

SOUTH AFRICA / JUDGMENT

T.K.G v M.N (44477/2021) [2023] ZAGPJHC 418 (4 May 2023)

[2023] ZAGPJHC 418

COURT

South Gauteng High Court, Johannesburg

BEFORE

Merchak

CASE / FILE NUMBER

44477/2021

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IN THE HIGH COURT OF
SOUTH AFRICA

(GAUTENG DIVISION,
JOHANNESBURG)

Case No: 44477/2021

Date of hearing: 9

February 2023

Date judgment

delivered: 4 May 2023

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

In

the matter between:

G,
T K
Applicant
and
N,
M
Respondent
In

re: G,
T K
Plaintiff
and
N,
M
Defendant

Neutral Citation: G,T K v N, M (Case No: 44477/2021) [2023] ZAGPJHC 418 (4 May 2023)

JUDGMENT

MERCHAK AJ

[A]

INTRODUCTION

1. The application in casu (“this application”) is one instituted by the applicant in terms of Uniform Rule of Court 33(4).
2. In this application, the applicant seeks, in essence, an order separating the issue of a decree of divorce and the issues pertaining to the validity of an agreement of settlement and the financial consequences flowing from a decree of divorce and maintenance, if any, together with ancillary relief.
3. Although the relief sought by the applicant is, somewhat, inelegantly worded in prayer 1.1 of the applicant’s notice of motion, it is pellucid from the founding affidavit attested by the applicant in support of this application (“the founding affidavit”), and argument in this application, that it is the granting of a decree of divorce that is to be separated from the remaining relief sought by the applicant in the principal matrimonial proceedings pending between the parties under the above case number (“the divorce action”).
4. This application is opposed, the respondent having filed her answering affidavit setting out such opposition.
5. This application served before me on 9 February 2023, after which I reserved my judgment. I set out below the reasons for the order made by me in this application, followed by such order itself.

[B] MIS-EN-SCENE

6. The parties are presently married to one another, which marriage appears to have irretrievably broken down. The parties’

marriage is one in community of property. There are two major children born of the marriage between the parties, who are not self-supporting (“the children”).

7. On 11 September 2021, the parties concluded an agreement of settlement in terms whereof they purportedly settled the relevant

issues arising from the dissolution of their marriage (“the settlement agreement”).

8. On 29 September 2021, the applicant caused a summons to be issued and, thereafter, to be served upon the respondent, in terms whereof he sought a decree of divorce and ancillary relief. The said summons commenced the divorce action (as defined above).

9. In consequence of the respondent not delivering a notice of intention to defend the divorce action, the applicant proceeded to have the divorce action enrolled and heard on an unopposed basis, seeking an order that the settlement agreement be made an order of court. On 21 November 2021, my sister, the Honourable Ms Acting Justice Segal, granted a decree of divorce dissolving the marriage between the parties, incorporating the settlement agreement (“the divorce order”).

10. On or about 9 December 2021, the respondent made application for the rescission of the divorce order (“the rescission application”).

11. On 14 December 2021, the applicant concluded a marriage with a third party (“the subsequent marriage”).

12. On 6 September 2022, an order was granted by my sister, the Honourable Ms Justice Mia (“Justice Mia”), in terms whereof she, inter alia, rescinded the divorce order (“the rescission order”). Pursuant to the granting of the rescission order, the applicant instituted this application.

[C] SUMMARY OF APPLICANT’S CONTENTIONS IN SUPPORT OF THE RELIEF SOUGHT BY HIM IN THIS APPLICATION

13. In essence, the contentions of the applicant in support of the relief sought by him in this application are as follows:

13.1. The applicant is married to the respondent and a third party, which is undesirable and a position in which he does not wish to be placed;

13.2. Justice Mia should not have granted the rescission order but should have merely rescinded the incorporation of the settlement agreement into the divorce order and have postponed the issue pertaining to the validity of the settlement agreement and patrimonial consequences flowing from the dissolution of the marriage of the parties for hearing at a later date;

13.3. The applicant is seeking a decree of divorce so that his present marriage cannot be characterised as a bigamist marriage;

13.4. It is convenient for the court to separate the issue of a decree of divorce from other issues;

13.5. Separation of the issue of a decree of divorce from the remaining issues in the divorce action will not prejudice the respondent, who asserts throughout her plea and counterclaim, that the marriage between the parties has broken down irretrievably;

13.6. The respondent will not be prejudiced in seeking an order for forfeiture or other claims by virtue of the separation of the issue of a decree of divorce from the remaining issues in the divorce action;

13.7. The respondent “will have her day in Court” dealing with the patrimonial consequences flowing from the dissolution of the marriage between the parties, the validity of the settlement agreement and maintenance.

