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

CASE NO: 20263/23

In the matter between

M[…] V[…] APPLICANT

AND

E[…] V[…] (NEE V[…] S[…]) RESPONDENT

Date of Hearing: 30 November 2023
Date of Judgment: 14 December 2023 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an urgent opposed application for an order for a separation of the decree of divorce from the other issues which included spousal maintenance, child support and a redistribution order, in a divorce action. The salient features of the application is couched in the following terms:

> "2. That the following questions of law or fact are to be decided separately from and before any other issues in dispute in the action, pending under case No: 8692/2020, before this Honourable Court ("the main action"):

2.1 Whether a decree of divorce should be granted, as claimed by Applicant (the Plaintiff in the main action) in prayer (a) of his Particulars of Claim (dated July 2020) and by Respondent (the Defendant in the main action) in paragraph A of her amended Claim in Reconvention (dated 20 July 2023), based on the common cause irretrievable breakdown of the parties' marriage;

3. That applicant, as Plaintiff is granted leave to set the divorce action down for hearing on the Third Division roll to obtain a decree of divorce on an unopposed basis after evidence is led;

4. That all further proceedings in the main action be stayed until the aforementioned issues have been determined and the decree of divorce dissolving the marriage between the applicant and the respondent has been granted;

5. Directing such further and/or alternative relief as this Court may deem appropriate;

6. Directing that the costs of this application shall stand over for determination at the hearing of the main application, save that if the Respondent opposes this application, the respondent be ordered to bear the costs of this application."

[2] In opposition to the application, the respondent also raised two points *in limine*, to wit, abuse of process and lack of urgency. The issues raised in the two points *in limine* were so closely related to the grounds of opposition that it was convenient to pronounce on them at the end of the hearing.

[3] The parties were married on 21 October 1995 out of community of property and by antenuptial contract with the exclusion of the accrual system. Only one of the two children born of the marriage was still a minor. The last child will also turn a major in March 2024. The applicant instituted the divorce action on 9 July 2020. The respondent left the common home, a farm, in late 2020. The applicant conceded that the respondent needed spousal maintenance. He averred that she was able to earn an income and that he should only be obliged to pay the difference between her need and her means. He alleged that

he had no assets other than what remained of a retirement annuity as he had liquidated every policy and investment owned over the last three years in order to meet her Rule 43 obligations. The annuity was used to cover the shortfall between what he could afford and what he was ordered to pay as he could not afford to comply with the Rule 43 order from his income. Pleadings have closed and the matter is on the Rule 37(8) conference roll. Pre-trial preparation such as exchange of particulars and delivery or notices and reports still needed to be done.

[4] In May 2022 the respondent brought a joinder application to join various Trusts and Eilandia Plase (Pty) Ltd (Eilandia) as defendants in the divorce action. The respondent had indicated her desire to subpoena documentation from various Trusts and the farming enterprise, Eilandia, which the applicant alleged was his employer. It was Trusts and other business entities in which the applicant had an interest. The respondent wanted the applicant to discover his medical records and bank statements of these entities. In 2020, before he issued summons, the applicant was diagnosed with colon cancer. He underwent surgery. The aftermath was that he took prescribed medication, went for regular check-ups, blood tests and had to follow an exercise regime to assist in regaining the efficacy of his colon. In July 2023 he was diagnosed with stage 4 metastatic liver cancer. He did chemotherapy whose side effects is nausea, lack of appetite with skin and mucous membranes hypersensitive and painful o touch. He continued as farm manager but because of inability to work a full day immediately after chemotherapy, Eilandia has employed a manager assistant. The real possibility that he may not survive was emotionally distressing and traumatic. Everything depended on the efficacy of the treatment. He consulted with a psychiatrist to deal with the anxiety and panic disorder. His psychiatrist, Dr Paul Magni has written a letter in support of the application where he said:

> "I am assisting Mr V[…] in managing generalized anxiety disorder, panic disorder and the emotional consequences of a painful divorce and stage 4 metastatic cancer.
>
> I am making an appeal to the legal teams involved that all effort and compassion be considered in expediting the divorce proceedings. The delays and uncertainty have had a

significant impact on his well-being. Furthermore, other than the emotional impact, I am concerned that the stress is having a negative effect on his immune system and ability to fight the cancer into remission.

