

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 2025-057077

In the matter between:

AMG

First Applicant

BD

Second Applicant

and

TSG

Respondent

Summary: Rule 33 (4) - Separation - Divorce - Accrual Claim - Maintenance Claim - No formal tenders concerning Accrual or Maintenance - Potential Prejudice to the Respondent – Separation Refused.

Coram: Wille, J

Heard: 17 October 2025

Delivered: 19 January 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an application by the first applicant to separate the issue of the granting of a decree of divorce from the respondent from other specified relief he claims in his particulars of claim. Also, he seeks a separation from the relief sought by the respondent in her counterclaim in these divorce proceedings. For clarity and ease of reference, the first applicant shall be referred to as the plaintiff and the respondent as the defendant.¹

[2] The reason why the second applicant was and is a party to these proceedings is that specific interdictory relief was also claimed against the defendant in these same proceedings. This interdictory relief has mercifully been settled, and the second respondent no longer features in this application for the separation of the identified issues.²

[3] The identified issues sought to be separated are: (a) the calculation of the accrual claims in the parties' respective estates, and (b) the defendant's claim for spousal maintenance. The safeguarding of the defendant's spousal maintenance claim is, in my view, one of the primary challenges in this application. I say this because the conduct of the respective parties may need to be decided at the trial. A thorough dissection of the alleged conduct (misconduct) could have been avoided had there been an upfront payment / settlement of the spousal maintenance claim.³

THE PLAINTIFF'S CLAIMS

¹ The applicant issued out the summons for a divorce and other relief.

² I granted both the interim and the final order concerning the interdictory relief.

³ This could have been achieved by means of an actuarial calculation.

[4] The parties were married on 21 November 1991. They were married out of community of property. They concluded an antenuptial contract. An accrual system was included in the contract. They have no minor children.⁴

[5] The plaintiff issued the divorce summons. The plaintiff avers that their marriage relationship has broken down because: (a) the parties have no meaningful communication, (b) the parties are unable to resolve their differences, and (c) the parties no longer live together as husband and wife. The defendant denies that these are the reasons for the breakdown of the marriage. These reasons may be the consequences of the parties' conduct. The plaintiff pleads that his estate has shown a greater accrual than that of the defendant and that the defendant thus enjoys an accrual claim.⁵

THE DEFENDANT'S COUNTERCLAIM

[6] The defendant alleges that the marriage relationship has broken down because: (a) the plaintiff was unfaithful during the marriage, (b) the plaintiff had several unfaithful relationships during their marriage, (c) the plaintiff had a long-standing and secret affair with a younger employee, (d) the plaintiff was and is unwilling to identify and resolve their marital problems, (e) the plaintiff withdrew from the marriage with no explanation nor reason, and (f) the plaintiff moved out of the matrimonial home to travel and live with his new partner.⁶

THE SEPARATION APPLICATION

⁴ A spousal maintenance claim is identified on the pleadings.

⁵ No upfront payment of this anticipated claim has been made by the plaintiff.

⁶ The defendant accepts that a divorce is inevitable.

[7] The plaintiff seeks a decree of divorce on an unopposed basis. In addition, the plaintiff seeks an order directing him to transfer to the defendant an amount equal to one-half of the difference between the accrual in the parties' respective estates. The plaintiff admits that his estate has shown more growth during the marriage. In the defendant's counterclaim, she also seeks lifelong maintenance together with security for this maintenance.⁷

[8] Most importantly, the defendant also seeks full disclosure in terms of section 7 of the Matrimonial Property Act to enable her to assess her claim against the plaintiff accurately and meaningfully, potentially without the need for evidence.⁸

THE REASONS FOR THE SEPARATION APPLICATION

[9] The plaintiff says a decree of divorce: (a) will have no impact on the remaining issues of the relief as formulated in the pleadings; (b) there will be no overlap of evidence at the two separate trials; (c) the decree of divorce will be unopposed and by agreement; (d) no credibility findings will be made at the first hearing; (e) an early strike date will be determined for the determination of the accrual and this would avoid recurring expenses to update values in the plaintiff's estate; (f) the plaintiff will be prejudiced as he continues to work and earns an income which increases the value of his estate and the defendant's accrual claim and, (h) the parties will be free to move on with their lives and formalise their relationships with third parties.⁹

THE POTENTIAL PREJUDICE TO THE DEFENDANT

⁷ By way of a cession of a life policy.

⁸ The Matrimonial Property Act 88 of 1984 (the "MPA").

⁹ The plaintiff has a new partner and wants to move on with his life.

