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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, PRETORIA)**

Case Number: 414744/16

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES

In the matter between:

**P[....] D[....]2 D[....]
(BORN M[....])**

Applicant

and

P[....]2 A[....] D[....]

Respondent

JUDGMENT

LEDWABA DJP

INTRODUCTION

[1] The parties were married to each other in community of property on 16 October 2007 at Mamelodi in the Gauteng Province.

[2] In 2016 plaintiff instituted a divorce action against the defendant seeking a decree of divorce, division of the joint estate, primary care and permanent residence of the minor children subject to defendant's rights of contact and visitation rights at all reasonable times are maintained for the minor children and rehabilitative maintenance for herself.

[3] The defendant is defending the action in his plea alleges that there are good prospect of reconciliation, the marriage has not irretrievably broken down, and if the parties can be counselled a normal marriage relationship can be restored.

[4] Before the trial commenced the defendant applied for the recusal of the plaintiff's legal representative because the plaintiff's legal representative previously represented him in matters relating to his business, I dismissed the application.

[5] Plaintiff and the defendant testified, without calling any witnesses. It is clear from the evidence of the parties that the main issue to be decided by this Court is whether the marriage relation between the parties has irretrievably broken down or not.

[6] Plaintiff in her testimony and during cross examination stated that she has not stayed with defendant since December 2018 and they have not accorded each other conjugal rights. She further stated that defendant has been having extra marital affair with one Ms M T Setati and two minor children have been born from the said relationship since she left the defendant.

[7] Plaintiff clearly stated that she has lost her love respect and affection

for the defendant. Counselling by four religious pastors and professional counsellors could not assist the parties reconcile and live together as husband and wife.

[8] During cross examination she denied that she had an extra marital relationship. When defendant confronted her with a message that she sent to him in September 2021 wherein she stated that she missed him, she conceded that she did send the message. But she insisted that their marriage has irretrievably broken down and she was not interested in continuing with the marriage.

[9] The defendant in his testimony denied that the marriage has broken down irretrievably. He admitted two minor children born in 2017 and 2020 were born from his relationship with Ms MT Setati.

[10] The defendant put too much emphasis on the message that was sent by the plaintiff to him in September 2021 and submitted that was proof that the plaintiff and him can still live together as husband and wife.

[11] During cross examination defendant did not explain why did he not challenge the plaintiff evidence when she said he is failing to maintain his children and that he avoided to be served with maintenance summons.

[12] On careful evaluation of the evidence that was presented I am satisfied that the plaintiff was an honest and a credible witness. On the contrary the defendant did not persuade me that the marriage has not irretrievable broken down.

[13] It is common cause that the parties have not lived together as husband and wife for more than five years, plaintiff clearly stated that she does not want to continue with the marriage.

[14] In 2018 the Office of The Family Advocate in respect of the children, made the following recommendations

"The parental responsibilities and rights in respect of the guardianship over the minor children should be awarded to the parties jointly

The primary care and permanent place of residence of the minor children should be awarded to the plaintiff subject to the defendant's specific parental responsibilities and rights to contact with the minor children as follows:

- a) The right of the defendant to remove the minor children for every alternative weekend from Friday 17h00 to Sunday 17h00;
- b) The right of the defendant to remove the minor children for every alternative short and long school holidays;
- c) The minor children shall spend special days of the plaintiff, such as her birthday and Mother's Day with the plaintiff and similarly, the children shall spend special days of the Defendant such as his birthday and Father's Day with the Defendant; and
- d) The right of the Defendant to regular and predictable telephonic contact with the said minor children at all practical times."

[15] The children have been permanently staying with the plaintiff for about four years. I think it is in the best interest of the minor children that the primary care and permanent residence of the minor children should be awarded to the plaintiff. The issue of maintenance for the should be referred to the maintenance court. There is not enough evidence before me to make an appropriate order of maintenance for the children.

[16] Parties are married to each other in community of property and there is no reason why an order of division of the joint estate should not be granted. The defendant has unnecessarily delayed the finalization of the plaintiff divorce action and raised spurious tactics to delay the finalization of the matter. The defendant should be liable for the costs of this action from his share in the joint

estate.

[17] *I make the following order;*

17.1 A Final Order of Divorce is granted

17.2 The joint estate to be equally divided

17.3 The primary care and permanent place of residence of the minor children, born out of the relationship between the Parties, a boy, N[....] A[....] J[....] D[....] and a girl, T[....] T[....]² D[....], is awarded to the Plaintiff subject to the Defendant's specific parental responsibilities and rights to contact with the minor children as follows:

17.4 The Defendant to remove the minor children for every alternative weekend from Friday 17h00 to Sunday 17h00. Should such weekend be either preceded or followed by a public holiday, the weekend shall include the additional day;

17.5 The Defendant to remove the minor children for every alternative short school holiday with the specific understanding that the Easter holidays shall rotate between the Parties;

17.6 The Defendant to remove the minor children for 50% (fifty) percent of every long school holiday with the specific understanding that the Christmas and New Year portions of the December holidays shall rotate between the Parties;

17.7 Notwithstanding the provisions of sub-paragraph .4 supra, the children shall spend every birthday of the Plaintiff falling on a weekend with the Plaintiff and similarly, the children shall spend every birthday of the Defendant falling on a weekend with the Defendant. Furthermore, the children shall spend every Mother's Day with the Plaintiff and every Father's Day with the Defendant; and

17.8 The Defendant to have regular telephonic contact with the said minor children at reasonable times.

17.9 The issue of maintenance of the minor children to be referred to the Maintenance Court for proper adjudication. Pending the finalization of the maintenance inquiry by the Maintenance Court, the Defendant is ordered to pay maintenance for the minor children born between the Parties at R3 500.00 (THREE THOUSAND FIVE HUNDRED RAND) per month per child by direct bank deposit into the Plaintiff's bank account; and

17.10 Defendant to pay the plaintiff's costs on attorney and client scale.

A P LEDWABA DJP
Judge of the High Court
of South Africa
Gauteng Division, Pretoria

Attorneys for the Applicant:

Mr S S E Sambo

Instructed by:

Sambo-Mlahleki Attorneys

Defendant in person:

Mr A P D[....]

Date of hearing:

13/05/2022

Date of Judgment

13/10/2022