**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 13072/2015**

Reportable: No

Of interest to other judges: No

Revised.

19/8/2016

**W, P D** **PLAINTIFF**

**AND**

**W, I** **DEFENDANT**

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**JUDGMENT**

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**THOBANE AJ,**

**Introduction**

[1] The parties in this matter were married to each other on 13 March 1993 at Klerksdorp out of community of property. For convenience the parties will be referred to as they appear in the main action. They concluded an antenuptial contract in terms of which the accrual system is applicable to their marriage. The marriage still subsists. According to the pleadings, there are no children born of the marriage. It is common cause that their marriage has broken down irretrievably and that there are no prospects

of salvaging it. The divorce matter was enrolled to proceed to trial on 15 August 2016.

**Background**

[2] On 22 June 2016 the defendant's sister launched an urgent application for appointment of a *curatrix ad /item* for purposes of representing the defendant in the divorce action as well as investigating whether the defendant is capable managing her own affairs and further return a report to court whether appointment of a *curator bonis or curator personam* is advisable. On 28 June 2016 Prinsloo J, granted an order in the following terms;

1. That Advocate Nadine Erasmus, an advocate of the High Court, be appointed as *curatrix ad /item* to the patient;
2. That the *curatrix ad /item* be awarded the following powers and duties;
    2.1. To ratify the actions taken by the patient and her attorneys in respect of all procedures relating to the divorce action;
    2.2. To instruct attorneys and counsel to proceed with the said action and to prosecute it to finality;
    2.3. To sign all documents necessary for the institution and prosecution of the action;
    2.4. To settle the action if so advised subject to the approval of a Judge (in chambers) of the above Honourable Court;
    2.5. To make recommendations on protection of any payments made to the patient as a result of the marriage between the parties or the appointment of a *curator bonis* or trustee to handle the estate as a whole and/or monies on behalf of the patient; and
    2.6. The right to appoint, at her discretion, an independent psychologist, and/or any other expert as may be necessary, to evaluate the patient in respect of the divorce action;
3. That the *curator ad litem* investigate the question of whether the patient is capable of managing her own affairs and to report to the court on this question;
4. That the *curatrix ad /item* is also requested to investigate the question of whether a curator bonis should be appointed to the patient;
5. That the *curatrix ad /item* is also requested to investigate the question of whether a *curator personam* should be appointed to the patient;

6. That the costs of this application, as between attorney and client, including the costs of the application for the appointment and the fees of the *curatrix ad /item* appointed to represent the patient, shall be paid out of the patient's estate; and
7. That prayers 6 and 7 are postponed sine die.

[3] The defendant has brought a substantive application for a postponement. The application for a postponement is opposed. The plaintiff for his part, launched a counter application in terms of which a decree of divorce is sought as well as effecting accrual in terms of a draft order that the plaintiff attached to the application. The plaintiff further sought an order postponing the defendant's claim for maintenance as well as costs. In essence, the plaintiff is seeking a separation of issues in terms of Rule 33(4) of the Uniform Rules of this Court.

**APPLICATION FOR A POSTPONEMENT**

[4] The defendant's legal representative deposed to the affidavit in support of an application for a postponement. In it is listed a brief history of the matter as well as circumstances leading up to the appointment of the *curatrix ad /item* as well as efforts made, since the appointment, to consult with the defendant. The defendant's attorney states that after the *curatrix ad /item* took office there was a lengthy consultation between her as well as the defendant. Following this consultation the *curatrix ad /item* advised that an Industrial Psychologist be appointed. Subsequent to this and in preparation of the trial it became clear to the legal representatives that the trial would not be able to proceed on 15 August 2016. The plaintiffs legal representatives were advised of the difficulties on 25 and 27 July 2016. A pre-trial took place on 5 August 2016 but still the matter could not be settled. The pre-trial minute reflect the fact that it was conveyed to the plaintiffs legal representatives that they were unable to obtain instructions from the defendant and that as a consequence they were not ready to proceed with the trial.