[D] SUMMARY OF RESPONDENT’S CONTENTIONS IN SUPPORT OF HER OPPOSITION TO THE RELIEF SOUGHT BY THE APPLICANT IN THIS APPLICATION

14. In essence, the respondent advances the following contentions in opposition to the relief sought by the applicant in this application:

14.1. On or about 13 April 2021, the parties concluded a verbal agreement in terms whereof the applicant bestowed upon the respondent certain financial benefits (“the verbal agreement”);

14.2. The applicant advised the respondent that it was not necessary to incorporate the terms of the verbal agreement into the settlement agreement;

14.3. After presentation of an unsigned version of the settlement agreement to the respondent, the applicant issued certain threats to her;

14.4. Consequent upon the verbal agreement and the belief that the applicant was acting bona fide, the respondent signed the settlement agreement;

14.5. Given the conclusion of the settlement agreement, under the circumstances as aforesaid, the respondent did not deliver a notice of intention to defend the divorce action;

14.6. The applicant did not disclose the above facts and circumstances to the Court when seeking and obtaining the divorce order;

14.7. In the context of the findings made by Justice Mia in granting the rescission order, it is inappropriate for the applicant to pre-empt the issues that fall to be determined by the Court adjudicating the divorce action;

14.8. The respondent should have her “day in Court” to properly ventilate all claims arising from her marriage to the applicant and the breakdown thereof including, but not limited to, claims in respect of patrimonial consequences, spousal maintenance and/or forfeiture;

14.9. In accordance with the provisions of the Divorce Act 70 of 1979 (“the Divorce Act”), it is the Court hearing the divorce action and/or granting a decree of divorce that should determine the:

14.9.1. validity of the settlement agreement;

14.9.2. matrimonial regime applicable to the marriage between the parties;

14.9.3. respondent's claim for spousal maintenance;

14.9.4. respondent's claims for forfeiture;

14.10. The respondent denies that Justice Mia placed the applicant in the position in which he finds himself but rather that he is the creator of his own misfortune under circumstances where:

14.10.1. the applicant received service of the rescission application on 9 December 2021;

14.10.2. post-receipt, and in full knowledge, of the rescission application, the applicant proceeded to conclude a marriage to a third party on 14 December 2021;

14.10.3. in consequence of the rescission order, the subsequent marriage amounts to a legal nullity in that, by operation of law, the subsequent marriage was annulled through the rescission order;

14.11. If the applicant was displeased with the rescission order, he ought to have exercised his rights to seek leave to appeal same, but failed alternatively neglected further alternatively refused to do so;

14.12. This application is a contrived attempt to interfere with the operation of the rescission order and prevent the respondent from ventilating her claims in court;

14.13. It is denied that it would be appropriate for the granting of a decree of divorce to be separated from the remaining issues to be determined by the Court at the trial in the divorce action;

14.14. The separation requested by the applicant is neither convenient to the respondent nor the Court;

14.15. The respondent's claims in respect of spousal maintenance are issues which only the Court hearing the divorce action and/or granting a decree of divorce can determine;

14.16. It is denied that the granting of a decree of divorce will not prejudice the respondent;

14.17. The granting of a decree of divorce will automatically terminate any right of the respondent to receive spousal maintenance;

14.18. The respondent is entitled to pursue claims in respect of forfeiture which must, appropriately and properly, be ventilated before the Court hearing the divorce action and/or granting a decree of divorce in accordance with Section 9 of the Divorce Act;

14.20. This application is an abuse of the court process, and the Court should mark its displeasure with the applicant in this regard (presumably by way of a costs order), who has been legally represented throughout the relevant proceedings.

[E] THE LAW REGARDING, AND/OR APPLICABLE TO, A SEPARATION OF ISSUES IN TERMS OF UNIFORM RULE OF COURT 33(4) GENERALLY AND IN A MATRIMONIAL CONTEXT

15. Uniform Rule of Court 33(4) provides that:

“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”.

16. The Court in *Minister of Agriculture v Tongaat Group Ltd*[1] stated the function of Uniform Rule of Court 33(4) to be as follows:

“...the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application.”[2]

17. In *Tudoric-Ghemo v Tudoric-Ghemo*[3] it was held that the word 'convenient' in the context of Uniform Rule of Court 33(4) was used convey not only the notion of facility or ease or expedience but also the notion of appropriateness. The procedure as contemplated in Uniform Rule of Court 33(4) would be 'convenient' if, in all the circumstances, it appeared to be fitting and fair to the parties concerned.

