

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: 25887/2009

In the matter between:

LINDY JO TRACEY (born GORDON-BROWN)

Plaintiff

and

STEWART RONALD TRACEY

Defendant

JUDGMENT DELIVERED : THURSDAY 08TH SEPTEMBER 2011

SALDANHA, J

[1.] This is an application in terms of rule 33(4) wherein plaintiff /applicant in the main action seeks an order in the following terms:

1. Directing that the questions of whether the agreement dated 21 August 2008 and signed by the Plaintiff /Applicant and Respondent/Defendant is a Settlement Agreement and whether the Respondent/Defendant signed the aforesaid agreement under duress (collectively termed as "the question of duress") can conveniently be decided before evidence is led in the trial;
2. Directing that this question shall be disposed of prior to the commencement of the trial;
3. Directing that all further proceedings shall be stayed until such question has been disposed of;
4. Directing that Respondent/Defendant shall pay Plaintiff/Applicant's costs in this application;

5. Granting further and/or alternative relief.

[2.] The application is opposed by the respondent/defendant.

[3.] In the action the applicant/plaintiff seeks a decree of divorce incorporating the terms of a Settlement Agreement entered into between the parties during August 2008. In the defendant's plea he makes the following averments:

"(i) The defendant admits that the agreement purporting to be a settlement agreement was signed by the parties during August 2008;

(ii) The defendant denied that the agreement was a settlement agreement and pleaded that he signed the agreement under duress and the settlement agreement therefore is null and void".

[4.] In a claim in reconvention the defendant claimed as follows:

"(i) That the farm known as Portion 25 of the Farm Moerasrivier 233, Division George also known as the Red Barn Farm ("the property") purchased and registered in the name of the plaintiff be transferred into the name of the defendant on the basis that the defendant paid for the full purchase price of the property;

(ii) Further that the plaintiff's estate has shown a larger accrual than the defendant's estate and that the defendant is thus entitled to one half of the difference between the accrual of the respective estates."

[5.] In the plaintiff's plea to the defendant's claim in reconvention the plaintiff avers that in the event that the Settlement Agreement concluded between the parties is found to be null and void that:

" (i) The defendant's estate will show a larger accrual than that of the plaintiff's;

(ii) The plaintiff will enjoy a claim against the defendant for an amount equal to half of the difference between the accrual in the respective estates;

(iii) Alternatively, and only in the event that the defendant's estate has shown no accrual or has an accrual smaller than the estate of the plaintiff that the defendant will be unduly benefited, by reason of the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and the defendant's substantial misconduct, unless the defendant forfeits his right to share in the accrual of the plaintiff's estate."

[6.] With regard to the validity of the Settlement Agreement the plaintiff claimed that the defendant had voluntarily entered into the Agreement and that the Agreement was neither null nor void but of full force and effect. The plaintiff submitted that the question as to whether or not the agreement entered into between the parties and whether or not the defendant signed the agreement under duress is a question of both law and fact and ought to be decided separately from the balance of the issues between the parties for amongst others, the following reasons:

- (i) In the event that the defendant fails to establish his duress defence alternatively, in the event that the plaintiff disproves the defendant's defence then the entire matter will be disposed of without the necessity of hearing evidence in respect of the defendant's claim in convention and the plaintiff's defences to the defendant's claim in reconvention (which claims are styled as conditional claims for forfeiture of benefits and payment of an accrual entitlement).
- (ii) At a separate hearing the issues would be limited to the Settlement Agreement between the parties and more particularly the defendant's defence of duress. The length of such proceedings would be substantially less than a full trial on all the issues. In this regard the plaintiff submitted that the court would not be required to hear evidence regarding issues relevant to the forfeiture of benefits claim and evidence on the circumstances which led to the breakdown of the marriage and the misconduct of the parties or either one of them and issues relating to the beneficial ownership claim, such as the agreement between the parties regarding the property, and the details of funds expended by both parties, and issues relevant to the accrual claims which would include details concerning the commencement values of each party's estate and their current net asset value which issues appear to be in dispute between the parties.

