

SOUTH AFRICA / JUDGMENT

# GK v KK (2015-96997) [2024] ZAGPPHC 1015 (16 October 2024)

**[2024] ZAGPPHC 1015****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

de Vos

**CASE / FILE NUMBER**

2015-96997

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**Source record****FLYNOTES:**

FAMILY – Divorce –  
Separation of issues –  
Change in circumstances –  
Seeking to have divorce with respondent declared to start new life  
with lover and new child  
in Dubai – Applicant showing no  
interest in ongoing proceedings beyond decree of divorce –  
Prejudice to respondent  
and minor child – Impact of being  
unable to ensure applicant's attendance at court and  
effective implementation  
of court orders – Not convenient or  
expeditious to separate issues – Application dismissed.  
REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA  
CASE  
NO: 2015-96997  
(1)  
REPORTABLE: NO  
(2)  
OF INTEREST TO OTHER JUDGES: NO  
(3)  
REVISED: NO  
Date: 16 October 2024  
In

the matter between:      GK  
                                         Applicant  
                                         and  
                                         KK  
                                         Respondent

## JUDGMENT

DE VOS AJ

- [1] The parties are involved in divorce proceedings. The disputes in the divorce proceedings include unbundling the parties' financial affairs, an existing Rule 43 maintenance order, as well as the maintenance, care and contact of O, an 8-year old child born of the marriage.
- [2] The applicant approached the urgent requesting the Court to separate out the dissolution of the marriage from the remaining issues in dispute, and to grant a decree of divorce. The applicant's

motivation for the relief is that whilst the divorce proceedings are winding through the court, his life has altered. He has met a new partner and fathered a one-year old child, M. He has moved to Dubai and wishes for his new partner and M to join him and live as a family there. However, whilst he remains married to the respondent, it is difficult to obtain visas for his partner and M. The laws of Dubai do not permit that type of co-habitation, whilst he is still legally married to the respondent. In addition, he wishes to marry his new partner and live as a family with her and M in Dubai. This he also cannot do whilst he remains married to the applicant.

- [3] The relief sought by the applicant was an urgent separation of issues and urgent decree of divorce. The Court concluded the matter was urgent as it involved the interests of one-year old M. The Court was however not persuaded that the applicant had proven the separation of issues would be convenient and expeditious. The Court

therefore dismissed the application with costs.

- [4] These are the reasons for dismissing the application.
- [5] The applicant moved to Dubai in February 2024 and regards Dubai as his permanent residence, he has no intention of returning to South Africa in the foreseeable future and he intends to apply for permanent residency and citizenship at the first available opportunity. The applicant has immigrated and intends to make Dubai his home in the long term with no intention to return. The position is clear.
- [6] The applicant's immigration contains consequences for the unresolved divorce proceedings as it affects the Court's territorial jurisdiction over the applicant. The proceedings will involve a maintenance order for O, contribution applications and Rule 43 orders. In addition, the divorce proceedings contain a claim and a counter-claim. All these will have to be determined through court proceedings. Once determined, the court orders will have to

be implemented and if not complied with, will have to be enforced by the Sheriff through attachment and execution.

[7] As the applicant is no longer within the court's jurisdiction, his attendance of Court proceedings are cumbersome. In addition, if the applicant were not to attend at court or comply with court orders, the respondent has only lengthy and costly options available to her to finalise the divorce proceedings.

[8] Were the applicant to obtain the relief he seeks, a separation of issues and an immediate divorce, there would be no motivation for the applicant to attend court proceedings to finalise the remainder of the issues in dispute. The remaining issues in dispute all involve aspects which affect O directly. However, the applicant has

indicated that as far as he is concerned his relationship with O has become "moot". The applicant has shown no interest in the ongoing proceedings, beyond the decree of divorce.

[9] If the applicant were to decide, decree of divorce in hand, to remain in Dubai and not attend any further court hearings, there is very little relief available to the respondent that would be effective and not costly. To ensure the attendance of someone outside the court's jurisdiction is a costly and lengthy exercise. To add to this, the enforcement of a court order becomes much harder if the applicant is no longer within the court's jurisdiction.

[10] To give a concrete example, the future proceedings would include a determination of what is the best interests of an 8-year old child. The Court's concern is that if it now grants a separation and a divorce, whether it affects the ability of the Court determining O's maintenance from granting a remedy which can be effectively executed upon.

[11] This concern cries out for a response. The Court assumed this would be a matter which the applicant would address head-on in his founding affidavit. The applicant makes no undertaking or expresses no interest in ensuring the remaining issues are resolved expeditiously if the separation and divorce are granted. The applicant failed to make out a case in this regard in his founding papers.

