REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 52101/2018

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 6 November 2023

In the matter between:

M P[redacted] **Plaintiff**

and

PG P[redacted] **Defendant**

Summary:

Action for divorce- married in community of property – requirements for a decree of divorce restated – failure to settle on division is not a bar to such a decree

Requirements for the appointment of liquidator to divide joint estate discussed

Section 10 of the Divorce Act re costs – relative means and conduct of parties considered

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JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 06 NOVEMBER 2023

K STRYDOM, AJ

INTRODUCTION:

1. This opposed divorce appeared before me by way of special allocation, granted given the protracted duration of the litigation. Instituted in 2018, there have been no less than three opposed Rule 43 applications, three applications to compel discovery, criminal proceedings of varying nature and arch levers of recriminatory correspondence. Even a case management meeting presided over by the Honourable Ledwaba DJP in February 2023 could not salve the oppositionary stances of the parties.

2. And yet, at its heart, the matter concerned, as with most divorces, two main issues: children and assets. Ironically, the more problematic issue, which is usually less capable of judicial resolution, namely the children, had not really been in dispute since 2021 and, by the morning of trial, the parties had managed to reach an agreement in this regard.

3. This beggars the question: what was so unique regarding the division or the assets that justified the extent of the litigation herein? The parties were married in community of property. The joint estate consists of two houses of moderate value, two pension funds and some movable property consisting of household goods, investments policies and money in bank accounts. From the outset the Plaintiff in her particulars of claim claimed that a liquidator should be appointed to divide the assets equally between the parties. The Defendant countered that the assets should not be liquidated but divided per item between the parties (for instance, that the Plaintiff keeps one house and the defendant the other) and that his pension fund should not be divided equally with the Plaintiff.

4. There was certainly a dispute, however, nothing to the extent that a Court could not relatively easily decide on division of the estate. In short, neither the arguments regarding division of the joint estate, nor the nature of the assets were unique within the context of the plethora of divorce proceedings brought daily in this division.

5. So why then the proverbial "War of the Roses'? Fortunately, the Court does not The answer may lie somewhere within the context of Conradie AJ's reasoning in *Spangenberg NO and Another v De Waal:*[1]

" More often than not, evidence of the irretrievable breakdown of a marriage is emotional rather than factual in nature. When a spouse states that his or her marriage has irretrievably broken down, he or she is making a statement of the heart rather than a statement of fact[2]*.."*

"Even though marriage as an institution is today much more secular in nature than it was a century ago, and even though divorce is much more prevalent and certainly socially more acceptable than then, the deep personal nature of marriage has not changed and it remains the most intimate of all human relationships recognized by law.

[1] Spangenberg NO and Another v De Waal (15226/2005) [2007] ZAGPHC 233; [2008] 1 All SA 162 (T) (18 October 2007) at
[2] Spangenberg at page 14

It is thus my considered view that the fact that fault no longer needs to be proved makes the decision to institute divorce proceedings rather more personal than less personal in nature." [3]

THE CHILDREN:

6. On the first day, prior to commencement, I was informed that the parties have reached a settlement pertaining to the children in respect of all issues, including maintenance, primary residence, parental responsibilities and the reasonable contact rights of the Defendant.

7. In chambers, it was indicated that the Family Advocate had not delivered a final report but that there were two (2) interim reports from her and that a social worker has delivered progress reports (uploaded on Caselines) pertaining to a reunification process between the children and the Defendant, which was instituted pursuant to a Rule 43(6) order that was granted in 2021. The terms seemed of the agreement seemed to be in line with the opinion of the social worker. I, however, requested counsel to upload the interim reports of the Family Advocate for perusal.

8. On the first day of trial both the Plaintiff and the Defendant testified and both parties closed their respective cases. The matter then stood down to the following day for argument.

9. Afterwards, upon perusal of the interim report of the Family Advocate dated December 2022, it became evident that the previous reunification process was not done at the behest of the Family Advocate. The Family Advocate was only requested to do an enquiry in November 2022. By that stage the final report as to the reunification process had already been furnished which indicated that the process had failed. In terms of that report the finding was that such a process should only be reinstituted if either of the minor children approached the social worker directly requesting such a reunification process.

