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IN THE NORTH WEST HIGH COURT
(MAFIKENG)

DIV 56/2013

In the matter between:

P[…] M[…] S[…] J[…] E[…] **PLAINTIFF**

and

C[…] H[…] E[…] **DEFENDANT**

JUDGMENT

LANDMAN J:

[1] In this matter I reserved judgment after hearing the evidence presented on behalf of the plaintiff. The action is for a divorce instituted by P[…] M[…] S[…] J[…] E[…], then residing at 6[…] B[…] Street, R[…], North West Province.

[2] The defendant is C[…] H[…] E[…] (born M[…]) residing at 7[…] S[…] Street, R[…] North West Province.

[3] I am satisfied with the evidence presented including the agreement of settlement. There were no children born of the marriage.

[4] I would have granted a decree of divorce incorporating the agreement save for the fact that the plaintiff's witness was the defendant. The plaintiff is in Bermuda and does not, according to the defendant, intend returning to South Africa.

[5] Such decisions as I have found require that a decree of divorce be sought by means of action as in this case. However in ***Ex parte*** **Inkley v Inkley** 1994 (3) SA 528 (C) Van Zyl J said at 536J – 537A:

> "Public policy demands that a Court should consider granting a divorce only after it has had the opportunity of hearing the evidence of at least the plaintiff in an action claiming such relief. If it should feel the need for further, or corroborative, evidence, it must be free to call for it."

[6] I agree that there must be evidence by the plaintiff. But because a decree of divorce is sought by means of action that does not preclude a plaintiff from presenting evidence by means of an affidavit subject, of course, to the court hearing the matter, requiring other evidence. This is the practice in the High Court, South Gauteng. See para 10 of chapter 12 of **The Practice Manual of South Gauteng** as contained in Erasmus **Superior Court Practice** (Looseleaf: page D6–98 revision service 38) which reads:

> “10 Subject to the discretion of the presiding judge the evidence necessary for the grant of a decree of divorce may be presented on affidavit provided that –
>
> 10.1 the affidavit proves that no child was born to or adopted by the parties to the marriage, or, if there was that such child is over the age of 18 years;
>
> 10.2 all financial matter between the spouses have been settled in a signed written agreement which is identified in and attached to the affidavit, or if the only order to be sought in regard to financial matters is division of the joint estate or forfeiture of the benefits of the marriage in community of property;
>
> 10.3 all the necessary evidence is set out in the affidavit. (In this regard it is emphasised that primary facts and not conclusion of fact are required);
>
> 10.4 the affidavit is attached to the notice of enrolment.”

[7] The plaintiff must, at least, therefore file an affidavit duly complying with the Uniform Rules of Court and the substance of the abovementioned practice directive, before I can consider granting a decree of divorce.

[8] This matter is therefore removed from the roll. It may be re-enrolled when the plaintiff’s affidavit comes to hand.

[9] In the result the following order is made:

1. The matter is removed from the roll.
2. The matter may be enrolled when the plaintiff’s affidavit and annexures is filed.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING	: 22 APRIL 2013
DATE OF JUDGMENT	: 2 MAY 2013
COUNSEL FOR PLAINTIFF	: ADV SCHOLTZ
ATTORNEYS FOR PLAINTIFF	: VAN ROOYEN TLHAPI & WESSELS