18. In *Rauff v Standard Bank Properties*,[4] the Court stated the following with regard to the purpose of Uniform Rule of Court 33(4):

“The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff’s case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff’s claim (or one of the claims) without the costs and delays of a full trial.”[5]

19. The Supreme Court of Appeal (“the SCA”) cautioned against the all too ready granting of a separation of issues in *Denel (EDMS) Bpk v Vorster*[6] as follows:

“Rule 33(4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances - is aimed at facilitating

the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation

is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.”[7]

20. Expanding on, and elucidating, the notion of convenience as envisaged by Uniform Rule of Court 33(4), the SCA expressed the following in *Molotlegi v Mokwalase*:^[8]

“It follows that a court seized with such an application (for a separation of issues in terms of rule 33(4)) has a duty to carefully

consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition the court considering an application for separation is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation.

Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously.”^[9]

21. A synopsis of the general principles governing a separation of issues was conveniently provided by the Court in *De Wet v Memor (Pty) Ltd*,^[10] as follows:

“The Court has a discretion to grant or refuse an application in terms of Rule 33(4). The overriding consideration in such applications is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all parties in the matter inclusive of the court. The determination of such an application requires the court to make a value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for separation. The notion of appropriateness and fairness to the parties also comes into the equation.”^[11]

22. In *CC v CM*,^[12] the Court found that:

“[25] In applying the provisions of rule 33(4), a court will consider whether questions of law or fact may be decided separately before others or whether the issues sought to be separated may be conveniently separated. In considering the question of convenience, a court will have regard to its convenience, as well as the convenience of the parties and the possible prejudice either party may suffer if separation is granted. The court is obliged to order separation unless it determines that the issues

separated.

[26] I concur with Hancke J in *ABSA Bank v Botha* 1997 (3) SA 510 (O) at 513C, where in considering the predecessor to rule 33(4) he concluded that —

'the present rule differs from the previous one in the sense that the court should grant such an application unless it is inconvenient, in other words the court is obliged to order separation except where the balance of convenience does not justify such separation'. [My emphasis.]

[27] The purpose of rule 33(4) is to determine the fate of a plaintiff's claim (or one of the claims) without the costs of a full trial.

'An important consideration will be whether or not a preliminary hearing for the separation decision of specified issues will materially

shorten the proceedings. The convenience must be demonstrated and sufficient information must be placed before the Court to enable it to exercise its discretion in a proper and meaningful way.'

See *Optimrops 1030 CC v First National Bank of Southern Africa Ltd* [2001] 2 All SA 24 (D) at 26f – g ; *Sibeka and Another v Minister of Police and Others* 1984 (1) SA 792 (W) at 795H; *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) ((2004) 25 ILJ 659; [2005] 4 BLLR 313) at 485A – B; *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) G and Another* 2002 (6) SA 693 (W) at 703.

(See Erasmus Superior Court Practice at B1 – 236.)

[28] 'The nature and extent of the advantages which would flow from the granting of the separation order sought in terms of rule 33(4) should be weighed up against the disadvantages. The court is obliged, to order the separation of issues unless it appears that the issues cannot conveniently be decided separately. Accordingly it is for the respondent to satisfy the court that the separation application should not be granted.'

[See Erasmus Superior Court Practice B1 – 235]."[13]

23. On the question of onus, the Court in *NK v KM*, [14] referencing *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others*, [15] held that:

"[16] In an application for separation of issues in divorce proceedings, the onus is on the applicant to set out facts with

sufficient particularity to assist the court in considering whether it is convenient to grant separation of issues. Once the applicant

has shown a prima facie case favouring separation of issues, the burden is on the respondent to show that the granting of separation

of issues would be prejudicial on him or her and thus the balance of convenience does not favour the granting of separation of

issues.

Failure to discharge this onus by the respondent will result in the court being obliged to grant the separation.”[16]

24. In *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd*,[17] the Court set out the following guiding principles when considering a separation of issues:

“[25] The guiding principles are as follows:

25.1 Whether the hearing on the separated issues will materially shorten the proceedings: if not, this militates against a separation. In *Braaf* (supra) it was said that despite the wording of the subrule, it remains axiomatic that the interests of expedition and finality are better served by disposal of the whole matter in one hearing;

25.2 Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong

indication that separation ought to be refused. The granting of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in reaching a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper;

25.3 Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are

controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation;

25.4 Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues: if after careful consideration of the pleadings, the relevant issues are found to be linked, even though at first sight they might appear to be discrete, it would be undesirable to order a separation; and

25.5 Whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence

required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.”[18]

25. The question of a separation of issues has enjoyed consideration in several cases specifically within the matrimonial context, more particularly, where one party seeks to separate the issue of the granting of a decree of divorce from the remaining issues in a matrimonial action.

