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

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Electronic reporting only
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

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DATE SIGNATURE

Case no: 13116/13

In the matter between:

A C Applicant

and

J C Respondent

Case Summary: **Costs – Divorce Action – Settled, apart from the costs of the divorce action - General rule is that costs follow the event – but court is not bound to make an order for costs in favour of the successful party in a divorce action – s 10 of the Divorce Act 70 of 1979 provides that the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.**

Rule that when a case has been settled and the costs have still to be decided, the court must do its best with the material at its disposal to make a fair allocation of costs employing such legal principles as are applicable to the situation, applied. Husband ordered to pay 50% of wife's costs of the divorce action.

JUDGMENT

MEYER J

[1] The applicant, Ms A C, seeks the costs of the divorce action between her and the respondent, Mr J C, which was settled just before the trial in the action was due to commence.

[2] Mr and Ms C were married to each other on 6 April 2002, out of community of property and with the exclusion of the accrual system. Three minor children were born from their marriage. During 2013, Mr C instituted the divorce action against Ms C, which forms the subject-matter of this application for costs. Therein, he, *inter alia* claimed a decree of divorce, joint parental responsibilities and rights and primary residency of the minor children, subject to reasonable contact between Ms C and the children. Ms C filed a plea and counterclaim. Therein, she, *inter alia* claimed primary residence of the minor children, subject to reasonable contact between Mr C and the children, maintenance for the minor children, rehabilitative maintenance for herself and a declaration that a universal partnership existed between her and Mr C, a dissolution thereof, and the appointment of a receiver and liquidator.

[3] The divorce action was ultimately enrolled for trial on 19 October 2016. On that day the matter was not allocated to a judge for hearing and stood down to the next day. On 20 October 2016 at about 09:30, just prior to the commencement of the calling of the trial roll by the Deputy Judge President of this division, Mr C agreed to an order declaring that a universal partnership existed between him and Ms C, to its dissolution and the appointment of a receiver and liquidator. The issue of a universal partnership seems to have been the biggest bone of contention between them. Once that issue had been finally resolved, the matter was not allocated to a judge for trial and Mojapelo DJP

made an order dissolving their marriage. Both parties were awarded joint responsibilities and rights in respect of the minor children. The primary residency of the minor children was awarded to Ms C subject to contact as defined in the order between Mr C and the children. Mr C was ordered to pay maintenance for the minor children in the sum of R5000 per month per child (R15 000) subject to annual escalation of 7%, to retain them on a medical aid scheme and to pay half of their reasonable excess medical expenses. The order specifically provides that either party 'shall be entitled to approach the Maintenance Court for an increase or decrease of the aforesaid maintenance awards without having to prove a change in circumstances'. A declaration was made that a universal partnership in equal shares existed between Mr and Ms C during the period July 2002 to the date of divorce, the partnership was dissolved and the order provides for the appointment of a receiver and liquidator with the authority to realise all of the universal partnership assets. As to costs of the divorce action, it was ordered that:

'The costs are reserved, and either party has the right to approach the motion court to have the costs adjudicated.'

[4] The general rule, it is trite, is that costs follow the event. A court, however, is not bound to make an order for costs in favour of the successful party in a divorce action. Section 10 of the Divorce Act 70 of 1979 provides as follows:

'In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.'

[5] A decision on the merits of the respective claims of Mr and Ms C in the divorce action is no longer required. The matter was settled. In such an instance the decision as to costs should, however, generally not be reached in total isolation from considerations linked to the merits. A court must then make a proper allocation of costs with the material at its disposal. In *Jenkins v SA Boiler Makers, Iron & Steel Workers and Ship Builders Society* 1946 WLD 15 at 17-18, Price J said the following:

