

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 7139/2020

In the matter between:

C[...] **P[...]**

PLAINTIFF

and

G[...] **P[...]**

DEFENDANT

ORDER

Having read the papers and after hearing counsel, the following order is made:

1. The application for amendment is granted.
2. The application for separation of issues in terms of rule 33(4) is refused.
3. The trial is postponed sine die.
4. The plaintiff is to pay the costs occasioned by the postponement and the separation applications.

JUDGMENT

Date Delivered: 1 March 2024

MASIPA J:

[1] This matter was set down for trial from 28 August 2023 to 31 August 2023. At the commencement of the proceedings, counsel for the plaintiff submitted what he termed a consent draft order with the following terms:

- '1. The plaintiff is granted a decree of divorce dissolving his marriage with the defendant
2. Under uniform rule 33(4) an order of separation of issues is granted as follows:
 - [a] The first issue to be determined is whether the plaintiff is entitled to the relief set out in its application for an amendment issued on 11 July 2023, namely the following:
 - [i] The plaintiff's particulars of claim are hereby amended in accordance with the plaintiff's notice of intention to amend dated 9 June 2023.
 - [ii] The defendant is ordered to pay the costs occasioned by her opposition to the said amendment including the costs of senior and junior counsel.
 - [b] In the event that the said amendment is granted, the parties are directed to forthwith make any consequential amendments that they may desire.
 - [c] The second issue to be determined is the proper interpretation of the antenuptial contract concluded between the parties.
 - [d] The parties are directed to make every effort to conclude any consequential amendments, evidence, and argument relating to the first and second issues during the current set down dates of 28 August 2023 to 31 August 2023.
 - [e] The determination of all other issues between the parties is stayed until the final determination of the first and second issues.'

[2] The plaintiff argued that the decree of divorce was to be granted, but this was contested by the defendant's counsel, who stated that the decree could not be granted while the issue of maintenance, among others, was still outstanding.

[3] As per the proposed draft order, the parties agreed for the issues to be separated under Uniform rule 33(4). The issues sought to be separated were the determination of an amendment sought by the plaintiff and one relating to the correct interpretation of an antenuptial contract ('the ANC') concluded by the parties on 10 January 2009.

[4] In my view, it was unnecessary to invoke the provisions of rule 33(4) in respect of the amendment. This invocation seemed unnecessary since, in terms of rule 28, a party can amend its pleadings at any stage before judgment.

[5] The plaintiff sought to amend his particulars of claim in accordance with a notice of intention to amend dated 14 June 2023. The defendant objected to the intended amendment on or about 27 June 2023. The notice of motion for the leave to amend was served on the defendant on 11 July 2023 while the answering affidavit was dated the same date as the replying affidavit being the 22 August 2023. Despite the exchange of papers between the parties, the full set of the application to amend was only handed up for the first time at the hearing, together with the parties' respective heads of argument, and the application was argued.

[6] The relevant terms of the ANC provided as follows:

- '4. The commencement value of the respective estates of the intended parties as at the date of marriage is NIL.
5. The parties further record that in determining the accrual in each parties estate, the following assets shall be included in the calculation of the accrual:
 - 5.2.1 That of C[...] P[...]: K[...] CC, situated at [...], Springfield Park. Valued at: R3 000 000.00
 - 5.2.2 That of G[...] D[...]: [...] H[...] Road, Durban North. Valued at R2 000 000.00 F[...], situated at [...] H[...] Road. Valued at: R1 000 000.00
6. The assets of the parties mentioned as reflected in 5.2.1 and 5.2.2 hereto as well as all liabilities attached thereto, or any other asset acquired by such party by virtue of his/her possession thereof, shall be taken into account as part of such party's estate either on the date of conclusion of the marriage or upon dissolution of the marriage and shall be specifically included from the accrual of the estate.'