26. In *Schwartz v Schwartz*, [19] the Appellate Division, as it then was, ("AD") held as follows:

"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.

.....

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 out. 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 under s 4 (1)."[20]

27. Accordingly, whilst the AD in *Schwartz supra* found that once a marriage has irretrievably broken down, a court does not have a discretion as to whether a decree of divorce should be granted or not, it acknowledges that the granting of such decree is subject to the provisions of section 6(1) of the Divorce Act which state that:

"(1) A decree of divorce shall not be granted until the court-

(a) 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

(b) if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4 (1).”

28. The above finding in Schwartz supra, enjoyed the imprimatur of the AD in Levy v Levy.[21]

29. In CC supra, the Court found that:

“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.[22]

....

The need decreed by public-policy considerations to as soon as possible normalise the lives of parties bound to a moribund broken-down

marriage was highlighted in Levy v Levy [1991] ZASCA 81; 1991 (3) SA 614 (A), which militates against parties being shackled to a dead marriage.”[23]

30. Schwartz, Levy and CC supra are, however, in certain common and/or different respects, distinguishable from the facts in casu in that:

30.1. neither Schwartz nor Levy pertained to a separation of issues;

30.2. it does not appear from CC or Levy that:

30.2.1. either party had a claim against the other for a forfeiture of benefits in terms of section 9 of the Divorce Act;>

30.2.2. maintenance in respect of minor or dependent children was in dispute;

30.2.3. consequently, the effect that a decree of divorce between the relevant spouses would have on the aforesaid claims was considered;

30.3. in adjudicating whether a separation of issues should be granted, the Court in CC was primarily focused on the question of the effect that a decree of divorce between the relevant spouses would have on claims in terms of section 7(2) and 7(3) of the Divorce Act, which claims are not in issue in casu;

30.4. payment of significant sum of money (R25 million) was tendered by the applicant in CC to address any potential prejudice to be suffered by the respondent therein;

30.5. in the Court a quo in Schwartz an order had been made in respect of all extant issues in dispute between the relevant spouses and thus, neither said Court nor the AD on appeal was called upon to deal, separately, with a decree of divorce or was enjoined to refrain from granting a decree of divorce until satisfactory arrangements had been made in connection with minor or dependent children;

30.6. due and proper consideration was not given to the effect of a grant of a decree of divorce between spouses on the right of such spouses to invoke Uniform Rule of Court 43.

31. In considering a separation of issues in terms of Uniform Rule of Court 33(4) within the matrimonial context, consideration must also be given to the relevant authorities pertaining to the effect of the granting of a decree of divorce on the rights of spouses to exercise certain remedies, and enforce certain 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.

32. Uniform Rule of Court 43(1) provides that:

“(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) Maintenance pendente lite;
- (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;
- (c) Interim care of any child;
- (d) Interim contact with any child.”

33. In *Bienenstein v Bienenstein*,^[24] the Court found that Uniform Rule of Court 43 refers only to pending matrimonial disputes, clarifying that such disputes would only be extant before the final order of divorce has been granted.

34. In *Gunston v Gunston*,^[25] the Court held, with reference to Uniform Rule of Court 43, that:

“The words italicised in paras. (b), (c) and (d) do not appear in para. (a), but there can be no doubt that the whole sub-section concerns interim orders made in connection with a matrimonial action which is pending or about to be instituted. 'Matrimonial actions' include actions for divorce, restitution of conjugal rights, nullity of marriage and judicial separation. (See Hahlo, South African Law of Husband and Wife, 3rd ed., pp. 199, 497).

...

There is, at present, no matrimonial action between the applicant and respondent pending or about to be instituted.

That being so, there is not in existence or contemplated a lis such as is referred to in para. (a) or para. (b) of Rule 43(1) and consequently the present application is not a competent one”^[26]

35. In *Beckley v Beckley*,^[27] the Court, granting a separation of issues, ordered that:

“1. the plaintiff shall be entitled to approach this Court today for an Order in the following terms:

1.1. a decree of divorce;

1.2 that the nett joint estate which exists between the parties be divided between them equally in the following manner:

1.3. The order sought by the defendant for

1.3.1. spousal maintenance in prayers 2.1; 2.2 and 2.3 of her Claim in Reconvention; and

1.3.2 a damages claim against the third party be postponed sine die to be heard on a date to be allocated for hearing by the Registrar of this Court.