I hope this letter helps clarify the need for urgent assistance in this regard."

[5] On 24 July 2023 the applicant's legal representatives wrote to the Acting Judge President requesting the allocation to a preferential and/or expedited trial date. On 28 September 2023 the applicant's legal representatives wrote to Saldanha J, requesting that a further pre-trial conference be held sooner than 13 February 2024 which was the date to which it was postponed, in order that an expedited trial can be allocated for the matter. The respondent opposed both requests. The salient reasons for the opposition are set out in the letter addressed to the Registrar of Saldanha J, dated 5 October 2023 and couched in the following terms:

"1. As is evident from the Pre-Trial Minute dated 29 August 2023, the Plaintiff has declined to discover documents which the Defendant believes are relevant to the matters in issue, more particularly his medical records and the bank statements of various entities in which he has an interest, but which are not parties to the divorce action.

2. While the Plaintiff has refused to discover his medical records and to provide copies thereof, he tendered inspection at the chambers of his Counsel. The writer duly attended at Adv Bartman's chambers on 31 August 2023 and perused the available records. None of the documents made any mention of stage (terminal) liver cancer. Apart from forming the basis of the Plaintiff's contention for an expedited pre-trial/trial date, his health ability and to earn income are relevant to the Defendant's maintenance claim. Any application n to compel proper discovery of the Plaintiff's medical records would in all likelihood be opposed and the earliest available dates on the semi-urgent roll would be in the second term of 2024 (at the earliest). We have accordingly been instructed to issue subpoenaes in order to obtain the records directly from the Plaintiff's medical service providers in order to enable us to prepare for trial.

3. The Plaintiff controls three Trusts of which he is both a Trustee and a beneficiary (capital and income) and which own significant assets. The Plaintiff is also a director of a highly successful company. Accordingly, the financial affairs of these entities are relevant to the Plaintiff's means for the purpose of determining his maintenance obligations (if any) to me. Again these documents will have to be subpoenaed to enable the Defendant to prepare for trial. …

5. Trial Particulars have not yet been requested or supplied nor have expert summaries been delivered. …

7. The issue of the Defendant's personal maintenance claim is not the only material issue in the action. In the light of recent case law and the challenge to the constitutionality of spouses in the Defendant's position not being entitled to rely on Section 7 (3) of the Divorce Act, the Defendant has amended her Claim in Reconvention to include a prayer for a redistribution of assets.

In all the above circumstances, the Defendant cannot and does not agree to the Pre-Trial conference scheduled for 13 February 2024 being brought forward more to an expedited trial date being allocated, which would severely prejudice the Defendant."

[6] The applicant was concerned that if he did not obtain a decree of divorce imminently, he will continue to be under undue strain on his day-to-day life. He wanted to move on with his life and have closure with the respondent. The stress and shame of being married to the respondent affected his already compromised health. The continued litigation was traumatic to his elderly mother, his children and extended family who were desperate for the parties to divorce. His belief was that the respondent would not agree to separation was a tactical one as she believed that his income may increase if the divorce was delayed as she wished to secure a more favourable award. The respondent was an income and capital beneficiary of the M[…] V[…] Family Trust. Although she was not named specifically, she was referred to as "Die eggenote of weduwee van M[…] A[…] V[…]". As it was a discretionary trust, the respondent was not entitled as of right to any benefits or rights and could not insist on remaining married in the hope of securing a benefit. Her marital status would not have any impact in the hope of securing any benefit.

The applicant's case for urgency was that his health was deteriorating gradually due to the toxic and invasive treatment that he was subjected to. He was not certain nor could his medical carers give any assurance that the chemotherapy will be successful. He did not have any time on his side. He was advised that dates on the opposed roll were in November 2024. Given the cancer, its stage and the rate at which it progressed, he could not wait for months for this application to be determined. He wished to be divorced as a matter of urgency. His reasons were not the usual reasons but he asked for the court's indulgence.

