

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

CASE NO: 2022-4392

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE 05/10/2025

SIGNATURE

In the matter between:-

O[...], C[...] T[...]

Applicant

and

O[...], M[...] C[...] (Born B[...])

Respondent

JUDGMENT

Mfenyana J

[1] This is an opposed application in terms of which the applicant seeks a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. In the notice of motion, the applicant further seeks an order declaring that the G[...] shares and all proceeds emanating therefrom are excluded from the accrual calculation by virtue of clause 6.1 of the ANC. The applicant further seeks an order directing that the balance of the disputes would be determined in the divorce trial. Costs are sought only in the event of opposition.

[2] The background to the application is that the parties, who are married to each other, are embroiled in divorce proceedings, which are still pending before this

court. The parties concluded their marriage on 25 November 2006 out of community of property, with the inclusion of the accrual system. No children were born of the marriage between the parties. On 9 November 2006, prior to the marriage, the parties had concluded an antenuptial contract. On 4 February 2022, the respondent instituted divorce proceedings. In December 2022, the applicant vacated the marital home, which is jointly owned by both parties, leaving the respondent to reside there alone. The respondent continues to live in the property.

[3] In respect of the separation, the applicant avers that it would be in the best interests of both parties and the convenience of the court to have the interpretation of the antenuptial contract (ANC) separated from the remainder of the disputes in the divorce action. He avers that in recent times he became aware that the respondent believes that no assets are to be excluded in terms of the ANC. He states that according to him, the interpretation of the ANC is that, according to clauses 5 and 6, certain assets from his estate should be excluded when calculating the accrual. He maintains that these assets include his shares in G[...] T[...] Holdings Limited, which he claims to have acquired before his marriage to the respondent. He further argues that any assets acquired from the proceeds of selling those shares or deriving from ownership of the shares, specifically the Investec Money Fund account, the Ninety-One Equity Fund, the Investec UK Savings account, the Discovery Global Endowment, the Converso International Retirement Plan, and the Nedbank 32-day Notice account, should also be excluded from the accrual calculation. The declaratory relief sought by the applicant pertains to these assets. The respondent disputes the inclusion of these assets in the accrual.

[4] In opposing the application, the respondent disputes the applicant's interpretation of the ANC. She contends that in bringing this application, the applicant is dishonestly attempting to prevent her from investigating his complicated and substantial financial affairs and from seeking the correct amount of accrual, which she is entitled to. She further asserts that the applicant is trying to avoid addressing the fact that he has transferred most of his assets out of the country, which requires the respondent to engage a forensic investigator. The respondent relies on the provisions of clause 5 of the ANC, which states that the net value of both parties' respective estates at the commencement of their marriage is zero. She

avers that the accrual calculation should be performed using a commencement value of zero for both herself and the applicant. The respondent further states that, as there are no assets listed in the exclusion clause, no assets should be excluded from the calculation.

[5] In reply, the applicant denies that he instituted this application in order to hide assets and states that he would still be required to prove that the G[...] shares and assets were acquired prior to the commencement of the marriage, even if this application is granted. Thus, the financial investigation would still need to take place, he adds. However, this would be done with certainty as to which assets are to be included or excluded from the accrual calculation.

[6] Clauses 5 and 6 of the antenuptial contract state:

“5. For the purpose of proof of the net value of their respective estates at the commencement of their intended marriage the intended spouses declared the net value of their respective estates to be as follows:

5.1 that of C[...] T[...] O[...] to be R0.00.

5.2 that of M[...] - C[...] B[...] to be R0.00.

6. The assets of the parties or either of them, which are listed hereunder, and all liabilities presently associated therewith, or any other assets acquired by such party by virtue of his or her possession or former possession of such assets, shall not be taken into account as part of such party's (state) at either the commencement or the dissolution of the marriage.

6.1 the assets of C[...] T[...] O[...] so to be excluded are any and all assets acquired prior to the intended marriage and the proceeds thereof and

6.2 the assets of M[...] - C[...] B[...] so to be excluded are any and all assets acquired prior to the intended marriage and the proceeds thereof.”

[7] The applicant asserts that the respondent is entitled to half of the difference between the accruals of their respective estates, excluding the assets previously specified that were acquired before his marriage to the respondent. He acknowledges that not all the shares were acquired prior to the marriage. He further contends that the matters involved in the divorce are uncomplicated and should be quickly resolved, either by settlement or through the appointment of a receiver to determine the accrual.

[8] On the other hand, the respondent argues that there is no benefit or convenience to the court in granting the application, as all issues in dispute are inextricably linked and should be dealt with simultaneously. The respondent contends that the application is *mala fide* and is only brought for the benefit of the applicant. Notably, the respondent avers that the applicant bypasses the provisions of clause 4 of the ANC, which deal with the net value of each party's estate at the commencement and dissolution of the marriage.

[9] The respondent further argues that the application is not the normal standard separation application, which seeks a separation of the divorce order from the proprietary aspects of the divorce proceedings. The respondent decries the fact that the applicant did not seek a divorce order. As such, there would be no material convenience in separating issues as suggested by the applicant, she further avers.