1.4. Pending the determination of the Defendant's maintenance claim as provided for in paragraph 1.2.1 above, the Defendant shall retain the right to claim interim maintenance in terms of the provisions of Rule 43. [my emphasis]

1.5. the defendant is ordered to pay the costs of this application, such costs to be paid out of her portion of the joint estate which will become payable only after finalisation of all disputes between the parties.”^[28]

36. Notwithstanding the provisions of paragraph 1.4 of the order in *Beckley supra*, in a subsequent decision in said suit made upon application to the Court in terms of Uniform Rule of Court 43,^[29] the Court held that:

*“[10] That there is no such right to claim interim maintenance where there is no matrimonial action or where none is pending or about to be instituted is clear from the matter of *Gunston v Gunston* 1976 (3) SA 179 (W), a decision of this very same court. In that matter, an applicant who intended to institute an action for divorce against her*

husband had brought an application for attachment of a farm ad fundandam jurisdictionem as her husband was in England and later

applied for edictal citation for service in England. Both applications were granted.^[30]

^[13] So much the more where there could be no matrimonial lis pending as the parties in the present matter were granted a decree of divorce on 19 August 2014. The present application for interim maintenance in terms of Rule 43 is therefore not competent.^[31]

^[14] In my view, the decision of this Court on 19 August 2014 in purporting to reserve Antoinette the right to claim maintenance in terms of Rule 43, was completely wrong. I am therefore not bound to follow the decision.^[32]

[18] It is inexplicable, in the circumstances of this matter, as to how long the interim maintenance order would endure as in terms of Rule 43, an interim order endures until the lis in a matrimonial action is finalised. As there is no pending lis, the inevitable conclusion is that the interim maintenance would be indefinite.”[33]

37. After considering and referencing many of the above authorities, the Court in NK supra,[34] held that:

“39. It is thus correct that, once a decree of divorce is granted, the provisions of rule 43 of the Rules will find no application. Accordingly, the decisions in Gunston and Beckley made by the Gauteng Division are correct and binding on this court, as opposed to KO v MO, which is a decision of the Western Cape Division.

40. In light of the above findings, there would be no basis in law for the respondent to institute a rule 43 application once a decree of divorce is granted following the separation of the divorce from the other issues. In the premises, the applicant’s application stands to fail because it would not be convenient for the respondent if the issue of divorce were to be separated from the other issues”[35]

38. Whilst I am alive to authorities that are at odds with those traversed supra on the score of the survival of the right to invoke Uniform Rule of Court 43 post a decree of divorce being granted,[36] same are judgements granted by other divisions of the High Court of South Africa and are thus not binding on me.

39. Section 9 of the Divorce Act provides that:

“(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order

that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial

misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.”

40. In Joseph v Joseph,[37] the Court opined that:

“In my opinion the point that no specific order was made in her case does not assist the present plaintiff, because an order dissolving, or which has the effect of dissolving, community of property does not merely operate to prevent future acquisitions of assets by the erstwhile spouses from falling into community, but also operates as an order for the equal division of the joint estate if no order for forfeiture is also made at the time. Geard v Geard, 1943 E.D.L. 322. It follows that the present case is on the same footing as Nortje v Nortje, supra; there has been in intentment of law an order for equal

division, and the addition now of an order for forfeiture would conflict with that order. The plaintiff was entitled of right to an order for forfeiture if she had asked for it.”[38]

41. Although not entirely relevant in casu in the absence of a claim by the respondent for spousal maintenance, but to provide a holistic picture of the relevant and applicable law, it bears mention that our law is settled on the score that the reciprocal duty of support terminates between spouses, and neither spouse may institute a claim for maintenance against the other, upon a decree of divorce being granted dissolving their marriage.[39]

42. Having regard to the authorities traversed above, it is convenient to distil and set out the relevant principles regarding a separation of issues in terms of Uniform Rule of Court 33(4) as extracted from said authorities, both of general application and in the matrimonial context, as follows:

42.1. The purpose of Uniform Rule of Court 33(4) is to facilitate the adjudication of a particular issue that will give direction to the rest of the case and obviate costs and delays of a full trial;

42.2. The Court will grant a separation of issues in the event that a prima facie case is made out therefor, unless it appears that the relevant question cannot conveniently be decided separately;

42.3. The notion of convenience is paramount;

42.4. The expeditious disposal of litigation is often best served, not by a separation of issues, but by ventilating all the issues at one hearing;