[10] The plaintiff says that the defendant will suffer no prejudice should the separation be granted because he has tendered interest on the amount of the accrued claim in accordance with the Consumer Price Index. In addition, the parties' rights to any interim financial assistance will remain extant until all issues in the divorce have been determined. Most importantly, the plaintiff says that at the end of the day, the defendant will, in any event, only receive a nominal spousal maintenance award.¹⁰

RULE 33 (4)

[11] This legislative intervention is aimed at the convenient and expeditious disposal of litigation. As a general proposition and in the interests of finality, it is desirable to have only a single hearing.¹¹

[12] Thus, in this case, the question to be answered is whether there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of the litigation.¹²

[13] The question is whether any issue may conveniently be decided either before any evidence is led or separately from any other question. The rule contemplates and provides that the court:

*'...shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately...'*¹³

THE ONUS CONCERNING SEPARATION ISSUES

¹⁰ This is because the defendant will receive a substantial amount by way of her accrual claim.

¹¹ Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at 484J – 485C.

¹² Primvest Employees Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd 2005 (5) SA 276 (SCA) at 282J – 283C.

¹³ Rule 33 (4) of the Uniform Rules of Court.

[14] The onus is on the applicant (plaintiff in this case) to set out sufficient facts to assist the court in deciding whether it is convenient to grant any separation of any of the issues. Once a *prima facie* case has been established, the burden shifts to the respondent (the defendant in this case) to demonstrate that the granting of a separation would be prejudicial and the balance of convenience does not favour the granting of the separation sought.¹⁴

CONVENIENCE

[15] The convenience concerns both the court and the parties. The following factors may, *inter alia*, be considered when weighing up the issue of convenience, namely: (a) would the separation shorten the court proceedings, (b) whether there is more than one issue that may readily be dispositive of the matter, (c) whether there would be a cost savings if specified issues were separated, (d) whether there is a question of law that could dispose of the entire matter, and (e) whether there is a likelihood that the separation might cause the other party prejudice.¹⁵

THE ADVANTAGES AND DISADVANTAGES OF A SEPARATION

[16] It is the function of this court to assess the extent of the advantages and disadvantages of the proposed separation. In exercising this function, the court must consider whether the issues sought to be separated are inextricably linked with any issues that would arise in the main trial and if a separation of the issues would delay the finalisation of the case.¹⁶

CONSIDERATION

¹⁴ NK v KM 2019 (3) SA 571 (GJ) and Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA).

¹⁵ TKG v MN ZAGP JHC 418 para 42.

¹⁶ Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at 485 A-B

BREAKDOWN OF THE MARRIAGE RELATIONSHIP

[17] There is no room for this court (if the separation is granted) to direct what evidence may be relevant to a specified issue. This would bridle the trial court's powers and discretion.¹⁷

[18] The plaintiff seeks a separation on the basis that the evidence at the first trial will be confined to evidence relating to the breakdown of the marriage relationship and nothing else. The plaintiff's case on the pleadings is that his marriage to the defendant has broken down because they have not lived together as husband and wife for more than thirty months.¹⁸

[19] This allegation, however, does not (as currently formulated) meet the strict requirements of section 4(2) of the Divorce Act.¹⁹

[20] These provisions explicitly refer to parties who have not lived together as husband and wife for a continuous period of at least one year immediately prior to the institution of the divorce action. The timeline as formulated in the pleadings suggests that the parties had been separated for only eight months before the divorce action was instituted, and thus the provisions of section 4(2) do not apply. While it may be suggested that this is a highly technical argument and that the evidence will suggest that the marriage relationship between the plaintiff and defendant has broken down, it raises the question of what evidence will have to be tendered on this issue.²⁰

THE ISSUES TO BE SEPARATED

¹⁷ Van den Burgh v Guardian National Insurance Co Ltd 1997 (2) SA 187 (E) at 189-190.

¹⁸ This is the allegation as set out in the pleadings,

¹⁹ Act 70 of 1979

²⁰ Section 4 (2) (a) of Act 70 of 1979 (DA).