10. In view of the aforementioned I was not satisfied that during testimony, the Plaintiff and Defendant respectively gave sufficient evidence as to the best interest of the children. Given that were certain allegations that the parties may want to keep private, which are however relevant to the determination of the best interest of the children, I offered the parties the option of recalling the Plaintiff and the Defendant to testify formally on record in Court or to have an off-record discussion in chambers. The parties elected to have off record discussions.

11. The content of the off-record discussions will naturally not be repeated here, however it is noted that the parties were given the option to object to certain information provided during the discussion. They indicated that they have no objection to my consideration of all the facts revealed in exercising my function as the children's upper guardian. Having had a full and frank

[3] Spangenberg at page 15

disclosure and discussion with both the mother and father of the children, I, as upper guardian, am satisfied that the order I make herein does serve the best interest of the children.

DIVISION OF THE ESTATE:

12. The parties were married in community of property to each other in 2008.

13. The joint estate consists of two immovable properties, which I will refer to as the "*Centurion property*" and "*Moreleta property*". Both the properties are paid for in full. The household goods have largely already been divided, save for a few items that remain in dispute as agreed upon between the parties. Both parties are members of a pension fund.

14. The joint estate also owes money to the Plaintiff's father in respect of a loan made for the acquisition of one of the properties property. The repayment of the loan is however subject to an action instituted by the Plaintiff's father against the Plaintiff and Defendant for repayment. I have been informed that the question of the interest and the legal costs are the main bones of contention in that action. However both parties concede that the repayment of the capital at least is a liability that falls within the joint estate. The loan was approximately for R300 000-00. Both parties in argument agree that after division of the joint estate but prior to distribution to the parties, an amount should be kept separate for purposes of satisfying the outcome of said action. The Plaintiff's counsel proposed an amount of R400 000-00 to which the Defendant's counsel at hearing raised mo objection.

15. During testimony the Defendant conceded that the Plaintiff was entitled to an equal portion of his pension fund, as well as the remainder of the joint estate. Effectively therefore the issues pertaining to the division of the estate to be decided were largely settled.

16. The issue in contention, however, remained the methodology of the division. The Plaintiff has, since inception of the matter in 2018, maintained that a liquidator should be appointed. The Defendant has, for a similar period maintained that the costs pertaining to such an appointment is detrimental to the joint estate and that the parties should be able to settle the question of how to divide the joint estate. Initially, while testifying in the trial to finalise the dispute, the Defendant seemingly still believed that settlement was possible. The realisation that amicable settlement was no longer an option did however dawn of the Defendant during the course of the proceedings.

17. During argument on his behalf, it was initially submitted that the parties should each retain a property, the defendant retain his investments and that the Plaintiff be compensated for the difference in value by allocating her a larger percentage of his pension fund.

18. The proposal however raised certain practical difficulties, such as*, inter alia*, the determination of values of the property *vis-à-vis* the percentages of the value of the percentage of the Defendant's GEPF. (This difficulty, ironically, favours the appointment of a liquidator, as contended for by the Plaintiff.)

19. A major issue, that featured prominently in the arguments pertaining to the division of the joint estate, as well as the cost arguments, is that of the Defendant's failure to properly discover all his bank statements, as well as his failure to disclose the existence of two bank accounts. For purposes of the methodology for the division of the joint estate it is only relevant to note that during testimony the Defendant admitted to having two bank accounts that he had not disclosed during the discovery process or on his financial disclosure form. This, the Plaintiff argues, necessitates the appointment of a liquidator with the powers to fully investigate the extent of the joint estate with specific reference to the assets held by the Defendant.

Legal principles applicable to the appointment of a liquidator

20. Where parties cannot agree on how to divide the joint estate, then either one or both of them may approach the courts for the appointment of a receiver and liquidator. In *Botha NO v Deetlefs and Another* 2008 (3) SA 419 (N), for example, Koen J held at para 15 that:
'*Upon termination and in the absence of agreement, a receiver should in the ordinary course and in the absence of agreement as to how the dissolution of the partnership is to be achieved, be appointed to collect all assets, discharge debts and generally liquidate the partnership.'*

21. However, in exercising its discretion a Court should also have regard to the nature of the estate and the extent of the dispute as to division. For instance, in the case of *Schoeman v Rokeby Farming Co (Pty) Ltd* 1972 (4) SA 201 (N) at 206D-G the Court, in deciding whether or not the size of the joint estate justified the appointment of a receiver and liquidator, held that:

"'[The plaintiff] could claim the appointment of a liquidator … . In this case, however, there does not seem to be any practical purpose in doing so. … There are no difficulties with regard to capital contributions and it is simply a question of determining the expenses that have been incurred in the farming operations. … The farming activities do not appear to have been particularly complex nor to have extended over a long period. In fact the partnership has been of a very restricted nature. In these circumstances, it appears to me to be unnecessary to go through the formality of having a liquidator appointed … ."

