

**Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Appeal Case No. A91/2023
Case Number (Court a quo) RCC/SW1741/2018
REPORTABLE**

Before: The Hon. Ms Justice Mantame
and Ms Acting Justice Hofmeyr
Date of hearing: 4 August 2023
Date of judgment: 14 August 2023

In the matter between:

C[...] C[...] (Née O[...])

Appellant

And

D[...] G[...] C[...]

Respondent

JUDGMENT DELIVERED 14 AUGUST 2023

*Judgment handed down electronically by circulation to the parties' legal representatives
and released to SAFLII.*

HOFMEYR AJ:

1 This is an appeal from the Magistrates' Court against the dismissal of the appellant's special plea. The appellant was the plaintiff and the respondent was the defendant in the court below.

2 The parties are married out of community of property and are seeking a divorce. Their antenuptial contract provided that there would be no community of property between them, no community of profit or loss and that the accrual system would not apply to their marriage.

3 The appellant brought a claim in the Regional Magistrates' Court Somerset West, Western Cape, in December 2018 for a decree of divorce, orders for retention of certain properties, and a claim for maintenance against the respondent.

4 The respondent agrees that the parties should be divorced. But he denies the grounds on which the appellant alleges that the relationship between them has broken down. He also denies that he should be ordered to pay maintenance and he advances two counterclaims against the appellant. The first is for an amount of R250,000 and the second is for an amount of R1,701,731.13.

5 The appellant raised a special plea to the second counterclaim of approximately R1.7 million. According to the appellant, the claim exceeds the monetary jurisdiction of the Regional Magistrates' Court and so should be dismissed. The special plea was dismissed by the Magistrate. It is against the dismissal of her special plea that the plaintiff appeals to this court.

6 Although the appellant framed her special plea on the basis that it was about the monetary value of the claim, her true defence lay elsewhere.

7 In 2010, the Magistrates' Court Act 32 of 1944 was amended to give Regional Magistrates' Courts jurisdiction in divorces. When the legislature extended the Regional

Magistrates' Courts' jurisdiction to determine divorce actions, it clothed the courts with the same jurisdiction as High Courts when they determine those matters.

8 After the amendment, section 29(1B) of the Magistrates' Court Act read as follows:

“(a) A court for a regional division, in respect of causes of action, shall,—subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between parties and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.”

9 This section makes it clear that, provided the matter before the Regional Court is a divorce or any question arising therefrom, the Regional Court will have the same jurisdiction as a High Court. In other words, provided the matter is a divorce or a question arising therefrom, the Regional Court's jurisdiction is not limited by, for example, the monetary limits that usually apply in the Magistrates' Courts. Provided the matter is a divorce or a matter sufficiently connected therewith, the usual monetary limits to the jurisdiction of the Magistrates' Court do not apply.

10 The real issue in the appeal, therefore, is not that the counterclaim was for an amount of R1.7 million but, rather, whether that counterclaim qualifies as *a question arising from the divorce*.

11 To answer that question requires an analysis of the counterclaim.

The counterclaim

12 The counterclaim of R1.7 million is based on an agreement that the respondent alleges he entered into with the plaintiff in 2011. He pleads that the agreement provided that the appellant would be entrusted with the administration of his financial affairs and would attend to the administration thereof. In administering the defendant's affairs, the plaintiff was required to collect rentals due to the respondent, pay bond instalments, pay property levies and pay municipal rates and taxes.

13 At points in the counterclaim, the respondent's claim against the appellant is pleaded as a claim in contract. The allegations are that the appellant breached their contract when she held onto monies instead of transferring them to the respondent. However, at other points, the counterclaim reads as a claim in delict because the defendant alleges that the plaintiff stole or misappropriated the defendant's funds. However, whether the claim is one in contract or delict does not matter for the purposes of the appeal because the question is whether the counterclaim is sufficiently connected to the divorce to qualify as "a question arising therefrom". The nature of the cause of action does not matter; the issue is whether it qualifies as a question arising from the divorce.

14 The Magistrate concluded that the counterclaim qualified as a question arising from the divorce but provided limited reasoning for this conclusion. The Magistrate held that the legislature "could not have intended to exclude marriages out of community of property where parties have contractual obligations against each other to enforce from being heard in the Regional Courts". However, this analysis misses the point. The question is not one of marriage in or out of community of property. The question is what qualifies as a sufficient link between the divorce, on the one hand, and the other matters that the Regional Courts may decide, on the other.

"A question arising therefrom"?

15 The proper interpretation of section 29(1B) of the Magistrates' Court Act appears not yet to have received judicial attention. I could find no case dealing with the issue and none was referred to us by counsel for either of the parties.

16 Nonetheless, it is firmly established in our law that the interpretation of statutes requires the consideration of a triad of text, context and purpose.¹

17 The Magistrates' Courts are creatures of statute without inherent jurisdiction.² It is Parliament that defines the limits of the Magistrates' Courts' jurisdiction. It was therefore important for the legislature, when it introduced the amendment to the Magistrates' Court Act to include a jurisdiction to hear divorce actions, to be clear about the limits of that jurisdiction.

18 In enacting the amendment to the Magistrates' Court Act, the legislature did not simply provide that the Regional Magistrates' Court would hear divorce actions. It employed language to extend the scope of jurisdiction to include "questions arising" from a divorce. The language chosen signals two things. First, it denotes that the Regional Magistrates' Courts' jurisdiction is broader than merely deciding divorce actions. Second, it sets an outer limit to that extension of jurisdiction because it constrains the jurisdiction to "questions arising therefrom". The phrase "any question arising therefrom" forges a link or connection between the subject (divorces) and the questions associated with it.