[5] The basis for seeking to have the matter postponed is the following;

5.1. the *curatrix ad /item* has been in office for a period of 6 weeks therefore there has not been sufficient time to finalize her investigation and prepare a report;

5.2. the *curatrix ad !item* has not been able to appoint an Industrial Psychologist, owing to her recent appointment, who would be available to testify at the trial of the matter, which was imminent;

5.3. the *curatrix ad /item* has a concern about the functionality of the defendant, specifically whether she would be able to manage her own affairs.

5.4. that there is a dispute with regard to the valuation of assets in the estate and the *curatrix ad item* has not had insight into discovered documents to consider settlement proposals as well as the calculation of accrual.

5.5. that although experts advise that speedy finalization of the divorce will benefit the defendant's emotional wellbeing, doing so in circumstances where there is no proper consultation will prejudice the defendant.

[6] The plaintiff opposes the application on the basis that it is ill conceived and ill advised for the following reasons;

6.1. that the experts who treat the defendant are of the opinion that the divorce should be finalized as soon as possible, in that a delay would be prejudicial to her. It is therefore argued that the request for a postponement is in conflict with the defendant's own expert advice, which fact is also confirmed by the defendant's legal representative in a letter dated 1 June 2016;

6.2. that an Industrial Psychologist has already pronounced that the living conditions of the defendant were detrimental to her health. The conditions related to the fact that she was using alcohol while taking strong anti depressant medication, staying on her own and her inability to drive.

6.3. that there was a tender in terms of which the interests of the defendant in so far as the accrual is concerned, were catered for.

6.4. lastly, it was argued that the correct basis for calculating accrual was as per the methodology of the plaintiff. In the end it was disputed that accrual as calculated by the plaintiff's legal representative, was incorrect.

[7] In ***Myburgh Transport v Botha tla SA Truck Bodies 1991(3) SA 310 (NmSC) at page 314F-315J*** is set out the relevant legal principles applicable in considering an application for a postponement of a trial. Mohamed AJA (as he then was), stated it succinctly as follows:-

*"1. The trial Judge has* a *discretion as to whether an application for* a

*postponement should be granted or refused* ***(R v Zackey 1945 AD 505).***

*2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.* ***(R v Zackey*** *(supra);* ***Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398 - 9;Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.) H***

*3. ...*

*4. ...*

*5. A Court should be slow to refuse* a *postponement where the true reason for* a *party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.* ***Madnitsky v Rosenberg*** *(supra at 398 - 9).*

*6. An application for* a *postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant.* ***Greyvenstein v Neethling 1952 (1) SA 463 (C).*** *Where, however, fundamental fairness and justice justifies* a *postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made.* ***Greyvenstein v Neethling*** *(supra at 467F).*

7. *An application for postponement must always be bona fide and not used simply as* a *tactical manoeuver for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.*

8. *Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of* a *Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by* a *postponement to the adversary of the applicant for* a *postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.* ***(Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 453.)***

*9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.*

*10. Where the applicant for* a *postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has*

*followed, but justice nevertheless justifies* a *postponement in the particular circumstances of* a *case, the Court in its discretion might allow the postponement but direct the applicant in* a *suitable case to pay the wasted costs of the respondent occasioned to such* a *respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be.* ***Van Dyk v Conradie and Another 1963 (2) SA 413*** *(CJ* ***at 418; Tarry & Co Ltd v Matatiele Municipality 1965*** *(3)* ***SA 131 (E) at 137.*** "

[8] I am of the view that good cause has been shown for the interference with the plaintiffs procedural right to proceed with the matter when weighed against the general interest of justice, for the following reasons;

8.1. there is no history of undue delay in the matter giving rise to prejudice as this is the first application for a postponement. I pause to indicate that Iwas addressed by both sides about prejudice. It was argued that the defendant seeks to gain an advantage in circumstances where the marriage between the parties was dead. I will deal with prejudice when considering the application for a separation.