[7] It was only in his replying affidavit that the applicant attached a report from Dr Redmund Nel from Clinical and Radiation Oncologists at Cancercare Panorama wherein it is reported:

> "During a routine follow-up evaluation in July 2023 revealed an elevated tumour marker and a large liver mass
>
> Ultrasound guided liver biopsy on the 20th July 2023 confirmed metastatic colon carcinoma metastasizing to the liver, including stage IV colon carcinoma.
>
> Mr V[…] has been discussed with two liver surgeons and both recommend neoadjuvant 3 months of chemotherapy followed by a re-evaluation and assessment for surgery.
> M[…] will proceed with 6 cycles of chemotherapy with FOLFOX 6 with Cetuximab or Bevacizumab pending the results of next generation sequencing Oncomine test.
>
> If Mr V[…] has a good response to chemotherapy, he may be a candidate for resection of the liver metastases."

It was also in his reply that the applicant alleged that the respondent did not disclose that she was sequestrated on 4 April 2023 and that should the respondent proceed with her joinder application, he would ensure that the respondent provided the necessary security for costs. In his reply to the allegations that he was not paying her maintenance as envisaged in Rule 43 and that she had to approach the

courts to enforce her rights, his response was that this had no bearing on this application. It was in reply that he indicated that when a writ of execution was issued against him a *nulla bona* return was received. His position was that the Trusts and Eilandia were not parties to the divorce action and that the Respondent was not entitled to receive documentation pertaining to those entities as those documents had no relevance to the divorce proceedings between himself and the respondent.

[8] The respondent's case was that the application was an abuse of court process as it would not change the applicant's physical or emotional status but allowed him to be in a position to conceal income and assets. Although the applicant's psychiatrist mentioned a stage 4 metastatic cancer, neither he in his letter nor the applicant in the application annexed proof of that cancer diagnosis. The respondent was provided with a copy of a radiologist report regarding the applicant's health status, dated 17 July 2023. This report stated on page 3:

> "There is no preliminary metastatic disease or distant lymphadenopathy."

Moreover, on 29 August 2023, separation of issues was specifically raised and discussed between the parties' legal representatives at a Pre-Trial meeting. The parties agreed and recorded in the pre-trial minute their agreement that there would be no separation of issues. The pre-trial was held more than a month after the applicant and his legal representatives became aware of the applicant's alleged medical status. Two and a half months later the applicant changed his mind. Furthermore, the applicant failed to attach any confirmation from an Oncologist confirming his diagnosis and confirming that if this application was granted it would improve the applicant's health. Most importantly, the respondent was in the process of applying for joinder, to ensure that the asset-holding parties, to wit three Trusts and Eilandia which it seems he controlled, were before court, in relation to the division of the joint estate issue.

[9] The respondent alleged that the applicant has a history of hiding money in the accounts of others, including one of his girlfriends who is also his accountant. The said accountant was also the auditor for Robertson Co-op and Winery, which was another entity that the applicant controls and in which he was a director. This entity was also the applicant's biggest client and source of income. The applicant allegedly farmed with wine grapes, deciduous fruits, vegetables and cattle on 7 farms. The applicant allegedly, through one of his companies, recently donated 910 hectares farm to a 100% black owned company. According to the respondent, the applicant's estate is worth R700 million. The respondent alleged that she contributed, directly or indirectly to the growth and/or increase in the applicant's estate. He now had everything whilst she had nothing, and the court hearing the divorce would be asked to correct the imbalance. The applicant refused to comply even with a Rule 43 order in the respondent's favour. The respondent alleged that she intended to appoint a forensic investigator to enquire and investigate the business entities of the applicant.

[10] Rule 33(4) of the Uniform Rules of Court states that:

> "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."

In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3, the Court said in respect of rule 33(4):

> "Before turning to the substance of the appeal it is appropriate to make a few remarks about separating issues. 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. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision. It is a matter to which I shall return later in this judgment."

[11] The Appellate division held that piecemeal litigation which defeats the object of rule 33(4) is to be eschewed. In *Molotlegi v Mokwalase* (222/09) [2010] ZASCA 59 (1 April 2010), the Court said:

"A court hearing an application for a 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. Crucially in deciding whether to grant the order or not the court has a discretion which must be exercised judiciously. The court cannot simply grant such an application because it is unopposed. I regret to say that the court

below failed in this respect. See Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) para 3."

