

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22901/21

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES:
Yes / No
(3) REVISED: Yes / No

Date: 20 June 2022 WJ
DU PLESSIS

In the matter between:

P[...] **M[...]** Plaintiff

and

M[...] **M[...]** Defendant

JUDGMENT

DU PLESSIS AJ

- [1] This divorce action was set down on the unopposed motion roll for hearing, as the defendant did not file a notice of intention to defend.
- [2] However, on the date of the hearing, the defendant was present in court. It emerged from counsel representing the plaintiff that this is not the first time. The court was previously enrolled to be heard before Fourie J on 7 April 2022. However, it was postponed *sine die* to enable the defendant to get legal representation.
- [3] There is no settlement agreement. Instead, the applicant asks for an order to make the draft order (endorsed by the family advocate) and order of the court. The draft order provides for a division of the joint estate, for both parties to retain full parental responsibilities and rights regarding their two minor teenage children, and for the defendant to pay R2000 maintenance per month for the

maintenance of the two children. It is clear from the papers that neither parties have the financial means to pursue a long and bitter divorce.

- [4] I would likely have granted the order if the defendant did not appear in court since all the papers are in order and duly served. However, with the defendant's presence, I am faced with competing rights of the parties: the right of the plaintiff to get finality in the divorce and not to incur the costs of another postponement and the right of the defendant to a fair public hearing.
- [5] When I asked the defendant if he understood why he was in court, he answered that his wife wants to divorce him. He expressed that he still loves her and does not want to divorce her, but he accepts her choice. When I asked him if he has legal representation, he stated that he made a plan to get legal representation but was unsuccessful for various reasons.
- [6] I informed the plaintiff, who was understandingly adamant that they would prefer to finalise the matter on the day, that if the delay was to no fault of the defendant, I would postpone the case. I felt obliged to follow this route since the Constitution affords everyone a right to a fair public hearing before a court.¹
- [7] After an inquiry based on the documents that the defendant handed up to indicate that he was trying to obtain legal representation, it emerged that the reason for not being represented was due to no fault of his own. The Legal Practice Council allocated two attorneys to the matter, who either declined because of heavy workloads or because they do not deal with family law. He was finally appointed *pro bono* attorneys two weeks before the court date who agreed to assist him. However, they were not aware of the set-down date.

[1] Right to a fair public hearing

- [8] Section 34, dealing with access to courts also in civil matters, states:
- Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
- [9] The issue, in this case, is the meaning of "a fair public hearing".² The promotion of this right must not only be theoretical or illusory but practical and effective.³ It certainly includes the right of access to professional advice and assistance.⁴ In other words, the right to be represented.
- [10] Since the Constitution does not set out the elements of a fair civil trial, it is left to the courts to determine the content of such a right on a case-by-case basis. Foreign case law provides some

¹ Section 34.

² Geoff Budlender, 'Access to courts' (2004) 121 South African Law Journal 339 provides a good overview of what this means in international and foreign law.

³ *Airey v Ireland* (1979) 2 EHRR 305 par 24.

⁴ *Mohlomi v Minister of Defence* [1996] ZACC 20 par 14.

guidance: the circumstances of each case must be considered regarding the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the party.⁵

- [11] This is not a complicated divorce matter, but the effect of the order would be to end a marriage, to set out parental rights and responsibilities and the maintenance obligation of the defendant. It might well be that the divorce order as sought will be granted at the next hearing.
- [12] It might be that Mr Mashao would not wish to oppose the matter after consulting with his attorneys. However, allowing Mr Mashao an opportunity to ensure that the *pro bono* attorneys assigned to him are aware of the proceedings and giving them the chance to inform him of his rights and assist him, means that granting the final order will then be done in line with his rights as contained in section 34 of the Constitution.
- [13] As to costs, I am reluctant to make an order since the lack of representation was not due to the fault of the defendant. However, it was also not due to the fault of the plaintiff, who must now, yet again, wait for a new court date to finalise the divorce and pay her attorney for another appearance in court. With this in mind, a cost order against the defendant taxed on a party and party scale seems fair.

[2] Order

In the result, the following order is made:

1. The matter is postponed *sine die*.
2. If the defendant wishes to defend the action, the defendant shall, within 10 (ten) days of the judgment date, file a notice of intention to defend, and serve a copy thereof on the plaintiff's attorneys in terms of rule 4(A)(1)(c) of the Uniform Rules of Court. If the defendant fails to serve a notice of intention to defend, judgment may be claimed against the defendant.
3. The defendant is ordered to pay the costs.

WJ du Plessis

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

Mr MK Mabote (attorney)

⁵ The Canadian case of *New Brunswick (Minister of Health and Community Services) v G(J)* 66 CRR (2nd) 267 (1999)

Instructed by:	MK Mabote Incorporated
For the respondent:	Not represented
Date of the hearing:	14 June 2022
Date of judgment:	20 June 2022