8.2. at the pre-trial of 5 August 2016, the defendant stated that trial preparation was hampered by the fact that the process of establishing capabilities of the defendant were still underway and that as a result they were not ready to proceed with the trial.

8.3. lastly and most importantly, the *curatrix* is clearly in no position to perform her functions owing to the condition of the defendant who is unable to give instructions. It is my view that the defendant has fully disclosed reasons for not being ready to proceed with the trial. I do not believe that the application for a postponement is a ploy to delay finalization of the divorce.

**APPLICATION FOR SEPARATION**

**The plaintiff's submissions**

[8] Counsel for the plaintiff asked this court to separate issues. The relevant parts of the draft order the plaintiff seeks are couched as follows:-

"1……

2. A decree of divorce is granted;

3. An order is granted that an amount equal to half the difference of the accrual in the respective estates of the plaintiff and defendant, be paid to the defendant's, in accordance with the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984;

4. The following disputes are postponed sine die;

4.1. the defendant's claim for maintenance with reference to prayers 5 and 6 of the counterclaim;

2.2. Costs with reference to prayers 5 of the particulars of claim and 7 of the counterclaim.

5. ……..

I refrain from repeating paragraphs 5 through to paragraph 12 of the draft order save for stating that it deals with; calculation of accrual from the plaintiffs point of view, the appointment of a referee in the event the parties can not agree on the accrual as well as the terms of reference of the referee, termination of joint ownership of immovable properties as well as how the proceeds from the disposal are to be dealt with, reservation of rights with regards to the amendment of pleadings and lastly that the defendant be liable for payment of costs of the separation.

[9] The court was referred to various decisions in support of the contention that a separation was not only competent but that it should be granted. The plaintiff contends that the court is obliged to grant a separation unless it is found that the issues cannot be conveniently separated. It is apposite to state what Rule 33(4) of the Uniform Rules of Court provides;

*"(4) 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."*

[10] The plaintiff is of the view that the court should follow ***CC v CM 2014(2) SA 430 (GJ)*** which was also cited with approval in ***Joubert v Joubert (6759112013) [2016] ZAGPPHC 25 (22 January 2016).*** It is not in dispute that the marriage between the parties has broken down irretrievably and is without prospects of restoration. Plaintiff submits that the court in the circumstances has no discretion but to grant the decree. This is so, it was submitted, because the only contentious issue is spousal maintenance and costs.

[11] It was further submitted that prejudice is manifest in the fact that the plaintiff should not be made to remain a party to a dead marriage. He has found new love and would like a clean break from his relationship with the defendant so as to move on and have new beginnings. In making the submission plaintiff relied heavily on what was said by Mokgoatlheng J, *inter alia* in ***CC v MM*** *(supra),* namely;

> *"[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. Where it has been shown that* a *marriage* has *irretrievably broken down without prospects of* a *reconciliation,* a *court does not have* a *discretion* as *to whether* a *decree of divorce should be granted or not, it* has *to grant* same. *By extension of logic and parity of reasoning* a *separation order should be granted where* a *marriage in fact, substance and law appears to have irretrievably broken down. See* ***Levy v Levy 1991 (3) SA 604 (A) at 621D – E and 625E - F; Schwarz v Schwartz 1984 (4) SA 467 (A).***
>
> .....
>
> *[41] It is inappropriate for* a *party to an apparently broken down marriage to oppose the separation of issues in* a *divorce action for the sole purpose of gaining* a *tactical advantage in order to secure* a *more favorable s 7(3) patrimony all redistribution award, or to use the perpetuation of what seemingly appears to be an irretrievably broken down marriage as* a *leverage for tactical reasons to pre-empt the dissolution of such marriage for ulterior motives."*

[12] It was pointed out that the defendant has failed to bring expert evidence about the

impact of the pending divorce on her. It was further pointed out that despite being appointed on 28 June 2016, six weeks, the curatrix has failed to make any progress while the plaintiff's life has stagnated.

