



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 26 January 2026

Case No. 2022-3952

In the matter between:

TSY

Applicant

and

LEY

Respondent

Summary

In a divorce action, separating the prayer for the dissolution of a marriage in community of property from the question of the division of the joint estate is neither conceptually possible nor practically advantageous.

JUDGMENT

WILSON J:

- 1 A marriage in community of property is not merely a union of souls; it is a mingling of estates. At the point of marriage, each spouse's assets become part of one larger estate, with each spouse owning an undivided half-share in almost everything that once belonged exclusively to the other spouse (see

Estate Sayle v Commissioner for Inland Revenue 1945 AD 388 at 395 to 396 and *De Wet NO v Jurgens* 1973 SA 38 (A) at 46D-H). Accordingly, a marriage in community of property is a particularly intimate union, which, depending on the value and complexity of the joint estate, may only be dissolved with some difficulty.

The parties and their marriage

- 2 The applicant, TSY, married the respondent, LEY, in community of property on 27 July 1989. The parties had two children, both of whom are now adults. They lived together as husband and wife for 22 years. In 2011, TSY and LEY separated, but TSY did not sue LEY for divorce until February 2022. In her plea, LEY admitted that the marriage had irretrievably broken down – largely, she claimed, as a result of what she referred to as TSY’s “various extra-marital affairs”. LEY counter-claimed for maintenance in the sum of R150 000 per month, which was to be index-linked and adjusted accordingly each year. She also sought the appointment of a receiver and liquidator to divide the joint estate. In his plea to LEY’s counter-claim TSY denied that LEY was entitled to any maintenance, and opposed the appointment of a receiver and liquidator.
- 3 Pleadings then closed, and each party made discovery. On 24 August 2024, LEY’s attorney complained that TSY’s discovery was incomplete, because, it was alleged, TSY is obliged to discover documents relating to various trusts under his control or of which he is a beneficiary. The suggestion appears to have been that some or all of those trusts form part of the joint estate. TSY denies that any of the trusts form part of the joint estate. He also denies that their value and nature are relevant to the issues in the divorce action, and has

steadfastly refused to disclose the documents LEY demands. LEY has not yet taken steps to compel the production of the documents. The parties have apparently explored the possibility of settling the divorce action, but have been unable to come to an agreement. Since October 2024, the divorce action has been at a standstill.

The separation of issues

- 4 TSY has lived with his current domestic partner, AS, since 2011. TSY has two children with AS, and says he wishes to marry her. To this end, TSY now applies to me for a separation of issues in the divorce action. TSY proposes that the dissolution of his marriage to LEY be separated from the proprietary consequences of the divorce. Since LEY and TSY agree that a decree of divorce should be granted, TSY says there is no reason why such a decree may not be granted unopposed, with LEY's claims for maintenance and the division of the joint estate being postponed for later determination.
- 5 Convenience is the overriding consideration in any application to separate the issues arising in a trial action. To be capable of convenient separation, the issues to be separated must be conceptually distinct. They must also generally be capable of determination without hearing evidence that will later have to be repeated in relation to other triable issues. It is also desirable that a repetition of witnesses is avoided, especially if credibility findings will have to be made in relation to particular witnesses who may have to testify more than once in respect of different issues.
- 6 Once a court is satisfied that the issues sought to be isolated for separate determination are conceptually distinct from those arising in the rest of the

action, and that there will be little or no overlapping evidence required to hear them, the question is whether there is some advantage to be had in ordering a separation which is not outweighed by any obvious or foreseeable disadvantage. If the advantages outweigh the disadvantages, the court will generally order the separation (see *S v Malinde* 1990 (1) SA 57 (A) at 68C–E).