'It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of

an offer, in order to decide questions of costs only. If a plaintiff were to sue for nullity of marriage and alternatively for divorce and were to succeed in his first claim, it would follow that no judgment would be given in respect of the second claim. In such a case I do not think that the Court would decide the costs of the alternative claim on the grounds that the evidence showed that if the plaintiff had not succeeded in the first claim, he would have succeeded in the alternative claim. Such a decision ought to have been based on much broader grounds. In an action for transfer, alternatively for damages if no transfer be passed within a given time, if the defendant were to give transfer before trial, I cannot imagine that a Court allowing the alternative claim to be set down for hearing to see who would have won in order to determine the question of costs on that issue. Academic success in respect of alternative claims in such cases would not necessarily carry costs. I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded. If the Court were eventually to say, that it awarded costs to a particular party because on the evidence that party would have won on that issue, would the disappointed party then be entitled to appeal in order to upset the decision as to who would have won the dead issue that has been tries? This must necessarily follow if Mr. *Kuper's* application is entitled to succeed. When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases litigants would be required to incur far greater costs than those at stake.'

[6] An enquiry into the merits of the case is not possible. Very little information regarding the merits was placed before me. In terms of the order, however, it seems to me that Ms C enjoyed the greater success in the divorce action. The only claim in which she achieved no success was the one for rehabilitative maintenance for herself. Her claim for payment of R300 000 was in the alternative to her claim for a declaration that a universal partnership existed between Mr C and herself, the dissolution thereof and for the appointment of a receiver and liquidator.

[7] The parties held a without prejudice round table meeting on 5 August 2016. Proposals were made and it appears to me that since that meeting the divorce action came close to settlement along the same lines as those included in the order that was ultimately granted by Mojapelo DJP on 20 October 2016. What stood in the way of an earlier settlement of the divorce action, so it appears to me, was that both parties required a settlement of all the issues. (Regrettably, the court order to which they ultimately agreed, also did not achieve that.) In a letter dated 30 September 2016 - when it appeared to Mr C's attorney that the divorce action was no longer capable of settlement, and in response to a letter from Ms C's attorney to the effect that the matter was not ripe for hearing and should be removed from the trial roll – Mr C's attorney, with regard to the relief relating to the universal partnership, states that his client-

'. . . in n laaste en slegs in 'n poging om die aksie finaal te probeer skik, bereidwillig was om u klient se eis met betrekking tot haar bewering dat daar n universele vennootskap tussen haar en my klient tot stand gekom het, te aanvaar en toe te stem dat die regshulp deur u klient in haar teeneis hieromtrent versoek, n bevel van die hof te laat maak.'

[8] Mr C contends that the divorce action did not settle at an earlier stage before the trial date, because Ms C kept on shifting the goal-posts as far as the issue of the universal partnership was concerned. He is of the view that the assets of the universal partnership are not of significant value. However, once he had indicated on 5 August 2016 that he might concede the claim regarding the universal partnership, Ms C indicated that she would settle the action provided he pays her R2,5 million for her equal share in the universal partnership. He considered her proposal '…nie net verregaande nie, maar om die minste daarvan te sê, oppertunisties'. Once he had rejected her proposal for payment of R2,5 million, Ms C insisted that the assets held by a certain Jack Family Trust form part of the assets of the universal partnership. Indeed, I am informed from the bar, that that issue was debated by the parties when the matter stood down on 19 October 2016. Mr C, on the other hand, denies that the assets held by the Jack Family Trust form part of the assets of the partnership. When he, on 20 October 2016, agreed to an order declaring that a universal partnership existed between him and Ms C and to an order dissolving the universal partnership and for the

appointment of a receiver and liquidator to realise its assets, Ms C insisted that the following proviso be included in the court order, and it was so included:

'With the proviso that the defendant is entitled to apply for the joinder of the Jack Family Trust to ascertain whether assets held by the Jack Family Trust are assets of the partnership.'

[9] I must say that the proviso seems senseless to me. A receiver and liquidator will be enjoined to investigate Ms C's claim whether the assets held by the Jack Family Trust indeed form part of the assets of the universal partnership, and, if so, take the necessary steps to take control of and to realise such assets. However, I do not believe that Mr C's criticism that Ms C kept on shifting the goal-posts as far as the issue of the universal partnership was concerned, is a factor that adversely reflects on her conduct in the divorce action. Both parties were desirous to settle all the issues, but regrettably, that did not happen. In the result, Ms C needed to institute maintenance proceedings in the Maintenance Court, which, I am told from the bar, were settled. She was also compelled to institute an application in this court for the appointment of a receiver and liquidator, because the parties could not agree on the identity of the liquidator and receiver nor on all his or her powers. That application is still to be heard. Then she needed to institute this application for a determination of the costs of the divorced action that were reserved.

