

SOUTH AFRICA / JUDGMENT

TD v LD and Others (32195/2017)

[2024] ZAGPJHC 751 (12 August 2024)

[2024] ZAGPJHC 751**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Ingrid Opperman

CASE / FILE NUMBER

32195/2017

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Source record**amended 23 august 2024****FLYNOTES:**

FLYNOTES: FAMILY – Divorce – Separation of issues – Cohabitation ended eight years ago and parties have not spoken for more than four years – Litigation has endured for seven years – Applicant wishes to remarry – Once divorce order is granted there will be “strike date” for determination of accrual – Will be convenient for court and parties – Applicant should not be shackled to dead marriage – Persistence on moribund marriage makes mockery of institution of marriage and offends public policy on facts of this case – Determination of issue of decree of divorce is separated from all other issue – Uniform Rule 33(4).
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
CASE
NO: 32195/2017
1.
REPORTABLE: NO
2.
OF INTEREST TO OTHER JUDGES: NO
3.

REVISED
12
August 2024
In
the matter between: TD
Applicant
and
LD
12
other Respondents & 4 Third Parties
First
Respondent
This
order was handed down electronically by circulation to the parties’
legal representatives by email on 12 August
2024.

JUDGMENT
INGRID OPPERMAN, J

Introduction

- [1] The applicant (the plaintiff in the divorce action) brought an application in terms of rule 33(4) of the Uniform Rules of Court in which he seeks an order separating the issue of a decree of divorce from all other issues between the parties in the divorce action.
- [2] The first and ninth respondents (the defendant in the divorce action and a trustee in one of the trusts) oppose the application.
- [3] The applicant, currently 58 years of age, and the first respondent, 56 years of age, were married to one another on 16 April 1992 out of community of property subject to the accrual system referred to in Chapter 1 of the Matrimonial Property Act, 88 of 1984 as amended. The two children born of the marriage have both attained majority and are employed. There are no longer any issues pertaining to the children or the parties' exercise of their respective parental responsibilities and rights in regard to the children that require to be adjudicated at the hearing of the divorce action.
- [4] The relationship between the parties broke down in August 2016 and cohabitation between the parties came to an end approximately 8 years ago. The parties have not spoken for more than 4 years. Both parties have formed committed permanent life partnerships with third parties. The first respondent and her permanent life partner cohabit in the Western Cape and have so co-habited for at least the past three years. The applicant wishes to marry his new life partner whom he met in 2019. The applicant's aged parents, being 83 and 85 years respectively, wish for their son and his fiancée (as the applicant refers to her) to be married, and furthermore wish to be present at the wedding ceremony. Thus the need for a

separation order which would facilitate his re-marriage relatively soon, but leave him and his ex-wife to litigate out the proprietary and related disputes, the postponed issues, at the leisure of the parties.

The Nature of the relief in the divorce action

- [5] On 28 August 2017, the applicant instituted an action against the first respondent in which he sought a decree of divorce and ancillary relief. The first respondent defended the divorce action and, on 10 May 2018, delivered her plea and counterclaim. The first respondent caused the trustees for the time being of the TD Trust and the M&C Legacy Trust to be joined to the divorce action in which she seeks relief against the trusts. The applicant, by third party notice, joined the LD Trust to the divorce action in which he seeks relief against the LD Trust.
- [6] The first respondent brought a rule 43 application and thereafter a rule 43(6) application against the applicant. An order was granted on 30 March 2021, directing that the applicant pay reduced maintenance to the first respondent pendente lite. This order stands (the rule 43 order).
- [7] The first respondent, on application of the accrual system, seeks in the divorce action an order that the applicant pay to her 50% of the difference between the net value of his and her estates. The first respondent also seeks an order that the applicant pay extensive lifelong spousal maintenance to her. The first respondent seeks orders against the trustees of the TD Trust and the M&C Legacy Trust that both trusts be declared sham trusts, alternatively the alter ego of the applicant, that the assets and liabilities of both trusts be declared to be the personal assets and liabilities of the applicant and that they are to be taken into account as such in the calculation of the accrual in the applicant's estate.
- [8] The applicant in the divorce action seeks an order against the trustees of the LD Trust that it is a sham, was not intended to take effect according to its terms and that the assets of the trust are the assets of the first respondent.

