

SOUTH AFRICA / JUDGMENT

Levy v Levy (494/89) [1991] ZASCA 81; 1991 (3) SA 614 (AD); [1991] 2 All SA 407 (A) (30 May 1991)

[1991] ZASCA 81

COURT

Supreme Court of Appeal

BEFORE

Hefer, Kumleben, Kriegel

CASE / FILE NUMBER

494/89

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between: CARON SARA LEVY APPELLANT and

STANLEY ROY LEVY RESPONDENT

CORAM : HEFER, KUMLEBEN JJA et KRIEGLERAJA HEARD : 16 MAY 1991

DELIVERED : 30 MAY 1991

JUDGMENT

KUMLEBEN JA/...

1.

KUMLEBEN JA:

The plaintiff, the present appellant, sued her husband, now the respondent, for divorce in the Witwatersrand Local Division of the Supreme Court on the ground that their marriage had irretrievably broken down. Relying on this cause of action she claimed an order of divorce, implementation of certain terms of their antenuptial contract and costs.

What might otherwise have been a straightforward matrimonial action was complicated - as the course of events amply demonstrates - by the existence of an agreement entered into by them on the day of their marriage. It provided that they would in addition marry each other according to Orthodox Jewish Law ("Jewish Law"), which they did, and that in the event of "their marriage being terminated or dissolved by way of any civil proceedings" the parties undertook to appear before a Jewish Ecclesiastical Court, known

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2.as a Beth Din, to have the marriage dissolved according to Jewish Law. To ensure compliance with its terms, this agreement stipulates that a party failing to do so is to pay the other, by way of a penalty or as liquidated damages, R50,00 for each day of default. In her particulars of claim the plaintiff alleges that as from 7 February 1985 the defendant has refused to appear before the Beth Din. In the premises she claims, in addition to a decree of divorce and ancillary relief, payment of R50,00 per day from that date until implementation of the terms of the agreement together with, if necessary, a declaratory order that it is valid and enforceable. Her particulars of claim thus contain two separate and distinct causes of action.

In his plea the defendant admits that the marriage is at an end but denies that this was due to

3/...3. any misconduct on his part. As regards what one may call the Beth Din issue , a number of defences are raised, inter alia, that a claim for the enforcement of any of its terms would be premature and unfounded until such time as the parties are divorced. In a counterclaim he avers that the misconduct of the plaintiff, particulars of which are stated, caused the disintegration of their marriage and he in turn seeks an order of divorce with forfeiture by the plaintiff of the benefits conferred on her in terms of the antenuptial contract. The material allegations in this counterclaim are denied by the plaintiff in her plea to the counterclaim.

The pleadings having closed, the trial was

due to start on 13 October 1987. However, on 9 October

1987 the plaintiff gave notice that at the hearing shewould apply for an amendment of her pleadings (the

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4."proposed amendment"). The amendments she sought were:

"A. The withdrawal and deletion of the Plaintiff's claim in its entirety. B. The deletion of the Plaintiff' s Plea to the Defendant's Counterclaim and the substitution therefor of a Plea to the Defendant's Counterclaim [the 'proposed plea'] and a counterclaim to the Defendant's Counterclaim [the 'envisaged counterclaim'] ...:"

Her prdposed plea and her envisaged counterclaim are

then set out. The relief claimed in A is not really an amendment but I shall refer to it as such. The defendant objected to the amendments. The trial was postponed to enable the plaintiff to make the necessary application in terms of Rule 28 of the Uniform Rules of

Court for the amendment sought. This she did by notice of motion dated 14 April 1988 and made and lodged an affidavit in support of her application. It was opposed by the defendant.

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5. In his answering affidavit he contended in limine that the order be refused. In the event of the application not being dismissed on any preliminary ground, further objections to the order sought were raised in this affidavit.

