

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: 2022/9405

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

13 February 2023

DATE

SIGNATURE

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In the matter between:

M W R

Applicant

And

M B J

Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 February 2023.)

JUDGMENT

MIA, J

[1] The applicant brings this application in terms of Rule 33(4) of the Uniform

Rules of Court for separation of the issues and an order in the following terms:

1. a final decree of divorce is granted,
2. division of the joint estate,
3. the joint estate shall be adjusted in favour of the defendant in terms of section 15 of the Matrimonial Property Act in the event, the defendant is granted prayer 7 of the counterclaim in due course,
4. The plaintiff shall continue to maintain the major dependent children H, K and T in accordance with prayer 10 of the counterclaim, save that the plaintiff shall continue to pay the amount stated in prayer 10.1 of the counterclaim in the respective bank account of the major dependent children.
5. The plaintiff shall continue to maintain the defendant post the granting of this decree of divorce, pending finalisation of the defendant's counterclaim and that prayer 9 of the counterclaim is granted *pendente lite* finalisation of the defendant's counterclaim, save that the amount in paragraph 9.1 shall be determined by the court.
6. Prayers 2,3,4,5,6,7 and 9 of the counterclaim are postponed *sine die*.
7. No order as to costs.

[2] Counsel for the applicant argued in favour of the application being granted, notwithstanding that there was no interim maintenance order in place in terms of Rule 43. Counsel submitted that this could be done even after a decree of divorce was granted. The present application was pursued to enable the applicant to move on with his life. He wished to be freed from a marriage that is over where the parties do not reside together and requested the decree of divorce to be granted as both parties are in agreement that the marriage is over. Counsel for the applicant argued that the applicant was hampered from moving on with his life and required the respondent's permission when he wished to purchase property as occurred last year when he had to purchase a motor vehicle, the same situation is envisaged should he wish to purchase a home to live in and it will become entangled in the joint estate.

[3] The applicant instituted divorce proceedings by way of action on 9 March 2022, the respondent delivered a notice of intention to defend on 24 March 2022. The plea and counterclaim have been delivered. The respondent admits in the plea, that a decree of divorce be granted with the division of the joint estate, and in the counterclaim, prays for amongst others, a decree of divorce and division of the joint estate. It is clear from the pleadings, that decree of divorce and division of the joint estate are not contested, therefore the applicant requests that such an order be granted on an unopposed basis. The dispute between the parties relates to the counterclaim in respect of maintenance of the respondent, joinder of a Trust and joinder of unknown third parties in respect of alleged donations and a purported adjustment in terms of s15 of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).

[5] The applicant alleges that these issues are separable from the decree of divorce which is not contested. The applicant requested the Deputy Judge President of this division to grant the parties a decree of divorce ordering division of the joint estate and an order separating these issues from the remaining matters, which are outstanding by way of correspondence. The response to the request was that an application be lodged seeking the

separation of issues, alternatively, that the parties could agree to case management of the matter.

[6] Counsel for the applicant submitted that the respondent will suffer no prejudice whilst the applicant continues to suffer prejudice whilst the parties remain married as the respondent benefits from the estate growing. During this period the applicant suffers prejudice on a daily basis and is unable to purchase property on his own, whilst the defendant enjoys the benefits of the joint estate, the matrimonial home, and the other assets in the joint estate. As indicated above, the applicant would like to acquire assets without the respondent's permission being required. Counsel relied on the decision in *CC v CM*¹ where the court stated at para [39]:

“[39] The irretrievable breakdown of a marriage is a question of law or fact which may conveniently be decided separately from any other question because a court may order that all further proceedings be stayed until such question has been disposed of. Where it has been shown that a marriage has irretrievably broken down without prospects of a reconciliation, a court does not have a discretion as to whether a decree of divorce should be granted or not, it has to grant same. By extension of logic and parity of reasoning a separation order should be granted where a marriage in fact, substance and law appears to have irretrievably broken down. See *Levy v Levy* 1991 (3) SA 614 (A) at 621D – E and 625E – F; *Schwartz v Schwartz* 1984 (4) SA 467 (A).