[13] The plaintiff further made extensive submissions based on rule 34 tender made to the defendant. Further reference was made to an offer made "with prejudice". In relation to the disclosure of the tender, I will not take it further than stating that litigating in this manner is not helpful.

**Defendant's submissions**

[14] The defendant submitted that on a proper interpretation of section 7 (2) and 7 (3) of the Divorce Act 70 of 1979, a separation is not competent in law. The section reads as follows:-

> ***"7. Division of assets and maintenance of parties***
>
> *(1) A court granting* a *decree of divorce may in accordance with* a *written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.*
>
> *(2) In the absence of an order made in terms of subsection with regard to the payment of maintenance by the one party to the other, the court* may, *having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.*
>
> *(3) A court granting* a *decree of divorce in respect of a marriage out of community of property-*
>
> (a) *entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property,*

*community of profit and loss and accrual sharing in any form are excluded; or*

(b) *entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 ( Act 38 of 1927 ), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,*

*may*, *subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first- mentioned party.* "

[15] In making the aforesaid submission the defendant relied, inter alia on ***Schutte v Schutte 1986 (1) 872 (A)*** and referred the court to the following dicta by Van Heerden JA;

*"Dit volg dus dat 'n onderhound bevel nie ingevolge art 7 van die 1979 Wet na ontbinding van 'n huwelik verleen kan word nie.* "

[16] The court was also referred to ***Ndaba v Ndaba (3935612013) [2015] ZAGPPHC (1110212015)*** where Kgomo J said in paragraph 15;

*"Section 7(1) and (2) deal with division of general assets and issues relating to spousal maintenance. If spousal maintenance is not claimed and dealt with and granted by the court granting the decree of divorce, it can not be claimed later."*

It was submitted that in Ndaba v Ndaba the principle of ***Schutte v Schutte,*** which is an SCA judgment, was confirmed.

[17] The defendant submitted that there was no prejudice to the plaintiff and that in view of the status of the defendant, convenience, which was the guiding factor, dictated that a separation not be ordered.

**Discussion**

[18] In ***African Bank v Soodhoo 2008 (6) SA 46 (DJ at 518-D*** the Court said the

following;

> *"The general principle in law would appear to be that notwithstanding the wide powers conferred on* a *court under rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter.* ***Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (DJ at 362G - H, and Dene/ (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) ((2004) 25 ILJ 659) at 4858 - C*** *have reference. In some instances, however, the interests of the parties and the ends of justice are better served by disposing of* a *particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away.* ***(Minister of Agriculture*** *(supra) at 362H.)"*

[19] Whenever the court is called upon to adjudicate an application for separation in terms of Rule 33(4) such as the present, the court's duty was in my view succinctly stated in Minister of ***Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (DJ at 364D-E*** as follows;

> *"...the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application."*

[20] It is clear from the aforementioned cases that a court has a discretion to grant or refuse an application in terms of Rule 33(4). The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all the parties in the matter, which includes, naturally, the court. The court is called upon, in making such a determination, to make a value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for

separation. The notion of appropriateness and fairness to the parties also comes into the reckoning. *See* ***De Wet v Breda (4415312009) [2011] ZAGPJHC 29 April 2011.***