42.5. The notion of convenience is broader than mere facility or ease of expedience and must also take into cognisance whether a separation is appropriate and fair to all parties, inclusive of the Court;

42.6. In adjudicating the aspect of convenience, the Court is enjoined to consider the advantages and disadvantages which might flow from a separation;

42.7. Where there is a likelihood that a separation might cause the other party some prejudice, the Court may, in its discretion, refuse to order a separation;

42.8. The granting of a separation falls within the discretion of the Court which must be exercised judiciously;

42.9. It would militate against a separation of issues if:

42.9.1. the principal proceedings would:

42.9.1.1. be delayed;

42.9.1.2. not be shortened;

42.9.2. any duplication of evidence would result;

42.9.3. an order made pursuant to such separation would be taken on appeal;

42.9.4. the relevant issues are linked;

42.10. It would generally be against public policy for parties to be shackled to a dead marriage;

42.11. Therefore, if a Court is able to give effect to public policy considerations in granting a decree of divorce, it should do so in appropriate circumstances which may include the ordering of a separation of issues in order to achieve a granting of a decree of divorce prior to the adjudication of the remaining issues in the relevant action;

42.12. Where a court is satisfied that a marriage has broken down irretrievably, it has no discretion but to grant a decree of divorce save that the Court can only grant a decree of divorce if, as is provided for by Section 6(1) of the Divorce Act, it 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;

42.13. Once a decree of divorce is granted between spouses, the provisions of Uniform Rule of Court 43 will find no application and such spouses will be deprived of any claim against each other under said Rule;

42.14.

42.14.1. Upon a decree of divorce being granted dissolving a marriage in community of property, the community of property existing between the relevant spouses terminates ex lege and their joint estate is (notionally) divided on an equal basis;

42.14.2. An ineluctable consequence of an order for the equal division of a joint estate, is that an order for a forfeiture of benefits in terms of section 9 of the Divorce Act may not subsequently be made in connection with such estate as it would, self-evidently, conflict with, and most often constitute an impermissible variation of, any order for the equal division thereof;

42.15. On the granting of a decree of divorce, and failing an order to the contrary:

42.15.1. the duty of support between spouses terminates;

42.15.2. a divorced spouse may not institute a claim for maintenance for him/herself against the other spouse.

43. I turn now to apply the law *supra* to the facts in *casu*.

[F] HAS THE APPLICANT ESTABLISHED A PRIMA FACIE CASE AND/OR PRESENTED SUFFICIENT INFORMATION TO JUSTIFY A SEPARATION OF ISSUES IN TERMS OF UNIFORM RULE OF COURT 33(4)

44. I am of the view that the applicant has not established a prima facie case and/or presented sufficient information to justify a separation of issues in terms of Uniform Rule of Court 33(4) as sought by him in this application.

45. An analysis of the applicant's contentions in support of the relief sought by him in this application as set out in the founding affidavit and amplified in argument, summarised supra, do not, in my view, pass muster more particularly under circumstances where:

45.1. whilst the applicant has, possibly, established that it may be convenient for him if the issue of the decree of divorce dissolving the marriage between the parties was separated from the remaining issues in the divorce action, he has not substantively alleged, let-alone proven, that this would be convenient for the respondent and/or the Court;

45.2. the applicant's allegation that it would be convenient for a separation of issues to be granted as sought by him in this application appearing at paragraph 20 of the founding affidavit, is rather bald and unsubstantiated;

45.3. the applicant has failed to meaningfully, or at all, identify the benefits to all parties concerned, of the issue of a decree of divorce being separated from the remaining issues in the divorce action;

45.4. whilst the applicant may have alleged that a separation of issues as sought by him in this application would not prejudice the respondent, he has not gone further and indicated on what basis such separation would be fair to, and/or convenient for, the respondent.

46. Even if I am incorrect on the above score and a prima facie case for a separation of issues as sought by the applicant in this application has been made, I am of the view that the prejudice to be suffered by the respondent as occasioned by, and the overall disadvantages of, such a separation far outweigh any advantages

and/or benefits thereof that may have been proffered by the applicant.

