REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 83614/2014

(1) REPORTABLE: ~~YES /~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES/~~NO
(3) REVISED. No

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DATE SIGNATURE

In the matter between:-

T. J. H. Applicant/Plaintiff

and

E. H. Respondent/Defendant

JUDGMENT

CRUTCHFIELD AJ:

[1] This matter was set down for trial, for the second time, on Thursday, 15 June 2017.

[2] The matter was referred to me to determine the plaintiff's application for a postponement of the trial, and the defendant's counter-application for a separation of the certain patrimonial issues from the balance of the issues in the divorce proceedings. Both applications were opposed.

[3] I would have liked more time to consider the issues and to prepare this judgment.

[4] The parties were married on 17 April 1999 out of community of property and subject to the accrual regime. Two children were born of the marriage, a daughter, on [….] 2007 and a son, on [….] ber 2009 ('the children').

[5] It was common cause before me that section 6 of the Divorce Act 70 of 1979, ('the Divorce Act'), precluded the granting of a decree of divorce given a dispute raised by the plaintiff regarding the best interests of the children.

[6] The plaintiff instructed his current attorney of record towards the end of September 2016. His previous attorneys had retained their file of the matter pursuant to a fee dispute between them and the plaintiff.

[7] The defendant also appointed her current attorneys of record at about the same date.

[8] The plaintiff launched the substantive application for the postponement on 22 May 2017 alleging various grounds relied upon by him for the postponement.

[9] Both parties referred to *Myburgh Transport v Botha t/a SA Truck Bodies*[1]. As stated therein, the administration of justice requires that proper consideration be given to the relevant principles, and that postponements not be merely for the asking.

[10] That the decision regarding a postponement is a matter of judicial discretion, is trite.

[11] The SCA in *Magistrate Pangarker v Botha*[2] contextualised the relevant principles within the ambit of matrimonial proceedings,[3] specifically referring to the competing right of the opposing party (the defendant in the current matter), to have the 'matrimonial dispute' settled swiftly.[4]

[12] It is not without significance that this matter incepted during November 2014 at the hand of the plaintiff, and, has not since been finalised despite the current date being the second trial date allocated for the hearing.

[13] The plaintiff relied primarily on the following grounds for the postponement, namely;

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1 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS).
2 *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA).
3 In paras [24] – [28].
4 In para [32].

13.1 His attorney's only gained possession of the pleadings and notices in the matter on 22 March 2017;

13.2 The defendant had 'misrepresented' to the plaintiff that the matter would be postponed; and

13.3 His pending application in terms of Rule 43(6) for the appointment of an expert to investigate the best interests of the children, (which application the plaintiff launched on 19 May 2017), and the plaintiff's amendment to the pleadings purposed at formulating a dispute in respect of the interests of the children.

[14] The chronology of events in this matter is instructive.

[15] The trial was set down for hearing on the first occasion, on 18 March 2016, on which date it was postponed by agreement between the parties.

[16] The defendant's attorneys obtained the current trial date of 15 June 2017, notice of which was served on the plaintiff's attorneys, and receipt acknowledged by them on 6 October 2016, some six (6) months prior to the date of trial.

[17] Despite notice of the trial date, the plaintiff's attorneys were not furnished with the pleadings and notices until 22 March 2017, some three (3) months before the trial date.

[18] Notwithstanding acknowledgment of receipt of the notice of set down on 6 October 2016, the plaintiff's attorneys requested copies of the pleadings for the first time, on 1 November 2016. The defendant's attorneys replied on 4 November 2016 albeit enclosing the incorrect banking details, which letter was not received by the

plaintiff's attorneys. Nothing further was heard from the plaintiff's attorneys in respect of the pleadings, until 12 February 2017 or thereabouts, a delay of some four (4), months since receipt of the trial date by the plaintiff's attorneys.

[19] Payment was made on 20 March 2017 and the copies furnished on 22 March 2017.

[20] In the light of the plaintiff's failure to take any steps in this regard, from between early November 2016 until February 2017, the fact of no pleadings is not a reason to grant a postponement at the instance of the plaintiff.

[21] Furthermore, no basis exists for the delay of the defendant's right to finality of the divorce proceedings pursuant to the plaintiff's fee dispute with his previous attorneys.

[22] One of the principles to be considered in determining postponement applications is that a court will not assist a litigant who has been the author of his own misfortune, as the plaintiff appears to be in this regard, and suffers injustice pursuant to his own misconduct.[5]

[23] The plaintiff sought, in addition, to rely on an alleged 'misrepresentation', in reality a suggestion, by the defendant's attorneys on 10 February 2017, that the matter be postponed given that it was set down for trial on the last day of a four (4) day working week. The plaintiff, however, failed to accept the proposal.

