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

Case No: **6912/2013**

In the matter between:

K O (born H)	Applicant/Plaintiff
and	
M O	Respondent/Defendant

Court: Acting Justice JH Loots
Heard: 28 August 2017
Delivered: 21 November 2017

REPORTABLE

JUDGMENT

[1] With the present application, the latest in a string of applications by both parties in what can only be described as an extremely acrimonious divorce action, the applicant, in terms of Uniform Rule 33(4), seeks to have the

question of the decree of divorce separated from the remaining issues in the action.

[2] This the applicant has formulated in paragraph 1.1 of the Notice of Motion, as follows:

> "whether a decree of divorce should be granted, as claimed by Applicant (Plaintiff in the main action) in prayer (A) of her Amended Particulars of Claim and admitted by Respondent (Defendant in the main action) in paragraph 1 of his amended Plea, as further amended, to Plaintiff's Amended Particulars of Claim based on the irretrievable breakdown of the parties' marriage"

[3] Together with the above relief, the applicant seeks, per prayer 2 of the Notice of Motion:

> "that all further proceedings in the main action be stayed until the aforementioned issues have been determined and the decree of divorce dissolving the marriage between Applicant and Respondent has been granted".

[4] The respondent opposes the application.

RELEVANT CHRONOLOGY

[5] The parties were married on 16 December 1995, out of community of property, by antenuptial contract, with the inclusion of the accrual system as provided for in Chapter 1 of the Matrimonial Property Act 88 of 1984. They have four children; E (born on […] 1996), H (born on […] 1998), J (born on […] 2006) and T (born on […] 2008). T and J are still minors, while E and H, although both having reached the age of majority, are still reliant on their parents for support.

[6] The parties separated on 22 November 2012 and have lived apart ever since, with the applicant also having entered a committed relationship.

[7] It is common cause the parties' marriage relationship has broken down irretrievably; with the result that, on 6 May 2013, the applicant instituted divorce proceedings.

[8] In November 2014 Nuku J certified the matter trial ready, with the result that 15 April 2015 was allocated as the date on which the trial was to proceed.

[9] In December 2014 the applicant instituted proceedings in terms of Uniform Rule 43 for a contribution of the monthly maintenance requirements of the children.

[10] On 19 February 2015, Blignault J, by agreement between the parties, *inter alia*, made the parenting plan annexed to the draft order that served before him an order of court; and ordered that, pending the determination of the divorce action, the respondent shall continue to contribute to the maintenance of the parties' children as set out in the order.

[11] On 15 April 2015 the trial was postponed to 4 August 2015.

[12] On 28 April 2015, the applicant's Rule 43 application (under case number 21450/14) was heard pursuant to which Ndita J, on 29 April 2015, granted an order in terms of which the respondent was ordered to pay a monthly cash contribution in the amount of R28 000.00 towards the maintenance of the parties' children, as well as to make payment of certain expenses relating to

the children, pending the determination of the divorce action between the parties.

[13] On 3 July 2015 the respondent launched an application pursuant to the provisions of Uniform Rule 43(1)(b), in terms of which he sought a contribution towards his legal costs in the amount of R 498 180.00. On 8 September 2015 this application was dismissed.

[14] In the meantime the trial was postponed from 4 August 2015 to 26 October 2015.

[15] On 26 October 2015 the trail was again postponed, this time to 19 April 2016.

[16] On 27 January 2016 the applicant instituted contempt proceedings against the respondent arising from his failure to comply with the order granted by Ndita J in April 2015.

[17] On 5 February 2016 the trial was removed from the roll and postponed from 19 April 2016 to 10 May 2016. The trial did not proceed on 10 May 2016 and it has not been set down again.

[18] Also in February 2016 the respondent approached the Wynberg maintenance court for a reduction in the maintenance ordered by Ndita J. The court refused to entertain this application and the respondent then appealed the magistrate's decision. The appeal was dismissed.

[19] The following month, on 11 March 2016, the respondent instituted an urgent application against the applicant and her mother in terms of which, *inter alia*,

the respondent sought to prevent the applicant from making payment to her mother of the proceeds of the sale of an immovable property in respect of which a bond was registered in favour of the applicant's mother. This application was heard on 6 April 2016, and dismissed with costs.