The matter came before Harms J and followed a rather unusual course. When argument commenced on 11 May 1988 it was restricted to one point in limine. Before judgment was delivered it became clear, or reasonably so, to counsel for the plaintiff, Mr Dison,

that the point in limine was going to be upheld, viz, that the rules of civil procedure do not provide

for a counterclaim to a counterclaim and that such a pleading could therefore not be countenanced. In anticipation of an order to that effect, Mr Dison handed into court, after serving a copy on defendant's attorneys, a "Notice of Proposed Order sought by the

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6. Applicant in respect of the abovementioned Application for leave to Amend" (the "second notice of amendment"). This was done without objection from defendant's counsel or on the part of the court. Harms J thereupon proceeded to deliver judgment (the "first judgment") upholding the point in limine. The order at the conclusion of this judgment reads that: "The point in limine is accordingly upheld, and the amendment per notice dated 8 October 1987 is refused." (One must add that in this judgment the court also stated that portions of the proposed plea and envisaged counterclaim were in any event open to objection.) The order in terms states that leave to withdraw the particulars of claim and the other amendments initially

sought in the proposed amendment are refused. On the face of it the matter was at an end. That this was not the case is evinced by the fact that this first judgment included no order for costs and argument

7/...7. proceeded with reference to the second notice of amendment. This first judgment must thus be construed as a ruling that there could in the circumstances be no counterclaim to a counterclaim and not as a final judgment in the application. On appeal before us Mr Dison confirmed that this was the understanding of all concerned. (Mr Marais, who appeared on appeal for the defendant, was not at any prior stage involved in this matter.)

During the course of argument after the first

judgment had been delivered, a further document was handed in, again without objection, headed "Relief

sought by the Applicant, the Point in limine having been upheld on 13/5/88". This further notice was also not objected to. All that need be said about these two notices is that they represented an alternative course

of action on the part of the plaintiff dictated by the

8/...8. fact that her envisaged counterclaim was held to be an impermissible pleading.

After argument with reference to the two subsequent notices, a further judgment (the "second judgment") was delivered. Its first two paragraphs read as follows:

"After argument on the point in limine, and prior to judgment thereon, the applicant gave notice of two alternative amendments to the amendment dealt with in the judgment on the point in limine. As a result of argument, during the course of argument, notice was given of six further alternative amendments. I do not wish to be disrespectful, but I do not believe it can be expected of me to unscramble all these applications. I shall attempt to deal with the matter in a sensible manner."

The court proceeded to authorise and order six amendments to the particulars of claim only and to award the defendant the costs of the application.

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9. Implicitly all the relief sought in the proposed

amendment was refused. Having thus decided, the court in the second judgment observed that:

"The relief granted was only due to my insistence. It seems as if the applicant has a real problem but the feverish attempts to resolve the problem were ill-founded. There is therefore good reason to order her to pay the costs. It is only at this very late stage, after two days of hearing and after lengthy papers, that something acceptable was formulated. I should indicate that the amendment as granted is not even within the terms of what counsel sought. I do believe however, that in the interest of the applicant and in the oft quoted reference to the interests of justice, that a correct order was formulated."

In the result, by virtue of the two judgments, the particulars of claim were not withdrawn but were amended as the court deemed appropriate; the original plea stood unamended; and her envisaged counterclaim was disallowed.

The plaintiff applied for leave to appeal.

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The grounds, some fifteen of them, clearly show that she wished to challenge the orders made in both judgments. They are in any event, for the reasons already given, to be regarded as one judgment in two instalments. These grounds of appeal are pertinently directed at the refusal to grant an amendment in terms of the proposed plea and the refusal to recognise her envisaged counterclaim. The refusal of the court to withdraw the particulars of claim in their entirety is

obliquely raised in the grounds of appeal, perhaps because such withdrawal was indirectly disallowed by the court. "Indirectly" in the sense that in the course of the first judgment the proposed amendment was said to be "a package deal. It is either all or nothing".

The court therefore concluded that the rejection of the envisaged counterclaim resulted in the failure of the proposed amendment as a whole.

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Harms J was not available to hear the application for leave to appeal. It came before Roux J who refused "leave to appeal against the two judgments of Harms J with costs." The plaintiff petitioned this court for such leave. It was granted with two special orders relating to costs, to which I shall in due course refer.