[24] Whilst the plaintiff argued that the suggestion of a postponement was 'favourably considered' by the plaintiff, the plaintiff did not accept it, and went so far as to berate the

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5 *Magistrate Pangaker* in para [24], quoting *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) paras [16] – [22] & [25].

defendant's attorneys for approaching the office of the Deputy Judge President of this court, on the basis of a 'general consensus' between the parties regarding the postponement of the trial.

[25] As at 15 March 2017, the plaintiff's attorneys, who had not yet accepted the proposed postponement, made the convening of a pre-trial conference a precondition to any agreement on the postponement. The plaintiff argued that the pre-trial conference was insisted upon by the plaintiff as a means to obtain copies of the pleadings.

[26] In the circumstance, the plaintiff's claim that the plaintiff had 'misrepresented' that the matter would be postponed, which proposal was being 'favourable considered' by the plaintiff, was without merit.

[27] Given the failure by the plaintiff to accept the proposed postponement within a reasonable time, together with the approaching trial date, the defendant's attorneys advised on 30 March 2017, at the pre-trial conference, that the proposed postponement was no longer open for acceptance, and that certain issues were capable of determination at the trial.

[28] At that stage, the trial was some two and a half (2½) months hence and given the appropriate will, finalisation of the issues was possible, (more especially in the light of the plaintiff not having brought the application in terms of Rule 43(6) or proceeded to give notice of his intention to amend the pleadings, in respect of the best interests of the children).

[29] The plaintiff raised concerns regarding the interests of the children, on 16 September 2016, when he alluded to the appointment of an expert to investigate their best interests. Despite the defendant's unequivocal stance that there was no

reason for such appointment and that she would not agree thereto, it was only on 19 May 2017 that the plaintiff launched the currently pending application in terms of rule 43(6).

[30] On 31 October 2016, the defendant's attorney informed his counterpart that if the plaintiff sought to dispute the children's best interests at the trial, the plaintiff's pleadings required amendment in order to do so. Notwithstanding, it was on 7 April 2017, that the plaintiff served his notice of intention to amend his particulars of claim in respect of the issue. Whilst the defendant initially objected to the proposed amendment, the defendant's attorney withdrew the objection by way of correspondence subsequent to considering the plaintiff's application for the proposed amendment.

[31] A dispute regarding the costs of the amendment, now unopposed, erupted, resulting in the plaintiff refusing to perfect the amendment. The plaintiff, in argument before me, insisted that a formal withdrawal of the objection by way of notice was necessary. I disagree with the plaintiff's view, which adopts an unduly formalistic approach to the issue. I alluded at the hearing, to the fact that the amendment had in all likelihood lapsed and all that the plaintiff required to do, was to file a fresh notice of intention to amend.

[32] Given that the amendment was now unopposed, it could be sought from a court on the basis that the costs of the amendment be determined by agreement, at the trial.

[33] In the light of the defendant realising that the trial could not be finalised pursuant to the dispute raised by the plaintiff regarding the children, the defendant gave notice on 2 May 2017, of her intention to amend her counterclaim by the insertion of various claims arising from the determination of the accrual, an issue already before the court.

[34] Thereafter, on 25 May 2017, the defendant's attorney suggested the separation of certain issues for hearing at the trial on 15 June 2017. The plaintiff refused. Before me, the plaintiff insisted that the entire matter required postponement. The plaintiff argued that the defendant knew from 30 March 2017, the date of the pre-trial conference, that the trial was not ready and could not proceed. Thus, the plaintiff claimed that the defendant's opposition to the postponement application was unreasonable, and justified an adverse costs order against the defendant in respect of the postponement application.

[35] However, by 30 Mach 2017 the defendant, in the light of the plaintiff's failure to accept the proposed postponement, had commenced preparation for trial and held the view that whatever could be salvaged on 15 June 2017, should be dealt with.

[36] As at the trial date, the defendant had finalised her amendment and the plaintiff had amended his pleadings consequentially, approximately one week before the trial.

[37] The defendant's amendment, from a substantive perspective, did not raise any new issue but served to particularise the existing issues within the overarching issue of the determination of the accrual, and should have been covered by preparation of the already pending dispute regarding the determination of the accrual.

[38] The defendant's amendment comprised a claim for payment of one half of the difference of the accrual, the determination of the commencement value of the defendant's estate, an order for the appointment of a receiver having powers to attend to the division of the accrual, an order appointing a liquidator to terminate the joint ownership of the immovable property by the sale thereof and division of the proceeds, together with an order that half of an amount unlawfully withdrawn from the joint bond account by the plaintiff, be repaid to the defendant.

