

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D6036/2023**

In the matter between:

A[...] K[...]

APPLICANT

and

R[...] N[...]

RESPONDENT

Coram: Mossop J
Heard: 23 April 2025
Delivered: 30 April 2025

ORDER

The following order is granted:

1. Condonation is granted to the respondent for the late delivery of her heads of argument and practice note and there shall be no order as to costs.
 2. The application for a separation of issues in terms of Uniform rule 33(4) is dismissed.
 3. The applicant shall pay the respondent's costs, to be taxed on scale A.
-

JUDGMENT

MOSSOP J:**Introduction**

[1] This application involves the application of the prosaic effects of Uniform rule 33(4). The applicant and respondent are husband and wife and are involved in a contested divorce action (the action) in which the applicant is the plaintiff, and the respondent is the defendant. In the action, the respondent has delivered a plea to the applicant's particulars of claim and has also delivered a claim in reconvention to which the applicant has pleaded. More about the pleadings shortly.

[2] The applicant envisions that the action will not be capable of settlement and that consequently, it will only be set down for determination several years from now. He has now commenced a relationship with another woman and wishes to 'get on with his life', as he puts it. He therefore desires to separate the issue of the termination of his marriage from the proprietary consequences thereof. To achieve this aim, he turns for assistance to Uniform rule 33(4). The respondent opposes this relief.

Condonation

[3] The respondent delivered her heads of argument and practice note out of time. The delay was not egregious and occasioned neither the court nor the applicant's legal representatives any inconvenience. The application for condonation was consequently not opposed by the applicant, and it is accordingly granted and an order as to costs is accordingly unnecessary.

The pleadings

[4] The competing claims in the divorce action have some relevance to this application for they constitute the factual matrix against which it is to be considered.

[5] The pleadings reveal that the parties are married to each other out of community of property with the exclusion of the accrual system. The applicant pleads in his particulars of claim that the marriage relationship has irretrievably broken down. He pleads further that the parties jointly own an immovable property, and he

tenders to transfer his half share therein to a trust to be created by him, in respect of which the respondent and his son will be the sole beneficiaries. The issues, on the applicant's version, are thus relatively narrow.

[6] That is not a view shared by the respondent. She denies in her plea that the marriage has broken down irretrievably and asserts that the parties may become reconciled 'by way of counselling or negotiations', whatever the latter may mean. Immediately after stating that the marriage has not broken down, the following appears in her plea:

'ALTERNATIVELY and in the event that the above Honourable Court finds that the marriage has indeed irretrievably broken down then in such event the Defendant pleads that the Plaintiff¹ refers the above Honourable Court to the true causes for the breakdown in the marriage relationship between the parties as detailed in her claim in reconvention filed evenly herewith.'

[7] The prayer to the plea reads, in part, as follows:

'WHEREFORE the Defendant prays for judgement against the Plaintiff as follows:

1. An order that the marriage has not broken down, otherwise dismissing the Plaintiff's application for divorce and/or alternatively a decree of divorce is to be moved by the Plaintiff on an uncontested basis.
2. An order in terms of the Defendant's claim in reconvention delivered evenly herewith.
3. An order otherwise dismissing the Plaintiff's claim with costs.'

[8] The extracts of the plea just narrated are not models of clarity. But, in my view, it is reasonably certain that the principal defence raised by the respondent is that the marriage relationship might yet be saved. It is only if that is found by the court not to be the case, that she admits that the marriage has failed and seeks the relief that is set out in her claim in reconvention. She also seeks maintenance from the applicant.

¹ It appears to me that perhaps what was intended here was not a reference to the plaintiff but a reference to the defendant.

[9] Before argument commenced, Mr Humphrey, counsel for the applicant, handed up a copy of a notice of an intended amendment delivered that morning by the respondent's legal representatives to the applicant's legal representatives. In the notice in terms of Uniform rule 28, it is revealed that the respondent abandons her claim for the declaration of a universal partnership contained in her claim in reconvention, and, instead, seeks to amend it to incorporate a claim in terms of s 7(3) of the Divorce Act 70 of 1979 (the Act). Both counsel agreed that none of this was relevant to the issue to be determined in this application and the recent delivery of the notice of amendment would not constitute an impediment to the application being heard and determined.

Uniform rule 33(4)

[10] Uniform rule 33(4) reads as follows:

'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.'