[12] In the article "Understanding Separation Applications in Divorce Proceedings: Navigating Rule 33(4) of the Uniform Rules of Court – M.D.A.P.G.S v L.M.D.S (2021/47489) [2023] ZAGPJHC 1373 (24 November 2023)" in the Family Law Blog, Bertus Preller referred to *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) where the court discussed the application of Rule 33(4) of the Uniform Rules of Court at length and expressed that:.

- The discretion to make an order under the Rule may be exercised only when it appears to the Court that it would be convenient to do so, and further, that it is not the convenience of any one only of the parties, or of the Court only, that is the criterion. The convenience of all concerned must be taken into consideration and there should exist substantial grounds to justify the exercise of such power;

  - ordinarily, it is desirable in the interests of expedition and finality of litigation to have one hearing only at which all the issues are canvassed so that the Court, after conclusion of the trial, might dispose of the whole case;

  - ordinarily, if it would appear to the Court that the duration of the trial would be substantially curtailed by a preliminary hearing to settle specific questions, it would probably grant the application, but even then it would not necessarily do so because the nature of the case may be such that proper consideration of overall convenience may involve factors other than those relating only to actual duration of the Court hearings;

  - the word "convenient" in the context of Rule 33(4) appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all circumstances, it appeared fitting and fair to the parties concerned;

- another factor which the Court held must be borne in mind and which is relevant to the question of whether there would be any real saving in time and cost of litigation, relates to the problem of a possible appeal against the decision of a Court on the special questions. If the litigant against whom that decision goes is dissatisfied with it, he may or may not be entitled to appeal to the Appellate Division before final judgment in the case has been pronounced. Whether he may appeal forthwith or whether he would have to wait until the final judgment has been given, there is inherent in the situation a possibility that, far from the separate hearing shortening the proceedings, it will prolong it. In the event that the appeal is brought only after judgment had been delivered at the end of the trial and the decision on the special questions is reversed on appeal, the matter would no doubt be referred back to the trial Court to hear the very evidence which, by reason of the erroneous decision, was not led at the trial.

[13[Preller further referred to where the Court in *Tongaat* considered the aspect of a credibility finding being made where a witness could potentially testify in the first hearing and then also at the trial, stating that:

> "It is a matter of extreme difficulty to estimate at this stage what the extent, if any, of the saving of evidence and time would be if the application were granted. Moreover, once it is accepted that evidence will or is likely to be led on these issues at the preliminary hearing, it follows that questions of credibility or reliability of a witness or witnesses might arise. The witnesses, or some of them, who testify at the first hearing will in all probability also testify at the trial in the event that the disputed questions are decided against the defendant at the preliminary hearing. They will, as it were, complete their evidence at the trial, but meanwhile findings depending on their credibility or reliability will already have been made by the Court, which might, after hearing the second instalment of such witnesses' evidence, be disposed to re-assess their credibility or reliability. What this serves to emphasize is not that such a situation should never be allowed to arise, but that generally it is undesirable to decide piecemeal an issue which, although notionally it may

be divisible into two parts, is essentially a composite issue to the extent that there is a degree of inter-dependence of its notionally divisible components."

[14] Preller further wrote:

"In summary, the following factors (set out by Loots, AJ in the matter of *O v O* 6912/2013 [2017] ZAWCHC 136 (21 November 2017) are considered in the application of Rule 33(4) by the Courts:

- Whether the hearing on the separated issues will materially shorten the proceedings;

- Whether the separation may result in a significant delay in the ultimate finalisation of the matter. The granting of the application, although it may result in the saving of many days of evidence in court, because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper, may nevertheless cause considerable delay in finalising the matter;

- Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated out are controversial and appear to be of importance;

- Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues;

- Whether the evidence required to prove any of the issues in respect of which a separation is being sought will overlap with the evidence required to prove any of the remaining issues.

Loots, AJ in *O v O* also stated:

> "Where the court is satisfied that a marriage has broken down irretrievably, the court has no discretion but to grant a decree of divorce; save that the court can only grant the decree of divorce if, as is provided by section 6(1) of the Divorce Act, it is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances."