The litigation history

- [9] The litigation has endured for 7 years during which time 13 subpoenas have been issued and 5 rule 35(3) notices issued, in some of these as many as 330 items have been called for, and some items spanning a number of years, mostly 14 to 17 years. Ms De Wet SC, representing the applicant, was at pains to emphasize that these proceedings were not intended to determine whether these notices and processes were necessary, rather that, as a fact, this is what has occurred.
- [10] The first respondent contends that this matter can be trial ready in 6 months and that no separation is needed. There are a number of pointers apart from the track record to date that indicate that this might not be a realistic prospect e.g. a request for further particulars filed by the trustees of the TD Trust and the M&C Legacy Trust in January of 2024 which request has yet to be answered by the first respondent some seven months later. This,

despite the fact that she anticipated in her opposing affidavit in the separation application that the matter would be trial ready in July 2024. All indications are that this litigation ‘has long legs’ and that it will carry on for some time. The estimate of the probable duration of the trial, according to the applicant, is 6 weeks. This estimate was not disputed.

Request for a separation of issues

[11] The applicant approached the first respondent on 1 February 2023 requesting agreement to the separation of issues. It is important to quote the letter in full as it reflects that this approach was done on a reasoned basis:

- ‘1. As you know, the parties have been separated since in or around August 2016, a period of approximately seven and a half years. The divorce litigation has been ongoing since August 2017, a period of approximately six and a half years.
2. It appears that there is no end in sight to this ongoing, acrimonious and costly litigation for the parties, and your client continues to conduct what our client believes to be a vexatious and futile witch hunt of him.
3. Both parties are involved in permanent life partnerships with other parties and there is no reason why they should remain shackled to one another in this long dead marriage,
4. The issues in respect of the parties' parental responsibilities and rights are no longer in dispute nor are they relevant to the divorce action, the children having become majors and our client supporting them by agreement with each of them directly.
5. In respect of the divorce action, there remain only certain limited issues in dispute being (1) the proprietary issues, (2) the claims against the trusts and (3) your client's claim for spousal maintenance.
6. In light of the above, there appears no reason why a separation of issues should not be ordered. In fact, a separation would be convenient for all parties, as well as the court, and the balance of convenience favours that such a separation be ordered. It would be in the interests of justice and fairness to do so.
7. Our client proposes that the parties agree to an order for a separation of issues on the following grounds:
 - 7.1. That the decree of divorce shall be separated from the remaining issues as set out above, and shall be granted on an unopposed basis;
 - 7.2. That the determination of the accrual claim be postponed;
 - 7.3. That the parties' respective claims against the trusts be postponed,
 - 7.4. That your client retains her rights in terms of the current Rule 43 order pending the outcome of the separated issues;

7.5. That both parties retain their rights in terms of Rule 43(6) pending the outcome of the separated issues;

7.6. That the determination of your client's claim to maintenance will be made at the hearing in respect of the separated issues.

8. A separation on the aforementioned basis will not be prejudicial to your client, or indeed any of the parties. We submit that the separation of issues on this basis would be both appropriate and fair, and would facilitate the proper, convenient and expeditious disposal of this litigation.
9. Kindly advise whether your client is in agreement with this proposal. If so, we will formulate a draft order for your client's consideration and, once the terms of the order are agreed upon, our client will launch an unopposed application.
10. In the event that your client does not agree to such a separation, we are instructed to approach the court for relief and seek a costs order against your client.' (emphasis provided)

[12] The first respondent responded to this on 9 February 2023 refusing to agree to a separation on the basis that the first respondent's rule 43 rights would be lost should she consent to such an order (an argument not persisted with in this hearing); that accrual cannot be determined post divorce; that business rescue proceedings will be used to siphon money away to the detriment of the first respondent (this point too was not persisted with at this hearing) and that there will be no incentive to finalise the divorce.

[13] On 24 October 2023, after the attorney representing the TD Trust and the M&G Trust had also engaged on the issue of a separation of issues and dealing with the substance of the objections raised by the first respondent, the applicant's attorneys again approached the first respondent's attorney of record to request his wife's consent to a separation order. This was refused and on 13 December 2023 the separation application was delivered. The matter was finally ripe for hearing on 18 April 2024 and heard on 6 June 2024.