[7.] The plaintiff further claimed that the question of the alleged duress can be determined with regard to evidence limited to the events during August 2008 when the Settlement Agreement was concluded, including such evidence relating to whatever threat of evil or harm was posed to the defendant, whether imminent or inevitable, and which induced fear into the defendant and whether the Settlement Agreement was concluded as a result of such duress. The plaintiff claimed that it anticipated that the witnesses who would testify with regard to the defence of duress would probably be the parties themselves, the witnesses who had signed the agreement and possibly the parties, their, legal representatives as both of them were represented at the time when the agreement was drafted and signed.

[8.] The plaintiff claimed that the evidence relating to the beneficial ownership claim, the accrual claims and the forfeiture of benefit claims were far ranging in scope and timeframe and would involve much financial detail and documentation.

[9.] The plaintiff also submitted that the evidence of the separate claims were independent of each other and should be dealt with separately. Plaintiff highlighted that the defendant bore the onus of proving the defence of duress on a balance of probability. Plaintiff further submitted that a waste of court resources and the legal costs would be avoided if the evidence was confined initially to the question of the duress. Expert evidence would not be required in dealing with the questions of duress and that the litigation between the parties

could possibly and expeditiously be disposed of if the question of duress was determined separately. The plaintiff also submitted that it would not only be convenient for her but also for the defendant and more importantly for the court for the issues to be separated.

[10.] The plaintiff claimed that the only possible prejudice that the defendant could suffer was in the event of the defendant duress claim being upheld and that the proceedings with regard to the remaining claims would have to be proceeded with at a later date.

[11.] The plaintiff claimed that it had foreshadowed the application by her attorneys writing to the defendant's attorneys wherein they requested a separate hearing as early as April 2010. In response, the defendant adopted the attitude that he was not prepared to agree to a separation of the issues and claimed that the issues pleaded by him were inextricably interlinked and that to a large extent the evidence of duress as well as the transfer of the beneficial ownership claims overlapped. The defendant further claimed that there would be a duplication of evidence and cost and it would not prove beneficial to either of the parties. The plaintiff however disputed these contentions in particular the claim that the issues were inextricably linked and submitted that the *facta probanda* for the defence of duress was mutually exclusive to that in respect of the commercial and matrimonial property regime claims. The plaintiff further submitted that it would not necessarily amount to a duplication of the evidence if the defendant was

successful in its claim and the court could give directions with regard to further discovery and trial particulars on the remaining issues and a date for the resumed hearing and which could take place before the same judge.

[12.] The defendant in opposing the relief sought by the plaintiff provided extensive detail with regard to the background of the marital relationship. Briefly the defendant is an Irish citizen and met the plaintiff in November 2003. Prior thereto he was resident in Canada. He claimed that he had visited South Africa with the intention of permanently settling down as he loved the country and considered it a place where he would make his future home. He met the plaintiff in November 2003 while traveling in South Africa and they developed a serious relationship. He considered his future to include that of the plaintiff as his wife. He claimed that as a result of the relationship he decided to invest most of his money in South Africa. In consultation with the plaintiff, he decided to purchase an apartment at Goose Valley Close in Plettenberg Bay as he was a foreigner and he had no legal status in South Africa and because he was advised that it would be more expedient to purchase the property in the name of the plaintiff who was to become his wife. He claimed that he had no reservations in doing so as he believed the relationship between himself and the plaintiff would be one of a permanent nature. For the purposes of purchasing the Goose Valley Apartment in 2004 he had transferred approximately R1 185 000.00 from his Canadian bank account into the plaintiff's account. He also claimed to have made improvements to the property using his own funds in approximately

R300 000.00. He claimed that he and the plaintiff had decided to sell the property in 2006 for an amount of R2 050 000.00. They had an excess bond which was paid up and the balance was invested in an Investec account which was also held in the plaintiff's name as the primary account holder.