The correct approach

[11] The general approach to the separation of issues is the following:

'The general principle in law would appear to be that notwithstanding the wide powers conferred on a court under rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter. *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362G-H, and *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) ((2004) 25 ILJ 659) at 485B-C have reference. In some instances, however, the interests of the parties and the ends of justice are better served by

disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away.’²

[12] In weighing up the competing considerations which exist when an application for separation is opposed, this court has previously remarked that:

‘...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.’³

Convenience

[13] The key consideration in Uniform rule 33(4) is the issue of convenience. ‘Convenience’ in its ordinary meaning refers to ‘a quality or situation that makes something easy or useful for someone by reducing the amount of work or time required to do something’.⁴ In the context of Uniform rule 33(4), convenience means not only facility or ease or expedience but also the concept of appropriateness.⁵ Separation will thus be convenient if it is fitting and fair to the parties.

[14] An order for the separation of issues must be generally convenient and not merely convenient to one, or some, of the parties. It appears to me that the convenience referred to in the rule means convenience to the court in the first instance and to the litigants in the second instance.⁶ While it is tempting to be seduced by the notion that a separation of issues always simplifies and hastens the resolution of matters, experience reveals that this is not always the case.⁷ Thus, the convenience claimed must be clearly demonstrated by the party claiming the separation.⁸ Where it appears to a court that one of the parties may be prejudiced by

² *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo and others* 2008 (6) SA 46 (D) at 51B-D.

³ *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D-E.

⁴ Britannica Online Dictionary: <https://www.britannica.com/dictionary/convenience>.

⁵ *Tudoric-Ghemo v Tudoric-Ghemo* 1997 (2) SA 246 (W) at 251B.

⁶ *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939H; *W v W* [2016] ZAGPPHC 812 para 20.

⁷ *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) para 90.

⁸ *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 411A-C.

an order of separation, the court will be entitled to exercise its discretion against granting the separation claimed.⁹

[15] What does the applicant say about such convenience? Not much, as it turns out. In fact, the respondent asserts that so little is said by the applicant in his founding affidavit in this regard that it appears that he has not considered it at all, and his application must accordingly fail, as he may not make out his case in reply.¹⁰

[16] The respondent's trenchant criticism of the applicant's founding affidavit is not without merit. There is no specific mention of convenience in the applicant's founding affidavit. Viewed generously, there appears to be but a single paragraph in the founding affidavit that could possibly be viewed as tangentially dealing with the issue of convenience. At paragraph 9 thereof, the applicant states the following:

'It therefore appears that the two of us are both intent on a divorce and we want to get on with our lives. I have subsequently met someone else with whom I am now involved and I do not want to remain shackled to the respondent whilst we are completely estranged and live entirely separate lives.'

[17] The content of this paragraph is singularly revealing in two respects:

(a) The first is that it commences with an inaccuracy. The respondent is not intent on divorce, for she declined in her plea to accept that her marriage has irretrievably broken down. Divorce, and the further relief to be claimed in terms of the Act, is simply her plan B in the event of her failing to establish her primary defence. Whether the marriage has irretrievably broken down is therefore an issue to be determined by the court hearing the trial. I do not believe that I am entitled to approach this application on the basis that the respondent cannot succeed with her primary defence and therefore find that the only issue between the parties is a patrimonial issue. The respondent may well have difficulties in convincing the trial court that her marriage has not irretrievably broken down, given the state of our law on divorce and the fact that the applicant has apparently commenced a relationship with another woman and that she and the applicant have lived apart for a considerable period, but she is certainly entitled to attempt to persuade the trial court

⁹ *Molotlegi and another v Mokwalase* [2010] ZASCA 59; [2010] 4 All SA 258 (SCA) para 20.

¹⁰ *Bashe v Meyer and another* [2008] ZAECHC 187 para 11.

of the soundness of her principal defence. Contrary to what is stated in paragraph 9 of the founding affidavit, the state of the marriage is thus not commonly viewed by the parties as being at an end. To simply view the respondent's plea as unsustainable in an interlocutory application would be to do an injustice to her;

(b) Insofar as there is a consideration of convenience to be found in the wording of paragraph 9 narrated above, it appears to me to be only the convenience of the applicant himself that is considered. The applicant has indeed pleaded in the founding affidavit that 'we want to get on with our lives', but it appears to me that he is not able to speak on behalf of the respondent and that he is, in fact, only referring to himself in making that statement. The applicant makes it plain that he does not want to remain 'shackled' to the respondent when he now has someone more interesting in his life. He may have honourable intentions as far as the new woman in his life is concerned, but he can only formally advance that relationship once the relationship between himself and the respondent has been resolved, either by an agreement between himself and the respondent and an order of this court or, in the absence of such an agreement, by an order of this court after a contested hearing.

Analysis

[18] Why it should be convenient for the respondent to do as the applicant proposes is not revealed in the founding affidavit and no heed at all appears to have been paid to the convenience of the court.

[19] Mr Humphrey, in an articulate and considered address, identified eight considerations that may constitute the required convenience. I shall not go through each of them but shall confine myself to mentioning but two of them.

