



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CASE NO: I 2406/2013

In the matter between:

**L NL**

**PLAINTIFF**

And

**L J L**

**DEFENDANT**

*Neutral citation: LNL v LJL (I 2406/2013) [2014] NAHCMD 309 (17 October 2014)*

**Quorum:** DAMASEB, JP

**Heard:** 01 October 2014

**Delivered:** 17 October 2014

**Flynote:** Exception – Doctrines of estoppel by representation and waiver of rights: when applicable – Reliance on disputed paternity for the inference of adultery – Duty of father in such circumstances – Section 9 of the Children’s Status Act 6 of 2006 casts a presumption of paternity on a father married to the mother of child – Father has duty to lay foundation in pleadings in order to reverse presumption – Section 10 of the

Children's Status Act confers a discretion on High Court as the upper guardian to order paternity test if 'in the best interest' of the child – Court not willing to exercise such discretion absent a specific allegation by father that paternity test in children's best interest, especially given his inaction over a long period of time to make paternity an issue.

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## ORDER

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I therefore make the following order:

1. The plaintiff's late filing of its heads of argument is condoned.
2. The defendant's exception on the ground that the plaintiff's plea to the claim in reconvention does not disclose a valid defence in law is dismissed, with costs.
3. The part of the defendant's exception alleging that paras 8.3 and 11.3 of the plaintiff's plea in reconvention are vague and embarrassing, is upheld, with costs of only one counsel. The plaintiff is afforded the opportunity to amend its defective plea on or before **31 October 2014**, if so advised.
4. The defendant is awarded the wasted costs of its opposition to the plaintiff's purported notice to amend dated 2 September 2014.
5. The matter is enrolled for the **4<sup>th</sup> November 2014 at 14:15** for case management conference and the parties directed to comply with their obligations in respect of such conference.
6. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rules 53 and 54;
7. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time before the next scheduled hearing, by notice to the opposing party.

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## JUDGMENT (EXCEPTION)

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Damaseb: [1] The defendant in the main action, whose wife had instituted divorce proceedings against him on the alleged grounds of malicious desertion, on 14 July 2014 filed an amended counterclaim also seeking divorce from the plaintiff-wife on the ground that she allegedly committed adultery with various men unknown to him during the subsistence of the marriage. In the counterclaim he states that because of the alleged adultery he 'doubts' that he is the biological father of the four children born of the marriage.

[2] The parties were married on 9 December 1986 (close to 28 years ago) and during that period four children were born to the wife on the following dates: 13 June 1992 (22 years old) ; 13 January 1994 (20 years old); 27 October 1996 (18 years old) , and 16 June 2004 (10 years old).

[3] The defendant alleges as follows as regards the adultery:

'6. During the subsistence of the marriage<sup>1</sup>...the plaintiff ...on various occasions and at places, the particulars of which are unknown to the defendant, committed adultery with other men.

7. Plaintiff, during and/or from 1999 until 2000<sup>2</sup> committed adultery with another man and cohabited with this other man in Windhoek, until she was brought back to the parties' common home by her relatives.

8. Plaintiff also committed adultery with another married man on dates and at places unknown to defendant, which adulterous relationship resulted in this other man's wife opening a criminal case against the plaintiff under CR No. 15/01/2006.<sup>3</sup>

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<sup>1</sup> A marriage that was in existence for 18 years when the last child was born.

<sup>2</sup>The next child after 2000 was born in 2006.

<sup>3</sup> On the assumption that adultery took place in 2006, no other child was born after 2006 as the last was born in 2004.

9. Defendant did not condone plaintiff's aforesaid adultery<sup>4</sup> and/or adulterous relationships.

10. As a result of plaintiff's aforesaid adultery, defendant has reason to doubt the paternity of the four children born during the subsistence of the marriage between the parties'. (My underlining for emphasis).

[4] In addition, the defendant made the following allegations regarding the marital regime between the parties:

'4. The parties were married on the 09 December 1986, at Engela, Ohangwena Region, in community of property, which marriage still subsists.' (My underlining).

[5] The plaintiff pleaded as follows to the allegations of adultery: (a) she denies the adultery attributed to her, in particular that she cohabited with another man; or (b) she pleads that during 1999-2000 the parties lived apart due to a communication breakdown but reconciled and thereafter 'continued with [the normal] marital relationship'; (c) she denies that a criminal case was made against her for allegedly committing adultery with a married man and says the case cited related to a crimen injuria which was settled and the case withdrawn; (d) she alleges that she was never confronted by the plaintiff with accusations of adultery and puts him to the proof of the adultery. The plaintiff then goes on to plead that:

'7.2.The defendant had at all material times during the marital relationship ...admitted and accepted the children as his own children...[and] never expressed the doubt of paternity of the minor children.