[20] The aforementioned contempt application was heard by Kose AJ on 10 May 2016 who, on 30 May 2016, found the respondent to be in contempt of court.

[21] On 30 September 2016 Kose AJ heard argument with regard to the appropriate sanction in respect of the respondent's contempt of court, but is yet to deliver judgment in this regard. At this juncture I mention that, while the applicant pressed me not to hear the respondent due to his failure to purge his contempt, because the application before me has the potential to affect the rights of the parties' children, particularly those of their minor sons, Jacob and Thomas, I considered it appropriate to hear the respondent, despite his failure to have purged his contempt.

[22] Shortly before the hearing of this application the respondent instituted an application in terms of Uniform Rule 43(6), seeking a reduction in the maintenance obligations, as well as a R 50 000.00 contribution towards his legal costs. This application has been dismissed.

[23] Numerous attempts at mediation have failed.

UNIFORM RULE 33(4)

APPLICANT'S CONTENTIONS IN FAVOUR OF THE SEPARATION OF ISSUES

[24] In support of the application the applicant, essentially, contends the following:

a. That the matter is not trial ready and should again be placed on the managed pre-trial roll. In support of this contention she cites the facts that discovery is outdated, and so are the expert reports relating to the patrimonial consequences of the dissolution of the parties' marriage.

b. A decree of divorce will draw a line in the sand for the purpose of calculating the relative accrual of the parties' estates.

c. She has entered into what is already a long term, committed, relationship. She wishes to marry her partner but, because the parties' divorce has not been finalised, she is unable to do so.

d. The children are being adversely affected by virtue of the divorce not nearing finalisation, despite the parties being ad idem that the marriage relationship is beyond redemption. As an illustration of this, the applicant attached a letter from Thomas' class teacher to the founding papers.

e. The delay in finalising the divorce is adversely affecting the applicant's health. In confirmation of this contention the applicant annexed to the founding papers a letter from a health care practitioner she has been consulting regularly.

RESPONDENT'S OPPOSITION

[25] Against the factors advanced in support of the application, the essential opposing contentions must be juxtaposed. These are:

a. That a separation of the issues pertaining to the welfare of the children from the decree of divorce is impermissible as being in conflict with section 6(1) (a) of the Divorce Act.

b. The Applicant's motivation for the separation is essentially a matter of convenience for her, rather than a matter of convenience to all concerned, including the court.

c. The applicant's true motive for the separation is to stifle all further litigation between her and the respondent.

d. A separation will not materially shorten the proceedings.

e. The applicant is seeking to avoid the consequences of a calculated choice that she made to introduce into the divorce action a considerable commercial claim against the respondent for the payment of an amount of some R 4 050 000,00 plus interest. By seeking to delay the determination thereof indefinitely, she is, in effect, "withdrawing" the claim, but avoiding tendering the costs.

f. It is neither appropriate nor fair to separate the issues as proposed and the proposed separation is highly prejudicial to the respondent, essentially because a decree of divorce will deprive him of the benefit of Uniform Rule 43 prior to the finalisation of the divorce. Specifically

the respondent contends that he would not be able to apply for a cost contribution from the applicant.

THE PROVISIONS OF UNIFORM RULE 33(4)

[26] Uniform 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 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."

[27] The purpose of Uniform Rule 33(4) was formulated as follows in *Rauff v Standard Bank Properties*[1], where Flemming AJP stated:

> "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."

[28] To the above statement by Flemming AJP the statements of the Supreme Court of Appeal, in *Denel (Edms) Bpk v Vorster*[2], where the scope and application of Uniform Rule 33(4) was discussed, must be added:

> "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

[1] 2002 (6) SA 693(W) at 703.

[2] 2004 (4) SA 481 (SCA), at par [3].

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."

[29] These views were echoed by the Supreme Court of Appeal in the judgment of *Molotlegi v Mokwalase*[3] where they were expressed as follows:

"It follows that a court seized with such an application (for a separation of issues in terms of Rule 33(4)) has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition the court considering an application for separation is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously."