Finding on the methodology for the division of the estate

22. The unfortunate result of the failure to properly disclose his financial status, is that the Court is not in an informed position to make an equitable order regarding the division itself. Had there been no uncertainty pertaining to the cash component of the assets held by the Defendant, it

would probably have been possible to dispense with the appointment of a liquidator. However, as soon as investigations need to be done into the financial affairs of a party, the Court is no longer in a position to properly assess the value of the joint estate.

23. As such it was found that a liquidator should be appointed. I requested both parties' legal representatives to provide proposed draft orders specifically indicating the process for the nomination of said liquidator, as well as his/her fees for consideration. However, on the 17th of October 2023 I was informed that the parties had reached an agreement on the identity of the liquidator, as well as his fee structure. The agreement will therefore be reflected in the order.

24. The parties have also provided a schedule of the household property still in dispute, however, given the appointment of the liquidator, it is not necessary for this Court to decide on the division thereof, save for noting these items for distribution by the liquidator in the order.

25. With regards to the only real liability in the joint estate, the loan by the Plaintiff's father, I agree that a portion of the capital realised by the liquidation of the estate should be set aside pending the outcome of the legal proceedings instituted by the Plaintiff's father against the Plaintiff and the Respondent jointly for the repayment of the loan.

COSTS:

26. A Court's, already almost exclusive, discretion regarding the awarding of costs, is expanded even further by Section 10 of the Divorce Act, which provides that costs need not be reliant on which party obtains substantial success. Having so done away with the golden rule insofar as cost awards are concerned, the only guide that the Section provides to a Court in exercising such an unfettered discretion is that regard may be had to the relative means of the parties as well as their conduct throughout the proceedings, if relevant. Costs may also be apportioned between the parties.

27. The Plaintiff has argued that the Defendant should be ordered to pay the Plaintiff's costs in view of his conduct and the relative means of the parties. The Defendant has argued against such an order and argued that parties should each pay their own costs.

Arguments regarding conduct

28. The Plaintiff's counsel referred me to the following factors to consider in support of her contention that the Defendant should pay her costs:
    28.1. The Defendant's failure to properly disclose and discover caused the delay.
    28.2. The Defendant obstinately refused to agree to the appointment of a liquidator despite the interventions of the Deputy Judge President in February 2022

28.3. The Plaintiff obtained three orders on various dates against the Defendant to compel him to make proper discovery of, mostly, certain bank statements. In one of those orders, the Court expressed it displeasure at the lackadaisical approach of the Defendant.

28.4. The Defendant did not disclose two bank accounts in his financial disclosure form and only admitted to holding them during the hearing itself.

29. These facts underscored arguments, loosely, centred around delay in finalisation of the action and the defendant's conduct in general.

Delay

30. A judicial case management meeting was held before Deputy Judge President Ledwaba on the 2nd of February 2022. The transcript of the meeting has been made available to Court and both parties have acknowledged the correctness thereof. The following excerpts are significant in contextualising the discussion:

> **Judge Ledwaba**: Instead of starting with this issue of discovery and other things, let's start with the main thing, on the issue is a question of permanent residence an issue"
>
> …….
>
> *(For the Defendant)* **Advocate Fitzroy**: Judge I think the matter must be set down for trial and if the steps must be taken but the plaintiff in my view is delaying the process by requesting one document after the other where they can simply just issue a subpoena if they struggle to get the participation of the defendant…. the matter needs to be finalized there's one application after the other brought by the plaintiff.
>
> **Judge Ledwaba**: That's why you going to court to get a divorce, the permanent residence is not an issue and then the ..... there would be what can I call it... structured a contact rights etc and you go for a simple division the liquidator will deal with the question of assets later."
>
> ……..
>
> **Judge Ledwaba**: If you agree on that and then you prepare a settlement agreement on those basis this matter can be finalized still in February. Instead of delaying this matter unnecessarily with applications to compel, costs are escalating unnecessary. So do you want an opportunity to go and discuss the proposals that I have said to you, get a divorce the issue of the children you say is not a problem anymore and then you get a blanket division and you can even agree on who should be the liquidator. The liquidator will deal with the rest of the things. Is it, is it not a maybe a sensible and practical way to, to deal with this because there are allegations that the defendant does not want the matter to be finalized the defendant alleges that it is the plaintiff whose asking for this documents dragging the matter unnecessary. Do you want to explore what I proposed to you and if you have reached an agreement then I can give you a date still in February?
>
> (For the Plaintiff) **Advocate Joubert**: Yes Judge
>
> **Advocate Fitzroy**: That, That's a good suggestion and my learned friend and I will, will do our best at the, how we can finalize this matter. .
>
> **……**
>
> *(For the Plaintiff)* **Attorney Geldenhuys**: My Lord, I just want to clarify because when making an application we will have to say that discovery was properly done and we can't do it at this stage.