[12] The respondent, however, raised this squarely in the answering affidavit, where she pleads that she is:

*"concerned about the delays in finalising the maintenance matter given that the applicant lives overseas, I will have no ability to control his attendances at court and him abiding by any court order granted by the Maintenance Court."*

[13] The applicant then is provided an opportunity in his reply to deal with these concerns. The applicant fails entirely to address the concern. The applicant's reply contains an ad seriatim response to each paragraph in the answering affidavit. However, notably absent from the reply is a response to this particular paragraph. The applicant does not even present a bare denial. Let alone a counter-fact, an undertaking or an expression of an interest to attend the hearings. In this case, the concern expressed by the respondent cried out for an answer, but

none was forthcoming. The applicant fails, wholly, to address the respondent's dual concern of court attendance and compliance with court orders. On the papers, the applicant appears to accept the respondent's concerns. The potential prejudice to the respondent in not

being able to enforce court orders is substantial and is not disputed or addressed at all.

[14] The facts before the Court, in terms of the parties' pleadings, are that the concerns regarding the Court's jurisdiction to deal effectively with the remainder of the disputes, are not denied or addressed.

[15] It weighs with the Court that the applicant could have told the Court that the concerns are baseless and provided assurances. The applicant did not do so. Prior to the proceedings being launched the respondent wrote to the applicant raising these concerns. The applicant did not provide a response. The respondent raised it in her answering affidavit. Again, the applicant failed to address the concern. During the hearing, the Court provided the applicant a further opportunity to address this prejudice. The Court repeatedly engaged the applicant's counsel on this point. The Court asked the applicant's counsel how the respondent was to be comforted that once divorced the respondent would attend any future hearings – as he was no longer living in the country – and on his version the remaining issues were “moot”. The Court asked for any reassurance or safety, any mechanism – even in the existing rules of court to ensure the respondent would have an effective

remedy for the remainder of the disputes - to address these concerns. Again, the applicant did not deny that the concerns

had any foundation and provided no comfort to the concerns.

[16] The applicant has had at least three separate opportunities to address the concerns. The failure to do so means that there is nothing to counter the concern that the Court's jurisdiction to effectively preside over the remainder of the disputes is undermined if the separation and divorce were granted.

[17] The Court can only grant a separation if it is convenient to do so for all parties involved, including for the Court. It is not convenient for the Court to grant a separation of issues and a decree of divorce, in circumstances where it is common cause that the Court's ability to make an effective determination of what is the best interest of an 8 year old child is undermined. The Court will be, euphemistically stated, inconvenienced if the maintenance order over an 8-year old child cannot be enforced. The applicant has not provided any basis to counter that inconvenience. On this basis alone, the Court refuses to grant a separation of issues.

[18] In addition, the Court is not assured that the separation will result in an expeditious resolution of the dispute. The contrary may be achieved as there will be no reason for the applicant to finalise the outstanding disputes.

- [19] The convenience of the respondent and O is also to be considered. The respondent has expressed a concern that she will not be able to ensure the applicant's attendance at court for the remainder of the disputes or to enforce any court orders. The applicant has not denied or addressed this prejudice. The prejudice is clear and claimed, common cause even, with no answer from the applicant. The Court is therefore not persuaded that it would be convenient to all parties to grant the separation and the divorce.
- [20] The Court accepts that the principle of separation of issues envisaged in rule 33(4) of the Rules is a recognition that no purpose is served in keeping parties in divorce proceedings together in a dead marriage and thus recognises the need to as soon as possible normalise the lives of the parties whose marriage has irretrievably broken down. The Court also has weighed the impact of the applicant's marriage to the respondent on his life in Dubai. The applicant explains the prejudice to him in the fact that the marriage persists. In particular, he cannot sponsor his new partner and M for visa purposes; he cannot marry his new partner. The applicant believes if his divorce is not granted now his relationship with his new partner will deteriorate and he currently does not have a relationship with M. The applicant submits he needs the divorce order to build a relationship with his new partner and M.
- [21] However, the Court must consider, before granting a separation of issues whether it will have an impact on the spouses' rights to exercise certain remedies and enforce their claims, including claims for interim relief in terms of Uniform Rule of Court 43, forfeiture of benefits in terms of section 9 of the Divorce Act and spousal maintenance. In addition, the Court must consider what is fair to all the parties, and not just one party. Whilst there is prejudice to the applicant in not granting the separation, the prejudice is not in fact caused by the ruling on separation, it is caused by the applicant's decision to move to Dubai. The principle of fairness requires the balancing of the interest of both parties. In this case, there is an inconvenience to the Court and clear prejudice to the respondent and O, which the applicant has not addressed at all.
- [22] Lastly, the impact of being unable to ensure the applicant's attendance at court and the effective implementation of court orders, is the court is unsure whether O's maintenance will be addressed. O's interests are paramount. Again, as the applicant has not addressed this at all, the Court cannot grant separation.
- [23] For these reasons the Court is not persuaded that it would be convenient or expeditious to separate the issues. The Court is particularly concerned with the prejudice to the respondent and O if the separation is granted.
- [24] In addition, the impact of a decree of divorce on an existing Rule 43 order is unclear. The case law on this conflicts, with some cases holding the Rule 43 survives and others concluding that it automatically lapses. The cases that hold the Rule 43 survives a decree of divorce include KO v MO 2017 ZAWCHC135; Carstens v Carstens 2267/2021 ZAECHC 100; OAJ v KJ [2024] PHC 214 and Joubert v Joubert (22 May 2018 with case number 6759/2013). Those