[30] I am, accordingly, mindful thereof that, despite the wording of Uniform Rule 33(4) and the important function its provisions fulfil in the efficient management of litigation, expeditious disposal of litigation is often best served by ventilating all the issues together.[4]

[3] 2010 All SA 258 (SCA) at par 20.

[4] *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at pars [26] and [27]; *First National Bank – A Division of Firstrand Bank Limited v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] JOL 32957 (SCA) at par [9]; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at par [21]; *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA) at par [45]; and *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) at pars [89] – [91]

[31] I am also mindful thereof that one should not lose sight of the possibility of inconvenience and prejudice to a party should the litigation be dealt with on a piecemeal basis[5].

[32] For, I believe, similar reasons the courts have distilled the following factors in their application of Uniform Rule 33(4)[6]:

a. Whether the hearing on the separated issues will materially shorten the proceedings.

b. Whether the separation may result in a significant delay in the ultimate finalisation of the matter[7]. The granting of the application, although it may result in the saving of many days of evidence in court, because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper, may nevertheless cause considerable delay finalising the matter.

c. Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated out are controversial and appear to be of importance.[8]

d. Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues[9].

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[5] *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 941D.

[6] *Hollard Insurance Company Ltd v SA Coetzee and Others* (24120/2011) [2015] ZAWCHC 57 at par [15].

[7] *Netherlands Insurance Co of SA Ltd v Simrie* 1974 (4) SA 287 (C) at 289B – C.

[8] *Hollard Insurance Co Ltd v S A Coetzee and Others* *supra* at par [15]; and *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363G – 364B.

e. Whether the evidence required to prove any of the issues in respect of which a separation is being sought will overlap with the evidence required to prove any of the remaining issues[10].

[33] It is also so that convenience must be demonstrated, and it is therefore incumbent on the applicant for a separation of issues to set out facts with sufficient specificity to enable the court to consider whether, *prima facie*, it is convenient to separate the issues.[11] Once the applicant has done this the *onus* to demonstrate that the balance of convenience favours him, and therefore that a separation should not be ordered, rests on the respondent[12]. Failing to discharge this *onus* will result in the court being obliged to order the separation.

DISCUSSION

FACTORS IN FAVOUR OF GRANTING THE SEPARATION CONSIDERED

[34] In considering this aspect I have grouped *inter alia* the factors listed above together as set out below.

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[9] *Denel (Edms) Bpk v Vorster* *supra* at par [3]; and *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* *supra* at par [89].

[10] *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SECLD) 411 G – I.

[11] *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* *supra*; and *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* *supra* at 413 D – G.

[12] *Braaf v Fedgen Ins Ltd* 1995 (3) SA 938 (C) at 939.

It is Common Cause that the Marriage Relationship Has Broken Down Irretrievably

[35] As stated above, the parties are *ad idem* that their marriage relationship has broken down irretrievably.

[36] Accordingly, I consider the following statement in *CC v CM*[13] at paragraph [42], apposite:

> "The need decreed by public-policy considerations to as soon as possible normalise the lives of parties bound to a moribund broken-down marriage was highlighted in *Levy v Levy* 1991 (3) SA 614 (A), which militates against parties being shackled to a dead marriage."

[37] Therefore, if a court is able to do so it must endeavour to give effect thereto. This will in appropriate circumstances, as indeed happened in *CC v CM*, include ordering the separation of the hearing of the issues relevant to the decree of divorce from the remaining issues in dispute between the parties.

[38] In the present matter:

a. The parties have been separated for five years.

b. The applicant is in a committed relationship and wishes to marry her partner. This she cannot do unless the marriage between her and the respondent is dissolved.

c. It cannot be seriously disputed that the delay in the finalisation of the divorce is hampering the commencement of the normalisation of the

[13] 2014 92) SA 430 (GJ).

lives of the parties, particularly (for the reasons set out above) that of the applicant.

d. It can also not be seriously disputed that the delay in the finalisation of the divorce action is having a negative impact on the health of the parties' children, specifically with reference to T.