> In South African law, a court will allow for the separation of issues in a legal proceeding, as per Rule 33(4) of the Uniform Rules of Court, when it is determined that such separation will lead to a more convenient, expeditious, and fair resolution of the case. This decision is contingent on the court's careful consideration of whether the issues at hand are sufficiently distinct to warrant separate hearings without being inextricably linked. The court must also assess whether separating the issues will indeed shorten the overall duration of the trial and not lead to unnecessary delays or potential prejudice to any party involved. Furthermore, the court must consider the likelihood of an appeal against the decision on the separated issues, as this could prolong the litigation process. In divorce cases involving minor children, the court must also ensure that any decisions regarding the children's welfare are satisfactory and in their best interests. The overarching principle is that the separation of issues should facilitate the efficient and fair administration of justice, without compromising the integrity of the legal process or the rights of the parties involved.

[15] Since 2020 the parties lived separately. They have lost love and affection for each other. They are agreed that the marriage had irretrievably broken down. The parties are shackled to a dead marriage. The applicant's case was that the granting of the decree of divorce can and should conveniently be determined independently from the other issues and that such separation would be fair to both parties. The applicant was diagnosed with a life threatening disease, but besides his mere say so, there is no expert evidence that he was terminally ill. From an inductive reading of the medical reports provided by the applicant, I understand stage 4 liver cancer to mean that the cancer may be spreading farther than the liver. I do not understand the medical reports to say that the applicant was diagnosed with cancer that cannot be treated into remission and which led to his death. Whilst his diagnoses may be life threatening, it is not terminal. It seems to me that the applicant's own legal team appreciated this. In their introductory paragraph of the heads of arguments, the say: "He has been diagnosed with a life threatening *and probably terminal disease"* (Italics are my emphasis). In paragraph 4.3 they said: "It is *most likely that the disease is terminal*". (Italics are my emphasis). This is not terminology employed by Counsel who advanced a case in which there was a portfolio of evidence that they submitted had established terminal illness as a fact in their papers. In his founding

affidavit, the applicant failed to set out sufficient and satisfactory grounds to justify why the wait in the queue would not be worth it unless they are pushed in front. I was not persuaded that the kind of harm that the applicant alleged justified the disruption of the roll and the resultant prejudice to other members of the public whose matters would take longer to be heard as they had to wait for the applicant's case to jump the queue. No case for urgency was made. It seems to me that an attempt to suggest a terminal illness was only built up in reply.

[16] The stress caused by the pending divorce between the parties did not lie in the fact that a decree of divorce was not granted, but in that the issues pending in the divorce had not been adjudicated upon and finalised. The stress of this process will not subside simply because a decree of divorce was granted whilst the other issues remained pending. The issues in dispute are beyond the bonds of the marriage and the divorce will only be finalized once all the issues have been ventilated and especially division of income and assets have occurred. I am unable to find any explanation how the granting of an urgent decree of divorce will grant relief to the applicant's alleged agony when the estate division, which is at the heart of the acrimonious litigation between the parties and the primary source of their distress, will still be hanging over his head in the very same action. It seems to me that the applicant was an opportunist who sought to abuse the language used by Dr Magni to impute to the Doctor what the Doctor did not say. Dr Magni did not single out the decree of divorce, as the applicant does, from the rest of the issues in the divorce proceedings. This clinical dissection to severe the decree of divorce as the source of his stress is the creation of the applicant, and the applicant only. Dr Magni pleads for the expediting of the divorce proceedings. I understand this to mean the quicker finalization of all the issues in the divorce action. His letter did not seek to extract the decree of divorce from the rest of the proceedings to single that out as the cause of stress which had a negative effect on the applicant's immune system and ability to fight the cancer into remission. I understand Dr Magni to be calling for the urgent finalization of all the issues between the parties, in their divorce. It would be stretching the language very far to suggest that the decree of divorce, an area where the parties were agreed, would cause Dr Magni to call the divorce a 'painful divorce'. The painfulness, under the

circumstances, can only emanate from the acrimony over the division of the estate. A decree of divorce is not going to resolve the dispute between the parties and will in no way ameliorate the effect thereof on both parties. The extent of the respondent's entitlement to spousal maintenance, the redistribution order and the legal costs remain at the eye of the storm between the parties.