Conceptual separability

- 7 At the outset of the argument before me, I asked Ms. Woodward, who appeared for TSY, whether a marriage in community of property is, legally speaking, conceptually separate from the union of estates it embodies. Ms. Woodward submitted that it is. She adverted to several cases in which the prayer for a decree of divorce has been separated from prayers for maintenance and the division of assets, with the effect that the divorce proceeded on an unopposed basis and the parties' monetary and proprietary claims stood over for later determination.
- 8 The problem with Ms. Woodward's reliance on each of those cases was that they all dealt with the dissolution of marriages out of community of property. In other words, the marriage in each case did not involve the mingling of the spouses' estates. It followed that a decree of divorce could be granted without any direct impact on either party's estate. Each party took out of the marriage the assets they owned at the point of divorce. In cases where the matrimonial property regime was subject to an accrual claim, that claim was conceptually separable from the claim for divorce, since it embodied no more than a

personal right to payment of half the difference between the nett increase in the value of each spouse's estate during the marriage.

- 9 Marriages in community of property are different, precisely because there are not two estates involved but one. Moreover, once married, each party owns an undivided share in that estate by operation of law. That ownership right arises because, and only because, the parties are married in community of property. There is accordingly no meaningful sense in which the joint matrimonial estate can survive a decree of divorce. Since each party owns an undivided half-share in the estate, it is necessary to determine how the estate is to be divided before the parties can be divorced. In other words, the fusion of the parties' estates is conceptually inseparable from the marriage itself.
- 10 It is of course possible to place the joint estate in the hands of a liquidator, and to say that the estate will be divided in the manner that the liquidator determines, subject to whatever guidance the law or a court may provide. But what TSY wants is a divorce without anything at all being said about the dissolution of the joint estate. That, it seems to me, is inconceivable. A marriage in community of property entails the formation of one joint estate. Likewise, the dissolution of such a marriage entails the division of that estate.
- 11 Taking her cue from the decision in *TD v LD* [2024] ZAGPJHC 751 (12 August 2024), Ms. Woodward submitted that this problem is more apparent than real. Ms. Woodward argued that the only effect of a decree of divorce in this case would be to provide what was referred to in *TD* as a "strike date" (see *TD*, paragraph 20), by reference to which the value of the joint estate can be calculated and then later divided. In other words, the decree of divorce would

freeze each party's claim against the other for a portion of the value of the joint estate as at the date of divorce.

12 This submission overlooks the fact that in *TD* the main outstanding issue between the parties was the value of the accrual in a marriage out of community of property. The claim for the value of the accrual could be determined later, since it was no more than a personal right to payment of a sum of money, rather than a claim for the division of a joint estate. In *TD*, the parties' estates had been kept separate notwithstanding their marriage. Accordingly, there was no co-ownership of assets – at least not by virtue of the marriage. This case is different. As things stand, each party owns half of one undivided estate. Their claim is neither personal nor exclusively monetary in nature. It is to ownership of half of nearly everything the other has. The concept of a “strike date” is inapplicable, since the problem is not merely the valuation of the estate, but the division of the parties' joint ownership of it.

13 In her post-hearing submissions, Ms. Woodward relied upon the decision of this court in *Gillespie v Gillespie* (case no. 6133/05, 1 December 2005) (“*Gillespie*”). But that case does not assist TSY. In that matter, Van Oosten J, in dealing with the dissolution of a marriage in community of property, separated prayers for a decree of divorce and division of the joint estate, on the one hand, from prayers for rehabilitative maintenance, on the other. The plaintiff was granted leave to apply for a decree of divorce and the appointment of a liquidator and receiver to divide the joint estate, while postponing the defendant's maintenance claims. As I have already pointed out, that is not the separation TSY seeks here. TSY wishes to separate his

prayer for the decree of divorce from the question of what happens to the joint estate on divorce. He expressly opposes the appointment of a receiver and liquidator. *Gillespie* is accordingly not authority for the proposition that the question of the dissolution of a marriage in community property can be separated from the question of the division of the joint estate.

- 14 It follows that the issue of the dissolution of the marriage in this case is not meaningfully separable from the issue of the division of the joint estate.

