

SOUTH AFRICA / JUDGMENT

M.D.A.P.G.S v L.M.D.S (2021/47489)

[2023] ZAGPJHC 1373 (24 November 2023)

[2023] ZAGPJHC 1373**COURT**

South Gauteng High Court, Johannesburg

BEFORE

O.K. Chwaro

CASE / FILE NUMBER

2021/47489

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Policy**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****Case Number:**

2021/47489

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

NOT REVISED

In

the matter between:

M.D.A.P.G.S

Applicant

And

L.M.D.S.R

Respondent

JUDGMENT

CHWARO, AJ:

INTRODUCTION

- [1] This is an interlocutory application premised on rule 33 (4) of the Uniform Rules of Court for the separation of the issue of the granting of the decree of divorce from the determination of the patrimonial consequences following from the dissolution of the marriage.
- [2] The applicant, a 67-year-old and the respondent, a 71-year-old, were married to each other on 2 September 2000 out of community of property and have, prior to the said marriage, concluded an antenuptial contract excluding community of property and profit and loss, with the accrual system[1].

The pending divorce action

- [3] On 5 October 2021, almost a month after their twenty first anniversary, the respondent instituted the divorce action seeking a decree of divorce and an order that the applicant pay him an amount equal to one-half of the difference between the accrual of the respective estates of the parties. On the other hand, the applicant filed a counterclaim also seeking a decree of divorce coupled with an order for forfeiture of the accrual against the respondent.
- [4] During the course of the divorce action and on 7 December 2021, the respondent launched a rule 43 application seeking payment of an amount of R20 000-00 per month for his living expenses and a contribution towards his legal costs in the amount of R250 000-00.
- [5] The rule 43 application was opposed by the applicant on the basis that the respondent did not make full disclosure of his financial status. On 12 April 2022, the rule 43 application served before Oosthuizen-Senekal AJ who dismissed it with a punitive costs order against the respondent.
- [6] Disappointed by their failure to reach an amicable solution on the action, on 21 April 2022, the applicant caused a notice contemplated in rule 41A of the Uniform Rules of Court to be served upon the respondent wherein she opposed the referral of the action to mediation.
- [7] In the meantime, pleadings having been closed and parties having filed their respective discovery affidavits, a pre-trial conference was held on 23 August 2022. The minutes reflect that upon being requested to furnish the respondent with the details pertaining to her membership of any pension fund, provident fund or any other pension interest, the respondent was informed that the applicant had only one living annuity from which she derives her monthly income.

- [8] The minutes further reflect that the parties agreed, at that stage, that there was no need to separate any issue in terms of rule 33(4). The parties were also in agreement that their marriage has broken down irretrievably and the decree of divorce ought to be granted. The disputed issues were detailed as being the reasons for the breakdown of the marriage, the respective accrual claims against each other, the applicant's claim for forfeiture and the costs.

Attempt to resolve the issue pertaining to accrual claims against each other

- [9] Subsequent to the pre-trial meeting referred to above, the parties agreed on the appointment of an outfit, Business Valuation Advisers, ("BVA") who were engaged to determine a fair market value of the applicant's living annuity. A report from BVA was obtained on 9 January 2023 and subsequent thereto, the applicant made a firm offer to the respondent for payment of an amount of R642 517-75.
- [10] The respondent did not react to the applicant's offer and on 28 March 2023, he caused a notice in terms of rule 35(3) of the Uniform Rules of Court to be issued where he called for a further and better discovery of certain documentation relating to the applicant's financial status. The applicant complied and made a further discovery.

The application for separation of issues

- [11] The applicant launched the present application on 17 April 2023 seeking an order for the separation of the issue relating to the granting of the decree of divorce from the rest of the other contentious issues between the parties. In motivating for the separation order, the applicant contends that in her view, the decree of divorce can conveniently be separated from the other issues because both parties are agreed that the marriage has irretrievably broken down, there are no minor children involved in the divorce action, there are no pending interim orders against each other, and the respondent stands to suffer no prejudice at all should the order for separation of the issues be granted.
- [12] The application is opposed by the respondent who contends that by seeking this separation of issues order, the applicant attempts to circumvent any gains in her estate to which he is entitled, and thus should the divorce order be granted, he stands to suffer severe prejudice in respect of the portion that he would be entitled to in terms of the accrual calculation. In his view, there is no basis for the piecemeal determination of the issues involved in their litigation.