[21] From two of the judgments the plaintiff relied upon, namely, ***CC v CB*** and ***Joubert v Joubert,*** it is clear that a separation can be ordered, as was done in the two decisions. Where Idiffer with Mokgoatlheng J and Phathudi J, is where they find that the court does not have a discretion as to whether a decree of divorce should be granted or not and that the court has to grant same. I am of the view that convenience is the overriding factor. In ***Levy v Levy 1991*** *(3)* ***SA 614 (A),*** Kumleben JA discusses the question whether the court has discretion to not grant a decree of divorce in circumstances where it is contended that the marriage has not broken down irretrievably. The question is therefore where a party is adamant that they can still reconcile, can a court withhold a decree of divorce to afford the parties that opportunity. The same question can be posed where the court wishes to satisfy itself about issues or requirements of dependents. In *casu,* that the marriage relationship had broken down is not in dispute. The court is called upon to consider a separation on the basis that the irretrievable breakdown of the marriage is uncontested. The court is further called upon to postpone the contested part being spousal maintenance and costs. In my view, regard being had to convenience and the interest of justice, not withstanding the fact that it is not disputed that the marriage has broken down irretrievably, a case has not been made for a separation. I advance the following reasons;

21.1. The *curatrix ad /item* has only been in office for a period of six weeks . Despite her best endeavors she has not been able to obtain instructions from the defendant. The primary duty of a curator ad litem is to manage the interests of the patient in relation to court proceedings on behalf of the patient who has been incapacitated. The barrier that exists between the curatrix and the defendant makes it difficult for the curatrix to carry out her primary functions. The state of affairs however should not be allowed to persist in perpetuity. For that reason there has to be time lines in terms of which the curator is expected report to court on the suitability of appointing a curator bonis and/or a curator ad personam to the defendant.

21.2. What weighed heavily in the courts mind in CC v CM was the fact that there was a pending seriously contested dispute in commercial and revocation proceedings which would take many years to finalize. In *casu* the dispute that

exists can be easily and speedily resolved, thus tampering prejudice.

21.3. The plaintiff has made a compelling case about the prejudice he stands to suffer. Personally he wants to move on with his life and financially there are cost implications if the decree portion is not finalized. Such prejudice in my view should recede so as to afford the curatrix an opportunity fulfill her functions and eventually report to court.

21.4. Courts generally do not favor litigation in piecemeal fashion. In ***Dene/ (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) ((2004) 25 /LJ 659)*** the Court said the following;

> *"....Rule 33(4) of the Uniform Rules - which entitles* a *Court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many* cases, *once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation* as a *whole that it will be possible properly to determine whether it is convenient to try an issue separately. "*

While ordering a separation will be convenient to the plaintiff, it will not be convenient to both the defendant, the executrix and the court.

21.5. In opposing the application for a separation I do not believe that the defendant is acting mala *fide* that is, she is opposing the separation of issues for the sole purpose of gaining a tactical advantage in order to secure a favorable patrimonial distribution or is using the perpetuation of an irretrievably broken down marriage as a leverage for tactical reasons to pre-empt the dissolution of the marriage for ulterior motives. I have paraphrased what Mokgoatlheng J said in *CC v CM.*

[22] In the circumstances the application for separation must fail.

**COSTS**

[23] A party that comes to court with an application for a postponement seeks the court's indulgence. The defendant has asked that the costs be reserved while the plaintiff is of the view that the defendant be ordered to pay the costs. I do not see any reason why the defendant shouldn't be burdened with costs occasioned by the postponement.

[24] I therefore make the following order;

1. The application for separation of issues in terms of Rule 33(4) is refused;
2. There is no order as to costs;
3. The trial is postponed sine die;
4. The defendant is ordered to pay the costs occasioned by the postponement;
5. The *curatrix ad /item* is directed to file her report to court within 120 days hereof;
6. The parties are granted leave to approach the office of the Deputy Judge President for a preferential trial date after the filing of the report in 5 above.

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**SA THOBANE**

**ACTING JUDGE OF THE HIGH COURT**

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| HEARD | : | 15/08/2016 |
| JUDGMENT | : | 19/08/2016 |
| ON BEHALF OF THE PLAINTIFF | : | ADV. L. HAUPT |
| ON BEHALF OF THE DEFENDANT | : | ADV. S. WAGENER, SC |