The statement or observation in the judgment

of the court a quo that the amendment is a "packaged deal" presented a difficulty when the matter came before us on appeal. The court clearly meant, as I have indicated, that its three components (withdrawal of claim, proposed plea and envisaged counterclaim) were inter-dependent and that it was in this sense a matter of "all or nothing". On the other hand, as appears from the original notice of amendment already quoted, the plaintiff sought: A - the withdrawal of

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12. the particulars of claim; and B - the amendment of her pleadings by the substitution of the proposed plea and the addition of the envisaged counterclaim. In the notice these two forms of relief are not said to be conditional upon both being granted nor are they explicitly linked. When questioned on this Mr Dison

informed us, drawing on his recollection of what took place, that at no stage during the argument was the court told that the application was to be regarded as an all or nothing one; that the plaintiff's consistent

stand was that she wished to withdraw her particulars of claim so as to no longer feature as a plaintiff, no matter what the fate of her proposed plea and envisaged

counterclaim might be; and that the subsequent

proposed amendments to the particulars of claim,

contained in the two later notices, were in the

alternative and on the supposition that the envisaged

counterclaim had been correctly refused. (What does

13/... 13. appear to have been common ground is that any "all or nothing" concept did not necessarily apply individually to the proposed plea or the envisaged counterclaim: they, unlike the curate's egg, could be good in parts and that partial amendment of each could result.) It is quite impossible for us to resolve this question at this stage with any degree of certainty. There may have been some misunderstanding in this regard particularly if one takes into account the informal, and in some respects novel, way in which the matter was allowed to proceed. In the circumstances I shall assume in favour of the plaintiff that the recollection of her counsel in this respect is correct.

Turning to the merits - after this somewhat

protracted prelude - it is convenient to consider in

the first place whether the court was correct in

deciding that the envisaged counterclaim was to be

14/...14. disallowed in principle and regardless of its contents. The learned judge did so, as I have said, for the reason that our rules do not provide for a counterclaim to a counterclaim. This is so. But the conclusion, with respect, overlooks the fact that the plaintiff simultaneously sought the withdrawal of her claim in its entirety. If withdrawn, the defendant's counterclaim would become in reality the main claim with her envisaged counterclaim (assuming it to be otherwise in order) a permissible response. One would be left, despite nomenclature, with a conventional set and sequence of pleadings: a claim, plea and counterclaim.

The primary - actually the anterior

question, is therefore whether there were valid grounds

for the court's refusal to allow the withdrawal of her

particulars of claim. Ordinarily there can be no

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15. objection to a plaintiff doing so (subject to the payment of costs; a requirement not relevant in the instant case for reasons that need not be stated). In fact, as one knows, a claim may be withdrawn without any application to court. Nor can it be said in the case of such an application that any indulgence is being sought on the part of the plaintiff. There can therefore normally be no objection to the withdrawal of a claim or an application to do so. In this case one can discern with reasonable certainty the underlying reason for the strategy which gave rise to the proposed amendment and in particular the necessity to withdraw her claim. The reason is evident from the pleadings, the proposed amendment and plaintiff's affidavits in the application. Initially, as I have

indicated, the plaintiff in her particulars of claim

sought a divorce and implementation of the agreement to

the extent of enforcing the penalty clause as an

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16. inducement to the defendant to grant a get (a Jewish Bill of Divorcement). After defendant's plea, which inter alia relied on the fact that the agreement only becomes operative after a divorce, she foresaw or fully appreciated that a get might not follow upon a divorce. She was also informed, one can reasonably

infer, that, even if the defendant proved the

irretrievable breakdown of the marriage, certain defences (to which I shall later refer) might still be open to her in opposing the divorce and that they could

hardly be raised if she herself were asking for a divorce order. As counsel said more than once in argument, "She wants a divorce but only if it is

accompanied by a get." This attitude is fully borne out by her evidence on affidavit. Her commitment to her Faith made this for her a vital requirement.

Whether this objective can be attained and whether the defences raised in the proposed plea are sound

17/...17. matters still to be considered - are, as I see it, immaterial as regards the question of the withdrawal of her claim. It is after all not ordinarily the function of the court to force a person to institute or proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one. An exception, though one difficult to visualize, would no doubt be where the withdrawal of an action amounts to an abuse of the court's process. In *Hudson v Hudson and Another* 1927 A.D. 259 de Villiers JA held at 268 that:

"Where ... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case."

