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THE HIGH COURT OF SOUTH AFRICA
(TRANVAAL PROVINCIAL DIVISION)

DATE: 16/8/2005
CASE NO.4826/2004

UNREPORTABLE

In the matter between

MMAMOTSUMI VIOLET NDABA

APPLICANT

and

ERALD FANNIE NDABA

RESPONDENT

JUDGMENT

SERITI, J

This is a divorce matter. The plaintiff herein is Mmamotsumi Violet Ndaba (born Keetse) an adult female presently employed as an administrative clerk and residing at Ga-Seabi, Mpumalanga with her parents and the minor child born out of the relationship between the defendant and the plaintiff.

The defendant is Erald Fannie Ndaba an adult male physiotherapist carrying on business at Erasmus Medical Centre and Legae Private Hospital and presently resident at 25 Kronkel Avenue, Extension 14, Magalieskruin Pretoria North, Gauteng.

The plaintiff issued summons against the defendant, claiming the following:

- a. A decree of divorce.
- b. Custody of the minor child, subject to defendant's right of reasonable access.
- c. Maintenance for the minor child at a rate of R 3000 - 00 per month.
- d. An order that defendant pay rehabilitative spousal maintenance for the plaintiff at the rate of R 5000 - 00 per month for a period of twenty four (24) months.
- e. Division of the joint estate.
- f. An order that one half of the accrued value of the defendant's pension/provident or annuity investment funds is payable to the plaintiff when such benefit becomes due:
- g. An order that the relief granted in terms of paragraph (f) above be noted against the defendant's pension/provident/ annuity /investment policies by the institution holding such funds.
- h. Costs of the action.

In the particulars of claim, the plaintiff alleges that the parties were married to each other in community of property on 5 November 2002 at Pretoria and the marriage still subsists.

One minor child was born out of the marriage, namely O M Ndaba, a boy born on [.....]

The marriage relationship between the parties has irretrievably broken down and has reached such a state of disintegration that there are no prospects of reconciliation -

Reason for the deterioration of the marriage relationship, are, inter alia, as stated by the plaintiff:

1. Defendant has advised plaintiff that he no longer loves her and chased her out of the matrimonial home.
2. Defendant falsely and maliciously accuses her of infidelity.

Plaintiff, in the said particulars of claim further alleges that it would be fair and equitable were the court to order that the joint estate be divided equally between the parties and also order that one half of the defendant's pension interests are payable to the plaintiff.

During the marriage, plaintiff was greater part thereof, a house wife who attended to the domestic duties of the matrimonial household and she was dependant on the defendant for maintenance and support.

In his plea, the defendant alleges, inter alia, that it would be in the interest of their minor child that custody and control be awarded to him, subject to the plaintiffs right of reasonable access.

Defendant admits that marriage relationship has irretrievably broken down and that there are no prospects of restoration of a normal marriage relationship between the parties.

Reasons for the said break down of the marriage relationship are stated by the defendant, in his counter claim as the following:

1. Parties do not live as husband and wife after plaintiff left the common home on her own accord on or about 16 February 2004.
2. Plaintiff told him that she is not interested in the marriage.
3. Plaintiff engages in extra marital affairs.
4. Plaintiff abuses alcohol and she normally arrives home late in the evenings drunk.
5. Plaintiff neglects the minor child, etc.

In the said counter claim, the defendant prays for an order of divorce, custody and control of the minor child subject to plaintiffs right of reasonable access to the minor child, maintenance in respect of the minor child in the amount of R 1- 00 per annum and costs.

At a pre-trial conference held few days before the hearing of this matter, the parties agreed that the matters in dispute to be decided by the court are the following:

- a. Custody of the minor child.
- b. Maintenance for the minor child.
- c. Maintenance for the plaintiff;
- d. Whether marriage of the parties is in or out of community of property;
- e. If marriage is out of community of property is the accrual system applicable or not.

The first witness to testify on behalf of the plaintiff is Ms Notunate Dlabentu. She testified that she is employed, as a marriage officer, by the Department of Home Affairs and she is stationed at Pretoria Regional office.

She produced copy of a marriage certificate of the parties, which was an extract from the marriage register -

She further testified that on the said marriage certificate, there is no note about an ante nuptial contract - If parties had agreed about an ante nuptial contract, same would have been noted on the marriage certificate. They have no records that the parties had entered into an ante nuptial contract.

Under cross-examination she said that she was transferred from King Williamstown to Pretoria on 12 January 2004 - The signature appearing on the marriage certificate is not her signature - Person who solemnised the marriage is a certain Mrs Killian.