[7] On 9 October 2020, the plaintiff issued summons against the defendant seeking a decree of divorce, rectification of the ANC, and that he pays to the defendant an amount in money equivalent to the difference between their accrual with the quantum of such amount being determined by the court, together with costs in the event of the defendant defending the case. The defendant defended the divorce and delivered a claim in reconviction. In both the defendant's plea and the replication, the defendant sought and/or consented to the decree of divorce, sought

spousal maintenance, and the determination of each party's estate and their accrual, amongst others.

[8] During 21 April 2021, the plaintiff amended his particulars of claim by the deletion of a paragraph and a prayer for rectification. The result of this was that the plaintiff no longer sought to rectify the ANC. The plaintiff averred that he no longer sought rectification since the ANC could and should be interpreted to exclude the separate assets' stated values as well as the value of any other asset acquired by virtue of possession or former possession of the separate assets.

[9] In the current application, the plaintiff seeks to amend his particulars of claim to allege that the correct interpretation of the ANC is to exclude separated assets from accrual. He contends the following:

'[14] I now seek to amend my allegations insofar as they relate to the antenuptial contract and rectification thereof, by the deletion of all relevant paragraphs and the replacement thereof with those contained in the Notice of Intention to Amend, which instead allege that the correct interpretation of the antenuptial contract, as it stands, is to exclude the separated assets in question from the accrual, specifically:

“The ANC is confusingly and badly worded, but upon a proper interpretation the manner in which the separate assets are to be included in the calculation of the accrual is to exclude their stated value as well as the value of any other assets acquired by virtue of possession or former possession of the separate assets (together “the separate assets values”) for the purposes of calculation of any accrual.”

[15] Simply put, instead of claiming rectification of the agreement to the effect that the relevant assets are excluded, I am alleging that the correct interpretation of the agreement is that the separate assets' values are excluded. This amounts to the same thing.

[16] Thus, the amendment seeks to amend my prayer to exclude rectification, and to determine the accrual claim on the interpretation of the antenuptial agreement which I allege is correct – that the separate assets' value to be excluded.

[17] Accordingly, the substantive issue in question remains: What is meant by the antenuptial contract, and are the separate assets' values to be excluded?

[18] My contentions, equally, remain substantively the same. There has been no deviation from this.

[19] The amendment results in the dispute being substantively the same as it has always been, and on this basis alone it is evident that there is no procedural or other prejudice to the respondent.'

[10] His contention is that the relief sought in the amendment is the same as the one he sought prior to the withdrawal of the rectification with the substantive issue being 'what is meant by the antenuptial contract, and whatever the separate assets values are to be excluded'. He avers that the amendment results in the dispute being the same as has always been the case. Accordingly, that there is no prejudice to the defendant.

[11] According to the plaintiff, in any event the intention to amend was mentioned under oath in an affidavit filed in a separate application during or about mid-2022. Therefore, that the defendant had always been aware of this.

[12] In her notice of objection, the defendant raised numerous issues. The first related to her contention that the intended amendment constituted a withdrawal of an admission. This was based on what the plaintiff initially averred in his particulars of claim being that the marriage between the parties is out of community of property without accrual. This was pleaded despite the 'express' wording of the ANC. In seeking the amendment, the plaintiff is said to have abandoned this to plead what the defendant says is the correct position that the marital regime is one out of community of property with the inclusion of the accrual system. The effect of the current proposed amendment is to seek to return to the initial position of excluding accrual.

[13] It was contended that the intention of the plaintiff was to exclude major assets of the plaintiff, more specifically K[...] (Pty) Ltd ('K[...]') from the calculation. According to the plaintiff, this objection has no merit. The plaintiff terms the suggestion that he seeks to effectively exclude the application of the accrual system so as to exclude what he categorises as separated assets, through the amendment as 'patently incorrect'.

[14] The plaintiff argued that the defendant's objection is incorrect because he has always sought the exclusion of the separate assets' values from the accrual, albeit by way of rectification. According to the plaintiff, it is still his averment that the marital regime is out of community of property with the exclusion of accrual and this, was evident from the notice of intention to amend. He contends therefore, that there was

no withdrawal of that admission and that the only difference is in the manner in which the exclusion is pursued, that is by way of interpretation as opposed to rectification.

