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

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
..... DATE SIGNATURE

Case Number: 66408/09

Date: 23 May 2014

In the matter between:

O. S. G.

APPLICANT (1ST DEFENDANT)

and

S. A. G.

RESPONDENT (PLAINTIFF)

In Re:

S. A. G.

PLAINTIFF

and

O. S. G.

1ST DEFENDANT

K. G.

2ND DEFENDANT

Coram: **HUGHES J**

JUDGMENT

Delivered on: 23 May 2014

Heard on: 16 May 2014

HUGHES J

1. On 20 July 1991 the parties were married to each other out of community of property subject to the accrual system. Two children were born out of this marriage.
2. In these proceedings the parties are cited as follows, the first defendant in the main action is the applicant and the plaintiff is the respondent for easy reference the parties will be referred to as applicant and respondent.
3. The applicant seeks an order that his counter claim for the forfeiture of the respondent's right to share in the accrual between the parties respective estates in terms of the provisions of Section 9 of the Act 88 of 1984 be decided first and separately.
4. In the main action the respondent in her summons in the divorce proceedings claimed payment by the applicant to her, an amount equal to half of the accrual in their respective estates.
5. The parties managed to resolve most of the disputes in the divorce action except the issues set out below:
 - 5.1 The reasons for the breakdown of the marriage between the parties insofar as such reasons are relevant for the remainder of the issues.

- 5.2 Whether or not the plaintiff (respondent) is entitled to nominal maintenance i.e. whether there are any present conditions which would render the plaintiff in need for maintenance in future.
- 5.3 Whether the defendant is entitled to an order that the plaintiff forfeit the right to share in the accrual between the parties' respective estates in terms of the provisions of Section 9 of Act 88 of 1984.
- 5.4 In the event that the defendant is not successful with the claim for forfeiture as set out supra, the quantum of the plaintiff's claim for accrual determined in terms of section 3(1) of Act 88 of 1984.
- 5.5 Which party should pay the costs of the action?
6. Rule 33(4) of the Uniform Rules of Court provides:
- “If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”*
7. The thrust of the applicant's argument for separation to be granted is primarily the reliance on the decision of **CC v CM 2014 (2) SA 430 (GJ)** and other decisions.
8. It is succinctly submitted by the applicant that a separation in terms of Rule 33(4) will be granted in the following circumstances as set out in **CC v CM** and its related paragraphs as set out below:

“4.1 A Court should grant an application for separation unless it is inconvenient, in other words, the Court is obliged to order separation

except where the balance of convenience does not justify such a separation.

4.2 The Court will consider whether the question of law or fact may be decided separately before others or whether the issue sought to be separated may be conveniently separated. In considering the question of convenience, a court will have regard to its convenience as well as the convenience of the parties and the possible prejudice either party may suffer if separation is granted.

4.3 An important consideration will be whether or not a preliminary hearing for the separation decision of specified issues will materially shorten the proceedings.

4.4 The nature and extent of the advantages which would flow from the granting of the separation order sought in terms of Rule 33(4) should be weighed up against the disadvantages. The Court is obliged to order the separation of issues unless it appears that the issues cannot conveniently be decided separately. Accordingly it is for the respondent to satisfy the Court that the separation application should not be granted.”

9. The respondent makes the following submissions in its opposition of the separation application:

“2.8.1 that it would not be convenient to separate issues in the manner in which the First Defendant is seeking to do;

2.8.2 that it would not be to the benefit of the Plaintiff nor the First Defendant to have the remainder of the divorce action heard piecemeal in the fashion proposed by the First Defendant;

2.8.3 that it would be appropriate and in the interest of expedition and finality of litigation between them, that the divorce proceedings be disposed of as soon as reasonably possible in a single hearing;

- 2.8.4 *the divorce action already commenced during October 2009, and a considerable sum has already been spent on the costs of litigation and the parties are affected by the lack of finality thereof;*
- 2.8.5 *The divorce proceedings have been acrimonious and require to be brought to an end;*
- 2.8.6 *The delays in finalising of the divorce may be attributed to the failure of the First Defendant to make proper and full discovery where his co-operation is required.*
- 2.8.7 *The estates of the First Defendant and the Plaintiff are not complex and there is no reason why the accrual cannot be dealt with together with the other aspects of the divorce.*
- 2.8.8 *Separation would result in both parties having to testify in two separate trials, if forfeiture were not granted.*
- 2.8.9 *It is necessary to first determine whose estate shows a larger accrual than the other, before the question of forfeiture is capable of being determined. The First Defendant denies that his estate shows a greater accrual than that of the Plaintiff. The extent of the prospective benefit ought to be known in order to determine whether forfeiture ought to be granted on the ground that to share in patrimonial benefits would be unjust.”*
10. The claim for forfeiture that the applicant wishes to have determined prior to the divorce proceeding is governed by section 3 and section 9 of the Matrimonial Property Act 88 of 1984. Reference is had to paragraphs 5 above specifically 5.3 and 5.4.
11. It is prudent to set out the provisions of section 3 which reads as follows:

“Accrual system

(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.”

12. From the submissions made by the applicant reference is made of the fact that a claim for an amount equal to one half of the difference of the accrual between the applicant and the respondents respective estates only arises upon dissolution of the marriage between the parties.

13. The above submission is in line with the decision of **Le Roux v Le Roux 2010 JOL 26003 (NCK)** where the learned Judge Olivier after an analysis was done of section 3 concluded that:

“(17) The provisions of section 3 are in my view clear and unambiguous and their ordinary grammatical meaning is simply that no such claim (that is acquired in terms of section 3(1)) will arise until such time as the marriage is dissolved.” (My additions in brackets).

14. To this end it is noted in paragraph 13 above that the applicant acknowledged the above contention that a claim in terms of 3(1) only arises upon dissolution of the marriage.

15. It is argued by the respondent that **Le Roux** explains this position aptly and that in terms of section 3 the respondent has a ‘right’ to share in the accrual of the

applicant which can be 'claimed' after the dissolution of the marriage, thereafter transfer and or attachment can occur.

16. In **Le Roux** at **paragraph 28** Olivier J expresses that section 9 provides that a 'right' to share may be declared forfeit wholly or partly. The crux in section 9 being the 'right' and its established that though the 'right' exists it can only be 'claimed' upon dissolution of the marriage (**Le Roux at paragraph 27**).
17. In addition refer to **Wijker v Wijker 1993 (40 SA 720 (A) at 726** which states:

"... It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial Court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section..."
18. On an analysis of the respondents argument and submissions as to why separation should be granted, the respondent has illustrated this by virtue of the fact that the respondent though she has a right to claim from the larger accrual she will have to first have the marriage dissolved to claim this right or enforce this right that she has to claim half of the estate of the applicant. Having said so after the dissolution the necessary calculation and debatement would need to take place.
19. Thus in the circumstances due to section 3 and 9 of the Act it is evident that an order to separate in the circumstances would not be operative, though the respondent has the right it only becomes operative after the dissolution, thus the dissolution has to occur before the respondent initiates the claim associated with the said right.
20. Under the circumstances the issue sought to be separated cannot be conveniently separated as it is clear that the respondent will be prejudiced in

exercising her right if the separation occurs, as her right only comes into fruition after the dissolution of the marriage. Finally due to section 3 and 9 of the Act the issue that the applicant seeks to separate cannot conveniently be separated.

21. In the circumstances the following order is made:

21.1 The application for separation in terms of Rule 33(4) is refused with costs awarded to the respondent.

W. Hughes Judge of the High Court

Delivered on: 23 May 2014

Heard on: 16 May 2014

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