[39] In the light of the fact that the commencement values of both parties' estates pending issues at the trial under the rubric of the determination of the accrual regime, the determination of the commencement value of the defendant's estate did not raise an issue that was not otherwise on the pleadings.

[40] As regards the amended claim for repayment of funds withdrawn by the plaintiff from the mortgage bond, this issue was mooted in correspondence between the parties, to which the plaintiff replied that it was his own money that he had withdrawn.

[41] As for the balance of the defendant's amendment, it refers to matters of a procedural rather than a substantive nature, such as the appointment of a receiver to determine the accrual and the appointment of a liquidator to deal with the termination of the co-ownership of the parties' erstwhile marital home.

[42] The plaintiff argued that he was not able to proceed on the separated issues for various reasons, including that he had not procured an expert to deal with the determination of the commencement value of the defendant's estate.

[43] No reason was given for the plaintiff's failure to procure an expert other than his attorneys not having the pleadings until 22 March 2017. Given the plaintiff's failure for some months to take the necessary steps as set out afore, the absence of pleadings is not an adequate reason for his failure to procure an expert. Moreover, the plaintiff did not explain why he had not procured the expert since obtaining the pleadings on 22 March 2017. Thus, any prejudice suffered by the plaintiff as a result, was due to his own inaction.

[44] The plaintiff referred to various requested documents that were outstanding and necessary for the purpose of preparing on the issues the defendant sought to be

separated. The plaintiff's rule 35(3) notice was dated 25 April 2017 and remitted to the defendant's attorney on 11 May 2017. The discovery issues could have been finalised prior to the trial date.

[45] Whilst the defendant argued various reasons before me as to why the accrual required determination in terms of section 8 of the Matrimonial Property Act 1988, this is not an issue to be decided by me, other than to find that the defendant did indeed, make out a case for potential patrimonial prejudice to her in the event of the plaintiff's postponement application being granted.

[46] The defendant argued that the application for postponement was neither *bona fide* nor brought timeously, at the earliest opportunity as required. The defendant's arguments in this regard were not without merit, pursuant to the apparent failure by the plaintiff to take meaningful steps to ready the matter for trial, notwithstanding him being *dominus litis.* A substantial case was made by the defendant as to the plaintiff having failed for lengthy periods of time to take the relevant and appropriate steps, which delays were not adequately explained by him.

[47] Regard being had to the items to which the plaintiff did attend prior to the trial date, it is evident that these matters were attended to by the plaintiff in the approximately 2½ months prior to the trial date, in circumstances where they ought to have taken place far earlier.

[48] The plaintiff complained of irreparable prejudice to him if the postponement was refused. However, I cannot find that the plaintiff's application, given the unexplained delays on his part as referred to afore, including the lateness of the Rule 43(6) application and the amendment to his pleadings, (which is easily resolved with the appropriate inclination to do so), that the plaintiff acted in good faith.

[49] In addition, a substantial case was made by the defendant that the plaintiff waited until after inception of the Rule 43(6) application and the amendment to his pleadings, to launch the application for postponement. This is in circumstances where the plaintiff raised the interests of the children as an issue, during September 2016.

[50] Furthermore, it was clear to the plaintiff at the pre-trial conference on 30 March 2017, that the defendant would not agree to a postponement. Yet the plaintiff waited until 22 May 2017, to launch the application.

[51] In the circumstances, the plaintiff has only himself to blame for any prejudice that may be suffered by him pursuant to any failure of the application for a postponement.

[52] In considering the question of fundamental fairness and justice, which might entitle the plaintiff to a postponement notwithstanding the lateness of his application, I am enjoined to consider equally, the defendant's rights to finality and to an opportunity to continue with her life free of the 'shackles' of her marriage to the plaintiff.[6] That finality, pursuant to section 6 of the Divorce Act, is unattainable at this stage. However, fairness being a bilateral concept, it includes consideration of the defendant's claim for finality on those issues that do not fall within the rubric of section 6, being the patrimonial issues arising from the divorce.

[53] In the circumstances, I cannot find that the plaintiff has made out a case for the postponement of the trial.

[54] The defendant has already endured a first postponement of the trial, and given that the matter has been pending since November 2014 it would be grossly unfair to

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6 *CC v CM* 2014 (2) SA 430 (GJ).

permit the plaintiff, regard being had to the facts and circumstances referred to herein, to deprive the defendant of finality of those issues capable of finalisation.

[55] The determination, at this stage, of the separated issues, would go some way to compensating the defendant for the inevitable delay that will result from the necessary postponement of the decree of divorce and the best interests of the children.

[56] The plaintiff objected to the separation application on the basis *inter alia*, of a duplication in various respects. The issues to be separated as claimed by the defendant are entirely discreet from the issue of the granting of the divorce, (in respect of which the irretrievable breakdown of the marriage was common cause), and the children's best interests. No overlap of the evidence will result from a separation of the issues.