that hold that the Rule 43 does not survive a decree of divorce are NK v KM 2019 (3) SA 571 (GJ); Gunsten v Gunsten 1976 (3) SA 179 (W); and Beckly v Beckley (case number 01098/2015).

- [25] The consequence of this dissonance in our law is that the Court cannot be satisfied that the respondent's existing Rule 43 order will survive the decree of divorce. It is not known if a subsequent court dealing with the remainder issues in dispute, will view itself as persuaded by the decisions that hold that the Rule 43 survives a decree of divorce. The Court knows that O's care hinges on her mother's ability to care for her. Her mother relies on the Rule 43 order to do so. As there is no certainty how subsequent courts will determine the fate of the Rule 43, the Court concludes that a separation of issues with a decree of divorce is not convenient, expedient or fair to all parties.
- [26] It also weighs with the Court that section 6 of the Divorce Act requires a Court when granting a decree of divorce to only do so once the interests of minor children have been considered. The applicant requests the Court to not only grant a separation of issues but also a decree of divorce. This Court is by no means in a position to determine what is best for O. The applicant has not attempted to address the Court on these issues and has just stated that the issues are "moot". They are not. The effect is that the Court cannot grant a decree of divorce as it has no information regarding O's interests. For this reason as well, the application is dismissed.

#### Urgency

- [27] The applicant sought relief on an urgent basis. The applicant contended that M is being deprived of a relationship with his father. In this way, contended the applicant, the best interests of M was at play. The Court has to, for purposes of urgency, accept the allegations regarding the best interests of M. The Court will be slow to refuse a hearing when the best interest of child is to be protected.
- [28] The respondent pointed out that it is not the separation which caused the prejudice to M, but the applicant's decision to move to Dubai knowing full well the impact of compliance with the local laws in Dubai would be on M. Whether there is truth in that statement or not, it cannot be that M's interests should not attract the urgent attention of the Court because the applicant's conduct may or may not be the cause of the prejudice. M is faultless in this and it is M's interests that led the Court to consider the matter on an urgent basis.

#### Costs

- [29] The applicant has been unsuccessful. The respondent is entitled to her costs. The respondent seeks cost on a scale of attorney and client. The submissions in this context are:

26.1 The respondent is responsible for O's care. She has had to stop medical treatment for O, as she had to use the money to oppose this urgent application.

26.2 The applicant has previously launched vexatious urgent proceedings against the respondent and has already been taken to task on such conduct by this Honourable Court. The respondent submits that the last urgent the applicant launched was in terms of rule 43(6) seeking a change of circumstance in the rule 43 application. This application was dismissed with punitive costs by Justice Manamela.

26.3 The applicant moved to Dubai in February 2024 knowing the impact of the laws on his relationship with O, as well as M. The urgency was created by this decision.

27 The submissions are sound and accepted by the Court.

28 The Court also considers that the basis on which the case was ultimately decided was brought to the applicant's attention prior to the proceedings being launched. The respondent wrote to the applicant indicating a concern regarding the impact of his immigration on the ongoing litigation. This was never addressed. Had this been properly considered the proceedings could have been avoided.

29 The Court also notes the applicant's stance that what happens to O – her care and contact – is “moot”. The care of a minor child might be decided or settled, but it is certainly not academic. It is an unfortunate position which means the applicant presented a one-sided approach to what would be convenient only to the applicant and inconvenient to all other parties, including the Court and O.

30 In this context, the matter is dismissed with costs on a punitive scale.

31 The Court grants costs on scale B. The Scale is justified not only in light of the history of the litigation launched by the applicant, but also because of the contradictory case law relating to granting a divorce whilst there is a rule 43 order in place. The nature of that dispute is contradictory and therefore not without complexity.

The respondent's team had to prepare to deal with this relief. This justifies a costs order on Scale B.

## Conclusion

32 The Court ordered:

32.1 The application is dismissed

32.2 The applicant is to pay costs of the application on an attorney and client scale, including the costs of counsel, on Scale B.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

Counsel for applicant: DJ Coetzee Instructed by: Christo Mulder Attorneys Counsel respondent: A Salduker Instructed by: Van Rooyen Attorneys Date of hearing: 26 June 2024 Request for reasons: 17 July 2024 Date of reasons: 16 October 2024

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