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

Case no: 25394/10

In the matter between:

**S F D T** Applicant

and

**C D T** Respondent

(born **VON F U P)**

**JUDGMENT DELIVERD THIS 4th DAY OF DECEMBER 2012**

**DOLAMO, AJ**

[1] This is an application brought in terms of rule 33(4) for an order separating the issues in a divorce action which was instituted by respondent (plaintiff in the divorce action) against applicant (defendant in the divorce action).

[2] The parties were married to each other on 17 July 1992 in Hamburg Germany;: out of community of property and profit and loss and by antenuptial contract which incorporated the accrual system specified in Chapter 1 of the Matrimonial Property Act 88 of 1994 (the “Matrimonial Property Act”). Clause 9 of the antenuptual contract between the parties provided as follows:

> *"The intended wife accepts the donations in 6 and 8 on the conditions stipulated therein and in consideration thereof waives any present of future*

*right whatever that she might have to claim maintenance for herself (but excluding maintenance for any dependent child or children born of the marriage) on the dissolution of the intended marriage in whatever manner and for whatever reason and regardless of the conduct of the parties."*

[3] In the divorce action the respondent claimed *inter alia* an order that the applicant's and respondent's parental rights and responsibilities in respect of their minor daughter, L M H d T (born on 29 September 1994) ("L") be governed by the terms of a parenting plan attached to the particulars of claim; maintenance in respect of L at the rate of R8 500.00 per month, as well as her medical, educational and related costs. (If the divorce action is set down for trial after L attains the age of majority, she will be able to pursue her maintenance claim in the divorce action in her personal capacity in terms of Rule 15(1).); maintenance in respect of herself at the rate of R30 000.00 per month (to be reduced to R20 000.00 by 1 January 2013), as well as her medical costs, linked with an order that this amount be reduced by R1 000.00 for every R285 000.00 in excess of R4.4 million which she will retain on divorce, together with such amount as she may be awarded in terms of her accrual claim; in the event of being awarded an amount of less than R4.4 million (together with her net assets as at date of divorce), an order that the applicant provide for her accommodation needs by making available to her a home purchased in his name for a maximum purchase price of R3.8 million and ancillary costs relating to such property; a furniture claim of R250 000.00 as maintenance to enable her to furnish and equip a home; and an order in terms of

section 3 and 4 of the Matrimonial Property Act that the applicant pay to her an amount of money equal to one half of the difference between the accrual of their respective estates.

[4] For her maintenance claim Respondent. relied on the factors set out in section : 7(2) of the Divorce Act 70 of 1979. These were she and that the applicant; have been married for eighteen years; that she had compromised her career opportunities to; care for their children (they also have a son born on 4 August 1992 who is not yet self-supporting) and to manage their home; that she was unemployed: and currently seeking work with no success; that it was unlikely, that her earning capacity in the future will be such that she will be able to support herself from her: earnings; ;in accordance with the standard of living they enjoyed during their marriage; that her existing and prospective means were such that she was unable to support herself from her own resources in accordance with the standard of living enjoyed during their our marriage; and that they enjoyed an above-average middle class standard of living during their marriage.

[5] It is alleged further in the particulars of claim that during the course of the marriage the applicant's estate has shown a greater accrual than that of the respondent. Accordingly on dissolution of the marriage the respondent will acquire a claim against the applicant for an amount equal to one half of the difference of the accrual of the parties'respective assets.

[6] Since clause 9 excluded her right to claim maintenance for herself, on dissolution of the marriage and in order to succeed with her claim for .maintenance respondent attacked the waiver condition of this clause. She alleged that clause: 9 of the antenuptual contract was contrary to public policy on one or more of the following grounds:

6.1. It deprived the respondent of her statutory right , to approach a court to claim: maintenance in terms of section 7(2) of . the Divorce Act on dissolution of the parties marriage by divorce;

6.2. It deprived the respondent of her statutory right to approach a court to; claim maintenance from defendant's estate in terms of section 2 of the Maintenance; of Surviving Spouses Act 27 of 1990 on dissolution of the parties marriage by; the; : applicant's death;

6.3. It provided for a unilateral waiver of plaintiff's right to claim maintenance-from the defendant on divorce without a corresponding reciprocal waiver on the applicant's part to claim maintenance from the respondent on divorce;

6.4. It provided for unilateral waiver of respondent's: right to claim maintenance from applicant's estate on applicant's death without a corresponding reciprocal waiver on the applicant's part to claim maintenance from the respondent's estate on her death;