[17] Rule 43 (1) provides:

> 43. Interim relief in matrimonial matters
>
> > (1) This rule shall apply whenever a spouse seeks relief from the Court in respect of one or more of the following matters -
> >
> > > (a) Maintenance *pende lite;*
> > >
> > > (b) A contribution towards costs of a pending matrimonial action, pending or about to be instituted;
> > >
> > > (c) Interim care of any child
> > >
> > > (d) Interim contact with any child.

[18] In *LS v GAS* (2558/2016) [2016] ZAWCHC 154 (26 August 2016) it was said:

> "Thus, Mr Steenkamp submitted that the intention to proceed with a divorce action would suffice for a triggering of Rule 43. Furthermore Mr Steenkamp submitted that *Moolman* supra was incorrectly decided, as the authorities referred to therein had little bearing on Rule 43 proceedings. …
>
> Furthermore, on a reading of Rule 43 it applied to four separate scenarios, maintenance *pende lite,* a contribution towards the costs of a pending matrimonial action, interim custody of a child and interim access to a child.

Mr Steenkamp submitted that it was noteworthy from a reading of Rule 43 that a distinction was drawn between maintenance and a contribution to costs. The former only spoke to *pende lite* while the latter referred to costs of a pending matrimonial action. He suggested that nowhere in the rule was there any requisite that interim custody or interim access to a trial was dependent upon the issuing of summons. …

EVALUATION

If Rule 43 was not to apply save for pending litigation, i.e. a divorce action, the High Court would certainly remain clothed with jurisdiction in respect of minor children. It is the upper guardian of children and it is therefore their interests that are protected by the inherent jurisdiction of the Court. Accordingly, the concept of *pende lite* has to be given some meaning so as to confine the scope of the rule. Were it otherwise, Rule 43 would equate to a *rule nisi* without any return date. The problem could be, on Mr Steenkamp's argument, that the rule could apply indefinitely unless "pending" was given some meaning."

[19] The papers reveal a destitute woman who was vulnerable to the whims of a probably wealthy philanthropist who was generous to the outside world but who to his family was harsh, insensitive, lacked compassion and had a self-centred personality as an opponent. The joint estate is in the control of the applicant who is unwilling to disclose the wealth in a network of Trusts, companies, Co-operatives and other entities. There was a real risk of prejudice to the respondent's maintenance granted as envisaged in Rule 43(1)(a) if separation was granted. The legal approach to the person in her position, if separation was allowed and a decree of divorce was granted, has not been settled, including in this Division. I am in the same school of thought with Davis J in *LS v GAS.* The scope of the rule needed to be confined so that spousal maintenance granted in terms of the rule was not indefinite, and ran the risk of directly or inadvertently being equated to a *rule nisi* without a return date. It follows that I am not inclined to follow Loots AJ in *KO v MO* (6912/2013) [2017] ZACWCHC 136 (21 November 2017) where in para 61 it was said:

> "[61] Accordingly, I find that, pending the finalization of the divorce, an extant order in terms of Rule 43 survives a decree of divorce to the extent the issues regulated thereby remain unresolved."

In *Carstens v Carstens* (2267/2012) [2012] ZAECPEHC 100 (20 December 2012), the decision on which Loots AJ relied, the parties themselves had agreed in the Rule 37 minute that interim arrangements would continue until the action was finalized. In disputed and often acrimonious divorce proceedings, the parties' earnest endeavours to contractually regulate their path to resolution of their disputes, is not on its own contrary to public policy, as long as they keep within the confines of the constitution and the law. I am more persuaded to the view of Molahlehi J in *KN v KM* 2019 (3) SA 371 (GJ) at para 39 where it was said:

> "[39] It is thus correct that once a decree of divorce was granted the provisions of rule 43 of the Rules will find no application."

It follows that I am inclined to the view of Merchak AJ in *TKG v MN* (44477/2021) [2023] ZAGPJHC 418 (4 May 2023) where it was said at para 42.13:

> "42.13 Once a decree of divorce is granted between the spouses, the provisions of Uniform Rule of Court 43 will find no application and such spouses will be deprived of any claim against each other under the said Rule."