Under re-examination she testified that she has access to all records at her office.

Next witness to testify is Mrs Violet Ndaba.

She testified that she entered into a civil marriage with the defendant on 5th November 2002 at Pretoria. She handed to the court two marriage certificates, with same details, one was a computer generated marriage certificate and the other one details thereof are handwritten.

The computer generated marriage certificate has a line which reads as follows:

"Type of marriage : Civil"

The hand written marriage certificate makes no mention about the type of marriage the parties entered into. At the time of entering into the said civil marriage, the parties were staying together at 25 Kronkel Avenue, Ext 14, Magalieskruin, Pretoria North.

On the day they entered into the marriage, they left home together at 8H30 and went to the Home Affairs offices where they met their two

witnesses, and Mrs Killian, the marriage officer, called them into her office.

The said marriage officer wrote down their personal details and she also asked them if they want to marry in or out of community of property - She replied and said in community of property and her husband said out of community of property.

The marriage officer advised them to go and consult with a firm of attorneys who can help them with an ante nuptial contract and gave them a pamphlet of a certain firm of attorneys, namely Hahn and Hahn Thereafter, Mrs Killian gave them the marriage register and they both signed the said register - After signing the said register, Mrs Killian gave them the hand written marriage certificate.

The parties went to another office where she changed her surname and the minor child's surname from her maiden surname to the husband's surname, and they were given the computer generated marriage certificate.

From the Home Affairs offices, they went to Rooth and Wessels, a firm of attorneys in Pretoria which they knew. On arrival at the said offices, at the reception, they advised the receptionist that they want to be assisted with drafting of an ante nuptial contract. A certain Mr Van der Walt called them into his office and he consulted with them. Mr Van der Walt advised them it is not possible to draft an ante nuptial contract

for parties who have already entered into a marriage. He further advised them that they should have prepared and signed ante nuptial contract 6 weeks before they entered into a marriage.

They left and went to Hahn and Hahn attorneys. They arrived at the said firm of attorneys at about 13H00. They were referred to a certain gentleman who consulted with them. They lied to the said gentleman and they advised him that they have not married as yet and they have planned to go to the Home Affairs offices in the afternoon at about 15H00.

Ante nuptial contract was prepared and they signed same.

They lied to the said gentleman as her husband was insisting that they should get ante nuptial contract signed.

They were given a letter which they were supposed to take to the Home Affairs offices, but they did not do so as they were already married. She handed to the Court the said letter.

The said letter was addressed to "The marriage Officer - Department of Home Affairs" and same read as follows:

"Re: Marriage/Erald Fannie Ndaba/Mmamotsumi Violet Keetse.

This is to confirm that the above persons have entered into an ante nuptial agreement whereby their matrimonial

property regime will be regulated as below; on the solemnisation of their intended marriage;

1. No community of property between them.
2. No community of profit and loss between them.
3. Application of the accrual system contemplated in chapter 1 of the Matrimonial Property Act -----.”

Reference number on the said letter is Mr Ronald J. Gell/SAK.

Prior to their marriage, her husband had already paid lobola for her and they had been staying together for a period of about 3 years. They did not apply to Court to change their marriage regime.

She left the common home during February 2004. She left minor child with defendant and went back to collect minor child after Easter holidays of 2004. The minor child was born on 6 March 1999. The minor child is presently staying with her at her parental home - Her parental home is at a rural area, about 125 kilometres away from Pretoria.

At some stage, after she left with minor child, defendant used to take minor child every 2nd weekend. He did that for 2 months and he stopped. He took child only during school holidays.

The last time defendant collected the child was on 25th June 2005 and he brought the child back to her on 18 July 2005 as the school were re-opening and the child was suppose to go to school.

Defendant is not contributing to the maintenance and support of the child adequately.

Last year she applied for maintenance order against the defendant, but the matter could not proceed as the Sheriff alleged that they could not find defendant to serve summons on him.

Last year, defendant spend about 4 months without seeing nor communicating with the minor child, until minor child phoned defendant on defendant's birthday, which was on 28 December.

She further testified that when the Family Advocate's report was drawn, she was not employed. She is now employed as an Administrative Clerk at Ramabale Primary School, which school is situated in her parental home's area. She earns about R 3000 - 00 per month.

She works from 8H00 until 16H00. Minor child attends a local school. When he comes back from school, child find plaintiff's mother and sister at home.

Plaintiff further testified that when she started staying with defendant in 1999, she was not employed but she was a hawker selling goods at her parental home. She used to make a profit of between R 1500 - 00 and R 2000 - 00 per month.