[13.] The defendant further claimed that in the hope of establishing himself in South Africa and to obtain a business and residence permit he purchased a Golf Retail Franchise known as the Pro Shop during 2006 for an amount of approximately R2 400 000.00. He had also purchased the Vodacom Golf Village Driving Range and certain on site Golf teaching rights for an amount of approximately R100 000.00.

[14.] In 2006 he claimed that he and the plaintiff had decided to purchase a farm close to George known as the Red Barn Farm for an amount of approximately R2.5 million which was paid in full by him. This issue is in dispute between the parties. He had likewise transferred funds from his Canadian account directly to the conveyancing attorneys and the property was registered in the name of the plaintiff. He claimed that the purchase was made on the understanding that the property would be his although registered in the plaintiff's name. He claimed that he had no problem at that stage with these financial arrangements as he had believed that the plaintiff and his relationship would last forever and that he could trust her.

[15.] In 2007 the plaintiff apparently developed certain health problems and he claimed that he had spent an entire year looking after her and from thereon their relationship dramatically deteriorated.

[16.] In March 2008 the plaintiff through her then attorneys instituted divorce proceedings against him in the George Circuit Court. There were negotiations between them with regard to the divorce and the dissolution of their marriage. He claimed that he and the plaintiff had separated at that stage and that she had barred him access to his funds in the Investec account. He also claimed that it appeared that the plaintiff was not the person that he had thought her to be and that he was in danger of "*loosing my life*". He claimed that he was extremely vulnerable for, *inter alia*, the following reasons:

- (i) He was a foreigner with no permanent right of residence in South Africa;
- (ii) He had purchased a business but that he did not have a business permit or work permit to operate in South Africa;
- (iii) That he had been denied access into his Investec account.
- (iv) That the plaintiff on a regular basis informed him that his right to remain in South Africa was solely dependant on the fact of their marriage relationship. He claimed that she told him on numerous occasions that she would advise the authorities of the fact that they were no longer living together as husband and wife and that he would inevitably be deported. He claimed that he believed this

information to be true as the plaintiff had always accompanied him to the offices of the Department of Home Affairs. He also claimed that he had verified this information with his attorneys who advised that he was indeed in a precarious position and that he was in danger of being deported should the plaintiff report him to the Department of Home Affairs.

[17.] The defendant claimed that during August 2008 he met with the plaintiff at a restaurant without any of their legal representatives being present. He claimed that the plaintiff presented him with a Settlement Agreement drafted by either her or her attorneys and that she had advised him that unless he signed the Settlement Agreement she would ensure that the relevant authorities were informed of their separation and that he would be deported and would not be allowed to return. He believed the threat to be serious and true and that he was in imminent danger of losing everything that he owned. He claimed that at that stage he had invested almost the entirety of his available funds in South Africa in the Farm and in the Pro Shop. He claimed that he had felt extremely vulnerable and had absolutely no doubt that the plaintiff would carry out her threat. He claimed that under such circumstances he signed the Settlement Agreement under duress. He claimed in the alternative that he acted on a misrepresentation deliberately made by the plaintiff which misrepresentation he believed to be true.

[18.] He claimed that the plaintiff thereafter through her attorneys issued summons and attached the Settlement Agreement to be incorporated in the order of divorce.

[19.] The defendant claimed that his financial position had seriously deteriorated thereafter and that he remained completely vulnerable. He claimed though that in March 2009 he obtained a business permit from the Department of Internal Affairs which granted him residence in South Africa until 2012. He claimed that upon receipt of the permit his situation changed dramatically and for the first time since his separation from the plaintiff he was no longer fearful of being deported. He claimed that he had no longer lived under the permanent threat of the plaintiff that she could ensure his deportation at will. He therefore instructed his present attorneys of record to defend the action issued out by the plaintiff on the basis that the Settlement Agreement was signed under duress. The divorce action was defended but was subsequently withdrawn as the plaintiff claimed that she did not wish to become embroiled in costly and protracted litigation over the validity of the Settlement Agreement.

