

SOUTH AFRICA / JUDGMENT

# D.J.M.F and Another v L.F and Others (749/2020) [2024] ZAGPPHC 1315 (11 December 2024)

**[2024] ZAGPPHC 1315****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

MPN Mbongwe

**CASE / FILE NUMBER**

749/2020

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**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE NO: 749/2020****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED.****DATE:**

11/12/2024

**SIGNATURE**

In

the matter between:

D[...]  
J[...] M[...] F[...]  
First  
Applicant  
D[...]  
J[...] M[...] F[...] N.O.  
Second  
Applicant  
And  
L[...]  
F[...]  
First Respondent  
L[...]  
F[...] N.O.  
Second Respondent  
M[...]  
A[...] L[...] F[...] N.O.  
Third Respondent  
NOLWAZI  
MATHEATSIE N.O.  
Fourth Respondent  
THE  
MASTER OF THE HIGH COURT, FREE STATE  
Fifth Respondent  
In

re the pending divorce  
proceedings between:

L[...]  
F[...]  
Plaintiff  
D[...]  
J[...] M[...] F[...]  
First Defendant  
L[...]  
F[...] N.O.  
Second  
Defendant  
D[...]  
J[...] M[...] F[...] N.O.  
Third Defendant  
M[...]  
A[...] L[...] F[...] N.O.  
Fourth Defendant  
NOLWAZI  
MATHEATSIE  
Fifth Defendant  
THE  
MASTER OF THE HIGH COURT, FREE STATE  
Sixth Defendant

**JUDGMENT**

MBONGWE J

**INTRODUCTION**

[1] The Applicant, who is the First Defendant in the pending opposed divorce action, has brought this interlocutory application in terms of Rule 33(4) seeking the following orders:

1.1 That the issue regarding the granting of a decree of divorce and the primary care and residence of the minor children be adjudicated initially and separately from the issues pertaining to the maintenance claim, the accrual claim and the issues pertaining to the Trust in terms of Rule 33(4).

1.2 That a decree of divorce be granted in terms of prayer 1 of the Particulars of Claim, read with prayer 1 of the Applicant / First Defendant's plea and counterclaim.

1.3 That the First Respondent/ Plaintiff's accrual claim and the maintenance claim as pleaded in paragraphs 11, 12, 13, 14, 15 and prayers 3, 4, 5, 6, 7, 8 and 9 of Section A of the Particulars of Claim (dated 28th day of May 2020) be postponed sine die.

1.4 That the First Respondent/ Plaintiff's claim in respect of the Trust as pleaded in paragraphs 16 and prayers 1, 2 and 3 of Section B of the Particulars of Claim (dated the 28th day of May 2020), read with prayers of the 1st and 2nd Defendants plea and counterclaim be postponed sine die.

1.5 That pending the adjudication of the postponed issues, that prayers 1, 2, 3, 4, 5, 7 and 8 of the Rule 43 order remain in force;

1.6 In the event of opposition that the First Respondent /Plaintiff be ordered to pay the costs of this application, alternatively that the costs of this application be costs in the cause.

[2] It appeared to me at the hearing of this application that the sought separation of the hearing in terms of Rule 33(4) is directed primarily at the hearing and finalisation of the divorce separately from those pertaining to maintenance of the First Respondent and the disposition of the accrued benefits in the parties' marriage which includes a determination of the First Respondent's claims against the Trust. The Applicant and the First Respondent were married out of community of property with the inclusion of the accrual system.

[3] It is specifically the First Respondent/ Plaintiff's case that certain assets purportedly of the Trust in actual fact form part of the accrued benefits of the parties, but have been disguised by the Applicant, in his alleged abuse of the status of the Trust, to disadvantage the First Respondent from receiving her fair share of the benefits. The First Respondent seeks that such allegedly disguised assets be declared as not being assets of the Trust, but those of the Applicant and that, consequently, form part of the accrued benefits of the marriage (and stand to be shared equally between the parties).