Defendant was earning +- R 20,000 - 00 per month and she was depended on the defendant for maintenance and support. Since they separated, defendant has not assisted her financially.

Before the separation, she used to have access, to the Opel Kadette and Ford Bantam motor vehicles which belonged to the parties. She was using the Ford Bantam motor vehicle for her business. She was also running a small catering business. When she left the common home, she took along only her clothes and the utensils she was using for her catering business.

At the moment, she does not have any motor vehicle and she is using public transport.

At the common home, she had a computer and telephone and she had access to internet, which facilities she no longer have.

If she can receive rehabilitative maintenance of R 5000- 00 per month, she will be able to acquire accommodation in Pretoria town and that will make life easier for her and the minor child.

Under cross-examination, she testified that her husband was unfairly accusing her of having extra-marital relationships. He later apologised for falsely accusing her of having the said relationships.

On a certain day, a certain lady telephoned her - She went to see the said lady. She advised her that the defendant is proposing love to her, and she (the plaintiff) later saw them together. She came to the conclusion that they are in love as she realised that he has lost interest in her and she later filed for a divorce. She filed for a divorce after

defendant told her, on more than one occasion that he is no longer interested in the marriage.

She further testified that she left common home after her husband chased her away.

She denied that she was misusing alcohol, neglecting her domestic duties and denying the defendant conjugal rights. She denied that on day they married, they first went to attorneys offices to sign the ante nuptial contract.

When she left the common home, she left the child behind because the creche which minor child attended, required 3 months notice and that is the reason she took minor child only after the Easter holidays.

Mr Gell, gave them letter to hand to Marriage officer because they told him that they will be going to the Home Affairs offices only that afternoon.

She further testified that the defendant paid lobola for her on 17 December 2000 and all the traditional requirements were complied with.

They employed their first helper in May 2003 and before that, she was attending to all the necessary domestic chores.

Plaintiff closed her case.

First witness to testify on behalf of the defendant is Mr Ronald James Gell. He testified that he is an attorney and public notary. He has been a Public Notary for the past 9 years.

On 5 November 2002 he drafted an ante nuptial contract for the parties. It was signed before him and executed by him. He further testified that the said contract was properly registered within 3 months period as prescribed by the Deeds Registries Act.

If he had known that the parties have already married, he would not have prepared an ante nuptial contract but he would have prepared a postnuptial contract.

Parties did not tell him that they married earlier that particular day.

He cannot remember what time the parties signed the said contract.

Under cross-examination, he said he cannot remember whether he personally took or obtained details from the parties or not.

It takes about 15 minutes to obtain instructions, prepare the document and execute same.

The next witness to testify is Mr Erald Fanie Ndaba, the defendant. He confirmed the date and places of their marriage but added that they

are married with an ante nuptial contract which they discussed and agreed to long before they got married.

He wanted to divorce his wife because of her behaviour.

He alleges that she started misbehaving after the traditional ceremony.

She stopped visiting his parental home and associated with male friends after the traditional marriage. She developed tendency of coming back home late and drunk particularly over weekends. She failed to attend to her domestic chores.

In the middle of the year 2003 she refused to accompany him when he was taking the minor child on holiday - he took child to M pumalanga together with his (defendant's) friends and their families. Same year, she refused to accompany him when he went on holiday with his friends and their wives to George and Knysna.

He once saw the plaintiff with another man, and the said man was driving their Ford Bantam motor vehicle and the plaintiff was seated on the passenger seat.

He confirmed that his wife was a hawker, but he does not know how much profit she was making and she never contributed anything towards the upkeep of the family home.

He further testified that he is self-employed and makes a gross profit of R 4000 - 00 - R 7000 - 00 per month and nett profit of about R 3700 - 00.

He later changed and said that he makes a gross profit of R10, 000 - 00 - R 18, 000 - 00 per month and nett profit of R 5, 000 - 00 to R 8000 - 00 per month.

Presently, he does not have a helper, but if custody is awarded to him, he will employ a helper who will take care of the child on a daily basis.

He further testified that on 5th November 2002 in the morning. Whilst at home, they phoned attorneys at about 7H30 in order to make an appointment - Said offices were not yet opened and they drive to town.

Prior to that, they had agreed that they will marry with an ante nuptial contract.

