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

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2018/25403

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED:

07 – 12 - 2018

DATE SIGNATURE

In the matter between:

K, N **Applicant**

and

M, K **Respondent**

Summary: Application for separation of issues in terms of rule 33 (4) of the Rules. Applicant seeking determination of the issue of decree of divorce be separated from that of division of joint estate in the divorce proceedings. Legal principles governing separation restated. Consequences to the application in terms rule 43 of the Rules once

separation is granted and decree of divorce is made. Can a rule 43 application sustain once decree of divorce is granted.

JUDGMENT

MOLAHLEHI, J:

Introduction

1. This is an application in terms of which the applicant seeks an order in terms of rule 33(4) of the Uniform Rules of the High Court (the Rules) for a separation of the issues in the divorce proceedings between him and his wife filed under case number 2017/42930. The relief sought is to have the issue of divorce separated from that in which he seeks to have the respondent forfeit the right to share in the joint estate on divorce.

Common cause facts

2. It is common cause that both parties are in the main action seeking an order to have their marriage dissolved. They are still living together in the same matrimonial home, except that they are no longer living as husband and wife for a period in excess of one year. They have accepted that their marriage, concluded on 21 March 2015 in community of property, has irretrievably broken down. There are no children born of this marriage. The respondent has two children from her previous marriage.
3. The divorce proceedings were instituted by the applicant during November 2017. In addition to seeking a decree of divorce in the main application the applicant prays for the forfeiture of the benefit of the marriage and whether he should be ordered to pay maintenance for the respondent.

4. From the papers it is apparent that the respondent is opposing the applicant's claim only to the extent that he is seeking forfeiture of the matrimonial benefits of the marriage. She contends that the joint estate should be divided equally between the parties and also that she be granted spousal maintenance or contribution towards her costs.

5. The main issues between the parties as matters stand now are:

    a. The applicant's claim for forfeiture of patrimonial benefits of the marriage.

    b. The respondent's claim for the division of the joint estate.

    c. The respondent's claim for maintenance.

6. The respondent has instituted proceedings in terms of rule 43 of the Rules in terms of which she is claiming maintenance pending the finalisation of the divorce. The application is opposed by the applicant.

<u>The grounds for the separation of issues</u>

7. The grounds for the separations of issues as set out in the applicant's founding affidavit are as follows:

    "14 As the Respondent and I are [living] together as husband and wife, share no common interest and the relationship between us is extremely strained, I wish to get on with my life and seek a decree of divorce."

    15 The trial in this matter has been set down for hearing on 18 April 2019.

    16 I submit that it is convenient that the issues be separated as sought by me in the notice of motion and that the matter be set down for hearing on the unopposed

roll for a divorce, subject to the remaining issues being stayed and to be determined at the hearing of the trial.

17 The Respondent will not suffer any prejudice if such separation be granted."

15 The above includes the contention that:

i. the respondent is employable and has assets and means to be self-supporting;

ii. that he will continue to pay maintenance *pendente lite* as tendered in the Rule 43 application until the final determination of the divorce action. The other reason for seeking separation is that the applicant wishes "to get on with his life."

The legal principles

9. As stated earlier in this judgment this application is brought in terms of rule 33 (4) of the Rules which provides as follows:

"(4) 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."

10. The principle of separation of issues envisaged in rule 33 (4) of the Rules is a recognition that no purpose is served in keeping parties in divorce proceedings together in a dead marriage and thus recognises the need to as soon as possible

normalise the lives of the parties whose marriage has irretrievably broken down. In *CC v CM,*[1] where reference is made to *Levy v Levy,*[2] the court in dealing with the need dictated to by public policy to normalise the lives of parties in divorce proceedings, held that it goes against public policy "to have the parties "shackled to a dead marriage."

11. Flemming DJP in *Rauff v Standard Bank Properties,*[3]: formulated the purpose of rule 33(4) as follows:

> "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 fact of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial."

12. In *Denel (Edms) Bpk v Vorster,*[4] the Supreme Court of Appeal cautioned against the assumption that the result would be achieved by separation of issues. Even though at a glance it may appear that the issues are discrete they may ultimately be found to be inextricably linked. The court found that the expeditious disposal of litigation is best by ventilating all the issues at one hearing.

13. In matters such as the present the court will quite often be faced with having to strike a balance between the separation of issues- proving an expeditious disposal of an aspect of litigation and fairness to one of the parties. An important consideration in this regard is that expeditious disposal of issues cannot outweigh

[1] 2014 (2) SA 430 (GJ) at 42.
[2] 1991 (3) SA 614 (A).
[3] 2002 (6) SA 693 (W) at 22.
[4] 2004 (4) SA 481 (SCA).

the principle of fairness. The principle of fairness requires the balancing of the interest of both parties.