In my view, having regard to the reason for the plaintiff applying for the withdrawal of her claim, such request cannot be said to be untoward or in any

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way improper.

In the result the court ought to have allowed the withdrawal of her particulars of claim in which event her counterclaim in principle presents no problem.

The proposed plea must next be considered.

It is a long, complicated and convoluted document, bristling with alternatives and alternatives to alternatives. In attempting to simplify and summarise

it I shall omit as many of them as possible. I shall also leave out ancillary allegations which fall outside

the range of the novel issues raised in this proposed plea and which distinguish it from one which simply answers a claim for divorce. On this basis the essential terms pleaded are the following (with some

comment of mine in parenthesis):

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- (a) She alleges that the parties were married according to Jewish Law and that "immediately prior to or at the time of the marriage the parties entered into an agreement "which was partly oral and partly in writing alternatively which was in writing." The provisions of the written agreement, annexed to her (former) particulars of claim, are repeated. In addition it is said that it was a further express or implied term that the defendant would provide for her clothing and maintenance as long as they were married in the eyes of the Jewish Law. Paragraphs 2A and 2B.

- (b) In eighteen paragraphs and sub-paragraphs there is a lengthy exposition of elements and aspect of Jewish marriage and divorce law. The substance of what is pleaded is that such a marriage is a

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20. contractual relationship; that the get is simply an act of release executed by or on behalf of the husband; and that, in the absence of a get, the parties remain married according to Jewish Law. Thus a further marriage after divorce would not be recognised by Jewish Law, the relationship would in fact be regarded as adulterous and any children born as illegitimate. Paragraphs 2C and 3C.

- (c) After answering certain allegations of misconduct on her part which are set out in the counterclaim, she denies the allegation that "the marriage relationship between the parties has reached such a state of disintegration, that there

is no reasonable prospect of a normal marriage relationship between them." Paragraph 3A.

(Yet, oddly enough, the averment in the counterclaim of the defendant that, "[i]n the

21/... 21 . premises, the said marriage has irretrievably broken down" is left unanswered.)

- (d) She next deals with the defendant's alleged misconduct as regards the procurement of a get. He was aware, she avers, of the position according to Jewish Law as pleaded by her. He has advised her that he will in no circumstances grant her a get. He has been married on two previous occasions and after divorce in each case he refused to grant his

former wife a get until she had paid him a considerable sum of money. She has offered to withdraw her claim and has agreed to an unopposed divorce and to pay the defendant's costs on an

attorney and client scale: provided he grants her a

get before the divorce order. This offer, which she

repeats in the proposed plea, has been consistently

rejected by the defendant. Paragraph 3D - 3H.

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(Certain of these allegations are repeated on oath in the plaintiff's founding affidavit and are not denied by the defendant or dealt with in his answering affidavit. These allegations of hers, I have little doubt, contributed to the court saying at the conclusion of the second judgment that: "There is reason to believe that the respondent's conduct may be reprehensible, and that he is in fact blackmailing the applicant")

On the strength of these averments, which I have no more than broadly sketched to reflect their substance, the plaintiff pleads as follows in paragraphs 3I, 3J and 3K of the proposed plea:

(1) "In the premises the plaintiff denies that the marriage between the parties has broken

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23. down."

(2) "Alternatively and in the event of this Court finding that the marriage between the parties has broken down, the Plaintiff prays that in the circumstances this Court exercises its discretion in her favour and declines to grant a decree of divorce."

(3) "Alternatively [to (1) and (2) above] the seeking of a decree of divorce by the Defendant and/or the persisting by the Defendant in his claim for a decree of divorce, in the circumstances ... constitutes an abuse of the process of court."

(A number of alternatives were pleaded to (3) above but Mr Dison, quite correctly, conceded that they were either unsound in law or simply repeated the "abuse of process" contention in other language.)