[15] The second ground of objection raised by the defendant relates to the interpretation sought to be given to clause 5 of the ANC. According to her, by seeking to amend his particulars of claim, the plaintiff seeks to inculcate an interpretation to clause 5 which would suggest that the value of K[...] as the value of any other asset acquired by virtue of possession or former possession would be excluded from the calculation of the accrual. Her contention is that this interpretation is contrary to the express wording of clause 5. It was submitted that this interpretation was not possible in light of the wording of the ANC and no interpretation can be contrary to the wording of the ANC.

[16] The plaintiff's contention was that this ground was not a proper ground of objection since it speaks to the merits of the amended case. According to the plaintiff, the defendant in raising this point sought to have the dispute regarding the ANC summarily and impermissibly determined at the interlocutory stage without any evidence. Additionally, that an amendment cannot be denied simply because a party believes that it lacks merit because matters of interpretation are generally not decided on exception but are matters of evidence led at trial.

[17] The plaintiff contends that the objection in no way evidences any prejudice occasioned by the defendant whereas prejudice or injustice are material considerations in applications for leave to amendment. The plaintiff avers that if the defendant's contention regarding this objection is correct, she can dispute the pleaded amendment at trial. Therefore, the amendment would benefit the defendant.

[18] The third ground of objection related to the prejudice likely to be suffered by the late introduction of the amendment. This, considering the fact that the plaintiff has obtained an order effectively evicting the defendant from the matrimonial home, which order is subject to an appeal. Secondly, the plaintiff was said to be delaying compensation for the defendant's unlawful termination by delaying proceedings before the CCMA, and the amendment might delay the trial. I agree with the plaintiff's submissions that these factors are of little consideration in determining the amendment.

[19] According to the plaintiff, there is no merit in the defendant's averment that she would suffer prejudice in her trial preparation since the amendment requires no deviation from the current trajectory of trial preparation. This is because, so contends the plaintiff, the substantive issues remain the same, being the interpretation of the ANC and whether separate assets values are to be excluded. The same witnesses would also be called at trial. This, of course, cannot be correct as it may necessitate that the defendant also amends her plea and counterclaim. In the event the amendment is granted, the defendant contends that it would be necessary that the matter be adjourned.

[20] The plaintiff avers that the defendant has an ulterior motive to delay the trial which would prolong her stay in their co-owned property, which was allowed by virtue of the rule 43 order. Also, that she had recently launched a 'groundless' belated rule 43 application for contribution towards legal costs despite the court having ruled that she was not entitled to any maintenance. According to the plaintiff, there is no basis for her objections. While some amendments may be heard and determined immediately without a need to adjourn the matter, the nature of the amendment sought by the plaintiff may result in the defendant seeking to amend her plea amongst others. The issue of the rule 43 order arises from a separate application which allowed the plaintiff to sell the common property. Such application is subject to an appeal with the result of the order being suspended.

[21] Despite the plaintiff knowing of his intention to amend his particulars of claim since 2022, he only decided to pursue it formally approximately two months before the trial which was set down approximately nine months before. It is the plaintiff's conduct which resulted in the application to amend only being heard on the trial date. He could have brought the application much earlier and it would have been determined long before the trial date removing the possible adjournment of the matter.

[22] While the rule 43 application relating to the contribution for legal costs is not an issue before this court, if the trial is adjourned, it allows for the defendant to pursue it. If this was to happen, it would be of the plaintiff's own doing having

launched his amendment belatedly knowing the risks associated with such applications.