[21] In the pleadings, the plaintiff seeks an order directing him to transfer to the defendant an amount equal to one-half of the difference between the accrual in the parties' respective estates. The plaintiff tenders a draft order amplifying the separation issues that he seeks. The right (in law) for the defendant to receive one-half of the difference in the accrual between her and the plaintiff's estate comes into existence when the decree of divorce has been granted. Thus, as a matter of law, the defendant is entitled to the calculation of the value of her accrual claim on that date.²¹

[22] That having been said, it is possible to defer the payment of an accrual claim in terms of section 10 of the MPA. This is to allow broad discretion to guard against the possibility that a spouse could be financially ruined if he or she is compelled to satisfy a claim during dire financial circumstances.²²

[23] The plaintiff, in these papers as currently formulated, has not made out a clear and defined case motivating the separation of the issues sought in respect of the defendant's accrual claim, which would cry out for a separation.²³

THE DELAY IN OBTAINING A TRIAL DATE

[24] The plaintiff delivered his plea to the defendant's counterclaim in March 2024. The defendant's claim in reconvention was filed on 21 November 2023. The plaintiff's plea was due on 12 December 2023. This plea was thus three months overdue.²⁴

²¹ Section 3 (1) and (2) of the Matrimonial Property Act 88 of 1984. (MPA).

²² No case has been made out by the plaintiff for a deferred payment of the accrual claim.

²³ This is one of the core complaints raised by the defendant.

²⁴ The plaintiff had been placed under bar in terms of the court rules.

[25] The divorce was enrolled on the continuous roll by the defendant on 19 December 2023. Further, the customary rule 37(8) notice has yet to be completed by the plaintiff. The defendant also filed a notice under section 7 of the MPA. This, too, calls for a response by the plaintiff, which has not yet been delivered. In terms of section 7 of the MPA, a duty is placed on a spouse to furnish full particulars of the information requested when called upon to do so.²⁵

[26] In addition, the defendant filed a request for trial particulars on 8 July 2025. The plaintiff's reply was due on 22 July 2025. A reply has yet to be filed. All this information, essentially financial in nature, is required by the defendants' forensic expert to calculate the net asset value of the plaintiff's estate.²⁶

THE DUPLICATION OF EVIDENCE

[27] If the extent of the defendant's accrual claim were only be determined at the second (separate trial), two financial enquiries possibly involving two different material dates would have to be conducted. For the defendant's accrual claim, the strike date to determine the extent and value of the parties' respective estates would be the date of divorce. The strike date for the maintenance claim would be the date of the second separate trial. This would likely broaden the evidence.²⁷

[28] In addition, the reasons for the breakdown of the divorce may be relevant considerations in both the first and second trials. Different decisions and different conclusions may be made in this analysis in both the first and second trials.²⁸

THE EMOTIONAL CONSIDERATIONS

²⁵ ST v CT 2018 (5) SA 479 (SCA) at para [36].

²⁶ This was not seriously disputed by the plaintiff.

²⁷ Considering the extensive and complex nature of the plaintiff's estate.

²⁸ TKG v MN (44477/2021) [2023] ZAGP JHC 418 (4 May 2023).

[29] The plaintiff wants to get on with his life and pursue his relationship with his new partner. As alluded to earlier, the interdictory relief I granted to the plaintiff and his new partner will give them the relief they need against the defendant's intrusion into their personal space and life. The plaintiff has moved on as he lives in a new home with his new partner.²⁹

[30] Given our current legislation on divorce, it seems that our jurisprudence does not readily separate issues in divorce proceedings merely to accommodate a spouse's desire to get divorced to pursue a new relationship.³⁰

THE POTENTIAL PREJUDICE TO THE DEFENDANT

[31] In my view, this is a core consideration in this matter. The court has a duty to protect potential financially vulnerable spouses from procedural gymnastics that may jeopardise their financial security. The plaintiff has supported the defendant throughout their marriage, and she has a limited income and few assets.³¹

[32] There is a risk that, in terms of section 7(2) of the DA, it may not be legally competent to grant spousal maintenance after the divorce has been granted. There is no extant court order regulating the plaintiff's maintenance obligations to the defendant. Our jurisprudence on this issue has yet to be settled, and there are conflicting judgments. I am unable to source a full court judgment or a judgment by the SCA directly addressing this issue.³²

[33] The tender made by the plaintiff in this connection is vague, and the terms thereof are uncertain. The defendant pleads that, since their separation, the plaintiff

²⁹ The plaintiff did not disclose for how long he has been involved with his new partner.

³⁰ AK v RN [2025] ZAKZDHC 15.

³¹ This is not disputed.