When will this matter, in all probability, be ripe for hearing?

[14] As mentioned previously, the first respondent has delivered no less than five rule 35(3) notices in which she calls for a vast number of documents. She has issued no less than 13 subpoenas duces tecum. She interrogates, in minute detail, transactions and the management of the trusts and the trustees' decisions over an extended period. Not only does the first respondent seek extensive discovery of financial documents of the numerous entities but also documents

pertaining to the internal management and conduct of the affairs of the companies and trusts and the decisions of the directors and trustees. The first respondent and her legal representatives appear to be set upon interrogating every minute detail of the management of the companies and trusts which is, by its very nature, a time consuming exercise.

[15] The very extensive discovery process will, in all likelihood, be followed by further steps to address and interrogate what is gleaned from the further discovery. Such steps may include requests for further discovery, the issuing of additional subpoenas, the delivery of rule 21 notices calling for particularity, further interrogatories at the pretrial conferences that follow as well as the amendment or supplementation of expert reports. All to ensure that no cent is unaccounted for, no loss is suffered and that the accounting within

all the commercial and other entities associated with the parties' estates is carried out with scrupulous precision.

[16] It is, in my view, clear that the entire action may not readily and soon be brought to trial readiness.

Convenience

[17] A point, persuasively made by Ms de Wet, is that one should draw a distinction between the issue being separated and the distinct advantages of the consequences of such a separation which, in this case, would have the effect of limiting, directing and defining the scope of the litigation.[1]

[18] If a divorce order is granted, one will have a 'strike date'. The beneficial consequences of a strike date, by granting the decree of divorce, would include that the parameters, or extent of the discovery insofar as the period is concerned, will be defined and be finite. The conundrum of ongoing discovery of a very significant volume of documents growing ever larger will be resolved. Accrual is calculated as at the date of divorce. For so long as divorce is withheld the set of relevant documents metastasizes indefinitely, the calculation of the accrual is a moving target so expert reports and other milestones in litigation rapidly become superannuated and the opportunity of each spouse to attain a 'clean break' and commence building a new life moves towards an ever receding horizon, causing untold uncertainty, lack of finality and misery in people's lives. The set of documents includes not only, in respect of the applicant and first respondent, personal bank statements and credit card statements, but also similar statements, documents and financial records of the TD Trust, the M&C Legacy Trust and the LD Trust.

It may also include the financial documents and management documents and records of the trusts and the large number of companies and other corporate entities that are owned by any one of the trusts. The structure of the group of companies held in the TD Trust and the M&C Legacy Trust is not fixed as the demands of the economy and the changing fortunes of the different entities over time has dictated and continues to dictate that the structure/s be adapted and re-organized. This in itself has a substantial impact on the documents to be discovered, the facts to be determined, the need for further discovery and the expansion of the scope of investigation by the experts and finally the supplementation of the expert reports. Upon the grant of the decree of divorce, the structure will be fixed, and the investigation and discovery defined. The extent and scope of the trial bundles will be determined and thus limited and the duration of the trial may be determined with more precision and the duration will be limited.

[19] In my view, it is clear that obtaining a 'strike date' for the determination of the accrual is, in this matter, convenient, and it will, in this matter, be convenient to both the Court and to the parties.

[20] Often, a separation of issues results in the finalisation of the matter being delayed because the decided issue is then taken on appeal, and the running of the appeal on the first-decided issue obstructs the continuation of the postponed issues. That feature has no application where the breakdown in the parties' relationship is common cause, they have lived separately for years with their new romantic partners and there is no prospect of an appeal against the divorce order under these circumstances, a purely status-based decision. The separate hearings can run concurrently. There is no need to wait for the conclusion of the hearing of the first separated issue before the hearing of the remainder of the issues. Both legs of the litigation can be run simultaneously or in parallel as so appropriately labelled by Ms de Wet in argument. In any event, the decree of divorce will be moved on an unopposed basis as the parties have not lived together for more than a year and there is no dispute that the marriage relationship has broken down irretrievably.