[23] Amendments to pleadings are regulated by rule 28. In bringing the application, the parties followed the procedure set out in the rules. It is trite that the powers of the court in granting an application for amendment are limited only by a consideration of prejudice or injustice to the opponent. Additionally, an amendment will not be allowed where there is mala fides or where the prejudice cannot be cured by an order for costs and where appropriate a postponement.¹

[24] In *Paddock Motors (Pty) Ltd v Igesund*,² the court held that by refusing to allow an amendment on an issue that was initially withdrawn and then sought to be reinstated, it would be refusing to investigate and may ultimately uphold a wrong order. It found that it was necessary for a proper adjudication of the case to allow the appellant to revive its contention based on the first question of law.³

[25] The amendment sought by the plaintiff placed the matter in a similar position as it was when summons was issued. Of importance is the fact that the plaintiff already raised the intended amendment long before the formal application. The defendant was therefore not taken by surprise. While the plaintiff's view is that he does not require the amendment and that the issue can be raised in argument, it is pertinent since parties are bound by their pleadings. The court may find that in the absence of the amendment, it is not required to and may not determine the issue sought to be raised in the amendment. The granting of the amendment will sufficiently place the new issue as one of the issues to be determined by the court.

[26] I accept that an amendment to a pleading involving the withdrawal of an admission ought not to be readily granted and requires a full explanation to convince the court of the bona fides of the party seeking the amendment.⁴ In this instance, there is nothing to suggest any mala fides on the part of the plaintiff. Also, there is little, if any, prejudice to the defendant in light of the facts of this matter.

¹ See *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638H-639C; *Amod v South African Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614A-B.

² *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A).

³ *Ibid* at 24F-G.

⁴ See *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H-111A.

[27] As already stated, issues relating to the pending appeal in respect of the rule 43 order and the subsequent rule 43 application are not relevant considerations in the application for amendment. In my view, therefore, the plaintiff ought to be granted the amendment as sought. The granting of the amendment called for the adjournment of the matter as was argued by the defendant. Accordingly, the trial was adjourned. In any event the matter had to be adjourned for the court to consider the remainder of the relief sought in the draft order. The defendant may then consider her position on whether to also amend her plea and claim in reconviction.

[28] As regards the issue of separation of the divorce from the remainder of the issues, rule 33(4) provides as follow:

'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.'

[29] In deciding whether or not to grant the separation, the overriding consideration is convenience.⁵ It was argued that in the current case, convenience favoured the granting of a separation order with the divorce being granted and other issues determined later. This was because the remaining issues included contested commercial disputes requiring forensic accountant investigations and expert evidence from both parties which would result in unavoidable delays.

[30] The plaintiff relies on *CC v CM*⁶ where the court stated as follows:⁷

'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

⁵ See *W v W* [2016] ZAGPPHC 812 paras 20-21.

⁶ *CC v CM* 2014 (2) SA 430 (GJ).

⁷ *Ibid* para 39.

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).'

[31] The plaintiff argued that the reason for the breakdown of the marriage is irrelevant in granting the divorce. Relying on *Schwartz v Schwartz*⁸ the plaintiff submitted that evidence to prove the breakdown can be led later as part of determining maintenance. According to the plaintiff it is against public policy and is prejudicial to the parties to require them to remain in a marriage mutually agreed to be dead.⁹

[32] According to the plaintiff, the defendant's rights provided by rule 43 do not fall away upon the granting of the divorce. During August 2022, the court only granted the plaintiff an order for the maintenance of the parties co-owned property which order would survive the divorce. He argued that the defendant's subsequent rule 43(6) application for the contribution towards costs pre-supposed the existence a rule 43 order where none was in place and that the relief for interim maintenance and contribution towards costs were both *res judicata* having been previously refused by the court during August. However, he had no objection to an order reserving the defendant's rights to bring the rule 43(6) application even after the granting of the divorce.

[33] Relying on *K O v M O*¹⁰ the plaintiff submitted that the court could grant a separation order reserving the defendant's right to bring an application in terms of rule 43(6). If the dicta for such reservation was not preferred, the plaintiff contended that there was in any event no pending rule 43 proceedings nor would a right to pursue same stand in the way of a separation order. It was argued therefore that no prejudice would be suffered by the defendant if the divorce was granted. Accordingly, that it was apparent that the defendant was utilising the shackles of a dead marriage as leverage.

⁸ *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 472E-475D.

⁹ See *W v W* [2016] ZAGPPHC 812 para 11.