14. In *Beckley Anntonette v Beckley Darryley Bruce,*[5] Tsoka J, in dealing with the provisions of rule 43 of the Rules, where separation of issues had already been granted, cautioned that the courts should be slow to resort to the provisions of rule 33 (4) where such separation is not competent and the question of law and fact sought cannot be conveniently decided.

15. In *K 0 v M 0,*[6] the court held 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.

16. In an application for separation of issues in divorce proceedings the onus is on the applicant to set out facts with sufficient particularity to assist the court in considering whether it is convenient to grant separation of issues. Once the applicant has shown a *prima facie* case favouring separation of issues, the burden is on the respondent to show that the granting of separation of issues would be prejudicial on him or her and thus the balance of convenience does not favour the granting of separation of issues. Failure to discharge this onus by the respondent will result in the court being obliged to grant the separation.[7])

17. The use of the word "convenience" in rule 33 (4) of the Rules was held in *Tudoric –Ghemo v Tudoric-Ghemo,*[8] to include the notion of facility or ease including the

[5] Unpublished judgment under case number 01098/2015. .
[6] Unpublished judgment accessed at www.saflii.org/za/cases/ZAWCHC/2017/136.pdf

[7] *Hotels, Inns and Resorts SSA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C).
[8] 1997 (2) SA 246 (W).

concept of appropriateness. In this respect the Supreme Court of Appeal in *Molotlegi v Momkwalase,*[9] said:

> "The notion of convenience is much broader than the mere facility or ease or expedience. Such a court should also take due cognisance of whether separation if 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."

18. The general principle governing the approach to an application in terms of rule 33 (4) of the Rules is set out in *African Bank v Soodhoo,*[10] quoted and applied by Tsoka J in *De Wet and Others v Memor (Pty) Ltd*[11] as follows:

> "... The Court has a discretion to grant or refuse an application in terms of Rule 33(4). The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all the parties in the matter inclusive of the court. The determination of such an application requires of the court to make a value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for separation. The notion of appropriateness and fairness to the parties also comes into the equation."

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[9]2010 JDR 0360 (SCA) at 20.
[10]2008 (6) SA 46 (D).
[11](2009/44153) (2011) ZAGPJHC 188 (29 April 2011) at 6.

19. The court in *De Wet* in dealing with the general principles governing the approach to separation of issues quoted with approval and applied what was said in *African Bank v Soodhoo*[12] where the court in that case said:

> "*The general principle in law would appear to be that notwithstanding the wide powers conferred on a court under rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter. Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 362G - H, and Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 *(SCA) ((2004) 25 ILJ 659) at 485B - C have reference. In some instances, however, the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away. (Minister of Agriculture (supra) at 362H.)"*

20. The general principles governing separation of issues are set out in De Wet and are provided as follows:

> "[6] The general principles gleaned from the abovementioned cases may briefly be summarised as follows. The Court has a discretion to grant or refuse an application in terms of Rule 33(4). The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all the parties in the matter inclusive of the court. The determination of such an application requires of the court to make a

[12] 2008 (6) SA 46 (D) at 51B-D.

value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for separation. The notion of appropriateness and fairness to the parties also comes into the equation."

Evaluation and analysis

21. In my view this matter turns on whether the applicant made his case in the founding affidavit. The founding affidavit is five and half pages and the replying affidavit eleven and half. It is apparent from the reading of the applicant's papers that he sought to make his case in reply.

22. It is trite that an applicant in motion proceedings has to make out his or her case in the founding affidavit unless there are special circumstances why that has not been done.[13]

23. It is clear from the reading of the founding affidavit, that the applicant in seeking to have the issue of divorce separated from the other issues, failed to take into account the principle of fairness and whether separation if granted would be appropriate and fair to the respondent. The only thing he tells the court in the founding affidavit is that the respondent will not suffer prejudice. He does not deal with the personal circumstances of the respondent in that affidavit.

24. It is only in the replying affidavit that the applicant deals with the issue of lack of prejudice on the part of the respondent. He does so by projecting a picture that the respondent is irresponsible and that she is to blame for the situation she finds herself in and also that she is unwilling to find work.

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[13] See *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D) at 315H-316A.

25. It was also contended on behalf of the applicant that account should be taken of the fact that the marriage was of a short duration and that the applicant has good prospects of success in his claim for forfeiture of benefits once the marriage is dissolved. This issue is not dealt with in the founding affidavit including the alleged health problems he has developed as a result of the breakdown of the marriage.
26. The objective facts, to the contrary, depict the respondent as a person who for all intents and purposes is destitute and vulnerable. This is in the context where she is given a personal allowance of R3 000,00 from a joint estate which is controlled by the applicant who has not disclosed to her the assets and his income from an investment portfolio which is alleged to be in the region of five billion. It is alleged that his monthly salary is in the region of R112 000,00.
27. The irresistible conclusion to draw from the above is that the applicant has failed to make out a *prima facie* case to separate the issue of divorce from the other issues in the divorce proceedings. In the circumstances it would neither be fair nor appropriate to order separation of the issues in this matter.