[39] In addition a decree of divorce carries the benefit that the parties can, in circumstances where they have for many years led separate lives, both build up separate estates without fear of this impacting on the accrual, with the converse risk of a diminution in one party's estate in the present instance (where the respondent contends that he is entitled to benefit from the accrual in the estate of the applicant) not outweighing this benefit to be gained by a decree of divorce.

Calculation of the Accrual

[40] It is common cause that the patrimonial consequences of the dissolution of the parties marriage form part of the divorce action, and that this aspect of the action, including the calculation of the respective parties' estates for the purposes of accrual, remains in dispute.

[41] It is well established that accrual, in terms of section 3 of the *Matrimonial Property Act*[14], is calculated at the dissolution of the marriage, i.e. the date of divorce[15].

[14] Act No. 88 of 1984.

[15] *AB v JB* 2016 (5) SA 211 (SCA) and the cases cited there.

[42] In circumstances where it was contended that, due to the delays in the finalisation of the action, discovery is outdated as are the expert reports relating to the parties' estates, both parties would benefit from a definite date from which to calculate the value of their respective estates for the purpose of the calculation of accrual.

[43] This is so because the parties would then have a fixed reference point on which to base their respective contentions in regard to accrual; which, in turn, will to a large extent prevent a repetition thereof that discovery, as well as the expert reports, are rendered outdated and redundant through the passage of time.

[44] The separation of the question of whether to grant the decree of divorce, to be heard prior to the questions relating to the patrimonial consequences of the dissolution of the parties' marriage, therefore carries with it the very real prospect of an earlier finalisation of the divorce action than would be the case if the date for the calculation of the accrual is to be an uncertain future date of divorce.

No Delay in Finalising the Divorce Action

[45] Since, as stated above, it is common cause that the parties both seek a decree of divorce, the questions of overlapping evidence and the possibility of conflicting findings on the same or similar issues do not arise in this instance.

[46] To this must be added the already stated benefits of having a fixed point from which to calculate accrual.

[47] In addition, and as alluded to above, should there not be certainty with regard to the date on which the accrual is to be calculated, there is a definite risk that the litigation will be even more protracted as, should the action not be finalised soon after the matter has again been declared trial ready, the information presented in respect of the parties' respective estates may, once again, be rendered outdated and thus redundant.

[48] Because the Uniform Rules empower litigants enforce to compliance with the rules of court I do not accept that the applicant will be in a position to escape the consequences of having instituted any claim. It is within the power of the respondent to prosecute the remaining issues in the divorce action, and to force the applicant to do the same unless she formally withdraws any portion of her case in terms of the Uniform Rules

THE OPPOSITION TO THE SEPARATION OF THE ISSUES CONSIDERED

[49] I now turn to those grounds of opposition not discussed as part of the previous section; which grounds I have, similarly, grouped together where it appeared appropriate.

Section 6 of the Divorce Act

[50] In *Schwartz v Schwartz* [16] Corbett JA (as he then was) summarised the position regarding the discretion in respect of the grant of a decree of divorce as follows:

[16] 1984 (4) SA 467 (A) at 474 D- 475 C; cited with approval, and applied, in *Levy v Levy* 1991 (3) SA 614 (A).

“Section 4 (1) empowers the Court to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage "if it is satisfied that..."; and then follows a specified state of affairs which is in effect the statutory definition of irretrievable breakdown. Clearly satisfaction that this state of affairs exists is a necessary prerequisite to the exercise by the Court of its power to grant a decree of divorce on this ground. But once the Court is so satisfied, can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize on what grounds a Court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff. In Smit's case supra it seems to be suggested that, notwithstanding the fact that a marriage has broken down irretrievably, the Court may refuse a decree of divorce in order to exercise the power granted to it in terms of s 4 (3) of the Act, ie to postpone the proceedings in order that the parties may attempt a reconciliation (see at 41H - 42A). The pre-requisite to the exercise of the power contained in s 4 (3) is that it must appear to the Court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection. If there is this reasonable possibility, can it be said that the marriage has broken down irretrievably? And conversely if the marriage is found to have broken down irretrievably, can such a reasonable possibility exist? It seems to me that there is much to be said for the view that these concepts, ie irretrievable breakdown and the reasonable possibility of reconciliation, are mutually contradictory and that the existence of the power conferred by s 4 (3) does not necessarily indicate a residual discretion vested in the Court by s 4 (1).