[20.] The defendant further claimed that the plaintiff had launched a Rule 43 application wherein she claimed a large amount of maintenance from him. The application was dismissed with costs.

[21.] He further claimed that he had been advised that given his contentions with regard to the settlement agreement he would have to amend his plea and counter claim to incorporate an alternative prayer of a conditional counter claim for the rectification of the Settlement Agreement.

[22.] The defendant claimed that a separate hearing will not limit the issues that a court would need to decide as the financial arrangements between the plaintiff and him, his resident status and the origins of the money that were paid for all the assets were part and parcel of the entire matter and could not be excluded from evidence. Defendant claimed that all of these issues were inextricably interlinked with the question of duress as the reason why he had signed the Settlement Agreement. Further he claimed that the question of duress was not limited to the events of August 2008 but related to his personal circumstances in South Africa as a foreigner and the reasons why he had arranged his financial affairs in the manner that he did and in particular and why the properties were in the name of the plaintiff. He claimed that the plaintiff had continuously threatened him about his residency status from as early as April 2008 and that all such evidence would be necessary in the determination of the duress claim.

[23.] In response, the plaintiff claimed that the defendant sought to obfuscate the issue of duress with that of his claims in reconvention and that the matters were clearly discreet and separate.

[24.] Rule 33 (4) provides as follows:

“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 questions 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 an order unless it appears that the questions cannot conveniently be decided separately.”

[25.] Counsel for the plaintiff Ms Gordon-Turner emphasized that the court was obliged on application by any party to make an order for separation of issues unless it appeared that the questions could not conveniently be separated. In this regard she relied on the decision of the full bench in **Edward L Bateman Ltd v CA Brand Projects (Pty) Ltd 1995 (4) SA 128 (T) at 132 C**. She further submitted that it was for the party opposing the application for a separate determination to satisfy the court why the application should not be granted. See in this regard the remarks of Van Reenen J in the matter **Berman & Failkov v Lumb 2003 (2) SA 674 (C)**;

“[17.] In terms of the provisions of Rule 33(4) in its present form, an application for the separation of issues by any party must be granted unless it appears that such issues cannot conveniently be decided separately (see Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd

1995 (4) SA 128 (T) at 132D) and it is incumbent on the party who opposes such an application to satisfy the Court that such an order should not be granted (see *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G). The convenience to be considered is primarily that of the Court and the litigants (*Braaf v Fedgen Insurance* (supra at 939H)). Convenience in the context does not only connote facility or ease or expedience but also appropriateness in the sense that in all the circumstances it is fitting and fair to the parties concerned (*Braaf v Fedgen Insurance Ltd* (supra at 940-D)). The Courts function is to assess to the best of its ability the nature and extent of the advantages and the disadvantages that would result should the order that is being sought be granted (see *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D-E). Such an application will normally be granted if the advantages that will flow therefrom outweigh the disadvantages (see *Grindrod Cotts Stevedoring (Pty) Ltd and Another v Brock's Stevedoring Services* 1979 (1) SA 239 (D) at 241A.”

[26.] The provisions of Rule 33(4) is aimed at facilitating the convenient and the expeditious disposal of litigation and in this regard see also **Denel (Edms) Bpk v Vorster 2004(4) SA 481 (SCA) at 484J-485E.**

[27.] In the matter of **Rauff v Standard Bank Properties 2002 (6) SA 693 (W) at 703G** Flemming AJP stated as follows:

“The entitlement to seek separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff’s case or an answer to a case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff’s claim (or one of the claims) without the costs and delays of a full trial. Proper handling of litigation – and accordingly professional handling of the case- requires that this avenue be explored to the advantage of the own client, the flow of Court hearings and even of the other client.”

