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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **10025/2021**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 22 February 2024

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between

J[...] H[...] D[...] P[...]

Applicant

and

C[...] D[...] P[...]

Respondent

In re:

C[...] D[...] P[...]

Plaintiff

(Identity Number: 7[...])

and

J[...] H[...] D[...] P[...]

1ST Defendant

(Identity Number: 7[...])

HDP TRANSPORT CC

2nd Defendant

H[...] D[...] P[...] (PTY) LTD	3 rd Defendant
H[...] D[...] P[...] PROPERTIES (PTY) LTD	4 th Defendant
H[...] T[...] AND B[...] C[...] (UPINGTON)	5 th Defendant
H[...] T[...] AND B[...] C[...] (KIMBERLEY)	6 th Defendant
UPINGTON LIQUOR CC	7 th Defendant
UPINGTON FRUIT & VEG CC	8 th Defendant

JUDGEMENT

JANSE VAN NIEUWENHUIZEN J:

INTRODUCTION

- [1] The trial in this matter was set down for hearing on 15 February 2024. At the commencement of the trial, I was informed that the parties have agreed to postpone the matter.
- [2] The only issue to be decided, was the first defendant's application in terms of the provisions of rule 33 (4) of the Uniform rules of court for the separation of the issues pertaining to the irretrievable breakdown of the marriage and the care of a child who has attained majority from the issues pertaining to, *inter alia*, the plaintiff's claim for spousal maintenance in terms of section 7(2) of the Divorce Act, 70 of 1979, ("the Act") and her claim for redistribution in term of section 7(3) of the Act.

- [3] The plaintiff opposes the application. For ease of reference the parties will be referred to as cited in the action.

Rule 33(4)

- [4] Rule 33(4) reads as follows:

*“33(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact that 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.”* (own emphasis)

- [5] In order to determine whether it will *infra* be convenient to grant an order for the separation of issues, it is apposite to have regard to the background and the opposing views of the parties as set out in their respective affidavits.

Background

- [6] The first defendant, a 50 year old businessman, married the plaintiff, a 50 year old female, on 10 February 1996 out of community of property with the exclusion of the accrual system. Two children were born from the marriage, and both children have attained majority.
- [7] The marriage relationship between the parties deteriorated to such an extent that the first defendant vacated the matrimonial home on 24 September 2020. The plaintiff issued summons for divorce and ancillary relief during March 2021. The first defendant defended the action and filed a counterclaim in terms of which he, *inter alia*, prays for a decree of divorce.
- [8] An order in terms of rule 43 was granted in favour of the plaintiff on 11 November 2021 in terms of which the first defendant was ordered to maintain

the plaintiff *pendente lite* by paying for a host of the plaintiff's expenses. On 27 June 2022 the rule 43 order was extended in terms of rule 43(6) to include a monthly *pendente lite* cash payment in the amount of R 36 784, 40 in respect of the two dependant children and the plaintiff.

- [9] The first defendant's attorneys applied for a trial date and the matter was set down for trial on 15 August 2022. The matter was, however, removed from the roll by agreement between the parties.
- [10] The first defendant's attorneys applied for a new trial date and the 15th of February 2024 was allocated for the hearing of the matter.

First defendant's case

- [11] The first defendant confirmed that both parties are *ad idem* that the marriage relationship has irretrievably broken down and that a divorce order should be granted. The first respondent, furthermore, submitted that the evidence to be let to prove the breakdown of the marriage will not impact on the adjudication of the remainder of the issues between the parties. I agree.
- [12] In the result, I am *prima facie* satisfied that the issues pertaining to the breakdown of the marriage relationship between the parties and the remainder of the issues can conveniently be decided separately.

Plaintiff's case

- [13] The plaintiff relied on a number of grounds in her opposition to the separation application. Firstly, the plaintiff expressed the fear that the separation will automatically terminate her right to claim or receive post-divorce spousal maintenance, either in accordance with the provisions of section 7(2) of the Act, or in terms of rule 43.
- [14] Secondly, the possibility that there might be a lengthy delay between the issuing of a decree of divorce and the hearing of the separated issues.

[15] Thirdly, that the evidence to be let in obtaining the decree of divorce is inextricably linked to the remaining issues.

[16] Fourthly, that a number of judgments had been handed down by the Courts in which it was found rule 43 refers only to pending matrimonial disputes, clarifying that such disputes would only be extant before a final order of divorce has been granted and not thereafter, irrespective of the provisions of the order granting a decree of divorce and separation of issues.