47. Reference was made by the applicant, throughout the founding affidavit and in argument, to the subsequent marriage. The

subsequent marriage is of little assistance to the applicant in this application under circumstances where:

47.1. it is common cause between the parties that the marriage between them subsists;

47.2. the relevant and applicable authorities discussed and quoted above, enjoin the Court to consider issues of convenience, fairness and/or prejudice, with reference to the parties, and the Court, and not third parties, such as the third party to whom the applicant was subsequently joined in marriage;

47.3. even if the applicant were visited with certain unfortunate and/or adverse consequences by virtue of the subsequent marriage, this does not relate to the question of whether a separation of issues as sought by the applicant is convenient to the Court and/or the respondent;

47.4. applying the Court's view as expressed in *Togo v Molabe and Another*[40] (being authority relied upon by the applicant in this application) the inevitable result of the rescission order was to void the

subsequent marriage and thus "the horse has bolted" and the applicant is no longer in an invidious position contending with two marriages.

48. In support of this application, the applicant relies on several authorities including, primarily *M v M* (2014),[41] *Togo supra* and *M v M* (2011).[42]

49. *M v M* (2014), *Togo* and *M v M* (2011) *supra* are, however, in certain common and/or different respects, distinguishable from the facts in *casu* in that:

49.1. they pertained to an application for rescission and not separation of issues in terms of Uniform Rule of Court 33(4);

49.2. in at least *Togo* and *M v M* (2014), the rescission of the decree of divorce was common cause and did not require extensive consideration;

49.3. in *M v M* (2014) and *Togo*, the Court did not meaningfully consider:

49.3.1. section 6(1) of the Divorce Act;

49.4. in *M v M* (2014), the Court did not meaningfully consider the prohibition of proceeding with a claim for a forfeiture of benefits in terms of section 9 of the Divorce Act post the granting of a decree of divorce between the spouses;

49.5. In *Togo*, the spouse seeking maintenance from the other spouse forfeited such claim.

[G] LACK OF CONVENIENCE, PREJUDICE AND DISADVANTAGES OCCASIONED BY A SEPARATION OF ISSUES IN CASU

(a) Peremptory satisfaction with the arrangements pertaining to children in terms of Section 6(1) of the Divorce Act

50. Section 6(1) of the Divorce Act is peremptory to the effect that a decree of divorce shall not be granted until a Court is satisfied that the provisions made and/or contemplated with regards 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.

51. There are two dependent children born of the marriage between the parties. Thus, *prima facie*, the children would require that certain arrangements pertaining to their maintenance are made.

52. There is a dispute between the parties as to the arrangements pertaining to the maintenance of the children that will require

adjudication by the Court.

53. The applicant fails to address whether there are satisfactory arrangements pertaining to the maintenance of the children.

Thus, I am not in a position to confirm that such arrangements are in place.

54. Whilst it may be argued that this issue may be one to be considered by the Court faced with the granting of a decree of divorce, by granting the order sought by the applicant in this application I am, in the circumstances of this matter, allowing an approach to the Court by the applicant to seek a decree of divorce on an unopposed basis, where on the facts before me, such a decree of divorce between the parties may not be granted having regard to the peremptory provisions of Section 6(1) of the Divorce Act.>

(b) Deprivation of rights and/or remedies under Uniform Rule of Court 43

55. The relevant, applicable and binding authorities as referenced above, dictate that upon a decree of divorce being granted between the parties, the respondent will be precluded from approaching the Court for any relief in terms of Uniform Rule of Court 43.
56. Thus, if I grant the relief sought by the applicant in this application and the marriage between the parties is subsequently

dissolved in light thereof, the respondent will, forever, be deprived of her right and/or remedy to approach the Court in terms of Uniform Rule of Court 43 for:

56.1. maintenance for herself;

56.2. maintenance for the children;

56.3. a contribution towards costs.

57. Given that, inter alia, disputes rage between the parties, it is not inconceivable that the respondent may be required to approach the Court for, at the very least, maintenance in respect of the children pendente lite.

58. In the circumstances, I am not prepared to deprive the respondent and/or the children (and/or, for that matter, the applicant) of their rights and/or remedies in terms of Uniform Rule of Court 43.

(c) Deprivation of respondent's claim for forfeiture

59. The respondent has raised a claim against the applicant for forfeiture of benefits in terms of Section 9 of the Divorce Act.

60.1. terminating the joint estate between the parties;

60.2. attaining an order, whether in express terms or otherwise, that the joint estate between the parties is divided equally;

60.3. operating as a bar to the respondent proceeding with her claim for a forfeiture of benefits in terms of section 9 of the Divorce Act;

60.5. constituting a pre-determination and rejection of her aforesaid claim sans evidence and/or a hearing.

(d) Effect of separation of issues sought by the applicant on the trial in the divorce action

61. Having regard to the above authorities, it may be regarded as convenient to separate the decree of divorce from the remaining

issues in the divorce action if such separation would curtail the costs and/or length of a full trial in due course. This is not the case in casu.