³² W v W [2016] ZAGPPHC 812 paras 14 - 16.

has underfunded her and reduced her standard of living. The plaintiff counters this argument by tendering that, notwithstanding a decree of divorce, the defendant will retain all her rights to approach the court for interim financial assistance.³³

[34] While the tender made is no doubt genuine and in good faith, the law does not come to the assistance of the defendant should she elect to exercise this right post-divorce. I say this because the legal position on whether this type of interim financial relief would be available to the defendant remains unclear.³⁴

[35] Again, our jurisprudence on this issue is unclear and uncertain, with several conflicting judgments. An issue that may also arise is the potential prejudice to the defendant arising from a claim under the Maintenance of Surviving Spouses Act 27 of 1990.³⁵

[36] A separate decree of divorce may potentially (in my view, almost certainly) deprive the defendant of a claim for maintenance against the plaintiff's deceased estate should he pass away before the second trial date if the separation is granted. The defendant, in her pleadings, also claims, as part of her maintenance claim, the cession of a life policy as security. No executor would be bound by any *inter partes* agreement between the plaintiff and the defendant regarding a 'reservation of rights' prior to a maintenance award being made by the court.³⁶

³³ In terms of Rule 43 of the Uniform Rules of Court.

³⁴ GK v KK [2024] ZAGPPHC 1015 (16 October 2024) para 24.

³⁵ "MOSSA"

³⁶ The defendant would not be "spouse" as defined.

[37] The plaintiff avers that, should the court grant a separation and an earlier strike date for the accrual claim, any prejudice to the defendant could be cured by the payment of interest on the accrual claim.³⁷

[38] This interest tender (although undoubtedly made in good faith) will only allow the defendant to keep pace with inflation and nothing more. This could potentially be commercially prejudicial to the defendant, and she would not be able to financially get on with her life. Significantly, the plaintiff is a high-income earner, and he seemingly does not want the defendant to share in the increase in the value of his estate by achieving an early strike date. The defendant may suffer real financial prejudice if a separation and early strike date is granted.³⁸

CONCLUSION

[39] I am grateful to both the experienced, thorough, and likeable Senior Counsel who appeared in this matter, and to them for their extensive written and oral arguments. Without exhaustively dealing with every authority to which they referred, it seems that separations of the species sought in this case are granted in exceptional circumstances. In most of the authorities relied upon, if not all, the party seeking a separation (in circumstances such as these) has paid a substantial amount upfront to his or her spouse.³⁹

[40] Alternatively, and/or in addition, tenders of substantial upfront payments have been made upon the date of the grant (the early strike date) of the separated decree of divorce.⁴⁰

³⁷ This interest in line with the Consumer Price Index.

³⁸ The court has a duty to guard against this prejudice.

³⁹ No such upfront payment has been made by the plaintiff to the defendant.

⁴⁰ This in matters where a separation of this species was granted.

[41] At the hearing (and after consultation with the Judge President and the legal representatives for the plaintiff and the defendant), an 'earlier' trial date was agreed upon to finalise this divorce. The parties have agreed that I will adjudicate the divorce action, and the trial will run from 17 August 2026 to 28 August 2026. In addition, I will case-manage the matter to secure trial readiness by 17 August 2026.⁴¹

[42] Thus, the potential prejudice as contended for by the plaintiff pales into insignificance compared with the potential prejudice to the defendant. Put another way, the separation sought will now not result in the curtailment and expeditious disposal of this litigation and the application must fail.⁴²

COSTS

[43] As part of this application, the plaintiff and his new partner sought certain interdictory relief against the defendant. I granted the interim interdictory relief that was sought and the final interdictory relief. The interim order in connection with the interdictory relief was granted on 24 April 2025, and the final order concerning the interdictory relief was granted on 23 May 2025. In all the circumstances, a costs order against the plaintiff in connection with the separation issue would be inappropriate. Also, to make a costs order against the defendant for the interdictory relief would also be inappropriate.⁴³

ORDER

[44] Thus, the following order is granted:

1. The application for the separation of issues is dismissed.

⁴¹ The parties have all agreed to and confirmed these trial dates.

⁴² There are considerable disadvantages which would flow from a separation order.

⁴³ Each party should be responsible for their own costs.

2. The first applicant and the respondent shall each be responsible for their own costs as agreed or taxed on a party and party basis, including the costs of two counsel (where so employed) on scale C.
3. No costs order is made regarding the second applicant.

WILLE, J
(Cape Town)

LIST OF APPEARANCES

FOR THE APPLICANTS

TRACY DICKER SC

INSTRUCTED BY D MACGREGOR

ATTORNEYS - MACGREGOR STANFORD KRUGER INC

FOR THE RESPONDENT

BARBARA GASSNER SC

AND JULIA ANDERSSEN

INSTRUCTED BY Z DU TOIT

ATTORNEYS - MILLER DU TOIT CLOETE INC