IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 32041/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

DATE: 29 October 2024

SIGNATURE:

M[...] S[...] APPLICANT
(neé R[...])
(ID Number 5[...])

And

J[...] S[...]
(ID Number 5[...]) RESPONDENT

In re:
J[...] S[...]
(ID Number 5[...]) PLAINTIFF

And

M[...] S[...] (neé R[...])
(ID Number 5[...]) DEFENDANT

JUDGMENT

AMIEN AJ

[1] This is an application in terms of Rule 33(4) of the Uniform Rules of Court, to separate an issue pertaining to the nature of the matrimonial property regime in a pending divorce action between the parties.

[2] Rule 33(4) provides:

> "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."

[3] In *Minister of Agriculture v Tongaat Group Ltd*,[1] Miller J. said the following of rule 33(4):

> "Whereas previously the Courts were empowered to direct that questions of law be decided separately, the power now extends to questions of fact also. It appears from the wording of Rule 33 (4) 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. It goes without saying 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, as DE WET, J., pointed out in *Vermeulen v. Phoenix Assurance Co. Ltd*., 1967 (2) SA 694 (O) at p. 697, there should exist substantial grounds to justify the exercise of the 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 of the case. Rule 33(4) was no doubt conceived in the

[1] 1976 (2) SA 357 (D) at 362E-H.

realisation that in some instances the interests of the parties and the ends of justice would be better served by disposing of a particular issue (or issues) before considering other issues which, depending on the result of the issues singled out, might fall away or become confined to substantially narrower limits."

[4] From the above, it is clear that Rule 33(4) applies to the separation of issues pertaining to law and/or fact when it is convenient for all concerned and when it serves the interests of justice to do so. Substantial grounds should exist for the application of Rule 33(4).

[5] In this matter, the Applicant / Defendant and Respondent / Plaintiff are both pensioners who were married to each other on 27 March 1982. The Respondent / Plaintiff instituted divorce proceedings against the Applicant / Defendant.

[6] The Applicant / Defendant wants the issue of the matrimonial property regime between the parties to be decided independently of the main action for divorce in terms of Rule 33(4).

[7] At the time of entering the marriage, the parties concluded an antenuptial contract, which rendered their marriage out of community of property. This was prior to the enactment of the Matrimonial Property Act 88 of 1984, so accrual did not apply.

[8] It appears from the Respondent / Plaintiff's Particulars of Claim annexed to the Combined Summons in the divorce action that during 1992, and in accordance with section 21 of the Matrimonial Property Act, the parties were authorised by an order of court to change their matrimonial property regime to out of community of property excluding the accrual system. This resulted in the parties signing a postnuptial agreement, which was duly notarised and registered at the Deeds Office, in which the parties' matrimonial property regime was rendered out of community of property without the accrual system.

[9] The conclusion of the postnuptial agreement appears to have been at the behest of the Applicant / Defendant when she realised several years after their marriage, that their marriage had subjected her to the marital power of her husband. She therefore decided that they needed to conclude a postnuptial agreement to exclude the marital power of her husband. The parties subsequently concluded a postnuptial agreement on 30 July 1992 that rendered their marriage out of community of property excluding the accrual system.

[10] The Applicant / Defendant avers that the reference to the exclusion of the accrual system on the front page of the postnuptial agreement was either done in error or was added without her knowledge. She contends that it was never her intention to enter a matrimonial property regime that was out of community of property without the accrual system.

[11] The Applicant / Defendant suggests that there was no meeting of the minds between herself and the Respondent / Plaintiff regarding the postnuptial agreement, and that the question regarding the clarification of the parties' intention when they entered the postnuptial agreement should be referred for oral evidence before commencement of the divorce trial.

[12] The Applicant / Defendant avers that separating the issues will not take much time and preparation, and the number of witnesses required will be limited.

[13] The Applicant / Defendant is also of the view that pending the divorce trial, the Respondent / Plaintiff could alienate assets, which would be prejudicial to her. In particular, the Applicant / Defendant informs the Court that she has moved out of the matrimonial home and the Respondent / Plaintiff has placed the property on the market and could therefore sell it without her knowledge. Furthermore, the Applicant / Defendant contends that the Respondent / Plaintiff could transfer monies and/or investments into financial institutions without her knowledge.

[14] Through an interlocutory application, the Applicant / Defendant seeks an order that the postnuptial agreement is invalid and not binding, followed by a rectification of the matrimonial property regime to include accrual, alternatively a redistribution of

assets, alternatively further that their matrimonial property regime is governed by a universal partnership.