The above three contentions are the essential features of the proposed plea. They rely on the facts summarised in paragraphs (a) to

(d) above. Those facts and these contentions distinguish the proposed plea

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from the one originally lodged. I turn to consider each of these three propositions.

As regards (1) above, the defendant says in his answering affidavit:

"The applicant having instituted action against me for a decree of divorce and it having at all material times been common cause between us that our marriage has irretrievably broken down, now seeks to avoid those facts, withdraw her admission that our marriage has so broken down and to oppose the grant of a decree of divorce."

This is clearly so. It is, and has always been, commoncause that the marriage has irretrievably broken down. This she admitted in paragraph 3 of her original plea

(quite apart from it being the ground on which her action was based). For present purposes it is unnecessary to decide whether the withdrawal of an

admission in a pleading will only be permitted when made in error (cf *Gordon v Tarnow* 1947(3) S.A. 525 (A))

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25.532 and *President-Versekeringsmaatskappy Bpk v Moodley* 1964(4) S.A. 109 (T) 110 G - H) or whether in exceptional circumstances a deliberate admission may be retracted if no prejudice results. (cf *Frenkel, Wise & Co, Ltd. v Cuthbert*; *Cuthbert v Frenkel, Wise & Co., Ltd.* 1946 CPD 735 at 749). What is plain, as *Ogilvie Thompson AJ* pointed out in the last-mentioned decision, is that:

"Before granting an amendment to a pleading which has the effect of withdrawing an admission therein I consider that the Court should require a satisfactory explanation both of the circumstances whereunder the admission was made and of the reasons why it is now sought to withdraw it:"

The admission was obviously not made in error. The reason for seeking its withdrawal was a tactical one. This the plaintiff herself admits in her founding affidavit. She says:

"It is clear that, apart from the question of the

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granting of a Jewish ecclesiastical bill of divorce ("GET") to me by the Respondent, the marriage has broken down. I submit that this is common cause between the parties.

However, it is my respectful contention that in the light of the facts alleged in the notice of amendment, the marriage has not broken down in the sense contemplated in terms of the Divorce Act as long as the Respondent refuses to give me a GET and thereby holds me bound to him until his death in such a manner as to prevent me from forming an association with any other man or marrying any other man."

(The illogicality of what is said in the second paragraph hardly needs emphasis: if the marriage has broken down, the refusal to grant a get cannot change that situation as a matter of fact or law; if anything it would aggravate it.) That the marriage is

irreversibly at an end has never been, and still is not, genuinely in dispute. In the circumstances the withdrawal of her admission in order to deny this fact cannot be permitted.

I turn to the contention that the court has a

27/...27. discretion to refuse a decree of divorce notwithstanding proof that there has been an irretrievable breakdown in the marriage. This question was considered by this court in *Schwartz v Schwartz* 1984(4) S.A. 467. The court concluded on an interpretation of the relevant provisions of the Divorce Act 70 of 1979 that no such discretion exists. Its conclusion was obiter on the facts of that case inasmuch as the court a quo found that there had not been an irretrievable breakdown of the marriage. However, this question was pertinently raised as appears from the respondent's heads of argument 469A -C. Her counsel submitted on appeal that the court a quo had exercised a discretion which should not be interfered with on appeal. This led to the question being comprehensively considered as appears from the following extract from the judgment (per Corbett JA):

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"Section 3 of the Act provides that:

'A marriage may be dissolved by a Court by a decree of divorce and the only grounds on which such a decree may be granted are-

(a) the irretrievable breakdown of the marriage

as contemplated in s 4;

(b) the mental illness or the continuous unconsciousness, as contemplated in s 5, of a party to the marriage.'

The ground upon which a decree of divorce was claimed by appellant in this case is that stated in s 3 (a) above. This is amplified in s 4 of the Act in the following terms:

'(1) A Court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(2) Subject to the provisions of ss (1), and without excluding any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage, the Court may accept evidence-

(a) that the parties have not lived together as husband and wife for a

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continuous period of at least one year immediately prior to the date of the institution of the divorce action;

(b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,

as proof of the irretrievable breakdown of a marriage.

(3) If it appears to the Court that there is a reasonable possibility that the parties

may become reconciled through marriage counsel, treatment or reflection, the Court may postpone the proceedings in order that the parties may attempt a reconciliation.