Discussion

- [13] Our civil procedural law allows for the separation of issues in a pending trial action. The mechanism of pursuing such separation is found in rule 33(4) of the Uniform Rules of Court which provides thus:

“(4) 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”

[14] There is a plethora of case law on the approach to be adopted by a court in determining whether to grant an application for separation of issues. This has crystallised to mean that in its determination, a court must objectively decide the issue of whether it is convenient to decide the issues involved separately by promoting expeditious resolution of disputes, whether it is fair and appropriate to separate such issues especially having regard to the nature of the issues at hand. In so doing, a court should exercise a judicial discretion to ensure that no marked prejudice befalls any of the parties.[2]

[15] It is equally trite that a court is obliged to grant an order for separation, unless it can be shown that the issues involved are not capable of being conveniently decided separately. The onus in this regard rests with the opposing party to demonstrate that the issues at hand are incapable of being decided separately.[3]

[16] In respect of separation of issues in matrimonial disputes, our law has been clarified in CC v CM[4] to the effect that

“[t]he 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 separation order should be granted where a marriage in fact, substance and law appears to have irretrievably broken down”.

[17] The facts in this application reveal that both parties are agreed that their marriage has irretrievably broken down. In applying the principle enunciated in CC v CM above, it follows that as a matter of fact and law, the parties are entitled to a decree of divorce and in the absence of any impediment to the question of convenience, fairness and appropriateness, the separation of issues ought to follow.

[18] In determining whether it is convenient to order separation of the issue of a decree of divorce from the accrual calculation, forfeiture and costs, it is my firm view that the only issue holding the parties is the true nature of the market value of the applicant's living annuity, for purposes of calculating the respondent's entitlement to his portion of the accrual. The evidence presented by the applicant demonstrates that her living annuity is the only source of income from which a proper calculation can be assessed.

- [19] The respondent's rejection of BVA's calculation of the applicant's fair market value is in my view, a ruse aimed at unnecessarily delaying the finalisation of their marriage with the hope that the applicant's financial position would turn out differently so as to derive a better portion of his accrual calculation. The respondent's attempt to conduct his own calculation of the financial status of the applicant using figures arrived at by BVA is a further illustration of his stratagem.
- [20] The view that I take on the stance adopted by the respondent is fortified by the fact that since the production of the report by BVA during January 2023, the applicant has failed to take any concrete steps to counter their conclusion by either appointing another entity to redo the calculation or compelling the applicant to produce that which he asserts amounts to financial benefits that may have an influence on the calculation of his portion of the accrual.
- [21] In my view, the issues in this matter are such that it will be convenient not only to both parties but to the Court dealing with the decree of divorce and the consequences of the dissolution of the marriage to hear these matters separately so as to allow the applicant to be unbound from what both parties agree to be a non-existent marriage.
- [22] In the premises, I hold that the applicant has made out a case for the separation of the issue of the decree of divorce from the determination of accrual or forfeiture and costs and thus she must succeed. I find no reason to hold otherwise than that the costs must follow the result.

Order

[23] In the result, the following order is made:

1. The issue of the granting of a decree of divorce is separated from the determination of the patrimonial consequences of the dissolution of the marriage in terms of rule 33(4) of the Uniform Rules of Court.
2. The applicant may enrol the divorce action on an unopposed divorce roll to obtain a decree of divorce.
3. The issues relating to the quantification of the accrual, forfeiture of the benefits and costs of suit are postponed sine die.
4. The respondent is ordered to pay the costs of the application.

O.K. CHWARO

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 21 November 2023

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 24 November 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 November 2023.

Representation:

For the Applicant:

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Instructed by:

Schindlers Attorneys

Melrose Arch, Johannesburg

For the Respondent:

Adv. N. Riley

Botoulas Krause & Da Silva Inc

Bedfordview, Johannesburg

- [1] In accordance with the provisions of Chapter 1 of the Matrimonial Property Act, No. 88 of 1984
- [2] Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357(D) at 362E-G and Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at para 3
- [3] See Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 (C) at 939A-B
- [4] 2014
- (2) SA 430 (GSJ) at para 39. See also Levy v Levy [1991] ZASCA 81; 1991 (3) SA 614 (A) at 621D-E

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