On arrival in town, they went to a firm of attorneys who prepared an ante nuptial contract for them. They signed the said contract and thereafter they preceded to the Home Affairs offices,

A marriage officer called them together with their witnesses into her office. She solemnised their marriage and thereafter congratulated them. She did not ask them how they want to get married. Both of them did not know that they had to advise the marriage officer how they want

to marry. He does not recall if Hahn and Hahn attorneys, who prepared their ante nuptial contract gave them any letter to give same to the marriage officer.

He was told by his Counsel that the plaintiff alleges that the attorneys gave them a letter to give same to the marriage officer and he responded by saying "I deny that." He further said that they were never given anything to take to the marriage officer.

He further testified that from the Home Affairs offices, they went back to the attorneys to collect their ante nuptial contract.

Defendant later said that they had an appointment with the notary and they gave him instructions relating to the drafting of the ante nuptial contract over the telephone.

Under cross-examination he said that they did not tell marriage officer that their marriage should be out of community of property. He further said that on 5 November they telephoned Hahn & Hahn attorneys in the morning after 7HOO gave them telephonic instructions to draw an ante nuptial contract for them. Thereafter, they drove to town to see the said attorneys.

The defendant was asked why it was not put to the plaintiff that they phoned attorneys Hahn & Hahn whilst the parties were still at home to make an appoint, he replied that he has no answer.

He was further asked why he did not mention, in his evidence in chief that they made appointment with Hahn & Hahn attorneys by phone he did not give a sensible answer.

The defendant was asked why he failed to make any contact with the minor child between August 2004 and December 2004 and his response was that it is because his wife had obtained a Protection Order against him. When it was pointed out to him that the Protection Order does not prohibit him from communicating with minor child, his reply was that he did not understand the Protection Order properly.

Defendant was asked why he failed to maintain his minor child for several months, he replied that he did not know how he should pay and he was waiting for the maintenance order.

He was referred to his banking accounts that he has at Nedbank, FNB and Standard Bank.

He agreed that he used to deposit various amounts in the said accounts, varying between R 25,000 - 00 to R 30, 000 - 00.

He further said that he also use to deposit various amounts into his FNB and Standard Bank accounts and he said that although they were not substantial amounts.

On a question of the court, he said that he did not inform the Social Worker and the Family Advocate who prepared reports about the fact that his wife was a drunkard, she use to come home very late in the

evening and she was neglecting the minor child. Asked why he failed to inform them about the said behaviour of the plaintiff, he could not give a proper answer.

In the Family Advocate Report, the following is stated:

"The defendant indicated that he has not initiated contact with the child as he fears to contravene the provisions of the protection order obtained against him by the plaintiff.

He also does not pay maintenance for the child as he has no contact with him. It is his opinion that the two go together."

The Social Worker, who interviewed both parties, the minor child and the helper, concluded, inter -alia "that neither party can be regarded as irresponsible or uncaring."

The said Social Worker goes further and stated that the defendant has sufficient financial means to cater for the needs of the child and it will be in the best interest of the child if custody of the said child is awarded to the defendant.

The Family Advocate, in her report accepted the recommendation of the Social Worker and she also recommended that the defendant should be awarded custody of the child.

I will now analyse the facts of this case and deal with different headings thereof:

1. Marriage

The plaintiff described in details how they went to the Home Affairs, their discussions with the marriage officer, how they went to Rooth and Wessels attorneys and to Hahn & Hahn attorneys.

She also produced a letter which was given to them by the attorneys who prepared the ante nuptial contract, with instructions to take same to the marriage officer.

On the other hand, the defendant alleges that they first went to Hahn & Hahn attorneys where an ante nuptial contract was prepared and thereafter they went to the marriage officer.

He further alleges that the marriage officer did not ask them whether they want to marry in or out of community of property and they also did not advise marriage officer how they want to marry.

It is improbable that the marriage officer will solemnise the marriage of the parties without asking them how they intended marrying.

It is also improbable that the notary who prepared the ante nuptial contract and letter addressed to the marriage officer, would have failed to give the parties letter he prepared to take same to the marriage officer.

Evidence of the defendant about how he made an appointment telephonically with Hahn & Hahn is unsatisfactory in many respects.

Furthermore, the said evidence was never put to the plaintiff and afford her an opportunity to respond thereto.

It is also improbable that the marriage officer will solemnise a marriage without asking the parties what type of marriage they intend entering into.

The plaintiff's version is the more probable version and the court accepts same.

I find that the ante nuptial contract signed by the parties was signed after the marriage of the parties was solemnised.

The plaintiff testified that she signed the alleged ante nuptial contract because her husband was insisting that she must sign same.

She further testified that she advised the marriage officer that she intends to marry in community of property.