(4) Where a divorce action which is not defended is postponed in terms of ss (3), the Court may direct that the action be tried de novo, on the date of resumption thereof, by any other Judge of the Court concerned.'

As is apparent from a reading of the above-quoted

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sections, the Act has fundamentally changed our divorce law in regard to the grounds upon which a marriage may be dissolved by a decree of divorce. Prior to the commencement of the Act, the only grounds at common law upon which a Court could pronounce a decree of divorce at the instance of one of the parties to the marriage (the plaintiff) were that the other party (the defendant) had either committed adultery or maliciously deserted the plaintiff. (Possibly also on the ground that the defendant had been convicted of a crime and sentenced to life imprisonment, but there was some uncertainty about this: see Hahlo *The South African Law of Husband and Wife* 4 ed at 398-9.) Adultery and malicious desertion constituted a breach by the defendant of his marital obligations. Thus, apart from the possible exception of life imprisonment, entitlement to divorce was based on fault: the fault of the defendant. In 1935 the Legislature added two further grounds of divorce, viz the incurable insanity of the defendant and the imprisonment of the defendant for five years after having been declared an habitual criminal (see Act 32 of 1935, s 1 (1)). Section 3 (a) of the Act, read with s 4, introduces a 'no-fault' criterion for the grant of a decree of divorce, viz irretrievable breakdown of the marriage. The Court may grant a decree of divorce on this ground if it is satisfied, as an objective fact, that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between

them. Section 4 (2) specifies certain facts or

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circumstances which the Court may accept as proof of the irretrievable breakdown of a marriage, but the subsection makes it clear that this list does not exclude any other facts or circumstances which may be indicative of the irretrievable breakdown of the marriage.

The Act also places emphasis on the possibility of reconciliation. Section 4

- (3) provides that, if it appears to the Court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, it may postpone the proceedings in order that the parties may attempt a reconciliation. And s 4 (4) contains certain procedural provisions where an undefended divorce action is postponed for this purpose.

It was submitted by respondent's counsel that s 4 (1) confers a discretion on the Court; and that inasmuch as the Court a quo exercised a discretion in reaching the decision it did, this Court should not readily interfere with the exercise of that discretion. Reference was made in this connection to the decision of the Full Bench of the Orange Free State Provincial Division in the case of *Smit v Smit* 1982 (4) SA 34 (0).

The submission is, in my opinion, not well-founded. In the first place, I am not convinced that s 4 (1) does confer upon the Court the kind of discretion contemplated by counsel's submission. It is true that s 4 (1) is couched in permissive terms. It provides that a Court 'may grant a decree of divorce' (Afrikaans text: 'kan h

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egskeidingsbevel ... verleen'). It does not necessarily follow, however, that the Legislature intended to confer a discretion on the Court. Section 4 (1) is clearly an empowering section: it confers legislatively a power which the Court did not previously enjoy.* A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. (See generally *Noble & Barbour v South African Railways and Harbours* 1922 AD 527 at 539-40, citing *Julius v The Bishop of Oxford* (1880) 5 AC 214; *South African Railways v New Silvertown Estate Ltd* 1946 AD 830 at 842; *Commissioner for Inland Revenue v I H B King*; *Commissioner for Inland Revenue v A H King* 1947(2) SA 196(A) at 209-10; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) at 478-80, 502-4.) As was

pointed out in the Noble & Barbour case *supra*, this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.

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Section 4 (1) empowers the Court to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage 'if it is satisfied that ...'; and then follows a specified state of affairs which is in effect the statutory definition of irretrievable breakdown. Clearly satisfaction that this state of affairs exists is a necessary prerequisite to the exercise by the Court of its power to grant a decree of divorce on this ground. But once the Court is so satisfied, . can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize on what grounds a Court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff. In Smit's case *supra* it seems to be suggested that, notwithstanding the fact that a marriage has broken down irretrievably, the Court may refuse a decree of divorce in order to exercise the power granted to it in terms of s 4 (3) of the Act, ie to postpone the proceedings in order that the parties may attempt a reconciliation (see at 41H-42A). The pre-requisite to the exercise of the power contained in s 4 (3) is that it must appear to the Court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection. If there is this reasonable possibility, can it be said that the marriage has broken down

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34.

irretrievably? And conversely if the marriage is found to have broken down irretrievably, can such a reasonable possibility exist? It seems to me that there is much to be said for the view that these concepts, ie irretrievable breakdown and the reasonable possibility of reconciliation, are mutually contradictory and that the existence of the power conferred by s 4 (3) does not necessarily indicate a residual discretion vested in the Court by s 4 (1).