Convenience

- 15 Despite the assistance of counsel, I have not been able to find a case in which the dissolution of a marriage in community of property has been separated from the division of the joint estate. Nor have I found a case in which it has expressly been held that such a separation is impossible. In my view, this is at least partly because it has been tacitly accepted that it makes no sense to order such a separation. But it is also because there are few if any conceivable circumstances in which such a separation would be convenient in the required sense.
- 16 This case provides a good example of the inconvenience to the both parties that such an order would cause. TSY says that he wishes to get on with his life. He does not, he says, wish to be “shackled to a dead marriage” (*NK v KM* 2019 (3) SA 571 (GJ) (“*NK*”) at paragraph 10). He fears that LEY is dragging her feet in the divorce proceedings, and foresees many painful months or years of litigation over the division of the joint estate.

- 17 While it is possible to muster a degree of sympathy for that position, I cannot see how separating the decree of divorce from the division of the joint estate would assist TSY with what he believes is his predicament. Assuming that it were possible to divorce the parties without dividing the joint estate, the question of exactly what form that division should take would continue to haunt TSY. There can be no question, in the absence of the appointment of a receiver and liquidator, of LEY's ownership of half of TSY's assets simply coming to an end on divorce – at least not without some sense of which assets presently in the joint estate the parties will be allowed to retain, or of the monetary value to which their co-ownership rights should be liquidated. If TSY chooses to marry AS before that question is settled, he will take an encumbered estate into his new marriage. It is hard to foresee what effect that encumbrance might have on the new marriage or on any joint estate or accrual that new marriage might involve, but I am sure that nothing good will come of it. The problems for all concerned are likely to multiply as time goes on.
- 18 The likely inconvenience to LEY is even greater. LEY has yet to apply for interim maintenance pending the resolution of the divorce action. She may never do so. But she is increasingly likely to do so the longer the divorce action takes to resolve. Ms. Woodward urged me to find that it is competent to preserve LEY's right to apply for interim maintenance even after the decree of divorce is granted. But there is no unanimity on that point in the applicable case law (contrast, for example, the decisions in *NK*, *Gunston v Gunston* 1976 (1) SA 179 (W), *Beckley v Beckley* (case number 01098/2015, 6 May 2015) and *Beinstein v Beinstein* 1965 (4) 449 (T), all of which decide that a claim for interim maintenance cannot survive the dissolution of a marriage, with the

decisions in *Gillespie* and *TD*, which say otherwise). I do not think it can be “convenient” in the relevant sense to cast LEY’s rights into such doubt, especially where there is no concomitant upside for either party in my doing so.

19 There is, in addition, the question whether LEY will ultimately succeed in proving that TSY’s various trusts should form part of the joint estate. TSY quite reasonably complains that LEY has taken no steps to join the trusts or compel discovery of documents relating to them. But I do not think it would be appropriate to prejudice LEY’s right to seek that relief by allowing the divorce to go ahead before the assets in the joint estate have been identified and valued, or before a receiver and liquidator has been appointed to do so. It seems clear on the papers that TSY is the better-resourced of the two parties, and is able to litigate more extensively than LEY. His only real incentive to disclose his true worth is to obtain a decree of divorce. If a decree of divorce is granted before the contents and value of the joint estate are known, there is no reason to believe that TSY will not simply deploy his litigious firepower to exhaust LEY’s capacity to ensure adequate post-divorce disclosure.

20 TSY worries that LEY will simply exhaust him by delaying the resolution of the divorce action indefinitely. But that is an unrealistic concern. There are numerous procedural mechanisms available to hurry the divorce action along. LEY’s attendance at a pre-trial conference may be compelled. The divorce action may be set down. LEY’s defence and counter-claim may be struck out unless she complies with the various obligations placed on a party in making a case ready for trial. Ms. Woodward freely conceded that none of this has

been attempted, and I see no reason to grant the conceptually and practically dubious relief TSY seeks before it has.

- 21 For all these reasons, there are no true advantages to the separation of issues TSY seeks, and a great many foreseeable disadvantages.

Order

- 22 Accordingly, the application is dismissed with costs, including the costs of counsel, which may be taxed on the “B” scale.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 January 2026.

HEARD ON: 12 November 2025

FURTHER SUBMISSIONS ON: 28 November and 5 December 2025

DECIDED ON: 26 January 2026

For the Applicant: J A Woodward SC
Instructed by Gundlefinger Attorneys

For the Respondent: N Rambachan-Naidoo
Instructed by VR Attorneys