[20] The first ground advanced was that it is common cause that the marriage has irretrievably broken down. I have already considered this issue and found that I cannot arrive at that conclusion in these proceedings.

[21] The second ground that I wish to mention is Mr Humphrey's submission that any financial claim that the respondent may have would not be prejudiced by the granting of the relief sought. This is an issue of some importance to the respondent and was canvassed by her in her answering affidavit. The respondent is fearful that if

she is divorced before the patrimonial issues have been resolved, the applicant will cease making the payments that he presently makes to her. She will then no longer have the security of being able to bring a Uniform rule 43 application to protect her immediate financial requirements, because she will be divorced and will no longer be a 'spouse' as contemplated by Uniform rule 43. The respondent's fears in this regard may have been capable of being assuaged by an undertaking given by the applicant that he will continue to make the payments that he is currently making but no such undertaking has been made.

[22] As Ms Law, who appears for the respondent, states in her heads of argument, there is presently no certainty on whether the respondent will retain her ability to seek relief in terms of Uniform rule 43 if the divorce were to be finalised first. Mr Humphrey referred me to *CP v GP*,¹¹ a judgment of this division, in support of the proposition that the respondent would not be deprived of her right to bring a Uniform rule 43 application, should separation be ordered, and the divorce taken first. Ironically, in that matter, the court declined to grant the separation order sought. There are, as Mr Humphrey correctly pointed out, decisions in other divisions, helpfully collected and referred to by Ms Law in her heads of argument, where it was found that Uniform rule 43 can still be invoked, despite the issues being separated and the divorce being granted before the proprietary consequences of the marriage have been finalised.¹²

[23] I, however, do not believe that I need to enter this debate because the applicant has not satisfied me that he has established the requisite convenience that would permit me to grant the relief that he seeks. His convenience only is simply insufficient. In coming to this conclusion, I accept that no utility arises from requiring a person to remain trapped in a loveless relationship that has failed. But marriage is a special form of relationship that is exalted by society. It cannot simply be shrugged off to pursue better prospects. The formalities that society prescribes for the dissolution of such an elevated relationship must be followed and if an agreement

¹¹ *CP v GP* [2024] ZAKZDHC 10.

¹² A case in which the right to proceed in terms of Uniform rule 43 was refused consequent upon an order separating the issues being granted and the divorce order being granted, is *Beckley v Beckley* (GJ), unreported case number 01098/2015 (6 May 2015). Cases in which an order separating the issues was refused for fear that the right to invoke Uniform rule 43 would be lost include *NK v KM* 2019 (3) SA 571 (GJ) and *TKG v MN* [2023] ZAGPJHC 418.

cannot be reached on the terms of the dissolution of the marriage relationship, then patience must be the order of the day while the matter inches its way through the prescribed legal process.

[24] I have largely, but not solely, concluded that because of the dispute over whether the marriage has broken down and because the convenience of the applicant alone is insufficient, the threshold for the establishment of the requisite convenience has not been met. The granting of an order of separation will not, in my view, lead to a shortening of the trial itself but will simply lead to two hearings when only one is necessary. The preferred approach is to only have one hearing, and two contested hearings will impose an unnecessary burden on the court and upon its resources. As a general proposition, piecemeal adjudication of disputes is not to be encouraged.¹³

[25] On the scant facts disclosed by the applicant, I do not believe that he has established that it will be convenient for all the actors involved in the drama if the order that he seeks were to be issued, and, in my view, the respondent has demonstrated that no advantage is to be gained from separating the issues. I also do not believe that it would be fitting and fair to the respondent to grant such an order. I am fortified in coming to this conclusion by the following dicta from *Denel (Edms) Bpk v Vorster*,¹⁴ where the Supreme Court of Appeal observed that:

‘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.’

¹³ *SATAWU v Garvis and others* [2011] ZASCA 152; 2011 (6) SA 382 (SCA) para 45.

¹⁴ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

[26] The application must thus fail.

Costs

[27] There is no reason why costs should not follow the result. The matter was not complex, and the costs should therefore be taxed on scale A.

Order

[28] I therefore grant the following order:

1. Condonation is granted to the respondent for the late delivery of her heads of argument and practice note and there shall be no order as to costs.
2. The application for a separation of issues in terms of Uniform rule 33(4) is dismissed.
3. The applicant shall pay the respondent's costs, to be taxed on scale A.

MOSSOP J

APPEARANCES

Counsel for the applicant:

Mr S Humphrey

Instructed by:

Anand Pillay Incorporated
Suite 11, First Floor
The Palms
14 Palm Boulevard
Umhlanga

Counsel for the respondent:

Ms E S Law

Instructed by:

Dabideen Attorneys
1 Hopedene Grove
Morningside
Durban