¹⁰ *K O v M O* [2017] ZAWCHC 136.

[34] The plaintiff argued that *Schutte v Schutte*¹¹ was no authority to support the defendant's case since *Schutte* held that that a divorce order cannot be granted as a issue separate from the issue of maintenance. Further, that a maintenance order cannot be granted after the dissolution of a marriage. The court held that once the divorce is granted, the court is *functus officio*. According to the plaintiff, the reasoning in *Schutte* was that s 8(1) of the Divorce Act¹² regulates existing maintenance orders. In the current matter, the plaintiff is not seeking for the divorce to be granted and for the maintenance to be determined simultaneously but seeks an order that the maintenance be decided at a later stage by the divorce court as part of the same divorce action.

[35] The defendant argued that the plaintiff had not met the requirements of rule 33(4). Secondly, that the granting of the divorce separate from other issues would have a devastating effect on her since her common law and procedural rights will be removed, including reciprocal duty of spousal support, the right to claim maintenance and contribution towards costs as envisaged in rule 43 and the right to cross-examine the plaintiff on issues envisaged in s 7(2) of the Divorce Act. The third issue was that the date for the determination of accrual, if any, is the date of divorce and not the date of finalisation of all issues. The fourth issue relates to the presence of conflicting decisions on whether the rights of parties remain intact following the granting of the decree of divorce which issue the defendant submitted was likely to result in an appeal and delay the finalisation of the proceedings which would not be in the interest of justice. It was argued that this court could avoid the situation by simply refusing the separation. The last issue was that relating to costs of the proceedings.

[36] It was argued by the defendant that while the parties agree that the marriage is broken down, the reasons for the breakdown are different. Accordingly, it was necessary to lead evidence on the issue. Also, that the defendant claimed spousal maintenance post-divorce and an order that the plaintiff pays to her an amount equal to one half of the difference between the accrual of their respective estates.

¹¹ *Schutte v Schutte* 1986 (1) SA 872 (A).

¹² Divorce Act 70 of 1979.

[37] The defendant agreed with the plaintiff that in determining the issue of separation as envisaged in rule 33(4), the overriding factor is convenience. She placed reliance on *De Wet and Others v Memor (Pty) Ltd*¹³ for this submission. The onus rests on the plaintiff to demonstrate prima facie that it would be convenient to separate the issues and thereafter for the defendant to show prejudice or that the balance of convenience does not favour the granting of the separation. Relying on *G T K v N M*¹⁴ it was submitted that other relevant considerations in a separation application were delays, if any to the main proceedings, the fact that proceedings would not be shortened, any duplication of the evidence and the possibility of appealing the order made in respect of the separated issue, amongst others.

[38] The defendant submitted that the parties agreed to the separation of the issue relating to the interpretation of the ANC that is whether K[...], the plaintiff's company, should form part of the assets in the accrual. She contends that the separation in respect of this issue is convenient. However, that the separation of the divorce from the remaining issues would result in the defendant suffering prejudice. She relied on *Schutte*,¹⁵ to support her submissions that where a maintenance award was not granted at the same time as the divorce, it falls away. Accordingly, that if the court separates the decree of divorce from the determination of maintenance, it would in effect be denying the defendant of maintenance.

[39] The defendant contended that the issue of maintenance post-divorce as envisaged in s 7(2) of the Divorce Act can only be determined once the issue of accrual and its extent is resolved. Accordingly, separating the divorce from the remaining issues would be unfair at this stage.

[40] While acknowledging a conflict between *CC v CM*¹⁶ and *NK v KM*¹⁷ the defendant relied on *NK v KM* and argued that rule 43 only applied where divorce proceedings exist. The defendant contended that her rule 43 order granted by Mathenjwa J, would cease upon the granting of the decree of divorce. Also, that the granting of the decree of divorce would not only deprive her maintenance in

¹³ *De Wet and Others v Memor (Pty) Ltd* [2011] ZAGPJHC 188.

¹⁴ *G T K v N M* [2023] ZAGPJHC 418; 2023 JDR 1347 (GJ) para 42.9.