7.3. In view of the following;-

7.3.1. The time period that had lapsed (22 years).

7.3.2. The age of the minor children (the oldest is 22 and the youngest is 10 years old).

7.3.3 The vagueness of the alleged adultery pleaded.

7.3.4. The unexplained delay by the defendant to challenge paternity.

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<sup>4</sup> In his counterclaim the defendant does not even allege who left the common home and when.

7.3.5. The real, clear and present prejudice and harm that the minor children would suffer as a result of the challenge of paternity.

The plaintiff pleads that the defendant waived his rights to challenge the paternity of the minor children.'

[6] The plaintiff pleads in the alternative that:

'7.4. [T]he defendant had by words , conduct and by association admitted paternity of the minor children , and as a result of such an admission, the plaintiff pleads that the defendant is hereby estopped to deny paternity and to rely on the alleged vague adultery as the basis upon which he can doubt the paternity of the minor children.

7.5. In any event, plaintiff pleads that there is no nexus between the alleged adultery and the paternity of the children, and defendant is put to the proof thereof.' (My underlining for emphasis)

[7] To meet the defendant's claim that he had maintained the children of the marriage, the plaintiff pleaded that he never maintained the children during the subsistence of the marriage or did not maintain them adequately.

[8] As regards the defendant's allegations concerning the marital regime and his entitlement to a half share of the proceeds of sale of a property he claims belonged to the joint estate but sold by the plaintiff without any benefit to him, the plaintiff pleads as follows:

'In the view that the defendant insist that he was entitled to the proceed of the sale, then the plaintiff pleads that it is entitled to claim from the defendant half of the monthly repayment made be [sic] her to acquire the property'.

[9] The plea to the counterclaim was met with an exception in terms of rule 57(1) of the rules of Court. The exception is in two parts: the first exception is a law-point and is premised on the ground that the allegations quoted in paras 5 and 6 of this judgment, are bad in law in that they do not disclose a defence recognised in law; while the second exception complains that certain of the allegations in the plea quoted in paras 7 and 8 of this judgment are vague and embarrassing because they are 'contradictory'.

*The law-point exception*

[10] This exception is directed at the allegations in the plea dealing with the allegation of adultery. The defendant excepts to the plea on the ground that the plaintiff failed to allege a 'decision' by the defendant to abandon the right to challenge the paternity of the minor children on account of the plaintiff's adultery; further that the plaintiff failed to allege that when the alleged 'waiver' took place the defendant had full knowledge of the right he allegedly decided to abandon. It further states that the defences of estoppel and waiver are bad in law as they are inconsistent with ss 9 and 10 of the Children's Status Act<sup>5</sup>.

[11] Section 9 states as follows:

'Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if:

- (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
- (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
- (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963);
- (d) both he and the mother acknowledge that he is the father of the person in question; or
- (e) he admits or is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived. (My underlining for emphasis).

[12] Section 10 provides:

'(1) At any legal proceedings at which the parentage of any person has been placed in issue, the refusal by either party –

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<sup>5</sup> No. 6 of 2006.

- (a) to submit himself or herself; or
- (b) to cause any child over whom he or she has parental authority to be submitted,

to any procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Regardless of anything contained in subsection (1), the High Court as the upper guardian of all children has the power to order that a child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that Court in the best interest of the child.' (My underlining for emphasis)

[13] In his counterclaim, the defendant seeks to establish adultery on the part of the plaintiff by 'doubting' that he is the biological father of the children who, it is common cause, were all born within wedlock and thus are presumed by law, both statutory<sup>6</sup> and common law<sup>7</sup>, to be his biological children. Not only does the plaintiff not deny that she committed adultery as alleged by the defendant, but she specifically pleads that the defendant never at any time accused her of any adultery which could have given rise to her conceiving the children with another man. The plaintiff's plea to the counterclaim therefore squarely denies the alleged adultery and, in addition, puts up the defense that the defendant's doubting paternity of the children born during the subsistence of the marriage is indefensible, because his failure to have either acted thereon or challenged the plaintiff with it at any point since the alleged adultery took place, evinces waiver on his part, alternatively estops him from placing any reliance thereon. As I read her defence, the plaintiff's case is that the defendant's unexplained silence over the years in the manner she points out and he during that period accepting paternity, is inconsistent with he now 'doubting' paternity and that by his conduct as aforesaid he had accepted paternity and that it is not open to him (in other words he is estopped) from denying paternity.

[14] As I understand the plea, it suggests that paternity could not be an issue because:

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<sup>6</sup> Section 9 of Act 6 of 2006, supra.

<sup>7</sup>Hahlo HH, 1985. *The South African Law of Husband and wife*, 5<sup>th</sup> Edition. Cape Town: Juta, p 148.

