employment.
10. He has admitted at paragraph 11 of his answering affidavit

resisting Rule 43 application that “some years ago he used to habitually smoke “cannabis” and that he was arrested for possession of dagga.” He has also admitted in the same affidavit to using it but stated that he has since stopped.

11. At the same time the defendant has contradicted his plea, counterclaim and averments of being unemployed during his evidence in court. He stated that he is running a fruit market which is operated by an employee. It generates an income to the tune of ± R1300.00 sometimes depending on the circumstances every month.
12. He stated that he has no future plans of housing the children should the court order division of the joint estate of the common house he co- owns with the plaintiff. He will have to decide when he receives his share. This state of affairs militates against him as being capable to offer housing if the divorce is finalised.
13. The defendant has no medical aid, the existing one is paid by the plaintiff. If the divorce is finalised the children’s health, well-being and development need to continue. From the evidence before the court the plaintiff has demonstrated that with her means she can achieve same after the divorce is finalised. The evidence of the defendant does not indicate same.

14. After the divorce is finalised, it is difficult to infer from the evidence before court that Section 33 (l)-(4) can be successfully realised whilst the defendant is unemployed or if (indeed) he runs a fruit and vegetable market as he had verbally alleged. In the circumstances of the facts before court the defendant is not in a position to house, maintain or provide related sendees to all the children of the marriage. The plaintiff is in a position to do so.

THE LAW:

15. Section 17, 18, 19 and 20 of the Children's Act 38, 2005 spell out clearly the full parental responsibilities and rights of mothers and fathers of the children.

16. Sections 7, 8 and 9 of the Act deal with what is required for the best interests of a child and Section 9 in particular mentions care, protection and well-being of a child as being paramount.

17. In KRITZINGER V KRITZINGER, 1951 (2) SA 11 (N) the court qualified the paramount interest of the children as follows: "a Court should be loath in any case to allow "the so-called rights of the father" to interfere with the best interests of the children."

18. In *MADEN V MADEN* 1962 (4) SA 654 (T) at 658 D-E the court deals with the separation of the children in the following manner: "Another principle relevant to the present dispute is that the courts turn their faces against the separation of the children from one another if such a course can possibly be avoided (*SIMLEIT V CUNLIFFE*, 1940 T.P.D 67). Now in the present matter the *status quo* has this weakness that the older child is separated from the three others and staying as I understand, 4 miles away from his mother in [.....]. He is entirely on his own in this regard."

19. In *KEMP V KEMP* [1958 (3)] SA 736 (D & C.L.D) at 737H the court stated the following: "A common law duty rests upon divorced parents to maintain a child of the dissolved marriage. The incidence of this duty in respect of each depends upon their relative means and circumstances and the needs of the child from time to time. The true position appears to be that the existence of the duty is not dependent upon the child being under a certain age, but continues even after majority and remains operative, e.g. in the case of a cripple unable to fend for himself (cf *Spiro*, Law of Parent and child, p246)."

20. I cannot be persuaded otherwise than I would by all the considered facts before me do, to apply the law to the proven facts and find as follows:

- (1) the children's interests would best be served by granting the plaintiff the primary residence of Kagiso, Koketso and Sechaba;
- (2) The plaintiff has sufficient means of housing and maintenance to sustain the livelihood of all the children if the primary care and residence is given to her;
- (3) the defendant on his own version, has no plan of how to house, maintain or pay for the minor children's school fees thereof unless he receives his share of the joint estate;
- (4) the children in the circumstances should not be separated because they need to closely interact with one another and with the plaintiff's daughter who is their half-sister;
- (5) the defendant "plays lotto when he can afford to buy a ticket costing R2.50 and he sometimes gets lucky and wins little money. Neither of these can be called an income" (quote extracted from the defendant's answering affidavit resisting rescission application against Rule 43 at page 5 paragraph 9.1 thereof); Vide: Exhibit "C"
- (6) the defendant relies on the pity of some of his relatives which they have on him and the minor children to give

them little money when they visit them. (quote extracted from the defendant's answering affidavit resisting rescission application against Rule 43 at page 5 paragraph 9.1 thereof); Vide: Exhibit "C"

(7) the defendant who lives with the two minor children cannot afford R4000.00's worth of groceries as he estimates as reasonably needed by them. (quote extracted from the defendant's answering affidavit resisting rescission application against Rule 43 at page 6 paragraph 9.5 thereof); Vide: Exhibit "C"

(8) the defendant's credibility has been destroyed by material contradictions between his *viva voce* evidence and his plea, counter-claim, Rule 43 answering affidavit and his affidavit resisting Rule 43 rescission application;

21. Both counsel have been of assistance in their arguments. The plaintiff's heads of arguments also augmented my research on authorities. I thank both counsel for their assistance.

22. In the result, the following order is granted:

(a) a decree of divorce;

- (b) the plaintiff and the defendant shall retain parental responsibilities and rights in respect of the minor children born of their marriage subject thereto that the primary residence and care shall be with the plaintiff;
- (c) the defendant shall be entitled to reasonable contact with the children at all reasonable times, including alternate weekends, alternate public holidays, half of each long school holiday the' Christmas portion is to rotate, each alternate short school holiday and reasonable telephonic contact;
- (d) the defendant is ordered to contribute towards the maintenance of the minor children R1000.00 per month per child;
- (e) division of the joint estate;
- (f) costs are to be paid out of the joint estate of the parties;
- (g) the defendant's claims are dismiss

k. MAKHAFOLA (AJ)

ACTING JUDGE OF THE HIGH COURT