In Smit's case *supra* at 42A s 6 (1) is also referred to, apparently in support of the thesis that the Court enjoys a discretion under s 4 (1). Section 6 (1) provides that a decree of divorce 'shall not be granted' until the Court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. And in order to satisfy itself in this regard the Court is empowered by s 6 (2) to cause any investigation which it may deem necessary to be carried cmt. Section 6

- (1) thus requires, in imperative terms, that the Court should be satisfied in regard to these matters concerning minor or dependent children before it grants a decree of divorce. The power of the Court to grant a decree of divorce on the ground of irretrievable breakdown of the marriage (and on the other grounds stated in s 3) is thus qualified, or made subject to, the Court being satisfied as to the matters referred to in s 6 (1); but I do not read s 6 (1) as conferring, or substantiating the existence of, a discretion

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35. under s 4 (1)." (472E - 475D)

I have cited the relevant passage of this judgment fully since it, in my respectful view, advances all the cogent reasons for concluding that no such discretion was conferred. It at the same time refutes the submissions to the contrary advanced by Mr Dison in argument. What was said in that judgment is thus to be confirmed and adopted and it follows that the converse view expressed in *Smit v Smit* 1982 (4) S.A 34 (0) 41F must be rejected. Mr Dison in the course of his argument laid stress on the hardship which he submitted would result were a discretion not to be recognised and exercised in certain circumstances. This, so he maintained, is an indication that a discretion was intended by the Legislature. In this regard it is of interest to note that in *Hahlo "The South African Law of Husband and Wife"* (5th Ed) at page 347 the author,

36/...36. after respectfully approving of the view expressed in the *Schwartz* case, goes on to observe:

"By and large hardship clauses have not proved themselves. In England, the hardship clause is occasionally invoked by the respondent but seldom applied. If a divorce were to be refused whenever the dissolution of a marriage means substantial hardship to the respondent, not many divorces would be granted, for there are not many divorces which do not involve such hardship."

The third contention, (3) above, can be

disposed of more concisely. The defendant in seeking a divorce according to our law has no other motive in mind, and thus none that can be described as ulterior or improper. The fact that his motive for refusing a get may be reprehensible is in no way relevant. Should he persist in his refusal to grant a get, the plaintiff's remedy lies in the enforcement of the terms of their agreement. It is the plaintiff who has sought

artificially and incorrectly to conjoin two

separate causes of action and to make

37/...37. one conditional upon the other.

In the circumstances the new averments sought to be introduced by means of the proposed plea, in the way of factual allegations in support of these three contentions, are unwarranted and cannot be authorised. The court was thus correct in refusing the substitution of pleas.

Finally it is to be noted that no relief is sought in the proposed plea by virtue of the facts summarised in (a) above. At the conclusion of this pleading the prayer is simply for judgment in her favour with costs in respect of the defendant's counterclaim.

Turning to the envisaged counterclaim (which,

as I have said, is in principle to be acknowledged), it

38/...38. is as complex as the proposed plea. It is conditional, in the first place, upon the court granting a divorce in terms of defendant's counterclaim (the "first part") and is, in the second place, said to be conditional upon such an order being refused (the "second part"). In the light of what has been decided thus far a divorce must ensue and the second part need not be considered. It cannot remain as part of the envisaged counterclaim. This Mr Dison conceded - on the premise that the divorce could not be contested because the admission could not be withdrawn.