[57] Whilst it is correct that the plaintiff and the defendant would potentially require to both give evidence twice, albeit on different facts, a trial on the separated issues would be significantly shortened by the postponement of the issues in respect of the children, which may well, but not necessarily, become settled between the parties in time to come.

[58] Other than the plaintiff and the defendant themselves, the potential witnesses to the separated issues are entirely different from those to be called in respect of the interests of the children.

[59] Given that the patrimonial issues in dispute and the issues around the children are discreet, there would be no reason for the same judge to be appointed to determine both the separated and the postponed issues.

[60] The plaintiff argued before me that the defendant's proposed relief in terms of section 8 of the Matrimonial Property Act, was ill-considered in the light of the decision in *Le Roux v Le Roux*[7], in terms of which the determination of an accrual could only be claimed once the order of divorce was granted. The SCA[8] disagreed with the view expressed in *Le Roux*. Moreover, the SCA referred to section 8 as constituting an 'exception'[9] to the fact that a spouse acquires the right to claim the accrual upon the dissolution of the marriage.

[61] Separation applications are not easily granted in matrimonial proceedings. It is not the policy of our courts to separate issues in marital matters,[10] but rather to require the parties to deal, once and for all, with the entirety of the issues between them, in order that finality can be brought to the matter as a whole, as soon as possible.

[62] Moreover, pursuant to the very nature of these proceedings, the evidence required by the various issues generally overlays, precluding clear lines from being drawn between the evidentiary material on the various disputes.

[63] However, the distinguishing factor in this matter is that both parties concede that a decree of divorce cannot be granted in terms of the separated issues and should be postponed *sine die*. That serves to preserve the rights of the parties and the children in terms of rule 43 pending finalisation of the divorce.

[64] The defendant was frank in the admission that the claim for separation arose as a result of the application for a postponement and an attempt to save something of the second trial date. The plaintiff cannot justifiably seek a second postponement of the

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7 *Le Roux v Le Roux* [2010] JOL 26003 (NCK).
8 *AB v JB* 2016 (5) SA 211 (SCA) at 217A-B.
9 In para [16].
10 *Tudoric-Ghemo v Tudoric-Ghemo* 1997 (2) SA 246 (W).

trial and simultaneously prevent the defendant from exercising even a limited right to finality.

[65] My task is to determine, primarily, whether it is convenient to separate the issues in respect of which the defendant sought a separation. Notions of fairness, justice and convenience to both parties as well as the court, are inextricably wound up with each other and require consideration. I have already found that it would be unfair on the defendant to order a postponement of the trial in its entirety, which may potentially result in her having to wait until the last quarter of 2018 for a trial date.

[66] The result would be a wait of four years, the unfairness of which is self-evident, and cannot be countenanced. Given the nature of the claims to be made by the defendant in terms of the separation, the granting of the separation would facilitate the expeditious determination of the patrimonial aspect of these proceedings. Other than the parties themselves having to testify twice, albeit on wholly discreet facts, there would be no further inconvenience to them.

[67] Absent inconvenience, a court is enjoined to grant a separation as I propose to do.

[68] Both parties claimed costs. In my view, the costs should follow the outcome.

[69] In the circumstances, I grant the following order:

1. The application for postponement is dismissed with costs.

2. The application for separation in terms of Rule 33(6) of the Uniform Rules of Court is granted with costs.

3. The following issues are to be determined separately from the balance of the issues in dispute between the parties:

3.1. Whether or not the accrual should be divided immediately in terms of section 8 of the Matrimonial Property Act;

3.2. Whether, for purposes of the determination of the accrual of each party's estate, the net value of the defendant's estate is R300 000.00;

3.3. Whether a receiver should be appointed with the powers set out in prayers 5.2.1 to 5.2.18 of the defendant's amendment to determine the division of the accrual;

3.4. Whether the co-ownership in the property described as the Remaining Extent of Portion No 20 of the Farm K. 297, Registration Division JR, Gauteng should be terminated;

3.5. Whether the defendant is entitled to repayment by the plaintiff of the sum of R310 000.00 withdrawn by the plaintiff from the joint mortgage bond account;

3.6. Whether a liquidator should be appointed to sell the immovable property, referred to in 3.5 above and divide and pay the proceeds of the sale in terms of prayer 6.2 and 6.3 of the defendant's counterclaim;

3.7. That the balance of the issues under case number 83614/2014 be postponed *sine die*.

4. The plaintiff is ordered to pay the wasted costs arising from the postponement of the trial under case number 83614/2014.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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DATE OF HEARING	Friday, 15 June 2017
DATE OF JUDGMENT	19 June 2017