[28.] Flemming AJP went on to hold at **703H to 704A** that:

“An attorney does not practice in isolation. That is so even if his own client cannot discern the attorney’s lack of professionalism or inability to home in on what is relevant. It is not proper work if the separation of issues is attended to long after the pleadings are closed.

The possibility of separation of issues is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs. The attorney must apply himself to an assessment of how the matter can proceed with maximum expedition and without avoidable costs. There is so much that can be done and be gained by so using the attorneys insight that the frequent excuse that

discovery must first be obtained is more often than not an exaggeration of the importance of discovery and a lame excuse for inactivity.”

[29.] Ms Gordon Turner submitted that the parties were therefore under a duty to apply for an adjudication of issues under Rule 33(4) where it would result in the curtailment of a trial. She further submitted that based on the decision in **Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D)** at 364 D-E a court in considering the divergent interests of the parties and the considerations of convenience and where it appears that the advantages outweighs the disadvantages a court will normally grant such an application. She further submitted that while it was ordinarily desirable and in the interest of an expeditious and finality of litigation to have one hearing only at which all issues were canvassed so that the whole case can be disposed of, in some instances such as the present the interest of the parties and the ends of justice would better be served by disposing of a particular issue before considering others. More so, she submitted that where the entire litigation may be disposed of with a determination of the separate issue or bring about a substantial narrowing of the disputes.

[30.] Ms De Wet who appeared on behalf of the defendant placed reliance on the decision of **CNA v MTN 2010(3) SA 362 at 408 (para 89 & 90)**:

“[89] Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is

desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.

[90] This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. 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. A trial court must be satisfied that it is convenient and proper to try an issue separately”.

In essence she submitted that the court should not be required to deal with the matter on a piecemeal basis and that given the extent that the issues are inextricably linked it would lead to a duplication of evidence and would neither be a saving of costs to any of the parties nor of any convenience to the court.

[31.] As with most contested divorce actions the positions adopted by the parties have invariably become intractable and as often occurs, are obfuscated by peripheral issues compounded by their irreconcilable differences. In such matters the courts are faced with the difficult task of ensuring that the proceedings are expeditiously conducted while at the same time upholding and fully protecting the fair trial rights of each of the parties. The mechanism in Rule 33(4) appropriately enables the court to properly consider whether discreet issues in certain circumstances can as a matter of convenience but at the same


time without undermining the rights of any of the parties be separately disposed of.

[32.] The defendant accepts that it carries the onus of proving its defence of duress. In a separate hearing the defendant will be accorded and will enjoy the fullest opportunity of ventilating the basis of such a defence. The admissibility of any evidence that the defendant may wish to lead will be regulated by the principles of admissibility and by the court upholding the fair trial rights of both parties. There is in my view merit in plaintiff's contention that although the issues may overlap in certain respects the pleaded claims of the parties can conveniently be dealt with and decided separately. I am also of the view that greater advantage is to be obtained through a separation of the issues in dispute. A trial on the duress claim will also focus the parties attention on the key issues in dispute between them. A separation will also enable the court to properly manage the disputes between the parties and the relevancy of any evidence tendered in respect of their various contentions with regard to the circumstances under which the Settlement Agreement was entered into between them.

[33.] Given the nature of the application, I am of the view that it is more appropriate that the issue of the cost of this application be determined by the trial court.

In the result the following order is made:

- (1) Directing that the questions of whether the agreement dated 21 August 2008 and signed by the Plaintiff/Applicant and Respondent/Defendant is a Settlement Agreement and whether the Respondent/Defendant signed the aforesaid agreement under duress (collectively termed as "the question of duress). Directing that this question shall be disposed of separately and prior to the trial of the remaining issues;
- (2) All further proceedings shall be stayed until such question has been disposed of;
- (3) The cost of this application is to stand over for later determination.



SALDANHA J