Judge Ledwaba: This is not a question of sin. The question of discovery is sort for the purpose of division of the joint estate isn't it?

Attorney Geldenhuys: Yes

Judge Ledwaba: And if you agree that the liquidator is appointed, the liquidator has got the power to go to the bank and deem whatever is needed so the parties can, the estate can be properly divided

31. The inference that the Plaintiff, seemingly, wants this Court to draw from those proceedings, is that the parties had in principle agreed to settle the question of division on the basis of the appointment of a liquidator. Had this agreement been reached, it is argued, the divorce could have been finalised in February 2022. The Defendant subsequently, however, indicated that he wanted to withdraw his admission that the marriage had irretrievably broken down. As a result hereof, the Plaintiff argues, the agreement to settle fell by the wayside, resulting in a further delay. I will deal with the proposed withdrawal of the admission later in this judgment.

32. It is clear from the excerpts that counsel did not bind the defendant to a settlement agreement to appoint a liquidator. He agreed to present the (very) sensible proposal by the Honourable Ledwaba DJP, to the defendant. There was therefore no agreement to renege on. The defendant clearly did not accede to the proposal and instead proposed to amend his plea to deny the irretrievable breakdown. (It is common cause that such an amendment was never made).

33. As counsel for the Defendant rightly argued, a party cannot be penalised for the mere failure to settle a matter where they are entitled to defend same. Whether or not the defence succeeds before Court is not an issue germane to determining the obstructiveness or mala fides of the conduct of the party raising such a defence. Naturally, the relative strength of the defence may be indicative of the possibility that the party raising it is obstructive or mala fide, but it cannot be regarded, especially in divorce cases, as prima facie proof of such impugned conduct. To my mind most, if not all, defended divorces would, under those circumstances, be subject to special cost orders against the "unsuccessful" party. This conclusion ties in with the specific provision in Section 10 that substantive success is not an indicator of cost awards in divorce proceedings.

34. Furthermore, the failure to settle on the issue of dividing of the joint estate, (or the failure to properly discover or disclose financial statements), cannot be said to have been a bar to the Plaintiff obtaining the order for divorce along the lines of the proposal. In 2018 she had already indicated that the joint estate should be divided by a liquidator and that the issues pertaining to the children should be disposed of *"as per the report of the family advocate*".

35. Ledwaba DJP in fact indicated to the parties during the judicial case management meeting that the incomplete disclosure and discovery by the Defendant becomes irrelevant (for the lack of a

better word) once a liquidator is appointed with the powers to in any event investigate the financial affairs of the parties.

36. In terms of the Divorce Act, a Court should order a decree of divorce once the following two (2) requirements are met:
    a) That there has been an irretrievable breakdown of the marriage;[4] and
    b) That the rights of the children are adequately protected having had regard to the report of the family advocate.[5]

37. These are the only bars to the granting of a decree of divorce. There is no requirement that there should be a settlement on the patrimonial aspects. In fact, once an irretrievable breakdown is proven and the Court is satisfied that the interests of the children have been safeguarded, it has no discretion to refuse to order a decree of divorce.

