

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

22/01/16

CASE NO: 67591/2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

O A J

PLAINTIFF

APPLICANT IN THE RULE 33(4)

and

K J

DEFENDANT

RESPONDENT IN THE RULE 33(4)

JUDGMENT

A.M.L. PHATUDI J

INTRODUCTION

[1] The plaintiff is the applicant in the application brought in terms of Rule 33(4) of the Uniform Rules of this Court for separation of the granting of a final decree of divorce from the issues pertaining to the determination of the accrual of the parties' estates and the defendant's maintenance claim. The defendant is the respondent and opposes the

application. For ease of reference, I will refer the parties as the plaintiff and defendant respectively. This court is further required to consider the opposed plaintiff's application for amendment of the notice of motion. The reserved and wasted costs occasioned by previous postponements are as well issues to be dealt with.

[2] I digress to mention that at the commencement of the hearing, parties agreed to argue on all applications before court notwithstanding the defendant's *in limine* point raised in respect of the plaintiff's intended notice of amendment. They both agreed that there will be no need for determination of the cut-off date for purposes of quantifying the accrual in the parties' estates if I find in favour of the defendant.

BACKGROUND

[3] The parties married each other out of community of property, subject to the accrual system regulated in terms of Chapter 1 of the Matrimonial Property Act 88 of 1984(MPA). The marriage still subsists. There are no children born of the marriage. It is alleged that their marriage reached a state of disintegration with no reasonable prospects of restoration of a normal marriage relationship. The breakdown of the marriage prompted the plaintiff to cause issue of summons against the defendant. The trial was scheduled for 28 August 2015.

[4] On the 14 August 2015, the defendant applied for the postponement of the trial. The plaintiff opposed the application and countered with the applications for separation of issues in terms of Rule 33 (4).

[5] On the 28 August 2015 the parties appeared before the Deputy Judge President who ordered:

- '1. The matter be and is hereby postponed *sine die*.
- 2 The costs are reserved
- 3 Wasted costs of 28 August 2015 and separation application to be, argued on opposed motion roll

[6] On the 17 September 2015 the plaintiff caused issue of a notice of amendment with which he intended to introduce a new prayer to read:

'That it be declared that the date for the determination of the accrual in the parties' estates is the date of *litis contestatio* being 20 May 2014, alternatively that the date for the determination of the accrual in the parties' estates is on the granting of a final decree of divorce'(prayer as to costs omitted)

[7] The Defendant objected to the plaintiff's intent to amend the notice of motion and applied that same be struck out alternatively that it be disregarded.

[8] Considering how these issues unfolded, it is clear that the issues to be determined are:

1. Whether the plaintiff's notice of amendment to the notice of motion be struck out or not
2. Whether the granting of a final decree of divorce should be separated from the determination of the accrual of the parties' estates and the defendant's maintenance as envisaged in terms of Rule 33 (4) and
3. Who should be mulcted with costs of this application including the reserved and wasted costs occasioned by the postponed of 28 August 2015?

[9] I find it inevitable to first deal with the defendant's point in *limine*; being to struck-out the plaintiff's notice to amend his notice of motion.

THE PLAINTIFF'S AMENDMENT TO THE NOTICE OF MOTION:

[10] Rule 28 of the Uniform Rules of this Court regulates amendments to pleadings and documents. The rule stipulates:

'(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7)...

[11] I already have indicated that on 17 September 2015, the plaintiff caused issue of what he termed "Notice of amendment". The notice stated that the "plaintiff ... intends, at the hearing of his counter application, to apply for an amendment thereto . . . by the introduction of a new prayer 3 . . . "

[12] On the 30 September 2015 the defendant objected to the proposed amendment. The defendant stated among others that the 'proposed amendment does not accord with the rules of court. ' The defendant objected to the amendment within specified period prescribed in terms of rule 28 (2). The plaintiff was expected to lodge an application for leave to amend. The application for leave to amend ought to have complied with the provisions of rules 6(1)¹ and subrule (5) (a)² and to follow the procedure prescribe in terms of the rules.

[13] The plaintiff's application for amendment is neither an application for leave to amend as envisaged in terms of rule 28(4) nor rule 28(10).³ The application is further non-compliant with the provisions of both rules 6(1) and rule 6(5) (a) in that the notice is neither supported by an affidavit nor is as near as it may be in accordance with Form 2(a) of the First Schedule.

[14] Considering the plaintiff's non-compliant with the Uniform Rules of this Court, I am of the view that the intended amendment stands to be struck out. The issue sought to be introduced by the intended amendment will thus not be dealt with. This brings me to the second issue to be determined.