The first part can be thus summarised:

(i) The allegations in the proposed plea (as

set out in (a) above) are repeated and incorporated, with the additional averment that R2 500,00 per month

is "an adequate monthly amount for the plaintiff's

39/...39. maintenance." Paragraphs 3B and 3C.

(ii) The plaintiff next pleads the terms of the written agreement concluded on the day of the marriage together with the necessary allegations to entitle her, as she alleges, to claim a declaratory order that its terms are enforceable and that they be implemented by the defendant. Paragraph 4.

(iii) Finally she sets out certain obligations in their antenuptial contract which she alleges the defendant has failed to carry out. Paragraph 6.

On the strength of the allegations as summarised in paragraphs (i) to (iii) above she claims the relief as specified in prayers (a) to (e) of her counterclaim.

40/...40. I must stress that I have done no more than attempt to simplify what has been pleaded in a prolix and repetitive form in the envisaged counterclaim. Its essential feature is that she seeks recognition and implementation of the written agreement. Some of the averments in the counterclaim, incorporated from the proposed plea, do not appear to be strictly necessary for this purpose and certain of the relief claimed may turn out to be unjustified. (For instance, that the sum of R50,00 payable per month on default is to be adjusted in accordance with the rate of inflation.) It appears to me, however, that the interest of justice will be best served if the counterclaim be allowed to stand with those allegations permitted which are or maybe relevant to the relief sought though some, as I have

indicated, may not in the result be claimable. Naturally the defendant will have an opportunity to respond to her counterclaim by way of plea or in some

41/...41 . other manner.

The parties were married in September 1984. The plaintiff instituted action for divorce on 31 December of the same year. Thus the marriage, which lasted no more than four months, has been the subject of a bitter and costly dispute for over six years. One may only express the hope that it will be resolved outside court or come to trial on the pleadings as amended in terms of the order I proposed to make.

It remains to deal with the question of costs:

firstly, those relating to the application in the court a quo and the appeal in this court. The plaintiff's

success on appeal has not been substantial. The essential issues raised by her were whether the court had the discretion for which she contended, and whether the defendant by enforcing his right to claim a divorce

42/...

42. was abusing the court's process. Both have been resolved in favour of the defendant. On the other hand, the narrow ground on which the court a quo refused to allow her counterclaim has not been upheld; her counterclaim has in part survived; and the refusal to allow her to withdraw her particulars of claim is to be set aside. In the circumstances the most appropriate order, all things considered, would be that

each party should bear his or her own costs. This court, in granting leave to appeal, reserved for its decision the costs of the application for leave to appeal and the order for costs made by the court a quo

in regard to the dismissal of the application to it for

leave to appeal. The discursive nature of the

application and petition, and the unnecessary documents

annexed to each, prompted this court - one may

confidently assume - to reserve the question of these

costs. However, since the parties are to pay their own

43/...

43.

costs, no more need be said in this regard.

In the result the appeal partially succeeds. The order of the court a quo in the application in terms of the notice of motion dated 14 April 1988 is set aside and the following order substituted:

- (1) The plaintiff is granted leave to withdraw her particulars of claim.
- (2) The application to amend her plea to the counterclaim, in terms of a notice of amendment bearing the registrar's date stamp of 9 October 1987, is refused.
- (3) The plaintiff is granted leave to counterclaim to defendant's counterclaim (in the result the main claim) in terms of the annexure (marked "A") to this order.
- (4) No order as to costs is made in respect of the application to amend in the court a quo or in respect of this appeal.
- (5) No order is made as regards the costs of

44/...

44.

the application for leave to appeal or the costs of the petition to this court.

M E KUMLEBEN JUDGE OF APPEAL

ANNEXURE A

The following are the allegations and relief to constitute her counterclaim, conditional upon a divorce been granted:

A. Paragraphs 1, 4A, 4B and 8D of the envisaged counterclaim. Record page 65 . B. Paragraphs 2A, 2B, 2C, 3C, 3D and 3E of the plaintiff's proposed plea. See record pages 65 - 69 . C. The relief set out in prayers (a), (b), (c), (d), (e), (f), (g) and (h) of the envisaged counterclaim. See record pages 73 to 76 .

M E KUMLEBEN JUDGE OF APPEAL

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