[21] An argument was also advanced that the separation order should not be granted because there are appeals pending and litigation pending in a section 165 matter under case number 2022/20073 and a liquidation application under case number 2022/028546. I fail to understand what alleged prejudice the existence of these proceedings have on the 'strike date' and the obvious advantages of fixing that date in the interests of finality. Whatever the outcome of those proceedings are, the amounts to be considered will simply be adjusted

with reference to the 'strike date'. The accrual and the consequent claims will either be more, or they will be less – a simple accounting adjustment can be made.

[22] The attempt to oppose this application on the basis that 3 related companies had been placed in business rescue, fell away when it was revealed that they had been taken out of business rescue in January 2024.

[23] In my view the separation order should also be granted as the applicant should not be shackled to a dead marriage[2]. It offends public policy to permit parties to share in a 'partnership' of fluctuating fortunes where they have not

spoken in 4 years and where the 'partnership' came to an end almost 8 years ago. Marriage remains an important institution[3] in our society but it has content which includes love, respect, social interaction to name but some values endorsed and recognised by the institution. The relationship between the applicant and the first respondent currently has none of that. Both parties are in separate committed relationships. The persistence on a moribund marriage makes a mockery of the institution of marriage and offends public policy on the facts of this case.

Costs

- [24] Mr Beyleveld SC representing the first and ninth respondents argued that the appropriate costs order would be, should the applicant be successful in this application, for costs to be costs in the continued action or that costs be reserved. Ms de Wet argued that the costs should follow the result and persisted with a request for a punitive costs order.
- [25] Much time and effort was spent in the papers and in the heads of argument on whether or not the first respondent's rule 43 rights would be lost should she consent to the proposed separation order. The first respondent placed much reliance on the decision of Merchak AJ[4] who appears not to have been referred to the decision of KJ v OJ[5]. At the hearing and in this court it was conceded that the order sought by the applicant in this regard is competent in law. It was further conceded that there was no legal objection to the order proposed in the letter dated 1 February 2023 relating to the rule 43 rights i.e. that where the needs of the children have been taken care of (they have attained majority and are self-supporting or

independent arrangements are in place in respect of their maintenance), where a rule 43 order is in place, where an undertaking to be bound by the provisions of the rule 43 order has been provided under oath and where the rule 43(6) rights will expressly be preserved by order of court, the granting of the separation order and consequences of the unopposed divorce that will follow the separation order will not terminate the first respondent's right to maintenance, nor jeopardise that right. The complexity and nuanced differences of the legal principles on this topic were unpacked and critically analysed by Ms de Wet with her characteristic methodical thoroughness and should have elicited a reasonable and sensible agreement. Because of this legal concession this judgment does not need to deal with this issue in any detail nor does it have to consider the correctness of Merchak AJ's judgment. It is worth mentioning that the applicant in such matter, brought the application for a separation less than 1 year after action had been instituted. These two cases are clearly completely different and on this factual basis alone, distinguishable.

- [26] In my view, the separation application was vexatiously opposed. Whatever the prior concerns might have been, these were

definitively dealt with in the founding papers. I intend expressing my displeasure in the manner in which this application was opposed by awarding the applicant his costs on the party/party scale C up until 29 February 2024, and thereafter as between attorney and client. I have assumed in the first respondent's favour that there was some merit initially in opposing the relief but by the time the matter was argued, that was no longer the case.

Order

- [27] I therefore grant the following order:

- [28] In terms of Rule 33(4) of the Uniform Rules of Court, the determination of the issue of the decree of divorce is separated from all other issues between the parties which issues, as set out hereunder, are postponed sine die:

Ad the plaintiff's particulars of claim:

28.1 Claim 3: The plaintiff's claim against the first defendant that the party whose estate shows a greater accrual than the other party make payment to the other of an amount equal to one half of the difference between the net accruals of their respective estates;

28.2 Claim 4: Costs of suit in the event of the first defendant defending the action;

Ad the first defendant's counterclaim

28.3 Claim 4: The first defendant's claim for maintenance against the plaintiff;

28.4 Claims 6 and 9: The first defendant's claim that the plaintiff make payment to her of 50% of the difference between the net value of the plaintiff and the first defendant's estates;