¹⁵ *Schutte v Schutte* 1986 (1) SA 872 (A).

¹⁶ *CC v CM* 2014 (2) SA 430 (GJ).

¹⁷ *NK v KM* 2019 (3) SA 571 (GJ).

perpetuity but also take away her rule 43 order. The effect of this would be to remove the mechanisms available to her in law to claim income from the plaintiff and deprive her of access to resources to fight the divorce action going forward.

[41] In *AB v JB*¹⁸ the Supreme Court of Appeal held that the date of determining the accrual was the date of the granting of divorce. Since there is a pending issue relating to the assets of the estate, to grant the decree of divorce separate from the balance of the issues would mean that the future value of K[...] would be disregarded.

[42] It was common cause in *W v W*¹⁹ that the marriage relationship was irretrievably broken down with no prospects of salvaging it. The plaintiff argued that where it is undisputed, that the marriage relationship has broken down the court has no discretion but to grant the divorce. In *CC v CM*²⁰ the court held that the irretrievable breakdown of a marriage may be decided separate from other questions. The court found it inappropriate for a party to an irretrievably broken-down marriage to oppose a separation application for purposes of securing a more favourable s 7(3) patrimony redistribution award amongst others.²¹ The court found it convenient in terms of rule 33(4) to separate the granting of the divorce from the maintenance and redistribution issue. It granted the decree of divorce and postponed the maintenance which was counterclaimed by the respondent sine die.

[43] In *W v W* it was argued amongst others that the contentious issue was that of spousal maintenance. While it was argued that it was prejudicial for the plaintiff to remain party to a dead marriage the court held that on a proper interpretation of ss 7(2) and 7(3) of the Divorce Act separation was not competent.

[44] The defendant relied on *Schutte* and *Ndaba v Ndaba*²² where it was held that if spousal maintenance is not claimed and dealt with by the court granting the decree

¹⁸ *AB v JB* [2016] ZASCA 40; 2016 (5) SA 211 (SCA) paras 18 and 19.

¹⁹ *W v W* [2016] ZAGPPHC 812.

²⁰ *CC v CM* 2014 (2) SA 430 (GJ).

²¹ *Ibid* para 41.

²² *Ndaba v Ndaba*. Unreported judgment of the Gauteng Division of the High Court, Pretoria, case number 39356/2013.

of divorce, then it cannot be claimed later. Notably, on appeal, the Supreme Court of Appeal distinguished the issues in *Schutte* from those in *Ndaba*.²³

[45] The court in *W v W* refused the separation application and found that there was a genuine reason for the defendant to oppose the separation of issues since it was necessary in that case for a *curator ad litem* to be appointed to investigate the need for a *curator bonis* to protect the defendant's interests.

[46] In *NK v KM*²⁴ where separation was sought in respect of the decree of divorce and maintenance pendente lite the court held that on a proper interpretation of rule 43 a party had a claim for maintenance pendente lite only, where matrimonial action was pending or about to be instituted. Accordingly, that should the issues be separated and the decree of divorce granted then the application for interim maintenance would fall away. The court declined to follow the decision of *KO v MO*²⁵ which held that the granting of a decree of divorce could be separated from maintenance pendente lite. In *KO v MO* the court held that the granting of a decree of divorce did not disentitle a person from pursuing relief under rule 43, as long as the divorce action has not been finalised.

[47] In my view, in order to determine whether or not to grant the separation which would be convenient to the parties, much turns on the meaning of the phrase 'divorce action/matrimonial action'. The trite principles of interpretation are set out in *Jaga v Donges, NO and Another; Bhana v Donges, NO and Another*²⁶ and *Natal Joint Municipal Pension Fund v Endumeni Municipality*.²⁷ Additionally, it has been held that the process of interpretation is a unitary exercise, not a mechanical consideration of the text, context and purpose of the instrument under consideration.²⁸

²³ *GN v JN* 2017 (1) SA 342 (SCA) at para 29.

²⁴ *NK v KM* 2019 (3) SA 571 (GJ).

