

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)**

CASE NO.: 20622/06

In the matter between

J.B. M Plaintiff

and

G.K. M Defendant

DATE HEARD: 21st, 22nd and 23rd APRIL 2009 JUDGMENT HANDED DOWN ON 10th
SEPTEMBER 2009

JUDGMENT

EBERSOHN AJ.

[1] The plaintiff sued the defendant for a divorce, division of the joint estate and ancillary relief.

[2] In the particulars of claim the plaintiff alleged that they were married in community of property on the 27th January 2001. Exhibit "A" before court is the marriage certificate issued by the Department Home Affairs.

[3] There is one child, a daughter, K, born on the [.....] 2005 out of the marriage.

[4] The plaintiff alleged that the marriage relationship has irretrievably broken down and this was conceded by the defendant who testified that he was in a love relationship with another woman.

[5] The plaintiff testified that she and the defendant had a love relationship for several years during which she cared for the children of the defendant out of a his previous marriage and that in 2001 he caused his family to send a deputation to approach her family to agree on and pay lobola for her so that a customary marriage relationship could come into being.

[6] It was the plaintiffs case that a meeting was held between a deputation of the defendant, which deputation met the deputation of the plaintiffs family at the residence of the plaintiffs family, that there were negotiations about the amount of lobola to be paid and that an amount of R2 000,00 was paid to the plaintiffs deputation and that a meal was had by all thereafter, satisfying the requirements for a customary marriage relationship to have come into being according to her family's traditions.

[7] It was the plaintiffs' contention that the R2 000 was the agreed amount of lobola whilst it was the evidence on behalf of the defendant that the R2 000 was in fact only a deposit regarding the lobola and that the customary marriage relationship would only come into being when the full balance of the lobola would be paid and since it was not paid, so went the defendants' evidence, and was his case, the customary marriage relationship did not come into being.

[8] Neither party gave notice in terms of rule 36(9)(a) and (b) that they would call experts to testify about the customary law applicable.

[9] Both sides called witnesses who testified about the customary law applicable. This was clearly evidence from lay people. The plaintiff and defendant have different tribal traditions. None of the defendant's witnesses succeeded in persuading this court:

a) that he was an expert regarding tribal traditions; and

b) that a marriage according to tribal traditions did not come into being between the plaintiff and the defendant.

[10] It is, furthermore, common cause that the defendant had the plaintiff registered on the 7th July 2002 as his spouse with the Vuka u Sienzele Burial Society and as his spouse with his medical fund. Documentary proof of this was received as exhibits by the court during the trial.

[11] It is common cause between the parties that the plaintiff on the 23rd July 2004 called at the Offices of the Department of Home Affairs and that the customary marriage was there registered in terms of the provisions of section 2 of the Recognition of Customary Marriages Act, No. 120

of 1998 ("the Act").

[12] In terms of the provisions of the Act, the date of marriage was recorded as being the day the two deputations met and the R2000 was paid, namely the 27th January 2001. Exhibit "C" being a copy from the file of the Department of Home Affairs of the application for registration of the marriage was handed up as an exhibit by an official of that Department.

[13] The defendant didn't fare well under cross-examination. He was uneasy as he tried to explain why, when he learned of the registration of the customary marriage with the Department, he didn't take the matter to court to have it annulled, and why he caused the plaintiff to be registered as his spouse with the burial society and medical fund if they were not in a customary marriage relationship. It was put to him in cross-examination that by doing so he defrauded the burial society and the medical fund unless his evidence in court was untrue and that at the time he caused the plaintiff to be registered as his spouse he regarded her as his customary wife. The defendant could not give a satisfactory explanation.

[14] The birth of their child, K, on the [....] 2005 meant that the child was conceived at about the stage when the plaintiff registered the customary marriage. The defendant explained that although the plaintiff was not his customary wife he still had sex with her when he visited her where she was staying in his house and apparently is still staying.

[15] There is another very serious aspect which counts against the defendant. He was summonsed to appear before the maintenance court where, after an inquiry, he was ordered to pay maintenance for the plaintiff and for their minor child. He should have realised, by then, at least, that he was bound by the marriage and that he would in future suffer the consequences thereof, and he at least at that stage should have approached the court to have the marriage annulled, yet he didn't do so despite the lapse of several years. That the defendant also could not really explain in cross-examination.

[16] In the face of the marriage certificate issued by the Department and the absence of acceptable evidence on the part of the defendant to rebut the marriage certificate and what is more, in the absence of even a counterclaim to have the marriage annulled, and the fact that the defendant was a poor witness and was clearly lying at stages, this court cannot even consider the defendant's version that a valid marriage didn't come into being and the plaintiff must therefore succeed with her action for divorce.

[17] This court is of the opinion that joint custody and control over the parties' daughter should be awarded to both parties but that the parental control over her should vest in the plaintiff with reasonable access to the defendant to the child.

[18] The defendant will also be ordered to pay maintenance for the plaintiff and the child and the child's medical and ancillary expenses.

[19] An order will also be granted regarding the division of the joint estate. In this regard counsel submitted that an advocate with appropriate experience be appointed arbitrator in the event of the parties not being able to agree on the division of the joint estate.

[20] It is clear that the marriage disintegrated due to the conduct of the defendant and costs of this action must follow the event and his' and the plaintiffs costs will have to be paid out of the one-half of the defendant's share of the joint estate.

[21] The record is silent about it but in the event of the defendant belonging to a pension fund the plaintiff will be entitled to half a share thereof. [22] I accordingly make the following order:

1. A decree of divorce is granted.
2. Custody and control over the parties' minor daughter K is awarded jointly to the plaintiff and defendant.
3. Parental control over the parties' minor child K will vest in the plaintiff with the right of reasonable access to the said child by the defendant.
4. The defendant is ordered to pay maintenance to the plaintiff for herself in the amount of R750 per month until her death or remarriage whichever occurs first.
5. The defendant is ordered to pay maintenance to the plaintiff for the minor daughter K of the parties at the rate of R750 per month.
6. With regard to the parties' minor child K the defendant is also ordered to pay all her reasonable medical-, dental, ophthalmic- and hospitalization costs and the costs of all doctors' prescriptions and of her necessary toiletries and her school fees.
7. The joint estate of the parties must be equally divided between the plaintiff and the defendant and failing agreement as to how it should be divided and what the joint estate comprises of and the value of certain assets, an advocate of at least 10 years standing and who is a member of the Pretoria Bar, nominated for that purpose by the Chairperson of the Pretoria Bar Council, is

hereby appointed arbitrator with all the powers vested in him by the Arbitration Act to decide the issue(s) and to divide the joint estate.

8. In the event of the defendant belonging to a pension fund the plaintiff will be entitled to one half of the benefits thereof, as at the date of this order, and either party may approach this Court upon affidavit to make a further specific order regarding the name etc. of the fund to enable the pension fund to register the plaintiffs rights.

9. The defendant is ordered to pay his' and the plaintiffs costs of suit out of his half share of the joint estate.

ACTING JUDGE OF THE HIGH COURT

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