At para 42.15 the court continued:

> "42.15 On the granting of a decree of divorce, and failing an order to the contrary:
>
> 42.15.1. the duty of support between the spouses terminates.
>
> 42.15.2. a divorced spouse may not institute a claim for maintenance for him/herself against the other spouse."

I would have preferred the use of the word "person" than "spouse" in both instances in para 42.15.2. and at the second "spouses" at 42.13, to convey clarity of thought.

[20] In *CC v CM* 2014 (2) SA 4309GJ) the applicant acknowledged the possible prejudice to the respondent's section 7(3) redistribution claim and to safeguard that possible prejudice, the applicant tendered to pay the respondent an amount of R25 million in securitatem as part payment of the respondent's 7(3) claim, within 72 hours after the granting of the decree of divorce. The payment was not intended to suspend the respondent's rule 43 maintenance of R150 000 per month. The earnest endeavor to contractually regulate their issues with interim arrangements until the divorce action was finalized, showed the amicable mindset of the applicant in *CC v CM* towards interim maintenance, spousal maintenance and redistribution claims of the respondent. In the application before me, the failure of the applicant to honour the rule 43 order until prodded by the courts after the respondent's many struggles, and his conduct as a whole revealed a hostile mindset towards his obligations as regards the respondent in relation to the joint estate and respect for her rights. His mindset was adamant in drawing the battle lines at no cent, tickey or pond for the respondent at all costs, in this nasty dispute.

[21] In *Chisnall & Chisnall v Sturgeon & Sturgeon* 1993 (2) SA 642 (W) at 647G-H it was said:

> "I should, though, add that is has become clear that Courts should insist that plaintiffs (a) ensure early pre-trial conference and (b) shoulder their responsibility to actively searching for ways to eliminate evidence. It is the duty of a plaintiff (and any other party) to ensure the timeous discussion of proposals for shortening the trial about employing Rule 33(4) for limiting attention to the really crucial facts. Normally there is a need to discuss facts in order to establish what evidence can be eliminated and where leading questions may be put."

The crucial facts in dispute relate to the extent of the joint estate and whether the applicant hid property of the joint estate in Trusts, companies, co-operations and other third parties to avoid a disclosure of the available means towards maintenance of the respondent and

the entirety of the joint estate for purposes of a fair redistribution. Against the background of the Rule 43 maintenance of the respondent, spousal maintenance after the divorce and redistribution claims, and where there is no agreement between the parties to regulate the disputed issues until the divorce action is finalised, it appears that the questions of a decree of divorce and the other issues cannot conveniently be decided separately. It seems to me that at the time that the divorce will be determined, the minor will already have attained majority.

[22] I do not understand *Chisnall* to be an open invitation for chancers. It was not intended for people to take risks and apply, simply to get an advantage over other people, especially women who are left destitute by a separation leading up to divorce. Well aware that there was no portfolio of evidence to establish a terminal illness, the applicant dragged the respondent to court on an urgent basis primarily to severe the only issue that would be reason for him to see the need to expedite the resolution of the issues between them and have the divorce action finalized once and for all. Playing by the rules, including a frank and candid disclosure of the extent of the joint estate and by extension his available means, would not get him where he wanted to be. Some calculated risks should simply be that, expensive. Having said that, I must acknowledge that growth and progress are born of taking chances. Dale Carnegie is reported to have said:

> "Take a chance! All life is a chance. The man who goes the furthest is generally the one who is willing to do and dare."

The ignition of the zeal to reach new heights and the fire burning to push to be more creative, in legal proceedings, must go through the eye of the needle of the facts and the law. Legal proceedings in the High Court cannot be carefree and superficial having no serious purpose or value. The urgent court, especially, is not for issues that do not deserve serious attention and lack weight, importance, sound basis and seriousness. The urgent court should never be a triage to massage swollen egos. It should remain the exclusive thoroughfare to process those who have a case to jump the queue into the healing waters of the fountains of justice.

[23] For these reasons I make the following order:

(a) The application is dismissed with costs on attorney and client scale.

DM THULARE
JUDGE OF THE HIGH COURT