28.5 Claim 7: The first defendant's claim that 1.) the M & C Legacy Trust be declared to be a sham trust, alternatively the alter ego of the plaintiff; 2.) the assets and liabilities of the M & C Legacy Trust be declared to be the personal assets and liabilities of the plaintiff and to be taken into account as such in the calculation of the accrual in the plaintiff's estate; 3.) the TD Trust be declared to be a sham trust, alternatively the alter ego of the plaintiff; 4.) the assets and liabilities of the TD Trust be declared to be the personal assets and liabilities of the plaintiff and to be taken into account as such in the calculation of the accrual in the plaintiff's estate;

28.6 Claim 8: The first defendant's claim that the plaintiff render to her an account supported by documentary proof containing full particulars of the value of the plaintiff's estate, including all right, title, interest, benefits, benefits accrued and dividends in all companies and/or close corporations and/or businesses which were registered and/or commenced business and/or trade following the conclusion of the marriage, in order to determine the difference in the accrual between the plaintiff and the first defendant's respective estates;

28.7 Claim 10: The first defendant's claim for costs.

Ad the plaintiffs claim against the first third party, the second third party and the third third party

28.8 Claim 1: The plaintiff's claim that the LD Trust registered with the Master of the High Court, Pretoria under reference number IT 10098/97 is and has throughout been a sham and was not intended to take effect according to its terms;

28.9 Claim 2: The plaintiff's claim that the assets of the LD Trust are in truth and in fact the assets of the first defendant;

28.10 Claim 3: The plaintiffs claim against the first third party, the second third party and the third third party for costs in the event of opposition.

[29] The matter may be set down in the unopposed Divorce Court for the adjudication of prayer 1 of the Particulars of Claim.

- [30] Pending the determination of the separated issues in terms of paragraph [28] hereof, or by agreement between the parties, or any further court order, the applicant shall pay maintenance to the first respondent in accordance with the Rule 43(6) court order granted by Judge Siwendu on 30 March 2021, which order shall remain binding on the applicant and the first respondent.
- [31] Pending the determination of the separated issues in terms of paragraph [28] hereof, both the applicant and the first respondent have the express right to approach this Court for further relief in terms of Rule 43(6).
- [32] When determining the value of the accrual in the plaintiffs and the first defendant's estates, the final orders of the section 165 application under case number 2022/20073 and/or the liquidation application under case number 2022-028546 (including the appeals of these applications) shall be deemed to have been granted on the date of divorce and shall be taken into account.
- [33] In the event that the assets of either the TD Trust and/or the LD Trust are declared to form part of the estate of the plaintiff or the first defendant by the court hearing the separated issues set out in paragraph [28] hereof, the final orders of the section 165 application under case number 2022/20073 and/or the liquidation application under case number 2022-028546 (including the appeals of these applications) shall be deemed to have been granted on the date of divorce and shall be taken into account.
- [34] The first respondent is to pay the costs of this application up until 29 February 2024 on the party/party scale C and thereafter as between attorney and client which costs shall include the costs of senior counsel where so employed and the costs of the attorney of record, such costs to include, but not be limited to, drafting, preparation and appearance fees.

I Opperman

Judge of the High Court

Gauteng Division, Johannesburg

Appearances

For the Applicant: Adv Adelé de Wet SC instructed by Clarks Attorneys For the First and Ninth Respondents: Adv Albert Beyleveld SC instructed by Barter McKellar Attorneys For the Third to Eight Respondents: Brian Kahn Inc Attorneys (withdrew 15 July 2024) – no opposition to application

Date of hearing: 6 June 2024

Date of judgment: 12 August 2024

- [1] Rauff v Standard Bank Properties (A Division of Standard Bank of SA LTD) and Another, 2002 (6) SA 693 (W) at para 18

[2] Levy v Levy,

[1991] ZASCA 81; 1991 (3) SA 614 (A) at 626

[3] Centre for Child Law v Director General, Department of Home Affairs and Others, 2022 (2) SA 131 CC

[4] G, TK v N, M

[2023] ZAGPJHC 418 (4 May 2023) at paragraph [38]

[5] KJ v OJ, judgment of Gauteng Division Pretoria under case number 67591/2013

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