- [4] The Applicant disputes the First Respondent's assertions and requires that all assets in the name of the Trust stay as such for the benefit of its beneficiaries, including the Applicant and the First Respondent. It was argued on behalf of the Applicant that the First Respondent, by her seeking to pierce the corporate veil, so to speak, stands to 'walk away' with more of the accrued benefits in circumstances where the Applicant has contributed far more than her towards the accumulation of the Trust assets.
- [5] It is peculiar that the circumstances forming the basis of the First Respondent's assertion of her rights are referred to in these proceedings as the First Respondent's claims against the Trust. Hence so many parties to a mere divorce action.
- [6] Another difficulty in the determination of whether the separation of the issues ought to be granted, is the uncertainty with regard to the calculation of the actual value of the accrued benefits of the marriage and the value of the Trust assets are to be determined considering that the parties had not disclosed their individual assets that were to be excluded from the assets acquired during the marriage.
- [7] Having outlined the gravamen of each party's case, I turn to consider the Applicant's rationale for the separation in terms of Rule 33(4). The Applicant's motivation for the separation appeared to be the curtailment of the duration of the trial and the saving of costs of the hearing. It is worth noting that the hearing of the entire matter is already scheduled for the 17 February 2025 to 7 March 2025.
- [8] With the relevant facts and premise of the issues involved having been outlined, I deem it appropriate to now consider whether justified

grounds exist necessitating the granting the application in terms of Rule 33(4). Justified grounds would include the existence of; (a) an impediment to a full ventilation of a party's case, (b) in respect of an integral yet individually determinable part of the matter and/ or, (c) that would render impossible the finalisation of the matter in its entirety in an un-staggered hearing. [1]

- [9] The impediment should not be the making of the party seeking the indulgence. In *Rauff v Standard Bank Properties*[2] the Court stated as follows:

*"The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial."*[3]

- [10] The curtailment of the duration of the trial and cutting of costs should not be the sole reason for seeking an order for a separation of the determination of the issues. In casu, the separation is sought only because of the time it may take for the First Respondent to present her case, in particular, her six claims against the Trust.

There can be no saving of time and costs in a situation where the hearing of a matter takes place over two or more different occasions.

It is even more undesirable to grant the separation as sought in casu in light of the acrimony between the parties.

[11] In the main action of these proceedings, the irretrievable breakdown of the marriage between the parties is common cause. It is also common cause that the parties either did not declare what individual assets each had that were to be excluded from prospective accrual benefits of the marriage or, by their individual disclosures as ‘nil

assets’ owned in the prenuptial contract, it barely requires interpretation that the effect of the termination of the marriage by divorce on the parties’ accrued patrimonial benefits is no different to that which follows at the dissolution of a marriage in community of property.

[12] It is to be noted that the parties have a registered Trust in which their accrued benefit of the marriage reside. The parties together with their children and grand-children are the beneficiaries of the Trust.

[13] The calculation of the value of the accrued benefits of the marriage between the parties poses problems as a result of the parties’ indiscretions stated in para [11] and the situation described in para

[12], *supra*. A further complication in this regard would be the calculation of the actual value of the forfeiture, should the Applicant be successful in his prayer for forfeiture or partial forfeiture of the accrued benefits of the marriage against the First

Respondent.

[14] The Plaintiff herself has filed, together with the divorce action, six claims against the Trust and seeks, *inter alia*, orders that certain Trust assets be declared properties of the First Defendant for purposes of an equal distribution of the accrued benefits of the marriage and the removal of the Applicant as a Trustee. The First Respondent, the court was advised, is set to present evidence, including expert evidence, to prove that the Applicant had, in his abuse of the status of the Trust and for his personal benefit, hidden certain accrued benefits of the marriage in the Trust which (benefits) he dissipated through payments to other persons out of the Trust’s banking accounts which the Applicant has since closed when realising the looming institution of the divorce proceedings against him.

[15] It is necessary to state that the hearing the entire divorce matter between the Plaintiff and the First Defendant is set down for hearing from 17 February 2025 to 7 March 2025.