WHETHER THE GRANTING OR NOT OF A FINAL DECREE OF DIVORCE SHOULD BE SEPARATED FROM THE DETERMINATION OF THE ACCRUAL OF THE PARTIES' ESTATES AND THE DEFENDANT'S MAINTENANCE AS ENVISAGED IN TERMS OF RULE 33 (4)

[15] The relief sought in the plaintiff's notice of motion in its unamended form is formulated as follows:

'1. That the issues pertaining to the granting of a final decree of divorce be separated from the issues pertaining to the determination of the accrual and the

¹ Rule 6 (1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

² Rule 6 (5) (a) Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice and all annexures thereto, shall be served upon every party to whom notice thereof is to be given ...

³ Rule 28(10) The Court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

defendant's maintenance claim and these issues be adjudicated upon separately

2. The above Honourable Court to hear evidence pertaining to the granting of a final decree of divorce, grant a final decree of divorce and that the remaining issues be postponed sine die.

3. The defendant to pay the costs of the application for postponement and the application for separation of issues and these costs to be deducted from the amount owed to the defendant by plaintiff when the accrual has been determined.

4

[16] Rule 33 (4) provides that

'If, in any pending action, it appears to the court *mero muto* 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 in such 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.

[17] The court has, in terms of the Rule and the practice manual of this division,⁴ has the discretion to direct the disposal of any question of either of law or fact in such manners as it may deem fit unless it appears that the question cannot conveniently be decided separately.

[18] The plaintiff contends that the granting of a decree of divorce separately from quantification of the defendant's maintenance and the accrual of the parties' estates will be convenient to both the court and the parties. The plaintiff refers to **CC v CM 2014(2) SA 430 (GJ)** where the court held that:

'[39] The irretrievable breakdown of a marriage is a question of law or fact which may conveniently be decided separately from any other question because a court may order that all further proceedings be stayed until such question has been disposed of'

[19] It is common cause from the reading of the plaintiff's particulars of claim⁵ and the

⁴ Erasmus: Superior Court Practice: Gauteng Division of the High Court, Pretoria: Practice Manual- Clause 3.5.4: Page H2-22: The court may authorise separation of merits and quantum in accordance with rule 33(4) if it is convenient and the quantum is not ready to be dealt with.

⁵ Page 4:Pleadings Bundle: Plaintiff's particulars of claim: Paragraph 6:

defendant's plea⁶ that the marriage between parties has broken down irretrievably with no reasonable prospects of restoration of a normal marriage relationship between them. The only issue contested is the reason(s) that caused the breakdown of the marriage. The reason(s) that cause the breakdown of the marriage is (are), in my view, *facta probantia*⁷ to irretrievability of the marriage.⁸ When a litigating party proves that a fact in issue has been proven on a balance of probabilities, then such a party may be granted what he/she prays for. Facts relevant to the facts in issue are only relevant to substantiate the facts in issue. I cannot agree more with the plaintiff's contention in reliance with the findings in CC v CM⁹ that a court does not have discretion as to whether a decree of divorce should be granted or not, it has to grant same.¹⁰ The provisions of section 4 of the Divorce Act 70 of 1979¹¹ have been complied with.

[20] Seeing that the parties' marriage was subjected to accrual system regulated in terms of Matrimonial Properties Act 88 of 1984, the spouse whose estate shows no accrual or a smaller accrual has a claim against the other spouse's estate at the dissolution of a marriage.¹² It is trite law that a marriage may [only] be dissolved by a court by decree of divorce if not by death.

[21] It is worth mentioning that the plaintiff further submits that the separation of issues will give direction to determination of the "cut-off" date for purposes of quantifying the parties' estates and the defendant's maintenance. The defendant denies that separation will be convenient both to the court and the parties on the basis that the defendant will be prejudiced by duplication of evidence especially when determining the amount payable to the defendant's maintenance. Emphasis is put on the reasons alleged in the defendant's plea as being the one that contributed to the breakdown of the marriage.

⁶ Page 16: Pleadings Bundle: Defendant's Plea: Paragraph 6.

⁷ Fact(s) relevant to the fact in issue

⁸ Facta Probanda: Fact(s) in issue

⁹ Op Cit

¹⁰ See: Levy v Levy 1991(3)SA614(A)

¹¹ Section 4(1) provides: A court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

¹² Section 3 provides:

(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 [her] estate if he[she] is deceased, acquires a claim against the other spouse or his[her] 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

[22] It is clear from the readings of the provisions of Rule 33 (4) that separations of a question of either law or fact may be decided conveniently either before any evidence is led or separately from any question that may have been raised by the court or on the application by any party. The question to be answered is whether the issues raised by the plaintiff will conveniently be decided separately. Put differently, can the granting of a decree of divorce be conveniently decided separate from the determination of accrual of the parties' estates?