[10] Importantly, the respondent contends that the identification and valuation of assets requires expert evidence, which she contends is not a lengthy or onerous process. She states that the court would need to consider all of the assets in order to determine whether subsequent assets acquired are to be excluded and on what basis. As such, this would not cause any material delay, she contends. She avers that the applicant does not identify which assets he allegedly purchased as a result of the shares held by him in G[...] T[...] (Pty) Ltd. As such, the trial court will have to

make that determination, the basis for their exclusion and whether those assets were acquired by virtue of the applicant's possession of the excluded assets.

[11] The respondent relies on the decision in *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 to support her averment that the applicant has not provided sufficient particulars to enable the court to reach an informed opinion on convenience and that it is not for the court to search for the relevant allegations.

[12] It is trite that the purpose of a separation in terms of rule 33(4) is *inter alia* so that a question of law or a factual issue, which can give direction to the rest of the case, can be determined separately from other issues, unless it appears that the question cannot be conveniently decided separately. It is designed to facilitate convenient and expeditious resolution of litigation¹.

[13] Bearing in mind that convenience is a crucial element of rule 33(4), the question is whether it would be convenient to separate the interpretation of the ANC from the remainder of the issues in the divorce action. The respondent argues that all the issues are inextricably intertwined, while the applicant submits, with reliance on *Ruaff*², that the determination of the correct interpretation of the exclusion clause would 'give direction to the rest of the case' and do away with a parcel of evidence'. "The purpose is to determine the fate of (a party's) claim without the costs and delays of a full trial."³

[14] Considering the reference to the specific extract in *Hollard*, it is clear that the applicant is well aware that a rule 33(4) separation is not a foregone conclusion, and the possibility of inconvenience and prejudice to a party should be considered. In this regard, the applicant submits that the separation and declaratory relief sought are not only convenient but an absolute necessity in the absence of which the court would have to hear evidence on a myriad of issues, some of which would require expert evidence and result in a protracted trial. This is not correct. There does not

¹ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA).

² *Ruaff v Standard Bank Properties* 2002 (6) SA 693 (W).

³ *Ibid* at 703.

seem to be much to be gained by any of the parties if the separation is granted. This is even more the case given the applicant's admission that the determination of which assets were acquired before the parties' marriage would still require determination by the trial court. At that stage, the applicant would be required to provide proof of his acquisitions and the timing thereof. Apart from arguing that this will give direction to the rest of the issues, there seems to be no other reason why this question should be determined separately from the other issues.

[15] In *Molotlegi v Mokwalase*⁴ the court noted that :

“ A court hearing an application for separation of issues in terms of rule 33(4) has a duty to satisfy itself that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a court seized with such an application 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.”

[16] In my view, the determination of whether any assets are excluded from the accrual calculation cannot be detached from the determination of what those assets are. To separate a tiny part of the enquiry cannot result in any convenience to the parties or the court. It is not desirable to deal with the issues in the divorce action piecemeal, moreso that there appears to be a discrepancy between clauses 5, 6, 6.1 and 6.2. In my view, this is a factual issue to be determined by the trial court.

⁴(222/09) [2010] ZASCA 59; [2010] 4 All SA 258 (SCA) (1 April 2010), para 20.

Moreover, it would not serve the purpose contemplated in Rule 33(4), which is to streamline litigation.

[17] I cannot see how the separation sought by the applicant would curtail issues to be determined by the trial court in any significant way. There are issues relating to the ANC which require the attention of the trial court. This is because the ANC, in broad terms, identifies assets which should be excluded both at the commencement and dissolution of the marriage. The question is whether there is synergy between clauses 5 and 6, insofar as they declare the commencement values of the parties' estates to be zero, on the one hand, and, on the other, exclude certain assets at either the commencement or dissolution of the marriage. Beyond that, the issue of whether a particular asset is included or excluded from the accrual is a matter for evidence, to be determined by the trial court.

[18] What the applicant is inviting this court to do is to venture into an exercise of predetermining issues meant for the trial court. In essence, the applicant seeks to furtively strip the trial court of its power to analyse evidence and determine issues which should be conveniently determined by it. In the same vein, the net effect is that this court is overburdened with issues which by law fall within the province of the trial court.

[19] The applicant seems to accept that it is required of him to prove that the assets he considers to be excluded from the accrual were acquired before the conclusion of the marriage. What he does not accept is that the trial court is well-positioned to deal with the interpretation of the ANC.

[20] I am also not certain whether or not the applicant suggests that the assets for which he seeks a declarator are all the assets he acquired before the marriage. This would require evidence to be led by the parties. The relevance of this is that there can be no convenience to the parties for this court to decide on the G[...] shares and whatever other assets accrued as a result of their possession, if there are other assets that need to be determined by the trial court.

[21] Far from providing proof of ownership and that the G[...] shares were acquired by the applicant prior to the marriage, the certificate of incorporation submitted by the applicant seems to have opened a can of worms. The respondent avers that the certificate of incorporation pertains to an entity different from the one in which the applicant is a shareholder. Once again, this issue requires oral evidence and the trial court is best positioned to hear, analyse and decide on expert testimony and any oral evidence for that matter.

[22] Even if I am wrong in refusing separation of issues, it is clear in the circumstances that the declaratory order sought by the applicant cannot be granted in the face of the disputes, the veracity of the certificate, the entity it pertains to, and the assets involved being the subject of a fervent dispute between the parties. That being the case, the application falls to be dismissed.

Order

[23] In the result, I make the following order:

- a. The application is dismissed with costs.

S Mfenyana
Judge of the High Court
Johannesburg

APPEARANCES

For the applicant

Adv F Botes SC with