In Smit's case supra at 42A s 6 (1) is also referred to, apparently in support of the thesis that the Court enjoys a discretion under s 4 (1). Section 6 (1) provides that a decree of divorce "shall not be granted" until the Court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. And in order to satisfy itself in this regard the Court is empowered by s 6 (2) to cause any investigation which it may deem necessary to be carried out. Section 6 (1) thus requires, in imperative terms, that the Court should be satisfied in regard to these matters concerning minor or dependent children before it grants a decree of divorce. The power of the Court to grant a decree of divorce on the ground of irretrievable breakdown of the marriage (and on the other grounds stated in s 3) is thus qualified, or made subject to, the Court being satisfied as to the matters referred to in s 6 (1); but I do not read s 6 (1) as conferring, or substantiating the existence of, a discretion under s 4 (1).”

[51] From the above passage it is evident that:

a. Where the court is satisfied that a marriage has broken down irretrievably the court has no discretion but to grant a decree of divorce; save that

b. The court can only grant the decree of divorce if, as is provided by section 6(1) of the Divorce Act, it is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.

[52] The manner in which the applicant has framed the issue for referral, as set out in paragraph 1.1 of the Notice of Motion, does not fetter the court with regard to compliance with the provisions of section 6(1) of the Divorce Act.

[53] The court hearing the issue of the decree of divorce will therefore, in deciding whether to grant a decree of divorce, have the ability to satisfy itself that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.

[54] This in my view disposes of this ground of opposition, as advanced.

[55] Notwithstanding the foregoing, it also bears mentioning; firstly, that there is a parenting plan that has been implemented and which, as was recorded above, has by agreement been made an order of court, together with further maintenance provisions in respect of the parties' children; secondly,

considering the papers before court, the parties appear to be of sufficient means to maintain the children (with the applicant certainly having contended to be so); and thirdly, as will be discussed below, the provisions of Uniform Rule 43 will remain available to the parties to the extent necessary.

Uniform Rule 43

[56] One of the central grounds advanced both in support of the application for separation and as a ground of opposition was that, once a decree of divorce has been granted, the relief granted in terms of Uniform Rule 43 lapses and an ex-spouse would no longer be entitled to the relief afforded a spouse in terms of the Rule.

[57] The basis of the contention that the relief in terms of Uniform Rule 43 lapses, and that once a decree of divorce is granted relief in terms of this section is not open to parties in a matrimonial action, is the appearance of the word "spouse" in sub-rule 43(1). In support of these contentions I was referred to the case of *Bienenstein v Bienenstein*[17] where, at 451 D, De Villiers AJ found that Uniform Rule 43 refers only to pending matrimonial disputes, adding "that is before the final order of divorce has been granted".

[58] As was found in the matter of *Carstens v Carstens*[18], to which case I shall return presently, and in contradistinction with *Bienenstein*, which concerned a Rule 43 application during the appeal stage of proceedings where the entire divorce action had been finalised, the action in the present instance will still be

[17] 1965 (4) SA 449 (TPD).
[18] (2267/2012) [2012] ZAECPEHC 100 (20 December 2012), Saflii.

pending following the separation of issues the applicant prays for. In the present instance I, therefore, also find that ***Bienenstein*** is distinguishable on the facts that served before De Villiers AJ to the matter serving before me.