[15] While the Applicant / Defendant suggests that the purpose of separating the issues would be to determine the intention of the parties at the time that they signed the postnuptial agreement, the Respondent / Plaintiff argues that the parties' intention is simply one factor that a court would consider, to decide which matrimonial property regime governs their marriage.

[16] The Respondent / Defendant avers that there is no ambiguity regarding the wording of the postnuptial agreement.

[17] The Respondent / Defendant further asserts that a finding on the intention of the parties in concluding the postnuptial contract will not dispose of the matter because a full trial will still be required to determine all the legal issues in the divorce action.

[18] The Respondent / Defendant suggests that the issues are intertwined and would be conveniently disposed of in one hearing. Concomitantly, the Respondent / Defendant contends that a separation of issues will only serve to delay a finalization of the issues.

[19] Ms Vorster for the Applicant / Defendant brought the case of *J.G. v J.G.*[2] to the court's attention. The case involved parties who differed in their view regarding which matrimonial property regime governed their marriage. The plaintiff in that case was of the view that their matrimonial property regime was out of community of property with the exclusion of the accrual system while the defendant believed that their marriage regime was out of community of property with the accrual system. Van Oosten J decided that the determination of the matrimonial property regime could be decided independently of the main divorce action in terms of rule 33(4).

[2] Case number: 4846/2015, Gauteng Local Division, Johannesburg (2 September 2016).

[20] The case of *J.G. v J.G.* is similar to the matter at hand to the extent that the parties were of different minds about whether the matrimonial property regime governing their marriage was out of community of property with accrual or without accrual. However, it is distinguishable in the sense that the parties in this case were married prior to the enactment of the Matrimonial Property Act whereas the parties in the *J.G. v J.G*. case were married after the enactment of the legislation. The distinction is an important one because when the Applicant / Defendant and Respondent / Plaintiff were married to each other, accrual could not have been contemplated since it was not part of the law at that time.

[21] Ms Odendaal for the Respondent / Plaintiff directed the court to Erasmus' *Superior Court Practice*[3] where the author notes the following five questions for consideration in a rule 33(4) application:

(a) Will separation of the issue/s materially shorten the proceedings?

(b) Is the purpose of separating the issues to delay the proceedings, particularly where the Applicant's case is not strong?

(c) Are there prospects of appeal?

(d) Will the evidence led in the interlocutory proceeding overlap with the issues in the main divorce action?

(e) What prejudice will be suffered by the parties?

[22] Having regard to the Respondent / Plaintiff's Combined Summons and Particulars of Claim, and the Applicant / Defendant's Plea and Counterclaim in the main action for divorce, it appears that the main issue to be determined (apart from a claim for divorce and costs) is the division of the matrimonial estate between the parties.

[3] Juta and Company (Pty) Ltd, 2024.

[23] Therefore, in addressing the first to fourth questions above, a separation of the issue pertaining to the matrimonial property regime will not materially shorten the divorce trial since it is the main issue to be determined. Any evidence led in the interlocutory application will be intertwined with- and will overlap with the issues in the main divorce action. Consequently, separating the issue from the main proceeding will only serve to delay the proceeding, regardless if the Applicant / Plaintiff's case is strong or not. Having said that, the case could likely go either way, depending on the evidence that is provided. Thus, it is difficult at this stage to ascertain what the prospects of appeal could be.

[24] With regard to the prejudice that will be suffered by the parties, it was mentioned previously that the Applicant / Defendant is of the view that the Respondent / Plaintiff could alienate assets and transfer monies and/or investments without her knowledge.

[25] From the Respondent / Plaintiff's perspective, it appears that an unnecessary delay in the proceedings would be prejudicial to him since he has instituted the action for divorce.

[26] When balancing out all the above interests at play, substantial grounds do not appear to exist for an application of Rule 33(4). Furthermore, it would not be convenient for all concerned and would not serve the interests of justice for the issues pertaining to the matrimonial property regime of the parties to be decided in a separate application.

Order

[27] In the result, the application is dismissed with costs in the cause.

W AMIEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES:

Counsel for the Appellant:	I Vorster (with right of appearance in the High Court)
Counsel for the Respondent:	T Odendaal
Instructed by:	Weavind and Weavind Inc
Case number:	32041/2022
Date heard:	29 August 2024
Date of judgment:	29 October 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is **29 October 2024.**