6.5. It provided pre-marriage waiver of the respondent's right to claim maintenance from defendant (which may or may not eventuate) at a future uncertain date during the parties' marriage which the parties at the time of the waiver could not know and in fact did not know all the jurisdictional facts and circumstances; the court is enjoined to take into account in exercising its discretion in terms of section 7(2)of the Divorce Act which will be in existence at the time the .waiver may become effective;

6.6. It provide pre-marriage waiver of respondent’s right to claim maintenance at a future uncertain date on applicant’s death when the parties at . the time of the waiver could not and in fact did not know all the jurisdictional facts and circumstances the court is enjoined to take into account in exercising its discretion in terms of subsections 2 and 3 of the Maintenance of Surviving Spouses Act which could be in existence at the time the ; waiver may become effective;

6.7. It is contrary to the provisions of section 36 of the Constitution of the Republic of South Africa in as much as if deny the respondent the right of access to any court to claim personal maintenance;from the applicant either on divorce or death;

6.8. It is contrary to the provisions of section 10 of the Constitution of the Republic of South Africa in as much as it infringes the respondent’s right to dignity in that, without any maintenance contribution from the defendant on dissolution of the marriage she. will not be able to support herself according to the standard of living she was accustomed to during the parties’ marriage in circumstances where she, but for such waiver, would have been awarded spousal maintenance in terms of section 7(2) of the Divorce Act;

6.9. It is contrary to the provisions of section 9(1) of the Constitution of the Republic of South Africa which prescribes the right to equal protection and benefit of the law in that it unilaterally deprive plaintiff of the protection and benefits of section 7(2) of the Divorce Act and section 2 and 3 of the Maintenance of Surviving Spouses Act while it does not reciprocally deprive the applicant of such protection and;: benefit.

[7] In the alternative the respondent averred in her particulars of claim that in ;

terms of section 7(2) of the Divorce Act a court has an overriding discretion to order the payment of maintenance in favour of a spouse on dissolution of the parties5 marriage in the absence of a “written agreement” in the past with regard to the payment of maintenance by one party to the other as contemplated in section 7(1) of the Divorce Act. As a result she averred that an antenuptual contract in which a spouse waives the right to claim maintenance, on dissolution of the parties’ marriage does constitute a written agreement regarding the payment of maintenance by one: party to the other as contemplated in section 7(1). of the Divorce Act and therefore alleged that a court will, have an overriding discretion to order for a spousal maintenance in her favour having regard to the factors set out in section 7(2) of the Divorce Act notwithstanding the provisions of clause 9 of the antenuptual contract.

[8] In conclusion the respondent submitted that clause 9 of the antenuptual contract was invalid in its entirety alternatively that it is severable from the accrual provisions contained in clauses 1 to 5 and 7 of the antenuptual contract

[9] The donations referred to in clause 9 was an immovable property which was situated at 58 Twickenham Avenue, Auckland Park, Johannesburg and a sum of R300 000.00 (three hundred thousand Rand). Respondent acknowledged in her particulars of claim in the divorce action that she had received the; immovable property donation, pursuant to clause 6.1 of the antenuptual contract, but was.unable to.restore it since the property in question had been sold. In lieu of restitution of the benefits she received in terms of clause 6.1 of the antenuptual contract, the

respondent tendered to make such substitute restitution as the court may deem fit As regards the sum of R300 000 she aileged; that she had not received .in full this sum of money but nevertheless tendered restitution of what she had received till then.

[10] The applicant in his plea to the divorce action, admitted to the irretrievable break-down of their marriage and that: there were no reasonable prospects of a restoration of a normal marriage between them but denied that this break-down v/as brought about by the factual circumstances alleged by the respondent:. He also denied that clause 9 was invalid and pleaded that the respondent had affirmed ^nd given effect to the ante-nuptuai contract and accordingly couId not approbate ancj reprobate.

[11] Attempts at settling the divorce matter has, according to the parties- proved unsuccessful. As a result of intractable positions in which the parties found themselves the applicant launched the present application for an order that the question of law or fact, being the validity of clause 9, be decided separately from any other question, and that all further proceedings in the action be stayed until suph question has been decided. The applicant alleged that the issue of the validity, and enforceability of clause 9 of the ante-nuptial contract is an issue which can conveniently be decided before any evidence is led separately from any other condition.