19 To fall within the ambit of the Regional Magistrates' Courts' jurisdiction, therefore, the issue raised would have to arise *from a divorce*. In this case, the jurisdictional question is the following: does the defendant's counterclaim for R1.7 million arise from the divorce action?

¹ *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) para 23

² *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) para 5

20 The appellant's counsel, Mr Heunis, submitted that the counterclaim was entirely unrelated to the divorce. It was a claim that could just have as easily existed between the defendant and some third party appointed to administer his financial affairs who then subsequently ran off with the money. For this reason, therefore, the matter did not fall within the Regional Court's jurisdiction because it was not a claim that "stemmed" from the divorce action nor was it an issue that arose from the divorce.

21 The respondent's counsel, Mr Felix, sought to counter this argument in two ways.

21.1 First, he argued that because the respondent's success in the counterclaim would affect the plaintiff's patrimonial position, it was relevant to the divorce under section 7(5)(d) of the Divorce Act 70 of 1979.

21.2 Second, he contended that because the agreement between the parties was pleaded as having required the appellant to use the difference between rental monies received and expenses paid to "contribute to the parties' household expenses", this meant that the claim was sufficiently connected to the divorce.

22 However, neither of these arguments avails the respondent.

Section 7 of the Divorce Act

23 Section 7 of the Divorce Act deals with the division of assets and maintenance of divorced parties. The specific section that the respondent invokes for the necessary link between his claim and the divorce is section 7(5)(d). The section says, in relevant part, that in the determination of the division of the assets under the section, the court shall take into account any order which the court grants under any law which affects the patrimonial position of the parties.

24 In order for this argument to get out of the starting blocks, however, the court has to be engaged in an exercise of determining the division of assets between the parties. But, as Mr Heunis correctly pointed out, there is no claim for a division of assets in the divorce pleadings. The appellant did not seek a division; she sought a retention of assets and a claim for maintenance. The respondent, similarly, did not claim a division of assets. The argument based on section 7(5)(d) of the Divorce Act therefore does not assist the respondent because in order for it to apply, the court must be involved in the exercise of dividing assets but that it not an issue on the pleadings.

25 The counterclaim is also not relevant to any decision that the court will have to make on maintenance because the respondent did not plead that his counterclaim was relevant to the assessment of whether he should bear a maintenance obligation to the appellant. On the pleadings, he simply denied that he should pay maintenance and put the appellant to the proof of her claim for maintenance. The court raised with counsel for the respondent whether there was any reading of the respondent's plea which could support the notion that his counterclaim was relevant to the question whether he should bear a maintenance obligation to the appellant. Mr Felix fairly conceded that there was none.

26 As a result, section 7 of the Divorce Act does not create the necessary link between the respondent's counterclaim and the divorce in this case.

The household expenses

27 The only remaining link between the counterclaim and the divorce is therefore the respondent's contention that, because it was a term of their agreement that the appellant would pay for their household expenses from the monies left over while she was administering his financial affairs, the counterclaim was sufficiently linked to the divorce.

28 But whether or not the appellant and the respondent had an agreement for how they would pay for their household expenses, the fact of the matter is that they were married out of community of property, with the accrual system excluded and without any community of profit and loss.

29 The main obstacle facing the respondent's counterclaim is his own pleadings. Our courts have repeatedly held that jurisdiction is determined with reference to the allegations in the pleadings and not by the substantive merits of the case. In the event of the court's jurisdiction being challenged, the pleadings are the determining factor since they contain the legal basis of the claim under which the litigant has chosen to invoke the court's competence.³

30 But the respondent's own pleadings do not tie the alleged agreement with the plaintiff to the divorce. On the contrary, the respondent pleads the agreement with the appellant as if it is a self-standing contract that she breached. The only point in the pleadings where he links the claim to the divorce is that he contends that the reasons for the irretrievable breakdown of the marriage included her breach of the agreement. However, the most that this says is that one of the reasons their relationship fell apart is that the appellant did not keep to her undertakings. The relevant question in the divorce is whether there was a breakdown of the relationship. The question that arises in the counterclaim is a different one; it is whether the appellant is liable to pay damages to the respondent in an amount of R1.7 million. But that question does not arise *from* the divorce proceedings.

31 The vague reference in the pleadings to the fact that their agreement required the appellant to pay for household expenses with the difference between the monies received and paid out, does not make the determination of the counterclaim an issue arising from the divorce. More needed to have been done by the respondent, in his own

³ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 75

pleadings, for the determination of the counterclaim to qualify as a question arising from the divorce.

32 He did not set out a basis for the link and therefore, on his own pleadings, the necessary jurisdiction of the Regional Magistrates' Court was not established.

33 The special plea ought, therefore, to have been upheld. The Magistrate erred on a question of law. She interpreted the Magistrates' Court Act to give the Regional Court jurisdiction to decide the respondent's counterclaim when, on the pleadings before the Magistrate, it did not arise from the divorce.

34 In my view, the appeal must therefore be upheld and the Magistrate's order set aside with costs. The appellant has been successful and is entitled to her costs.

Order

35 In the light of what is set out above, I would make the following order:

35.1 The appeal is upheld, with costs, including the costs in the Magistrates' Court.

K HOFMEYR
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

B P MANTAME
JUDGE OF THE HIGH COURT

APPEARANCES

Appellant's counsel: Mr Heunis
Applicants' attorneys: Bester and Lauwrens Attorneys

Respondent's counsel: Mr Felix
Respondent's attorneys: Smith-Symms & Associates