²⁵ *KO v MO* [2017] ZAWCHC 136.

²⁶ *Jaga v Donges, NO and Another; Bhana v Donges, NO and Another* 1950 (4) SA 653 (A).

²⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

²⁸ *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.

[48] The court in *AM v RM*²⁹ found that even where the legality or subsistence of a marriage was challenged, it is accepted that there exists a pending divorce action. Such pending divorce action brought the matter within the ambit of matrimonial matters and a matrimonial action as envisaged in rule 43. At paragraph 10, the court held that it did not matter that the parties had divorced in terms of Muslim rites, the fact that there was a pending challenge to the status of the marriage meant that there was a pending divorce action.

[49] In *Zaphiriou v Zaphiriou*³⁰ dealing with the applicability of rule 43, the court stated that the rule was designed to provide an inexpensive procedure to procure interim relief pending matrimonial action as was provided for under the common law. The purpose being to regulate the position between the parties until the court finally determines all issues between them, one of which may be whether there exists a valid marriage between them.

[50] In *Gunston v Gunston*,³¹ also in the context of a rule 43, the court held that the rule relates solely to matrimonial action which includes actions for divorce, restitution and judicial separation.³² It was held further that a party cannot apply for maintenance pendente lite unless the contemplated *lis* is a matrimonial action. A matrimonial action includes proceedings incidental to such action, such as contribution towards costs, maintenance pendente lite or for an interdict restraining the disposing of assets pendente lite or an order awarding custody of children of the marriage pendente lite.³³

[51] B Clark in *Family Law Service*,³⁴ states that matrimonial actions pertinent to the dissolution of the marriage include not only actions for divorce and nullity but also 'include incidental proceedings for leave to sue *in forma pauperis*, for maintenance *pendente lite*, for a contribution to costs, for the custody of children *pendente lite*, or for interdicts against the other spouse'. Further, divorce action is described as a

²⁹ *AM v RM* 2010 (2) SA 223 (ECP).

³⁰ *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W).

³¹ *Gunston v Gunston* 1976 (3) SA 179 (W).

³² *Ibid* at 182A-B. See also *Naicker v Naidoo* 1958 (2) SA 134 (N) and *TM v ZJ* 2016 (1) SA 71 (KZD).

³³ See H R Hahlo *The South African Law of Husband and Wife*, 5 ed (1985) at 237.

³⁴ B Clark *Family Law Service*, Service Issue 80 (2023) at F51.

composite action which includes the divorce, a claim for maintenance, a claim for costs and the care and custody of minor children.³⁵

[52] On a consideration of several authorities, it is apparent that the meaning of the phrase 'divorce action' is broad and includes numerous issues associated with the granting of divorce.³⁶ Claims arising from rule 43 applications for example including a contribution for costs and maintenance pendente lite, claims for spousal and child maintenance post-divorce, and the distribution of assets are all issues arising from and associated with a divorce action. It is clear from the authorities that in some instances, the granting of a decree of divorce can be separated from other issues arising from a divorce action and can be granted while those other issues remain pending. Should there still be pending issues, then the divorce action would not be finalised. In such instances, issues arising from a rule 43 can still be raised and determined by the court. In my view, the court's finding in *G T K v N M*³⁷ that upon the granting of divorce, the right to pursue a rule 43 application falls away is incorrect. As was stated in *Schutte*, the right to pursue a pendente lite claim ceases to exist on completion of a divorce action.

[53] The court in *MG v RG*³⁸ stated the following:

'It is settled law that divorce dissolves the bond of marriage and, unless maintenance is granted at the time of divorce, the duty of care between spouses ceases to exist: Ex parte Standard Bank Ltd and Others 1978 (3) SA 323 (R); and Copelowitz v Copelowitz and Others NO 1969 (4) SA 64 (C) at 67. An order for the maintenance of a spouse must be made at divorce and cannot be made thereafter: *Schutte v Schutte* 1986 (1) SA 872 (A) at 881.'