38. Where there is no agreement on the division of the joint estate to be incorporated into the order, in terms of Section 7(1) of the Act, the joint estate will be divided upon the decree of divorce being granted. As was recently held in *T.K.G v M.N*: "(*u)pon a decree of divorce being granted dissolving a marriage in community of property, the community of property existing between the relevant spouses terminates ex lege and their joint estate is (notionally) divided on an equal basis*."[6]

39. Therefore, once a) and b) supra have been met the Court will order a decree of divorce. That having been done, the estate is automatically divided, with or without a settlement agreement. The appointment of a third party to administer the estate is an order the Court may make in the absence of such an agreement.. As state by Wallis JA in *Morar NO v Akoo and Another* 2011 (6) SA 311 (SCA):

    "When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate, and the court has power to appoint some person to effect the division on its behalf."

40. With regards to the irretrievable breakdown requirement as per a) supra, it should be noted that, by the time the possible withdrawal of the admission was canvassed by the defendant in 2022, the parties had not lived together for approximately three years. Therefore, even if such an

[4] Divorce Act Section 4
[5] Divorce Act Section 6(1)
[6] T.K.G v M.N (44477/2021) [2023] ZAGPJHC 418 (4 May 2023) at para 42

amendment had been affected, the irretrievable breakdown would have been *prima facie* proven in terms of S4(1)(a) of the Act. The defendant's proposed amendment therefore was no real bar to a successful claim for divorce in this regard.

41. However, the same cannot be said with regards to the requirement pertaining to children under b). In all matters where children are involved the family advocate at the very least should endorse a settlement where provision is made for care and contact. In cases, such as the present one, where the settlement or any proposed settlement would have fallen outside the norm given the less than favourable circumstances, the family advocate would probably have had to conduct an enquiry (as she in fact started to do).

42. That the Plaintiff was alive to the necessity of such a report from the family advocate, is evident from her particulars of claim dated 2018. However, the family advocate was only requested to conduct an enquiry in November 2022, well after the judicial case management meeting in February 2022.

43. During argument counsel for the Plaintiff submitted that had the question of the division of the estate been settled at that stage, the settlement pertaining to the minors could have been sent to the family advocate for endorsement timeously for the matter to still be finalised in February. This submission presupposes the position the family advocate would have taken at that stage and is speculative at best. What is known is that, in December 2022, the family advocate commented that, as the reunification process had failed, she requested updated psychological reports on the Defendant as well as updated school reports. Clearly the family advocate would not simply have endorsed the agreement without query.

44. Accordingly, the Defendant's conduct, in terms of his non-disclosure, failure to settle on the appointment of a liquidator or his intention to amend his plea, would not have been the true cause of the delay in finalising the divorce.

45. The fact that the Defendant did not disclose certain bank accounts or that his conduct in discovery led to the suspicion that he may be hiding certain cash assets would in fact have been one of the reasons in advancement of the appointment of a liquidator.

46. It appears to this Cour that both parties fixated on the methodology for the division of the joint estate and proper discovery as a prerequisite for a decree of divorce being granted and lost sight of the fact that the only bar to the Court making an order, in these circumstances would be if there had been no enquiry into the best interest of the children.

General conduct of the Defendant

47. During his testimony the Defendant admitted that he did not want to get divorced and that he therefore wanted to amend his plea to indicate that the marriage had not irretrievably broken

down. This was not because of an attempt to frustrate the legal process but due to him "*fighting*" for his marriage. He testified that after the Plaintiff left the marital home in 2018 he had made significant attempts to change from the person he *"did not want to be"* into the person that he should be for his wife and children. He testified that he had, for instance, stopped drinking and became involved in church. From the reunification reports it is also evident that he made attempts to change aspects of his behaviour that were deemed to be objectionable towards his children, such as his too strict disciplinary views.

48. The Defendant came across during testimony as a man who, until the day of trial almost, still believed that his marriage could be saved. His recounting of his reasoning pertaining to the unaffected amendment and the reasons for objecting to the appointing of a liquidator (costs and wanting to keep certain assets for the children etc) He, to his own detriment admitted to ownership of the undisclosed bank accounts.

49. Insofar as the proposed amendment of the plea as proof of obstructiveness is concerned, I do not find that the Defendant's conduct was obstructive for the mere sake of being so. He, in my view, albeit misguidedly, legitimately believed that he could save his marriage through his actions alone. His total disregard for the wishes of the Plaintiff, whilst deplorable, cannot, under the circumstances, be elevated to wilfully *mala fide.* In the words of Conradie AJ in *Spangenberg*:

" …it is very difficult for an outsider to prove that an individual no longer loves or respects his or her spouse."[7]

50. With regards to the previous cost orders made in the compel applications and specifically the Court's previous express indication of its displeasure at the "lackadaisical" approach of the Defendant, it is noted that he was ordered to pay attorney and client costs in that application. With regards to the other two applications, he was ordered to pay the costs on party and party scale.