[23] The plaintiff is an attorney at law, and practicing as such for his own account. The defendant avers that the plaintiff's practice is an extremely lucrative one due to its specialty in medical negligence. The defendant further states that '[she has] personal knowledge of the extent of his practice as my brother, mother and I were involved in the practice until he terminated our services...' The defendant had already requested through her attorneys, financial records informing of his practice because she regarded such information essential for the purposes of determining as to whether the plaintiff estate would show no or smaller accrual than hers. It must be borne in mind that the plaintiff alleged in his particulars of claim that his estate will show a lesser accrual than the estate of the defendant upon date of dissolution of the marriage... alternatively the estate of the plaintiff has shown no accrual.¹³

[24] What is required to be determined is whether the granting of a decree of divorce "may conveniently be decided separately" from the determination of the parties' estates with a view to quantify as to which of the parties' estates has shown no or smaller accrual than the other. The court is thus obliged to order separation of issues unless it appears that the issues cannot conveniently be decided separately. In considering the question of convenience, a court must have regard to (i) its convenience; (ii) the convenience of the parties and (iii) the possible prejudice either party may suffer if separation is granted. The word "convenient" as used in this context, denote appropriateness considering all advantages and disadvantages that may prejudice any of the parties. The onus is however on the defendant to satisfy the court that the separation should not be granted.

[25] It is common cause if not seriously disputed that the parties' marriage is irretrievably broken down with no prospects of restoration of a normal marriage relationship. It appears that prolonging the parties' litigation or keeping them married to

¹³ Pleadings Bundle: Particulars of claim: Paragraph 7.4

each other where there is no marriage is tantamount to keeping parties shackled to a dead marriage. Their marital road has reached a dead end. Parties' lives must continue. Mokgoathheng J penned in CC v CM that '[i]t is inappropriate for a party to an apparently irretrievably broken down marriage to oppose the separation of issues in a divorce action for the sole purpose of gaining a tactical advantage...' I am of the view that separation will be in the advantage of both parties.

[26] The defendant submits that the plaintiff failed to disclose the net value of his estate notwithstanding an umpteenth correspondence and notices with which he was requested to do. The defendant further submits that separation will prejudice her in that she will have to lead evidence twice. I do not agree. I further do not agree that the plaintiff's non-corporative behavior of not disclosing his financials will prejudice the defendant. I however agree with the defendant that the determination of spousal maintenance depends on among others, the parties' prospective means. The parties' prospective means has not been determined. They are however, determinable. Submissions have been made in the Rule 43 application of which judgment was still outstanding as at the hearing of this application.

[27] I cannot agree more with the defendant's counsel submission that the appointment of an expert in order to evaluate the parties' estates can only take place once a decree of divorce is granted. Expects to be appointed will have a "cut-off" date in evaluating the parties' estates. In fact the defendant will have a vested right which is said to accrue and acquired upon dissolution of the marriage. A marriage is dissolved when a decree of divorce is granted. The accrual is determined by the amount which an estate exceeds its commencement value on dissolution of the marriage. It will in my view, be convenient to order separation of the granting of a decree of divorce from the determination of accrual and the spousal maintenance.

COSTS

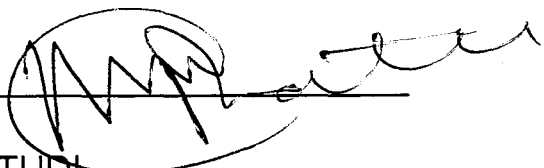
[28] It is trite law that costs follow the event. The defendant succeeds with her opposition to the amendment of the plaintiff's notice of motion and entitled to costs occasioned thereby.

[29] On 28 August 2015, the Deputy Judge President granted postponement of the trial at the instance and application by the defendant. The general rule is that he who seeks indulgence must pay the costs. The defendant sought indulgence and must pay the costs occasioned by postponement

[30] With regard to the costs of this application, the plaintiff succeeds and is thus entitled to costs.

[31] I, in the result, make the following order

1. It is ordered that the granting of a final decree of divorce is hereby separated in terms of Rule 33(4) from the issues pertaining to the determination of the accrual and the defendant's maintenance.
2. The determination of the accrual and the defendant's maintenance are postponed sine die
3. The plaintiff is ordered to pay the defendant costs occasioned by the amendment of notice of motion application.
4. The defendant is ordered to pay the costs of the application for postponement reserved on the 28 August 2015 and the costs of the application for separation of issues. These costs are to be deducted from the amount owed to the defendant by the plaintiff when the accrual has been determined.



AML PHATUDI

JUDGE OF THE HIGH COURT

Heard on: 05 November 2015

For the Plaintiff: Adv. DA Smith SC

Instructed by: Schoemans Attorneys

For the Defendant: Adv. LC Haupt

Instructed by: Adams & Adams

Date of Judgment 15 December 2015