[59] In respect of the word "spouse", as it appears in Uniform Rule 43(1), I agree with Roberson J in her analysis of the meaning of the word as contained at paragraphs [5] and [6] of the judgment in *Carstens v Carstens*, where she stated the following:

> "[5] It was submitted on behalf of the respondent that the words "*pendente lite"* and "pending matrimonial action" contained in Rule 43, relate to an action that has not been finalised. The marriage between the parties has come to an end by divorce, therefore, so it was submitted, Rule 43 does not apply. It was further submitted that a claim for contribution towards costs is *sui generis* and applies to spouses: the parties are unrelated litigants and there is therefore no obligation on the respondent to contribute towards the applicant's costs.
>
> [6] It is so that the parties are no longer married. However the "matrimonial action" has not been finalised. The status of the applicant with regard to the remaining issues in the action, is that of a spouse. It can be nothing else. The parties themselves agreed in the Rule 37 minute that interim arrangements would continue until the action was finalised. This agreement could only mean that the respondent acknowledged that the applicant was still a spouse, or was pursuing relief to which she was allegedly entitled as a spouse, for the purpose of adjudication of the remaining issues. The situation is distinguishable from that in *Bienenstein v Bienenstein* 1965 (4) SA 449 (TPD), to which I was referred. In that matter the respondent had instituted an action against the applicant for restitution of conjugal rights and failing which, divorce. A final order of divorce was granted. The applicant noted an appeal against this order and applied in terms of Rule 43 for a contribution towards her costs of appeal. With reference to the contention of the applicant's counsel that the application fell under Rule 43, De Villiers AJ said the following at 451D:

> "I cannot agree with that contention. Rule 43 to my mind clearly refers only to pending matrimonial disputes; that is before the final order of divorce has been granted."

In *Bienenstein*, unlike the present matter, no further matrimonial disputes were pending. The judgment therefore does not assist the respondent." [emphasis added]

[60] It cannot be the correct position that, in a pending divorce action, following a granting of the decree of divorce, the fact that the parties are no longer married, would disentitle a person who, until the decree of divorce (which is but one part of the divorce action), was entitled to the relief set out in Rule 43, *pendente lite*, would no longer be entitled thereto due to an unnecessarily strict interpretation of the word "spouse" for the purpose of the Rule.

[61] Accordingly, I find that, pending the finalisation of the divorce action, an extant order in terms of Rule 43 survives a decree of divorce to the extent the issues regulated thereby remain unresolved.

[62] The finding that an existing order in terms of Uniform Rule 43 does not lapse with the granting of a decree of divorce in circumstances where the remaining issues in the divorce action remain pending in terms of Uniform Rule 33(4), follows ineluctably. This is reinforced by the wording of Rule 43(1) itself, the relevant portion of which states that:

> "This rule shall apply <u>whenever a spouse seeks relief</u> from the court in respect of one or more of the following matters:" [emphasis added]

There is nothing in Rule 43 which states that, once relief has been granted to a spouse in terms thereof, the order lapses following the granting of the decree of divorce; save where the matrimonial action is no longer pending. In

addition to this the definition of a divorce action, as contained in section 1 of the Divorce Act[19], militates against finding otherwise.

[63] Section 1 of the Divorce Act defines a divorce action as follows:

> **'divorce action'** means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-
>
> (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
>
> (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application."

[64] Save for it being necessarily so that only a spouse[20] can apply for a decree of divorce, the remaining relief contemplated by the definition is not dependant on a party being a spouse at the time the relief is sought; with the operative words in sub-section (a) being "*pendente lite*" and in sub-section (b) being "such action". Should the legislator have wished to limit the relief claimable in a pending divorce action to only spouses, the Divorce Act would have stipulated so in terms, and would not have contented itself with the manner in which it defined a divorce action.

[65] I am further fortified in my view when the purposes of Rule 43 are concerned. In a nutshell Rule 43 aims (in a robust and cost effective manner) to provide interim relief on certain aspects in a divorce action pending their final

[19] Act 70 of 1979.

[20] A term which is not separately defined in the Divorce Act, but which must be construed in accordance with the development of the definition thereof by both Statute and the courts.

determination[21], and to provide a level playing field in respect of the determination of the action. It would therefore make no sense that aspects of the action the Rule intends to regulate pending their determination would lapse despite not having been finally determined.

[66] Furthermore, in the present matter the operative part of the order granted pursuant the applicant's application in terms of Uniform Rule 43 under case number 21450/14 commences with the words "pending the determination of the divorce action". The order will therefore, in terms, not lapse on the granting of the decree of divorce should the envisaged separation of issues be ordered, but will remain in force pending the determination of the divorce action.