51. During argument, on behalf of the Defendant, it was further submitted that the orders should not be seen in isolation but should be compared against the bulk of the discovered documents during the course of the matter. Essentially the argument is that the bank statements requested formed part of a much larger request for discovery and that the Defendant for the most part complied with the requests. It was further indicated that the divorce had been very involved and that throughout the process the Defendant, as is evidenced by the correspondences and documents discovered over the course of 5 (five) years, was engaged in the process and for the most part complied with requests.

[7] Spangenberg at page 15

52. I have already discussed the issue of delay vis-à-vis the failure of the defendant to properly discover and will not repeat those findings here, save to make the following observations: The need for multiple applications to discover bank statements (and in most cases only certain pages of bank statements), in a case where the Plaintiff ab initio wanted a liquidator to be appointed, is dubious. The liquidator would in any event have been able to obtain all the statements sought. A party is entitled to prepare his or her case to the best of their ability, but where one is litigating from a joint estate, sight should not be lost of whether a particular step taken is necessary to achieve the outcome sought.

53. In any event, cost orders had already been made against the Defendant in those instances and his conduct was already assessed and punished in one instance. It would not behove this Court to sanction the duplication of assessments on conduct and the institution of double punitive measures based on a such assessments.

54. The Defendant's failure to disclose his ownership of the two bank accounts on his financial disclosure form (or in discovery), on the other hand should draw the ire of this Court. The form itself contains a warning that failure to properly complete same could result in adverse costs orders against such a non-compliant party. The Defendant, during testimony, gave no justification or explanation for this non-disclosure.

The relative means of the parties

55. With regards to the relative means of the parties, the financial disclosure forms submitted by the parties indicate that the Defendant earns more than double (approximately R23 000) the income than that of the Plaintiff. (approximately R11 000) However, once this order is made, as agreed between the parties, the Defendant will pay R4500 maintenance, the full costs of medical aid for the children as well as the costs pertaining to school fees. He will also have to pay rent as the house he lives in currently will be sold by the liquidator.

56. The Defendant, on the face of the summary of capital per the financial disclosure form, seems to be in a far better position with an asset value of R2 322 563 the Plaintiff's R485 264-00. However, once the joint estate is liquidated, the only difference in the total value of their assets would be as a result of the legal costs incurred. The Plaintiff's legal costs are approximately and estimated R780 000-00, whilst the Defendant's are approximately R90 000-00. Naturally, a portion of the Plaintiff's costs are, by virtue of previous Court orders, already payable by the Defendant (estimated at R140 000-00).

57. It would be inherently contradictory to have regard to legal costs as a factor in determining the relative means of parties in order to determine liability for costs. I, in any event, do not understand

the section to indicate that “relative means” (within the context of a joint estate), should be a prevailing factor.

58. Correctly therefore, at the hearing, the conduct of the parties formed the predominant part of the argument presented.

Caselaw

59. By way of illustration as to how the Courts have decided costs in terms of Section 10, regard could be had to the following two cases:

60. In *N.S v M.F.S* (20/27078) [2023] ZAGPJHC 1044 (19 September 2023), the parties were married in community of property. The Defendant was self-represented and had brought no less than 12 applications against the Plaintiff; most of which were not proceeded with once an answering affidavit was filed. At the hearing, the Defendant first sought to unilaterally remove the matter from the roll, then requested a postponement to obtain legal representation. When given the opportunity to do so, he failed to. He further refused to attend pre trials, failed to sign a joint practice and failed to discover. He would only comply with any part of the pre-trial proceedings once compelled by a Court to do so. After proceedings were instituted, he cashed out his provident fund and did not explain what he did with it, he forged the signature of the Plaintiff on her bank statements and damaged her vehicle. The Defendant was ordered to pay 50% of the Plaintiff’s costs.