I align myself with this statement which on the basis that it was not made in the context of a separation application and whether a claim pendente lite maintenance claim could be made subsequent to the granting of a divorce. The facts considered by the court in *MG v RG* were therefore distinguishable since in that case, the granting of the divorce brought the entire divorce action to finality.

³⁵ Ibid at F53.

³⁶ See *Gunston v Gunston* 1976 (3) SA 179 (W).

³⁷ *G T K v N M* [2023] ZAGPJHC 418; 2023 JDR 1347 (GJ).

³⁸ *MG v RG* 2012 (2) SA 461 (KZP) at para 18.

[54] Since the plaintiff seeks an order for the granting of the decree of divorce and it is undisputed that the marriage has irretrievably broken down, based on *CC v CM*³⁹ the court may, upon concluding that a separation order is competent, grant the divorce. In determining whether such an order is competent, convenience plays an important role. In *Denel (Edms) Bpk v Vorster*⁴⁰ it was held that generally courts do not favour litigation in piecemeal. As was stated in *Denel*,⁴¹ where issues are inextricably linked and expeditious disposal of the litigation warrants the ventilation of all issues at one hearing, then separation should not be granted. Another important consideration being whether separation would shorten the proceedings.⁴²

[55] While the issue of maintenance pendente lite or that relating to a contribution towards costs can be separated from the divorce, I agree with the defendant that since *AB v JB*⁴³ held that the determination of the accrual is the date of divorce and not the date of finalisation of all issues, it would be prejudicial to the defendant and therefore not convenient to her and to the court if the determination of the decree of divorce was separated from the remaining issues since there is a dispute on the meaning and interpretation of the ANC which impacts on the extent of the accrual. In my view, the plaintiff has not discharged the onus to prove that a separation order should be granted.

[56] While the plaintiff argues that the defendant's opposition of the matter is aimed at delaying the finalisation of the divorce, I hold a different view especially because the adjournment of the matter is mainly attributable to the manner in which the plaintiff handled the application for amendment. The proposed order sought by the plaintiff in respect of separating the granting of the decree of divorce from other issues was disputed by the defendant as being competent at this point in time. The defendant argued that such order would bring the *lis* between the parties to an end. It was submitted that the separation and the divorce should not be granted at this stage. While it is common cause that the parties are to be divorced, I have considered the provisions of rule 33(4) and conclude that at this point it is not

³⁹ *CC v CM* 2014 (2) SA 430 (GJ).

⁴⁰ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA).

⁴¹ *Supra* at para 3.

⁴² See *Copperzone 108 (Pty) Ltd and Another v Gold Port Estates (Pty) Ltd* [2019] ZAWCHC 34; 2019 JDR 0587 (WCC) para 25.

⁴³ *AB v JB* 2016 (5) SA 211 (SCA).

convenient for the order to be granted. I am of the view that the separation application must fail.

[57] As regards the issue of costs, the plaintiff submitted that such should be left in the course of the divorce proceedings/action. The defendant argued that as regards costs and the manner in which the application was brought warranted the granting of costs of two counsel. While I agree with the defendant that the plaintiff's handling of the application for amendment leaves much to be desired, the defendant incurred unnecessary costs related to the postponement of the trial. This could have been avoided had the plaintiff initiated the process of amending his particulars of claim timeously. The issue relating to separation under the current circumstances is novel in this jurisdiction. It was an crucial point worthy of this court's time. Accordingly, while costs should follow the result and the matter warranted argument by senior counsel, I see no reason to award costs for two counsel.

Order

[58] The following order is made:

1. The application for amendment is granted.
2. The application for separation of issues in terms of rule 33(4) is refused.
3. The trial is postponed sine die.
4. The plaintiff is to pay the costs occasioned by the postponement and the separation applications.

Masipa J

APPEARANCE DETAILS:

For the plaintiff: Mr G D Harpur SC

With Mr A J Gevers

Instructed by:

For the defendant: Mr A E Potgieter SC

With Mr M C Tucker

Instructed by:

Matter heard on:

Judgment delivered on: _____ 2024