Discussion

[17] The plaintiff's fear that the separation of issues will automatically terminate her right to claim maintenance in accordance with section 7(2) of the Act, has decisively been dealt with in *CC v CM* 2014 (2) SA 430 (GJ). The respondent in the separation application raised the same fear and the court held as follows at para [48]:

[48]The respondent remains entitled to her s 7(3) redistribution claim and is at liberty, once the decree of divorce is finalised, and the value of the patrimonial estate has been determined.., to set down the ss 7(2) and 7(3) maintenance and redistribution issues for determination."

[18] The question whether the plaintiff's *pendente lite* right to maintenance in terms of the present rule 43 orders will survive a decree of divorce, overlaps with the fourth ground of opposition, and will conveniently be discussed as one ground.

[19] The plaintiff relied *inter alia* on the judgment in *NK v KM* 2019 (3) SA 571 (GJ) in support of her contention that the rule 43 orders will be unenforceable, once a decree of divorce is granted.

[20] In *NK* the court considered an application in terms of rule 33(4) in circumstances where a rule 43 application was pending. Relying on *Gunston v Gunston* 1976 (3) SA 179 (W) and *Beckley v Beckley* GJ 01098/2015, the court held that the right to *pendent lite* maintenance in terms of rule 43 falls away once a decree of divorce has been granted. The facts in *NK* as well as the facts in *Gunston* and *Beckley*, however, differ from the facts *in casu*. In all three matters the respondents did not have an existing rule 43 order. As alluded to earlier the plaintiff, however, does have rule 43 orders and the relief sought by the first defendant herein includes orders that the existing rule 43 orders shall remain of full force and effect and that the parties are entitled to utilise the provisions of rule 43 pending the finalisation of the remaining issues in dispute.

[21] Similar facts than the facts *in casu* were considered in *Joubert v Joubert* by Opperman J in the Gauteng Division, Pretoria on 22 May 2018 under case number 67591/2013. Having considered the legal position, Opperman J held as follows at para [26]:

“[26] Where the issue of spousal maintenance is expressly kept alive (like the present case), the *lis* contemplated in rule 43 has not come to an end. Such *lis* is clearly a matrimonial one in respect of proceedings incidental to an action for divorce. However, I need not go that far in this matter as in this case the respondent expressly invited the court to separate out the issue of spousal maintenance and undertook to be governed by the rule 43 relief which had already, by the time the undertaking was made, been granted.”

[22] In the present matter, the first defendant went further than a mere undertaking and explicitly included the relief pertaining to the existing rule 43 orders in his prayers.

[23] I do not fully grasp the plaintiff's second ground of opposition. The plaintiff is *dominus litis* and as such, she is at liberty to apply for the allocation of a new trial date without delay.

[24] Insofar as the third ground is concerned, it is factually incorrect to state that the evidence pertaining to the irretrievable breakdown of the marriage is inextricably linked to the remaining issues. The parties are *ad idem* that the marriage has come to an end. The evidence to be produced in respect of the plaintiff's claims in terms of sections 7(2) and 7(3), differ vastly from the evidence pertaining to the breakdown of the marriage relationship between the parties.

[25] In the result, none of the grounds of opposition raised by the plaintiff have any merit and the first defendant is entitled to an order as prayed for in the separation application.

Costs

[26] Having heard both parties in respect of costs, I am of the view that an appropriate order will be that costs are costs in the cause.

ORDER

The following order is granted:

1. A separation of issues in accordance with the provisions of Rule 33(4) is granted as follows:

1.1. Prayer 1 of the Plaintiff's particulars of claim is separated from the remainder of the prayers contained in the Plaintiff's particulars of claim.

1.2. Prayer 1 of First Defendant's counterclaim is separated from the other prayers contained in the First Defendant's counterclaim.

- 1.3. Save for the prayers referred to in 1.1 and 1.2 above, the remaining issues are postponed.
2. A decree of divorce is granted dissolving the marriage between the Plaintiff and the First Defendant.
3. Pending finalisation of the trial and the remainder of the disputes as referred to above:
 - 3.1. The existing Rule 43 orders granted on 11 November 2021 and 27 June 2022 between the Plaintiff and the First Defendant shall remain of force and effect until finalisation of the proceedings.
 - 3.2. Both the Plaintiff and the First Defendant shall be entitled to utilise the provisions of Rule 43 pending the finalisation of the remaining matrimonial proceedings separated and postponed in terms of this order.
4. Costs are costs in the cause.

**N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
DIVISION, PRETORIA**

DATES HEARD:

15 February 2024

DATE DELIVERED:

22 February 2024

APPEARANCES

For the Applicant:

Adv LC Haupt SC

Instructed by:

Van Heerden & Krugel Attorneys

For the Respondent:

Adv ML Haskins SC

Instructed by:

Couzyn Hertzog & Horak Attorneys