61. In *C v C* (13116/13) [2018] ZAGPJHC 535 (10 September 2018), an application for costs was brought after the decree of divorce had been already issued, based on a consent order to divide the assets equally. However, the parties could not agree on a liquidator or the amount of rehabilitative maintenance. Neither of these issues formed part of the application under discussion. The Court made a finding on the few facts before it. In concluding that Defendant (the husband) should pay 50% of the Plaintiff’s costs, Meyer J had regard to the parties relative means. The Defendant was a successful farmer whose earnings were noted as R25 0000, but lived rent free on the farm, did not pay for electricity, received meat and dairy free and used vehicles which belonged to the business. The Plaintiff was a beautician/ office worker who earned approximately R10 000-00 per month. The parties’ respective legal expenses in the divorce were roughly similar.

Finding on costs

62. As alluded to supra, the relative means of the parties are not such that would justify an order as prayed for by the Plaintiff or any order apportioning costs against the Defendant in favour of the Plaintiff.

63. As to the consideration of the Defendant's conduct, I cannot find that the delay in finalisation was solely his fault. The exacerbation of costs due to the applications brought by the Plaintiff is mitigated against by the cost orders already made. Furthermore, I have already indicated that these applications were not strictly necessary to finalise the divorce from the Plaintiff's point of view. This does not mean that the Plaintiff is solely responsible for the delay and exacerbated costs either. That the Defendant wanted to delay the divorce in an attempt to reconcile is obvious. However, given the factors mentioned, I am not in a position to determine which portion of the exacerbated costs should be attributed to which party. By ordering that the costs of the divorce, save for the costs already awarded against the defendant, be borne by the joint estate, I will be holding each party 50% responsible for the costs.

64. The "punitive" element, as regards the defendant's conduct, lies in the substantial increase in legal fees he would be paying for. By way of illustration: Instead of paying only his costs of R90 000-00 as per the financial disclosure form, he would be responsible for 50% of the total costs, excluding the costs awarded against him already. Using the figures, as per the form, purely for illustration, his liability would be calculated as follows:

- Total legal costs: Plaintiff (780 000)+ Defendant (90 000)		R870 000-00
- Defendant's liability:	50%=	R435 000-00
- Add: Costs already awarded:	+	R140 000-00
- Defendant's total liability for legal fees	=	R575 000-00

65. The Defendant's failure to disclose the two bank accounts on the financial disclosure form has, additionally, had an impact on the costs of the division of the joint estate. As already found, had there been no question as to the true financial status of the Defendant (i. e. he had fully disclosed and discovered) the Court may well have found that the appointment of a liquidator is unnecessary, especially given the concessions made at the hearing The Court would have been in a position to, for instance, order that the properties be sold, that the parties are entitled to 50% of the respective spouses' pension, that the disputed household items be sold and divided and that the cash component as contained in each party's bank statements similarly be divided. Provision with regards to the payment of the loan (that is still subject to an action), could have been made with reference to certain of the monies being paid into a trust account of, for instance, an attorney.

66. However, the fact that the Defendant has not been frank with regards to his bank accounts, has led this Court to conclude that a liquidator must be appointed to fully investigate the financial statement and assets held by both parties. Ironically, that which the Defendant feared, namely the unnecessary expenditure on the part of the joint estate due to the appointment of a liquidator, has materialised as a result of his own conduct. On the other hand, the Plaintiff has insisted on

the appointment of a liquidator from the start of the action. As such, the costs so incurred should be borne by her as well.

67. I therefore propose to apportion the cost of the liquidator's fee between the parties. In the exercise of my discretion, I accordingly hold that the Defendant is liable for 70% of the fees of the liquidator.