- (a) the alleged adultery, which is denied, is inconsistent with the timing of the conception and birth of the children;
- (b) was accepted as being within the marriage and therefore the result of the marriage.

### *Estoppel defined*

[15] Estoppel operates as a complete defence if, because of a representation made by another who seeks to enforce a claim, the one against whom the claim is made, relying on such representation, arranged his or her affairs with legal consequences resulting therefrom, and that it will be to the latter's prejudice if the claimant is allowed to resile from the representation. As Corbett CJ succinctly put it in *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd*<sup>8</sup>:

'The essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice. The representation may be made in words, ie expressly, or it may be made by conduct, including silence or inaction, ie tacitly; and in general it must relate to an existing fact.'

### *Waiver defined*

[16] Waiver is in essence failing to enforce a right one has in circumstances where one could and would be expected to and therefore by one's action or inaction losing the right. *Claassen's Dictionary of Legal Words and Phrases*<sup>9</sup> characterises waiver as the 'passing by or declining to take advantage of a legal right whereby such legal right becomes lost'. Giving the plea its most generous interpretation<sup>10</sup>, what is placed in issue is the defendant's right to sue for divorce based on alleged adultery. The 'doubting' of paternity by a man against whom s 9 of the Children's Status Act operates, is no separate cause of action; it only finds meaning in the context of a claim for divorce based on adultery and it is, as I understand the plea, the right to sue for divorce based on adultery that the defendant is said to have waived or is estopped from enforcing by

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<sup>8</sup> 1981 (3) SA 274 (A) at 291.

<sup>9</sup> Claassen CJ, 1977. *Dictionary of Legal Words and Phrases*, Vol 4. Durban: Butterworths, RES-Z at 277.

<sup>10</sup> *Ongopolo Mining v Uris Safari Lodge* 2014 (1) NR 290 at 295, para 14.



continuing a normal marital relationship with the woman who gave birth to the children he now wishes to disown.

*The Children's Status Act*

[17] The exception relies on s 9 of the Children's Status Act, read with s 10 of that Act. Section 9 in my view supports the plea to the counterclaim because it reiterates the common law presumption that a child born in wedlock is the child of the father married to the mother. Section 10 assists a father of a child born in marriage only to this extent: If the mother refuses to subject a child to a paternity test, there is a presumption that she is seeking to conceal the truth concerning the parentage of that person.

*Law to the facts*

[18] It is the defendant's right to accuse the plaintiff of adultery and to prove it, but he has no absolute right to deny paternity without laying the proper basis for why he could not be the biological father of children born inside wedlock. Not only is his so-called doubt inconsistent with the fact that all the children were born in circumstances consistent with his fathering them according to the laws of biology and the presumption created by law, but his assertions in no way lay the factual foundation that another man had sexual intercourse with the plaintiff at a time consistent with the birth of the children of the marriage.

[19] Had the defendant denied paternity each time the plaintiff conceived or gave birth to a child whose paternity he now 'doubts', the plaintiff would have been well within her rights to: (a) consider his accusation of adultery and implied denial of paternity as unreasonable conduct amounting to malicious desertion and sue for divorce; or (b) subject the children to a paternity test to place the defendant's paternity beyond doubt. It follows that the defendant's failure, by inaction or conduct, to deny paternity each time a child was conceived or delivered, lulled the plaintiff into the belief that he, as the law presumes, accepted that he was the biological father. In so doing, the plaintiff acted to her prejudice.

[20] The plaintiff is perfectly entitled to make the case that it is not now open to the defendant to dispute that he is not the biological father of the children born inside wedlock; in other words that he had by his conduct made the plaintiff act to her prejudice or that he had lost the right to seek divorce based on the alleged adultery on account of him accepting paternity of the four children, in so far as he seeks to draw therefrom an inference of her adultery.

[21] As regards the application of the Children's Status Act, the difficulty facing the defendant is that it is not alleged in his counterclaim that the plaintiff refused to subject any child, over whom she has control, to such a test. In any event, she would have no competence over any of the children who would have reached the age of majority. Nowhere in his papers does the defendant allege that it is in the best interest of a child that a paternity test be conducted and the court is for that reason unable to exercise its discretion under s 10(2). I gained the impression from statements made by Ms Visser for the defendant during argument that the allegations of adultery somehow entitle the plaintiff to demand paternity tests. She is mistaken: to invoke section 9, a party must in pleadings lay the factual basis for reversing the presumption of paternity.

[23] I find it hard to make sense of the assertion that the plaintiff failed to allege a decision to waive a right. What more can she say then to point to conduct which is inconsistent with his reliance on adultery or he not being the biological father? If it is proved that he in fact throughout accepted paternity or never accused the plaintiff of adultery, how could he possibly rely on adultery as a ground of divorce or place paternity in dispute? The plaintiff has in the pleadings placed the basis for challenging the defendant on cross examination at the trial that his version is not true and, if true, that he had abandoned the right to sue for divorce based on adultery by his conduct. That is not in any way linked to s 10 for which, in any event, the defendant has to date not laid any basis in the pleadings.