[12] This was disputed by the respondent who;alleged that in order to. establish that clause 9 is contrary to public policy she. intends to lead detailed^evidence, more

particularly about her current earning capacity and future earning capacity; applicant's current and future earning capacity;; applicant's current assets and liabilities as well as his access to additional funds;;\their standard of living during the marriage; her reasonable maintenance needs and requirements and obligations; the contributions she made to the children and her family during her marriage; the prejudice, depravation and. indignity she. will suffer if she was precluded from pursuing her maintenance claim on divorce;. and the extent of accrual claim inasmuch as this will have a material bearing on any prospective means. This, evidence will be by herself as well as by several expert witnesses. For this reason she denied that a separation of the issues in terms of Rule 33(4), regarding the validity of clause 9 of the ante-nuptual contract, will eliminate all evidence in regard to her maintenance or the applicant's ability to pay. She also alleged that even if the court could hold that clause 9 of the ante-nuptual contract was invalid and unenforceable this will not dispense with the need for evidence which will also be required on other issues in the divorce. According to the respondent the proposed rule 33(4) separation of issues will result in the unnecessary duplication of evidence with potentially conflicting credibility findings and a considerable lengthening pf .the proceedings.

[13] She anticipated that since the issue which the applicant seeks to dispose of in terms of rule 33(4) was highly controversial, there was a real possibility that the decision will be: appealed against by the unsuccessful party which will only delay the finalisation of the divorce.

[14] The question for determination is whether a separation of the: issues: in terms of

rule 33(4) as contemplated by the applicant will have the desired effect ofconveniently deciding the question of the validity of clause 9 of the ante-nuptial contract and which would lead to curtailing the proceedings in the divorce action.

[15] The question of separating issues in a trail is governed by Rule 33(4) which provides that if in any pending litigation it appears to the court *mero moto* 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 a 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 question cannot be conveniently decided separately.

[16] The applicant submitted that it was common cause that the parties' marriage has irretrievably broken down with not prospects of reconciliation; that the one minor child would soon turn major (has since turned major) and that the. ante-nuptial contract incorporated the accrual system as specified in Chapter I of the; Matrimonial Property Act 88 of 1984 and as such the claim based: on accrual would arise on divorce and can be computed then and therefore not an issue to be debated in the action. There were other issues arising from , the .applicant's, counter-blaim and conditional counter-claims; such as non-compliance with clause 8 of the ante-nuptial contract none of which, he submitted, affects the question of the validity of clause 9 which is

raised by the respondent . He. submitted, that .the grounds on which the respondent was attacking, the validity of clause 9 of,the ante-nuptial contract were issues of law on which the court can adjudicate either without evidence or with minimal amount of evidence unrelated to any other remaining issue on the pleadings.

[17] As regards the respondent's submissions that she would have to lead evidence, of herself and possibly of experts, to prove that clause 9 was contrary to public policy because this involved an assessment of the facts as set out in section 7(2) of the Divorce Act and a consideration of the effect of the maintenance waiver at the time of divorce, Mr Van Rooyen SC who appeared for the applicant, submitted that this amounted to circular reasoning. According to him the validity of clause 9 does not depend on evidence about standards of living nor income. Neither is her living standard a matter of public policy. Accordingly he submitted that the public has no interest in the waiver by an individual of a contingent claim for maintenance. The rest of his submission, in my view, went into the merits of whether clause 9 was validor not, which is not what this court is asked to determine at this stage. What this court is asked to determine at this stage is whether it would be convenient to separate the question of the validity of the clause from other issues in the divorce action.

[18] Respondent's main ground for opposing a separation of issues is that this will result in the. same evidence being canvassed at two different, hearings with potentially conflicting credibility findings and determinations. This will considerably lengthen the proceedings and inconvenience witnesses and the court. Furthermore this will cause an unnecessary delay in finalising . the divorce and the determination

of the remaining issues. Ms Gassner SC, who appeared for the respondent, was furthermore of the view that the applicant resorted to. the Rule 33(4) application in an attempt to avoid discovery procedures directed at establishing his income, assets and liabilities, as well as his access to trust funds. Finally she submitted that such a separation will lead to an escalation of legal costs.

[19] While the Court may *mero moto* order a separation of issues when it deems it convenient to deal separately with any issue of law or fact the latter part of Rule 33(4) makes it clear that a court shall on the application of any party grant an order for the separation of issues unless it appears that the questions cannot be conveniently decided separately. This view is supported by the authorities. In *Devel (Edms) Bpk v Vorster* 2004(4) SA 481 Nugent JA held at paragraph [3] that:

*"[3] Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules- which entitles a Court to try issues separately in appropriate circumstance's is aimed at facilitating the convenient and expeditious disposal of litigation. It should hot 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 expedition 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. But, where the trial Court is satisfied that it is proper to make such an order and, in all cases, it must be*