Rule 43 application

28. The other issue that arose in this matter is whether the pending rule 43 application will sustain once separation of issues was granted and the decree of divorce accordingly made. The argument in this regard on the part of the respondent is that her pending rule 43 application will fall away because she would no longer be a spouse of the applicant.

29. For the purpose of this judgment the relevant provisions of rule 43 reads as follows:

> "(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
>
> (a) Maintenance *pendente lite*;
>
> (b) a contribution towards the costs of a pending matrimonial action"

30. The respondent contends that the applicant would still in law be able to pursue her rule 43 claim despite the decree divorce. In this respect Counsel for the applicant relied on the cases of *CC v CM* and *KO (born H) v MO.*

31. The case of *CC v CM* is distinguishable from the present matter in that it dealt only with the provisions of rule 33 (4) and not rule 43 of the Rules.

32. In relation to *KO v MO*, Counsel argued that the court should follow that dictum and not that of *Beckley Antonoinette*. It was submitted that the *Beckley Antonoinette* is not binding on this court because it is clearly wrong.

33. In *KO v MO,*[14] Loots AJ held that:

> "[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 one of the 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 the unnecessarily strict interpretation of the with "spouse" for the purposes of the Rule.
>
> [61]. Accordingly, I find that, pending the finalization of the divorce action, and extant order in terms of Rule 43 survives a decree of divorce to the extent the issues of regulated thereby remain unresolved.

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[62] The finding that an existing order in terms of uniform Rule 43 does not lapse when the content of a decree divorce in circumstances where the remaining issues in the divorce action remain pending in terms of uniform Rule 33 (4) follows ineluctably."

34. The court further held:

[64] Save for it being necessarily so that only a spouse can apply for a decree of divorce, the remaining relief contemplated by the definition is not dependent on a party being a spouse at the time the relief is sought; with the operative weights in this subsection (a) being open quotation *pendente lite* and in subsection [B] being "such action" and. Should the legislature have wish to limit the relief claimable in a pending divorce action to only spouses, the divorce act would have stipulated so in temps, and would not have contended itself with the manner in which it defined a divorce action."

35. In *Beckeley* the court dealt with a situation where the application in terms of rule 43 was launched after decree of divorce was granted following the separation of issues. Following the granting of the final decree of divorce on 15 January 2015 the applicant launched a rule 43 application seeking interim spousal maintenance pending the final determination of her monthly cash maintenance payable to her until death or remarriage and the right to be retained on her husband's comprehensive medical aid.

36. The court found that the provisions of rule 43 of the Rules were not applicable as at the time there was no pending divorce action between the parties as provided for in this said rule. The court further found that the applicant did not have the right to claim interim maintenance where there was no matrimonial action or where

none was pending or was about to be instituted. In arriving at that conclusion, the court relied on the case of *Gunston v Gunston,*[15] where in dealing with the same issue the court held:

> "The words… in paras, (b), (c) and (d) do not appear in para (a), but there can be no doubt that the whole subsection concerns interim orders made in connection with matrimonial action which is pending or about to be instituted. "Matrimonial actions" include actions for divorce, restitution of conjugal rights, quality of marriage and judicial separations…".

37. In considering the facts of the matter the court held that there was no matrimonial action pending between the parties or about to be instituted and that being so, there was no existence or contemplated a *lis* such as is referred to in rule 43 of the Rules.

38. In *Beckeley*, the court in dealing with the facts of that case found that there was no matrimonial *lis* pending as the parties were granted a divorce on 19 August 2014 and the application in terms of rule 43 application was launched five months after the divorce was granted.

39. It is thus correct that once a decree of divorce is granted the provisions of rule 43 of the Rules will find no application. Accordingly the decisions in *Gunston* and *Beckley* made by the Gauteng division are correct and binding on this court as opposed to *KO v MO* which is a decision of the Western Cape division.

40. In light of the above findings there would be no basis in law for the respondent to institute a rule 43 application once a decree of divorce is granted following the separation of the divorce from the other issues. In the premises, the applicant's

[15] 1976 (3) SA 179 [W] at 182A.

application stands to fail because it would not be convenient for the respondent if the issue of divorce was to be separated from the other issues.

Order

41. In the circumstances, the applicant's application is dismissed with costs.

E Molahlehi

Judge of the High Court

Johannesburg.

Representation:

For the Applicant: Adv S Georgiou

Instructed by: Hirschowitz Flionis Attorneys

For the Respondent: Adv M Feinstein

Instructed by Raymond Joffe and Associates

Heard: 15 November 2018

Delivered: 7 December 2018