

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: 157/2017

In the matter between:

K V

Plaintiff

and

C J V

Defendant

Coram: Opperman, J

Heard: 6 June 2023, the heads of argument were submitted on 16 June 2023, 27 June 2023 & 4 July 2023, the matter was again argued in open court on 14 August 2023

Delivered: 29 August 2023. The judgment was handed down electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 29 August 2023. The date and time of hand-down is deemed to be 15h00 on 29 August 2023

Judgment: Opperman, J

Summary: Costs dispute in divorce on separated issue for auditing of accrual that was referred by agreement between parties

JUDGMENT

- [1] In *Fleming v Johnson & Richardson* 1903 TS 319 325 Innes, CJ said:
It is a sound rule that where a plaintiff is compelled to come to Court and recovers a substantial sum which he would not have recovered had he not come to Court, then he should be awarded his costs.
- [2] As the case number indicates; the history of this case goes back as far as 2017. Extensive litigation took place and numerous orders were issued. Unfortunately, the dust has not settled yet.
- [3] The parties agreed, in the settlement that was made an order of court, that the costs of the divorce action would be “costs in the cause”. It is commonplace that the last remaining issue for adjudication was the defendant’s claim for accrual, which the parties seemingly laid to rest by agreeing on the appointment of a receiver to quantify the amount to be paid to defendant.
- [4] The issue of the costs incurred in the quantification of the accrual by the chartered accountant(s) eventuating from the referral, has now arisen from the ashes.
- [5] The settlement order dated 2 August 2019 that send the issue of accrual to a receiver/chartered accountant reads as follows:
1. A chartered accountant to be nominated by the chairperson, for the time being, of the South African Institute of Chartered Accountants is appointed as a receiver in the divorce action between the parties with the powers and obligations as set out in Annexure “A”¹ hereto.
 2. The Respondent is ordered to pay the costs of the application.
- [6] All the preceding orders, and there were many, dealt with the costs of each aspect inchmeal; issue for issue and order for order. It is water under the bridge and this court

¹ Annexure “A” does not take the issue of costs any further and will therefore not be quoted in the judgement.

does not have authority to deal with it. It is not relevant to the specific aspect in hand. It also, now, serves within the realm of the Taxing Master's jurisdiction.

[7] The hearing/settlement in which the matter ended up being referred to a chartered accountant was agreed to be for the account of the plaintiff.

[8] In their heads of argument counsel for Mr Vennell/plaintiff claims that:

75. It is respectfully submitted that the proper order is that each party should pay their own costs of the divorce action, which, to be precise, shall be the costs of the Divorce Claim, the Rule 43 application and the Accrual Claim and that the defendant should be ordered to pay the costs of the present proceedings, such cost to include the costs that stood over in respect of the proceedings on 6 June 2023.

[9] In their heads of argument counsel for Mrs Vennell/defendant argued that:

39. It is humbly submitted that the plaintiff should be ordered to pay the defendant's costs of suit on a party and party scale, which costs will include the costs of the divorce, the rule 43 application and the accrual, excluding the costs of 4 December 2018.

40. It is further humbly submitted that the plaintiff should also be ordered to pay the costs that stood over on 6 June 2023 on a party and party scale.

[10] The above cannot be correct because all the issues except for the costs of the accrual audit and the costs of this application that happened on 6 June 2023 and 14 August 2023 remains for adjudication.

[11] This application consisted of an enormous amount of evidence that had to be considered and some confusion also reigned on the 6th of June 2023. It was exacerbated by the fact that this court was not involved in the litigation that happened before this application; counsel for both parties apparently also not. In the end the parties agreed that it is only the costs incurred for the audit of the accrual that must be adjudicated.

[12] Mrs Vennell was the successful party in the accrual audit. The conduct and the evidence of Mr Vennell caused the issue to be litigated and the accrual to be audited. This is what

happened:

1. The plaintiff did not play open cards with the court in regard to his net asset value. Counsel for the defendant summarized the situation aptly:

18.

18.1 In the plaintiff's first answer to the defendant's notice in terms of section 7 of the Matrimonial Property Act 88 of 1984 (*Act 88 of 1984*), delivered on 2 March 2018, the plaintiff indicated that his net asset value amounted to **R8 247 894.25**.²

18.2 In the plaintiff's second answer to the defendant's second notice in terms of section 7 of Act 88 of 1984, delivered on 8 March 2019, the plaintiff indicated that his net asset value, with tax adjustments, was **R7 979 886.96**.³

19.

19.1 In the final amended account of the receiver dated 6 November 2020 the receiver calculated that an amount of **R4 579 919.00** was payable by the plaintiff to the defendant in respect of the accrual.⁴

19.2 The following is evident from the final amended account of the receiver:

19.2.1 The total "*included*" asset value of the plaintiff was **R11 948 931.00**;

19.2.2 The total "*included*" liabilities of the plaintiff was **R446 164.00**;

19.2.3 The net disclosed and included liabilities of the plaintiff amounted to **R11 502 767.00** (R11 948 931.00 - R446 164.00);

19.2.4 The receiver calculated the accrual as at 4 December 2018, being the date of the divorce.

2. Mrs Vennell was substantially successful and received an amount of R4 579 919.00 in respect of the accrual on the calculations by the auditor that stands uncontested.
3. The amount of the accrual that the defendant received was substantially more than her settlement offer of R2 900 000.00. If she did not institute the application as she was forced to do by the misinformation of the plaintiff, she would have been seriously prejudiced. The litigation caused justice.
4. The defendant's application for the appointment of a receiver, which was settled, led to the finalisation of the defendant's accrual claim. The plaintiff was also

² Record, "Index to Notices", Plaintiff's Answer in terms of section 7, pages 102 – 104.

³ Record, "Index to Notices", Plaintiff's Answer in terms of section 7, pages 27 to 29.

⁴ The final amended account of the receiver dated 6 November 2020 was handed in as in exhibit in court on 6 June 2023.

ordered to pay the defendant's costs of the said application. The defendant was therefore substantially successful in the litigation on the issue of accrual.

[13] **ORDER**

1. The plaintiff to pay the costs incurred for the quantification of the accrual.
2. The plaintiff shall also pay the costs of this application and, *inter alia*, incurred on 6 June 2023 and 14 August 2023.

M OPPERMAN, J

APPEARANCES

For plaintiff: **W.A. VAN ASWEGEN**

Instructed by: Kleingeld Attorneys
Bloemfontein

For defendant: **W GROENEWALD**

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