ORDER

68. I accordingly order as follows:

1. A decree of divorce is granted;
2. The Plaintiff and the Defendant shall retain full parental responsibilities and rights of the two minor children as well as guardianship in terms of Section 18 of the Children's Act 38 of 2005;
3. The primary residence of the minor children shall be awarded to the Plaintiff, subject to the reasonable right to contact by the Defendant, which contact would be exercised as follows:
4. Contact rights of the Defendant to be exercised as follows:
   4.1. The reunification process will continue only after Ms Adell-Mari Wolmarans has:
      4.1.1. assessed each minor child and determined whether said minor child is ready to commence the reunification process; and
      4.1.2. having had regard to the the updated report of Ms Owens regarding the defendant, or, in the alterative having had regard to a new psychometric test report regarding the defendant; and
      4.1.3. having conferred with Ms Yolandi Heyns, the children's current psychologist.
   4.2. The reunification process will continue under the supervision of Ms Adell-Mari Wolmarans and assistance of the social worker Ms Magriet van Schalkwyk.
   4.3. The phasing in of contact as per the reunification process will develop at a pace to be determined by Ms Adell-Mari Wolmarans with the assistance of Ms Magriet van Schalkwyk
   4.4. Each next phase will only be implemented after approval by Ms Adell-Mari Wolmarans with respect to each minor child separately.
   4.5. Ms Adell-Mari Wolmarans will confer with the minor children's psychologist Ms Heyns throughout the process.
5. Costs not paid for by the medical aid, as referred to in paragraph 6.3 below, in relation to reunification process set out in paragraph 4 shall be shared equally between the parties;
6. Maintenance of the minor children to be paid follows:
   6.1. The Defendant will pay an amount of R 4,500.00 in respect of maintenance for the minor children directly into the nominated bank account of the Plaintiff on or before the 3rd of every month, which amount will increase by 5% every year on the anniversary month of this order;
   6.2. The Defendant will be liable to pay for the school fees of both minor children directly to the respective institutions, the Plaintiff to be liable for the boarding school fees;
   6.3. The Defendant will maintain the minor children and his medical aid;
   6.4. The Plaintiff will be solely liable to pay any amounts not covered by the medical aid;
   6.5. The Plaintiff will be solely responsible for payment of school stationary, school uniforms, equipment and clothing required for extramural activities and homeware;

7. The Plaintiff shall be entitled to 50% of the Defendant pension interest held with the Government Employees' Pension Fund, with member number [redacted] as at the date of divorce and that the Government Employees Pension Fund be ordered to make payment to the Plaintiff and endorse its records accordingly;

8. The Defendant shall be entitled to 50% of the Plaintiff's provident fund interest held under Lifestyle Retirement Preserver Fund, which is held by Liberty with policy number [redacted] as at the date of divorce and that Liberty be ordered to make payment to the Defendant and endorse its records accordingly;

9. The household effects to be divided as per annexure "A" attached hereto, the disputed item to be sold by the below nominated liquidator and receiver and the proceeds to be shared between the parties.

10. The remainder of the joint estate as at date of divorce to be divided between the parties by the appointed Liquidator and Receiver, Mr Jacques Fisher of Van Rooyen Fisher Trustees;

11. The appointed Liquidator and Receiver shall give effect to the division mentioned in paragraph 10, with the following functions and powers:
    11.1. Demand that both parties to provide a true and proper account of all their assets;
    11.2. To value all assets of the spouses both movable and immovable;
    11.3. To investigate claims of assets being hidden by either of the parties;
    11.4. To establish the true liabilities in the estate of the spouses;
    11.5. To interrogate the parties as may be necessary;
    11.6. Have access to any premises for purposes of valuating assets;

12. Before division occurs, the Liquidator shall keep an amount of R400 000.00 in abeyance until the finalisation of the matter under case number 3420/2020 in which matter the parties are Defendants. Upon resolution of the claim under case number 3420/2020 and after payment of the legal fees incurred or due in terms of such resolution or court order, the liquidator must pay any residual amount remaining to the parties in equal shares;

13. The Liquidator shall adjust each party's share of the joint estate to be paid to them following division, to give effect to the following:
    13.1. The costs of the divorce as incurred by both the Plaintiff and the Defendant are to be paid by the joint estate, but
    13.2. where costs have already been awarded by court against the Defendant, his share of the division stands to be reduced accordingly and such amounts to be credited to the Plaintiff;
    13.3. provided that, where the defendant has already made payment, in respect of the costs awarded against him, the amounts paid shall not be included in the adjustment.
    13.4. The Defendant shall be liable for 75% of the liquidator's fees and the Plaintiff for 25%.

14. The appointed Liquidator and Receiver to be entitled to the fees as stipulated in Tariff B in the Second Schedule to the Insolvency Act, 24 of 1936 as amended, as the remuneration of a Trustee under Section 63 of the Act, as applied to the value of the respective assets so divided by him.

K STRYDOM

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Judgment reserved: 17 October 2023

Judgement delivered: 6 November 2023

Appearances:

Plaintiff's Legal representatives:

Attorneys: Geldenhuys Botha Inc

Counsel: Adv. M. Joubert

Defendant's Legal representatives:

Attorneys: Anja Opperman Inc

Attorney appearing as counsel: Anja Opperman