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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
DATE	SIGNATURE

Case No: 2024-041851

In the matter between:

A[...], F[...]

Plaintiff

and

P[...], D[...]

Defendant

REASONS FOR ORDER

Gilbert AJ:

1. In this unopposed divorce action enrolled before me on 25 October 2024, and after having heard counsel for the plaintiff, I removed the matter from the roll to

enable the plaintiff to supplement her papers. I indicated that my reasons for doing so would follow.

2. The parties married each other in community of property on 18 July 2007. There are three minor children born of the marriage.

3. The plaintiff pleads that the marriage relationship has disintegrated in that:

- 3.1. there is no love and affection between the parties and the marriage is dead;
- 3.2. there is no communication between the parties;
- 3.3. the defendant "*absconded the relationship on or about the end of March 2023*".

4. The plaintiff pleads that it is in the best interests of the minor children that she retain parental responsibility for the children and that their primary place of residence is with her. The plaintiff continues to plead why full rights of guardianship over the children should be awarded to her.

5. The plaintiff then continues that given the circumstances that gave rise to the breakdown of the marriage, the defendant would be unduly benefited if he did not forfeit his patrimonial benefits from the marriage, particularly in respect of two motor vehicles and the movable household contents. Although not so pleaded in the particulars of claim, the plaintiff in her draft order expands the forfeiture to what appears to be of the defendant's entire patrimonial benefits of the marriage.

6. One of the reasons pleaded by the plaintiff for the forfeiture of the patrimonial benefits is that the defendant "*absconded from the common home on or about the end of March 2023 leaving the Plaintiff to fend for herself and the three minor children*".

7. My concern arose from the evidence, or more accurately the absence of evidence, in the affidavit filed by the plaintiff in terms of the prevailing practice directives. The plaintiff does no more than repeat the averments made in her particulars of claim. The plaintiff simply states that the defendant absconded the

relationship as well as the common home on or about March 2023 and that in doing so the defendant left her to fend for herself and the three minor children. Notably lacking is any evidence of any significance as to why the plaintiff believes that her husband with whom she has been married and shared a home since 2007 and with whom she has had three children, would have, without any warning, absconded. While it is not for me to be prescriptive as to the evidence that should be adduced, what is lacking, for example, is any evidence as to why the plaintiff would think that her husband absconded when he left the home in March 2023 as contrasted to misfortune having befallen him.

8. In the court file there is a letter from the plaintiff's attorney addressed to the Family Advocate dated 11 July 2024 seeking that the Family Advocate endorse the particulars of claim, which states as follows:

“2.1 The Defendant has absconded the common home on or around the end of March 2023. We are unaware of the whereabouts and contact details of the Defendant.

2.2 The parties have been separated since March 2023 when the Defendant suddenly absconded from the common home. The Plaintiff has since been unable to locate the Defendant. A copy of our instruction to the tracing agent and his response are attached hereto marked “A”.

2.3 The Plaintiff has made numerous attempts to locate the Defendant including checking in with family, friends as well as hospitals and mortuaries and has been unsuccessful in doing so. Therefore, there is no prayer in the particulars of claim regarding contact.”

9. When I drew the plaintiff's counsel's attention to the dearth of evidence, this is the letter I was directed to.

10. Apart from the contents of the letter not being under oath, it raises more questions than it answers. It may be that the defendant did not abscond but rather may have died and this may explain why he did not return to the family home that he had shared with his wife since March 2023.

11. In the absence of evidence, there is an inadequate basis to find that the defendant absconded rather than passed away. This is particularly so as the plaintiff herself appears to be uncertain as to which of these is the position.

12. No detail is provided as to the 'numerous attempts' that were made to locate the defendant, whether under oath or in the letter. The tracing report is not attached. No information is given as to which friends and family members were approached and why it may be that the defendant would abscond, with no warning to any of his friends or family, or any subsequent contact. In contrast, should the defendant have died, that may explain why there has been no such contact.

13. Of course, this is speculative but that is because inadequate evidence has been placed before the court on this aspect.

14. As the plaintiff's counsel readily recognised, the consequences of the defendant having died rather than having absconded are distinctly different. Should the defendant have died, then the marriage would have been dissolved by death and a divorce order cannot be granted. So too orders relating to the children as part of the divorce order cannot be granted if the defendant as died as the plaintiff would be the surviving parent with the parental responsibilities and rights.

15. The patrimonial consequences would be different. There would be no basis for a forfeiture of benefits. Apart from such forfeiture not being competent as a divorce order cannot be granted providing for such forfeiture in terms of section 9 of the Divorce Act, 1979 if the defendant has died, the primary basis asserted for the forfeiture is that the defendant absconded. Had he not absconded, there would be little factual basis, on the pleading, for a forfeiture of patrimonial benefits.

16. If the defendant has died, the distribution of the joint estate would then take place in terms of the laws of succession and not by way of a divorce order.

17. Consideration would have to be given as to whether the appropriate proceedings are divorce proceedings or whether the plaintiff should be seeking some other form of relief. Regard would be had, for example, to the Dissolution of

Marriages on Presumption of Death Act, 1979. As to the difficulties that arise from prematurely granting an order of divorce on the grounds of desertion where it subsequently is discovered that the defendant had died, see *Ex parte Kruger* 1982 (4) SA 411 (SE). Certain of the factual averments in the particulars of claim are remarkably similar to those in *Ex parte Kruger*. See also the discussion in relation to the High Court's common law jurisdiction to grant an order presuming the death of a missing person in Du Bois (ed) *Wille's Principles of South African Law*, 9th ed, Juta (2007) at pages 158 to 160.

18. It is in these circumstances that I removed the matter from the divorce roll to enable the plaintiff to supplement her papers.

Gilbert AJ

Date of hearing: 25 October 2024

Date of reasons: 5 November 2024

Counsel for the Plaintiff: W Bava

Instructed by: Aashia Saloojee Inc

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