*satisfied before it does so it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in this order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience*, *it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, a trial Court should ensure that the issues are circumscribed with clarity and precision. It is a matter to which I shall return later in this judgment "*

[20] In *African Bank v Covmark Marketing CC* 2008(6) SA 46 (C) at 51 Moosa AJ held that it was clear from the authorities that it is incumbent upon a party opposing an application for a separation, in terms of Rule 33(4), to satisfy the court that .the application should not be granted and that the balance of convenience favours him; In *Braafv Fedgen Insurance Ltd* 1995(3) SA 938 (CPD), it was held.that the keyword is "conveniently" which mean convenient to the court in the first instqnqe and ajso to both parties. In *Minister of Agriculture v Tongaat Group Ltd* 1976(2) SA :357 (D & CLD) Milner at 362T held that: "*it goes without saying that it is not the- convenience of any one only of the parties, or of the Court only that is the criterion"* and at 363A that:

> *"a most important consideration will, no doubt, usually be whether a preliminary hearing for the decision of such questions would materially shorten proceedings."*
>
> *and at 363D:*

"*.....It appears to be used to convey also the notion of appropriateness: the procedure will be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned.*

[22] While lauding the benefit of a separation of issue Miller J cautioned [at 363D]: that:

" . . *it must be borne in mind that the grant of an application under the Rule, although it might result in the saving of many days of evidence in Court, might nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy, barren interrogation between ., the conclusion of the first hearing at which the special question one canvassed and the commencement of the trail proper.*

The same sentiments were echoed by Mlambo JA (as he then was) in: *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005(5) SA 276 (SCA) at 282 par[27] as follows:

*“[27] In the present case, in spite of the separation of the issues as sanctioned by the trial Court in terms of Rue 33(4), almost all causes of action and defences are still open to the parties. The underlying dispute (between the parties) has yet to be determined. For example, thd defence of estoppel raised by the appellant, and which. was foreshadowed in the particulars^ of claim, still awaits its day in court. Neither counsel could deny that all the litigation thus far has not resulted in the expeditious disposal thereof despite the fact that it has now gone through, three Courts at*

*monumental cost, no doubt, to the litigants. I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of Rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditions disposal of litigation."*

[22] In CNA v MTN *2010(3) SA 382 (SCA) at paragraph [90] the court stated; that:*

*[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 m 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."*

[23] With the principles gleaned from the aforesaid authorities in mirid.I turn to determine whether the separation of the question of. the validity of clause 9: of the ; ante-nuptial contract, from the rest of the issues in the divorce will be convenient in : ; the sense of leading to an expeditious disposal of the matter. One particular aspect; in my view holds the key *in casu* to the determination of this question. Mr Van Rooyen submitted that the question of the validity of clause 9 is a question of

law ; which can be determined without leading evidence or the hearing: of minimalj evidence. The problem with leading evidence as Leach J pointed out in *Maa de:*^ *Burgh v Guardian National Insurance Co Ltd* 1997(2) SA 187 at 189J, is that there: is no room in Rule 33(4) for a court, on ordering separation of issues, to make any order in respect of what evidence, may or may not be relevant All' *a* court is : empowered to do is to order that certain issues be tried separately from others. Once' the order has been issued directing an issue to be disposed of separately and that issue is then before court, it is for that court to decide: what evidence may or may not be relevant to such issue. The fact that Mr Van Rooyen contemplates that evidence may be led in determining the validity of clause 9 of the ante-nuptial agreement is in my view, indicative of the fact that the benefit of a speedy resolution, hoped to be derived from the separation, may not eventuate. There is a real likelihood that the parties may for example lead evidence as to the background leading to the inclusion of the clause, the reasons for the inclusion; its interpretation; its severability from the rest of the: agreement and whether the clause is against public policy etc. all of which will negate the envisaged shortening of proceedings. This, if it happens, and; there is a high likelihood that it ma^ would come at considerable costs to the litigants coupled with the other attended problems of costs and delay in the expeditious disposal of the matter.

[24] For the reasons set out *supra* 1= am of the view that the question of the validity of clause 9 of the ante-nuptial contract cannot conveniently be decided separately from all the other questions in the divorce matter. It will be convenient to hear the whole matter at once to ensure a speedy disposal which, judging; from what has already transpired between the parties appear to be in the best interest of all. This

matter no doubt has invoked strong emotions. Litigation conducted in a highly combative atmosphere such as this one which does not bode well for any of parties and has to be finalizes without undue delay. The: sooner it is disposed of the better for the parties so that they can .move on with their lives.

[25] The application is accordingly dismissed with costs which costs shall include the employment of two counsels.

**DOLAMO, AJ**