Ante nuptial contract is a contract which is entered into between the intending spouses before their marriage. Purpose thereof is to arrange their matrimonial property regime and related matters _ See LAWSA First Reissue - Volume 16 at Para 111 and authorities therein quoted.

The ante nuptial contract is subject to other normal rules of the law of contract and if same is invalid, community of property kicks in. The agreement as contained in the ante nuptial contract, must be agreed

upon before the marriage - See Ex Parte Jacobson Et Uxor 1949(4) SA 360 (C) at p 364.

Duress and undue influence affects the validity of an ante nuptial contract - See Ratanee v Maharaj 1950 (2) SA 538 (D) 552; Ex parte Coetzee ET uxor 1984 (2) SA 363 W at ;366.

The postnuptial contract, for it to be valid, inter alia, its terms must have also been agreed upon before the marriage.

Section 88 of the Deeds Registries Act 47/1937 provides that a court may authorise postnuptial executions of a notarial contract having effect of an ante nuptial contract, if the terms thereof were agreed between the intended spouses before the marriage.

My view is that the alleged ante nuptial contract is invalid. The plaintiff was coerced by the defendant to sign same, and the alleged ante nuptial contract was signed after the parties had entered into their marriage.

The terms thereof were not agreed upon between the parties before their marriage and no application was made to the court as envisaged in section 88 f the Deeds Registries Act.

Generally, community of property applies to all marriages except in instances where community of property is excluded by an ante nuptial contract, operation of the law or by order of court - See LAWSA (supra)

at paragraph 63 and Family Law Service by B Clark, Lexis Nexis Butterworth at P B1-1 and Ex Parte Jacobson Et Uxor (supra).

In this case, there is no evidence which suggests that the ordinary consequences of marriage should not apply.

My view is therefore that the marriage of parties herein is in community of property.

2. Custody

Defendant, as mentioned earlier, testified that the plaintiff use to come home very late in the evening drunk, she was neglecting the minor child and she failed to perform her domestic duties.

When asked why he did not disclose the above-mentioned information to the Social Worker and Family Advocate he said he forgot to disclose to them the said information.

I think that the defendant did not disclose the above-mentioned allegations to the two officials mentioned above because the said allegations are false and they are recent fabrications.

The Family Advocate and the Social Worker in their reports mentioned that neither the defendant or the plaintiff can be regarded as irresponsible or uncaring. The said two officials goes on and recommend that the defendant should be awarded custody of the minor child because he is financially stable, unlike the plaintiff.

I do not agree with the said recommendation.

The defendant spend several months without communicating with the minor child nor maintaining and supporting him. The minor child is still young.

My view is that in this case, the best interest of the child will be best served if custody of the said child is awarded to the plaintiff.

3. Maintenance

From the evidence led in this case it appears that the defendant earns relatively well. The plaintiff earns almost 10% of what the defendant earns.

The court will attempt to make an order of maintenance for both the plaintiff and the minor child which is fair and reasonable, taking into account the earning capacities of both parties and the needs of the minor child and the plaintiff.

Unfortunately, the parties did not lead any evidence about the financial needs of the minor child, the plaintiff and the personal monthly expenses of the defendant.

The court therefore makes the following order:

1. A decree of divorce is granted.
2. Division of the joint estate of the parties.

3. Custody of the minor child is awarded to the plaintiff, subject to the defendant's rights of reasonable access to the child. The said rights of reasonable access entails;
 3. 1 To take the minor child after appropriate arrangements have been made with the plaintiff, on alternative weekends, provided the child is brought back to the plaintiff by 18H00 on Sunday.
 - 3.2 To take the child on alternative long school holidays after making proper arrangements with the plaintiff and bringing the child back to the plaintiff at 16H00 on Sunday prior to reopening of schools.
4. Defendant will exercise his right to reasonable access taking into account the religious and scholastic needs of the child.
5. Defendant pays maintenance of the minor child at the rate of R1800 - 00 per month, first amount to be paid on or before 7th September 2005, and thereafter on or before 7th day of subsequent months.
6. Defendant should pay for all the scholastic, medical and dental needs of the minor child.
7. One half of the accrued value of the defendant's pension, provident and annuity investment funds is payable to the plaintiff when same becomes due.

8. Defendant should pay plaintiff maintenance of R 3 800 - 00 per month for a period of 24 months, on same conditions as mentioned in (5) above.
9. Defendant pays the costs of this action on a party and party scale which costs will include costs of attending the pre-trial conference.

W. L. SERITI
JUDGE OF THE HIGH COURT