[10] Furthermore, on the evidence presented in this application it seems to me that both parties tried to act in the best interests of their minor children. Since the meeting on 5 August 2016, Mr C only insisted that the primary residence of their minor son be awarded to him, because that was the son's express wish. The parties agreed to an evaluation of the minor children by a psychologist in order to advise them what would be in the best interests of the children, but the report was not yet furnished by the time of the trial. In this regard Mr C's attorney, in his letter dated 30 September 2016, addressed to Ms C's attorney, states:

'Wat die kwessie rondom die primêre residensie van die minderjarige kinders aanbetref en soos reeds aan u meegedeel op 5 Augustus 2016, het ek my kliënt geadviseer om nie op hierdie stadium van die verrigtinge te volhard met sy eis met betrekking tot primêre residensie van die minderjarige kinders nie, gesien teen die agtergrond van die gesinsadvokaat en familie berader

se verslae en die feit dat daar op hierdie stadium geen verslag ter hand is wat teenstrydig is met bogemelde verslae nie.'

[11] I now turn to the means of the parties. Ms C states that she has not been financially able to fund the litigation and has borrowed monies from her father, a 70 year old pensioner. She states that she is self-employed as a beautician and earns approximately R8 000 to R10 000 per month. In addition she receives the maintenance payment from Mr C for the minor children. She states that she is presently indebted to her father in excess of R300 000 of which the legal fees amounted to approximately R200 000. Mr C, in his answering affidavit, denies that the applicant only earns an income as a beautician. In this regard he states:

'On her own admission (which was only made shortly before trial), she also works for an attorney, doing office work. The applicant has however never disclosed proper information or documents from which I could determine what her total monthly income is.'

Ms C's reply to that averment of Mr C is this:

'As per the application before the maintenance court, my earnings are clear and evident.'

And:

'As stated before, my earnings are quite evident from my bank statements discovered prior to the trial.'

I accept, therefore, that Ms C does not only earn an income as a beautician, but that she also works for an attorney, doing office work. But, I think it can be safely accepted that if her bank statements or the evidence placed before the maintenance court reflected an income significantly higher than that alleged in her founding affidavit, Mr C would have made the point in his answering affidavit.

[12] He is a farmer and he and his father are partners in the 'C Boerdery Vennootskap'. Mr C is the managing partner; his father is retired. His gross monthly income, he states, is R25 530.00. He further lives in a house on the farm, his electricity consumption is paid for by the partnership, he receives meat and dairy for his personal use and he uses a vehicle that is owned by the business. The vehicle which he uses, I pause to mention, is a luxury Range Rover Sport, and a few weeks before Ms C deposed to her replying affidavit in these proceedings, on 22 June 2017, she alleges that he went on a vacation to Italy with his new wife. Mr C states that his parents assist

him with certain expenses due to the fact that he has insufficient funds. His legal costs, excluding the costs of this application and the application for the appointment of a liquidator, amounted to R439 988.15. He states that he too was not financially able to fund the litigation. I was funded by means of a loan of R80 000 from the C Boerdery Vennootskap, and the balance by means of a loan from his mother and from utilizing his credit card account for the purpose. It is clear on the evidence presented in this application that Mr C's means are more substantial than those of Ms C.

[13] Doing the best with the material at my disposal and employing the legal principles applicable to this situation, and in particular in having regard to all the circumstances, including the means of the parties and their conduct insofar as it is relevant, I consider it fair and just for Mr C to pay 50% of Ms C's costs of the divorce action.

[14] In the result the following order is made:

(a) The respondent is to pay 50% of the applicant's costs of the divorce action.

(b) The respondent is to pay the applicant's costs of this application.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	4 September 2018
Date of judgment:	10 September 2018
Counsel for the Applicant:	Adv N Strathern
Instructed by:	Barry Sim Attorneys, Randburg
Counsel for the Respondent:	Adv I Vermaak-Hay
Instructed by:	EAL Muller Attorneys c/o Muller Voigt Attorneys, Blackheath