62. The evidence to be lead in granting, and the actual granting of, a decree of divorce would be a relatively simple and expedient issue, and not result in any extensive delay and/or the incurrence of significant costs at a trial in due course in the divorce action.

63. Accordingly, the granting of the separation of issues sought by the applicant in this application will not serve to curtail the length and/or costs of the principal proceedings.

(e) Risk of duplication and/or overlapping of evidence

64. There exists the risk of a duplication and/or overlapping of evidence were I to grant the separation of issues sought by the applicant in casu under circumstances where:

64.1. in order to attain a decree of divorce the applicant will be required to give evidence as to a number of aspects including evidence pertaining to the existence and breakdown of the marriage between the parties, and the children;

64.2. during the prosecution of the respondent's claim for a forfeiture of benefits in terms of section 9 of the Divorce Act, the respondent will most likely present evidence of the reasons for the breakdown of the marriage between the parties in that such reasons will overlap with the grounds upon which she seeks such forfeiture;

64.3. the applicant, in defence of the respondent's claim for forfeiture in terms of section 9 of the Divorce Act, will then cross-examine the respondent in relation to her evidence as aforesaid and, presumably, again present his evidence as to the breakdown of the marriage between the parties.

[H] COSTS

65. Both parties sought costs against the other. This, however, did not detain argument in this application for any significant period.

66. Insofar as the award of costs is concerned, it is trite in our law (and thus does not require lengthy exposition or repetition) that the general rule or principle is that costs should follow the result or, put differently, the successful litigant should be awarded his or her costs.

67. I find nothing in the affidavits filed, and/or argument advanced, in this application, to deviate from the above general rule or principle.

[I] ORDER

68. In the result, I order that:

68.1. This application is dismissed;

68.2. The applicant is to pay the respondent's costs in respect of this application, on a party and party scale.

MERCHAK SJ

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION JOHANNESBURG

Appearances

For the Applicant: Adv S S Cohen Instructed by: Martini Patlansky Attorneys For the Respondent:
Adv A Saldulker Instructed by: Cuthbertson & Palmeira Attorneys Inc

This judgment is handed down electronically by circulation to the respective legal representatives of the parties by e-mail and uploading to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 4 May 2023

[1] 1976 (2) SA 357 (D)

[2] Ibid 364D-F

[3] 1997 (2) SA 246 (WLD) 251A-C

[4] 2002 (6) SA 693 (W)

[5] Ibid 703F-H

[6] 2004 (4) SA 481 (SCA)

[7] Ibid 484I-485C

[8] 2010 JDR 0360 (SCA)

[9] Ibid para 20

[10] 2011 JDR 1487 (GSJ)

[11] Ibid para 6

[12] 2014

(2) SA 430 (GJ)

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- [13] Ibid 436A-436I
- [14] 2019 (3) 571 (GJ)
- [15] 1998 (4) SA 466 (C)
- [16] Ibid 575C-E
- [17] 2019 JDR 0587 (WCC)
- [18] Ibid para 25
- [19] 1984 (4) SA 467 (A)
- [20] Ibid 474D - 475D
- [21] 1991 (3) SA 614 (A)
- [22] Ibid 439A - C
- [23] Ibid 439E - G
- [24] 1965 (4) SA 449 (T) 451A-452A
- [25] 1976 (3) SA 179 (W)
- [26] Ibid 182A-182D
- [27] Unreported 41267/2012 (GLD) 19 August 2014
- [28] Ibid para 15
- [29] Unreported 01098/2015 (GLD) 6 May 2015
- [30] Ibid para 10
- [31] Ibid para 13
- [32] Ibid para 14
- [33] Ibid para 18
- [34] 2019 (3) SA 571 (W)
- [35] Ibid 579E-G
- [36] See *Carstens v Carstens* (2267/2012) [2012] ZAECPEHC 100 (20 December 2012) and *KO v MO* 2017 JDR 1839 (WCC)
- [37] 1951 (3) SA 776 (N)
- [38] Ibid 779G – 780A. See also *Grobler v Grobler*, 1944 E.D.L 153 and *Nortje v Nortje* (1888) 6 SC 9
- [39] *Schutte v Schutte* 1986 (1) SA 872 (A) at 882

[40] (29059/2014) [2016] ZAGPPHC 666 (26 July 2016) para 8

[41] (5710/2010) [2014] ZAFSHC 170 (5 September 2014)

[42] (52110/2007) [2011] ZAGPPHC 155 (27 May 2011)

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