[7] In circumstances where the respondent has admitted that the marital regime has irretrievably broken down, it was argued that it was convenient to grant a separation order. Moreover it was inappropriate to oppose the granting of a divorce or in order to “[*gain*] a tactical advantage in order to secure a more favourable s 7(3) patrimonial redistribution award, or to use the perpetuation of what seemingly appears to be an irretrievably broken down marriage as a leverage for tactical reasons”² and “The need decreed by public-policy considerations to as soon as possible normalise the lives of

¹ 2014(2) SA 430 (GJ)

² *CC v CM* 2014 (2) SA 430 (GJ) at para [41]

*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.*³

This was especially where the issues relating to the pension may well take a longer time to resolve than the decree of divorce.

[8] Counsel for the respondent submitted that the applicant did not meet the requirements for the granting of an application in terms of rule 33(4) and the court ought not to grant the request for relief. This was so as the respondent was prejudiced more than the applicant especially having regard to the applicant's relatively expensive inconvenience of residing in a R42 000 monthly rental apartment in Sandton and after having purchased a luxury vehicle with a value of nearly R 5million. Counsel pointed out that the judgment of *Joubert v Joubert*⁴ relied upon by the applicant was distinguishable from the present case in that the parties in *Joubert* had been living apart for five years at the time the application for separation was launched and the parties were married out of community of property with the accrual system. In the present matter, the parties are married in community of property and have recently commenced living apart. The respondent would suffer great prejudice once the decree of divorce was granted and the joint estate was divided.

[9] The applicant is aware that the division of the estate will happen automatically and immediately once the decree of divorce is granted, it cannot be postponed. Where the applicant is not aware of the full extent of the estate and is unable to furnish values of the properties or the extent of the estate which has been amassed over a period of 20 years it is appropriate that the respondent is afforded an opportunity investigate the extent of the joint estate. The applicant indicated the respondent was a housewife and managed some aspects of the joint estate. In the absence of an appreciation of the extent and value of the estate which comprises immovable properties, shares in companies and a Trust, various policies and three retirement annuities it is

³ As above para [42]

⁴ [2019] JOL 43022 (GNP)

preferable for the respondent to know what the assets are prior to the estate being divided. The respondent will be going into the future and getting divorced blindfolded without this knowledge.

[10] Counsel for the respondent also raised the consideration that the respondent will be denied statutory claims in terms of section 15 of the Matrimonial Property Act, if a separation is granted. She argued further that the conflicting decisions relating to rule 43 applications once a decree of divorce is granted is a further consideration where there were conflicting decisions on the aspect. That the respondent would be deprived of a claim for maintenance of a surviving spouse if the divorce went through prematurely and all issues were not resolved. In addition to the procedural and the statutory rights being compromised by hurrying the decree of divorce through, the respondent's constitutional rights would be prejudiced. The respondent, a house wife for 20 years, had little knowledge of the extent of the estate, where assets were already being transferred out of the estate.

[11] I appreciate the submission that the respondent has a right to equity in a joint estate. The divorce should not be granted without affording the respondent the benefit of the law which includes access to informed legal advice having regard to the extent and value of the estate and access to the court that is procedurally fair and is seen to be fair.

[12] In *Molotlegi v Mokwalase*⁵ the court stated at [20] :

“[20] A court hearing an application for a separation of issues in terms of rule 33(4) has a duty to satisfy itself that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a court seized with such an application 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

⁵2010 All SA 258 SA at [20]

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.”

[13] Having regard to the advantages and disadvantages, whilst it is important that the applicant who has contributed greatly toward building on the parties’ vast estate should be able to move on with his life and acquire assets and properties as he wishes, it is appropriate that the respondent should know the extent of the estate that has been built up. Her contribution as a mother and wife in supporting the applicant cannot be underestimated. The applicant indicates it has taken years to build up the estate. The respondent is entitled to appreciate the extent of the estate to which she contributed and to have her fair share determined. The applicant describes an extensive estate but is unable to attach values. The applicant indicates that it would take years to unbundle the joint estate and has no difficulty with the court granting spousal maintenance arguing that the respondent’s claims are novel. This is not the case, however, it may be the unique aspect of the claim which may be prejudicial in rushing it through a division of the joint estate and separating the divorce from the remainder of the issues related to the granting of the divorce. I am of the view that the separation may cause prejudice to the respondent and thus am not able to grant the request for such separation.

[14] In the premises, the application in terms of rule 33(4) is dismissed with costs.

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Adv. A Ayayee
Instructed by : Mashiane, Moodley & Monama Inc

On behalf of the respondent : Adv. M Feinstein
Instructed by : Clarks Attorneys

Date of hearing : 29 November 2022
Date of judgment : 13 February 2023