[16] In response to a question, during his address, why this application was brought or is continuing when the matter is already scheduled for hearing, Mr Maritz for the Applicant responded that it was convenient

for a determination of the application in terms of Rule 33(4) to be made prior to the scheduled hearing for the parties to know, if the sought separation is granted, what to prepare for and that, in any event, the separation may also be granted ordered by the trial judge.

[17] The main reason for the application in terms of Rule 33 (4) was the criticism against the length of time and the costs to be incurred in the First Respondent's presentation of her case, particularly her six claims against the Trust. One of two proffered solutions was contended for, namely, a dismissal of the First Respondent's

six claims against the Trust, or, alternatively, the granting of an order for the separation of the hearing of these claims together with the First Respondent's maintenance claim (and for the hearing thereof in the future) from the initial hearing and granting of the final order of divorce. I consider the implications of proposed solutions/ orders hereunder.

#### DISMISSAL OF THE SIX CLAIMS

[18] The argument in support of the dismissal of the First Respondent's six claims against the Trust envisioned the maintenance of three individual assets of the Applicant, the First Respondent and the Trust assets. This argument overlooks counsel for the Applicant's response (to a question) that the Applicant and the First Respondent

had not declared any assets they owned individually that they sought to be excluded from assets in their marriage. This aspect and implications thereof have been dealt with earlier in paras [11] and [12], above, and stand to be dismissed.

[19] A further reason proffered for the dismissal of the First Respondent's claims against the Trust was that the First Respondent, by her sought relief 'against the Trust', stands to (unfairly) receive more of the accrued benefits in circumstances where the Applicant has contributed far more to the acquisition of the assets of the Trust than the Respondent has. This contention stands to be dismissed on two grounds; the First Respondent is entitled, by virtue of the nature of the marriage, to assert her rights to receive her 50% share of the accrued benefits of the marriage, unless the Applicant succeeds in his claim for forfeiture or partial forfeiture of the benefits against the First Respondent.

#### THE SEPARATION ORDER (RULE 33(4))

[20] In addition to what is stated in paras 8, 9 and 10, above, in relation to the application in terms of Rule 33(4), it is important that a period of fifteen days have been allocated for the hearing of this matter. Equally important is that the hearing of this matter has previously been allocated a date in 23 October 2023.

#### FIRST RESPONDENT'S CASE

[21] Counsel for the First Respondent was critical of the argument on behalf of the Applicant regarding the consideration of the trust assets as a single unit for purposes of the disposition of the accrued benefits of the marriage, as being intended to preclude the First Respondent from leading evidence to prove that the Applicant has disguised some assets forming part of

the accrued benefit by registering them in the name of the Trust for the purpose of disadvantaging the Respondent from getting her share of the accrued benefit. He furthermore argued that the First Respondent will be unfairly treated were she to be prevented from calling the witness(es) or expert witness(es) she intends to call to demonstrate the extent of the Applicant's abuse of the corporate status of the Trust. Counsel for the First Respondent concluded his argument with the submission that the sought separation of the determination of the issues will not result in the saving of time and costs on the grounds advanced on behalf of the Applicant.

## ANALYSIS

### AND CONCLUSION

[22] I do not find that the reasons proffered in support of the granting of the application in terms of Rule 33(4) justify the granting of the order sought.

### COSTS

[23] I cannot see why there should be a deviation from the general principle that costs follow the result.

### ORDER

[24] Following the findings in this judgment, an order is made as follows:

1. The application in terms of Rule 33(4) is dismissed with costs on the party and party scale C, including the costs of senior counsel.

MPN MBONGWE

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv S Maritz SC, Adv C Spannenberg Instructed by: Rina Rheeders Inc  
For the First Respondent: Adv M Haskins SC Instructed by: Van Heerden and Krugel Attorneys  
Date of hearing: 28 November 2024 Date of delivery: 11 December 2024

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 11 DECEMBER

2024.

[1] See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D); *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd)* 2002

(6) SA 693 (W)

[2] *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd)* 2002

(6) SA 693 (W)

[3] Ibid 703F-H

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Prepared on 9 October 2026 · Esheria