[67] In my view the same principles stated above regarding the lapsing of the relief granted in terms of Rule 43 also applies to the contention that the relief becomes unavailable to an ex-spouse pending the finalisation of the divorce action the moment a decree of divorce is granted.

[68] From what has been stated above regarding the definition of a divorce action in the Divorce Act; should it have been so that the relief granted in terms of Uniform Rule 43 lapses or becomes unavailable on the granting of a decree of divorce in the current circumstances, an applicant for the relief contemplated in the definition of divorce action, but regulated in terms of Rule 43, would have to launch proceedings in terms of Uniform Rule 6. In both these scenarios Rule 43 was imported to prevent the necessity of having to do so,

[21] *Du Preez v Du Preez* 2009 (6) SA 28 (T).

and in the former scenario the applicant would be constrained to apply for the same relief he or she had already obtained in terms of Uniform Rule 43.

[69] For the reasons mentioned above I also find that an agreement such as was referred to in *Carstens* is not a prerequisite for Uniform Rule 43 to remain operative following the granting of a decree of divorce, but pending the finalisation of the action, the reference to which appears to have been included in the said judgment, not to serve as a *sine qua non*, for the Rule to remain operative, but in support of the definitional analysis undertaken by Roberson J[22].

[70] The above findings dispose of the remaining factual grounds of opposition advanced by the respondent, in that the respondent will be entitled launch applications for cost contributions until the final determination of the action.

[71] It also makes it unnecessary to consider the effect the lapsing of the Rule 43 order would have on the maintenance of the parties' children, the respondent's concerns in respect of which have already been dealt with above.

CONCLUSION

[72] In the premises I find that the applicant has made out a proper case for separating the question of the granting decree of divorce from the remaining

[22] In this regard, I mention in passing that paragraph 4 of the order by agreement made by Blignault J, referred to in the narrative above, it is ordered that " Pending the determination of the divorce action between the parties, respondent shall continue to contribute to the maintenance of the minor children Hannah, Jacob, and Thomas, as follows:" [Emphasis added]. Although this order appears to have been overtaken by the order made pursuant to Rule 43, which itself, as stated in the narrative, provides that it will remain in force pending the determination of the divorce action.

issues in dispute between the parties and that it be heard separately and prior to those issues.

COSTS

[73] Having considered whether it would be more appropriate to have costs stand over for later determination, I have come to the conclusion that this court is in the best position to consider the question of costs in respect of this application.

[74] In awarding costs I have come to the conclusion that the circumstances of this application do not warrant a departure from the ordinary rule that costs follow the event in respect of which I mention that, *inter alia*, I have considered the fact that the applicant has been substantially successful in the application, as well as that the respondent asserted that he would not have opposed the application should the applicant have agreed thereto that the provisions of Uniform Rule 43 remain operative, pending the finalisation of the divorce action.

[75] With regard to the respondent's aforementioned assertion I have also considered the effect of the respondent's opposition based on section 6 of the Divorce Act (which contradicts the respondent's assertion that he would have agreed to the order in the circumstances described in the immediately preceding paragraph), on the respondent's opposition of the application as a whole.

ORDER

[76] I, accordingly, make the following order:

a. The following questions of law or fact are to be decided separately from and before any other issues in dispute in the action pending under case number 6192/2013 ("the main action"):

i. whether a decree of divorce should be granted, as claimed by Applicant (Plaintiff in the main action) in prayer (A) of her Amended Particulars of Claim and admitted by Respondent (Defendant in the main action) in paragraph 1 of his amended Plea, as further amended, to Plaintiff's Amended Particulars of Claim based on the irretrievable breakdown of the parties' marriage.

b. All further proceedings in the main action are stayed until the aforementioned issues have been determined and the decree of divorce dissolving the marriage between applicant and respondent has been granted.

c. The respondent is ordered to pay the applicant's costs.

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JH LOOTS

Appearances:

For the Applicant: Adv L Buikman SC, instructed by Catto Neethling Wiid Attorneys.

For the Respondent: Adv F Gordon-Turner, instructed by Luitingh & Associates.