[24] The elements of both waiver and estoppel were therefore not only properly pleaded but clothed with a proper factual foundation by the plaintiff's allegation that the defendant had by words, conduct and by association admitted paternity of the minor children; and that at no stage had he accused the plaintiff of adultery or sought to

enforce his rights arising from such alleged adultery. If those facts are proved at trial, the defendant will be estopped from denying paternity of the children based on the alleged adultery which he, as pleaded, never raised at any time except now. It begs the question of course on what basis the defendant can rely on adultery which on his version he was aware of but never challenged the plaintiff with but instead continued a normal marital life with the plaintiff.<sup>11</sup>

[25] To the extent that the defendant wishes to rely on any paternity dispute in order to establish adultery as a ground for the divorce, his case is sufficiently met, and properly so. I therefore do not accept the defendant's proposition put forward in regard to the plaintiff's plea to the counterclaim that it is bad in law, either on the basis of waiver or estoppel. The law-point exception is therefore liable to be dismissed, with costs.

*Vague and embarrassing ground*

[26] The alleged contradictions in the plea concern the allegation that the plaintiff did not maintain the children or did not do so 'adequately'. Furthermore, it is said to be contradictory for the plaintiff to allege that, although the parties are married in community of property but conducted their marriage as one out of community of property with their estates separate from each other, the plaintiff would still be entitled to half of the monthly repayment made by her to acquire the property. The exception taken is that this stance is contradictory in that it is one or the other and that the defendant is as a result embarrassed in dealing with the plea. This latter allegation of the plaintiff's is met with the exception that it is vague and embarrassing 'in that it is contradictory to plaintiff's plea that the parties conducted their marriage as if out of community of property, and is as such capable of more than one meaning'.

[27] The plaintiff's pleaded case is that although the parties are married in community of property, they conducted their affairs as if they were married out of community of property. That is a legal conclusion which has been recognised judicially.<sup>12</sup> The defendant complains that such a conclusion is inconsistent with the further allegation of the plaintiff that she be refunded by the defendant half of what she paid as monthly

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<sup>11</sup>Compare H v H (I 675/2011) [2013] NAHCMD 123 (7 May 2013).

<sup>12</sup>Mofuka v Mofuka 2003 NR 1 (SC).

contribution towards the acquisition of the property claimed by the defendant to be joint property. That allegation is not made in the alternative in the event of the court finding that they did not conduct their affairs in the manner she says they did. Averments which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.<sup>13</sup> I agree with Mrs Visser's submission therefore that the allegation is to the extent of the contradiction pointed out, vague and embarrassing.

[28] The defendant also labels as vague and embarrassing on account of being contradictory, the plaintiff's allegation that the defendant failed to adequately maintain the children of the marriage given that just before that the plaintiff alleged that the defendant had never maintained the children and that she alone bore the brunt of the children's maintenance. Again, that does not make sense, it is really one or the other and she must make an election which one it is. The defendant is clearly embarrassed in meeting the plaintiff's defence as regards the maintenance of the children by the defendant.

#### Miscellaneous

[29] The plaintiff had filed its heads of arguments out of time and sought condonation for the late filing thereof. The same was not opposed and no inconvenience was caused to the court. The defendant had asked for costs in respect of an abandoned amendment after it filed its notice to except. I see no reason why costs should not follow the even in this case except that the defendant, being represented by instructing and instructed counsel, did not make out a case why an order of costs should be granted in respect of both counsel.

#### Order

[30] I therefore make the following order:

1. The plaintiff's late filing of its heads of argument is condoned.
2. The defendant's exception on the ground that the plaintiff's plea to the claim in reconviction does not disclose a valid defence in law is dismissed, with costs.

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<sup>13</sup> Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 210-211.

3. The part of the defendant's exception alleging that paras 8.3 and 11.3 of the plaintiff's plea in reconvention are vague and embarrassing, is upheld, with costs of only one counsel. The plaintiff is afforded the opportunity to amend its defective plea on or before **31 October 2014**, if so advised.
4. The defendant is awarded the wasted costs of its opposition to the plaintiff's purported notice to amend dated 2 September 2014.
5. The matter is enrolled for the **4<sup>th</sup> November 2014 at 14:15** for case management conference and the parties directed to comply with their obligations in respect of such conference.
6. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rules 53 and 54;
7. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time before the next scheduled hearing, by notice to the opposing party.

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PT Damaseb

Judge President

APPEARANCE:

Plaintiff

E Angula

Of Angula Coleman

Defendant

I Visser

On instructions of

Dr Weder, Kauta & Hoveka Inc.