



DIVORCE & RELATED MATTERS

RESOURCE MATERIAL

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DIVORCE & RELATED MATTERS

ACTIONS AND APPLICATIONS PRESENTATION

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Actions and Applications



WHAT PROCEDURE?

- S11 Of Act 70 of 1979
- Action or application?



- The summons should also warn the defendant of consequences of failing to enter an appearance to defend.
- The summons shall substantially correspond with Form 1
- Any amendment before service of the summons whether before or after issue by the registrar shall be initialed by the registrar.



- Any party who wishes to amend any pleading shall give the other party notice of the intent to amend and the particulars of such amendment.
- If there is no objection within 10 court days of delivery of the notice to amend the amendment will be effected.



- Any objection to an amendment shall clearly and concisely state the grounds upon which the objection is based.
- The court may grant leave to amend provided no party will be prejudiced in the conduct of his action or defence
- Particulars of claim will be annexed to summons




2nd- APPEARANCE TO DEFEND- Rule 22

- Defendant may enter an appearance to defend within the stated period by delivery of the appearance to the Registrar and the plaintiff or his legal representative.




3rd – PLEA and CLAIM IN RECONVENTION
Rule 23

- Within 10 days after entry of appearance to defend defendant must deliver a PLEA.
- In the plea the defendant shall admit or deny or confess and avoid all the material facts alleged in the particulars of claim.
- The plea shall clearly and concisely state the nature and grounds of the defence




- Any exception to the summons or special defence must be included in the plea
- Any claim in reconvention shall also be delivered with the plea.
- A defendant to a claim in reconvention shall deliver a plea within 10 court days of such a claim in reconvention



EXCEPTIONS/SPECIAL DEFENCE

- A defence which can be adjudicated upon without the necessity of going into the main case
- May be set down by either party for **SEPARATE HEARING** upon 10 court days notice after such defence has been raised.



FAILURE TO DELIVER A PLEA- Rule 24

- If there has been an appearance to defend but the defendant has failed to deliver a plea the plaintiff may deliver a notice in writing calling upon the defendant to deliver a plea within 10 days from service of this notice and
- Further warning the defendant that failure to do so may result in the case being set down without further notice and judgment may be given against him in his absence.



REPLICATION & OTHER PLEADINGS – Rule 25

- A plaintiff may within 10 days of delivery of a plea deliver a replication to the plea
- A replication which is a mere joinder of issue or a bare denial of allegations shall not be necessary
- A plaintiff in reconvention after 10 days of delivery of plea in reconvention may deliver a replication in reconvention.



- Failure to deliver a replication within the time limit is ipso facto barred from delivering a replication



CLOSE OF PLEADINGS

- Pleadings are closed upon the delivery of a replication or if no reply is delivered upon the expiration of the period for a reply ie 10 court days after delivery of the plea –amendment?



SET DOWN – Rule 29

- The plaintiff shall deliver a notice of trial (on a day and a place approved by the registrar)
- If the plaintiff does not do so within 20 court days after the pleadings have closed the defendant may deliver the notice of trial
- The notice shall be delivered at least 20 court days before the trial date





DIVORCE & RELATED MATTERS

APPLICATIONS – RULE 33

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APPLICATIONS – Rule 33

- ◆ Application procedures are used to obtain specific relief within a shorter time
- ◆ Usually used when there is no dispute of fact and the matter can be decided on the papers.

EX PARTE APPLICATIONS

- ◆ Made without first giving notice to the other side because the relief sought generally affects only the applicant.
- ◆ Eg applications for substituted service or edictal citation
- ◆ Applications may be made ex parte if giving notice to the other party would defeat the effectiveness of the remedy being sought

- ◆ Or where the applicant is facing imminent danger or harm the ex parte application may be made on an URGENT BASIS

APPLICATIONS ON NOTICE

- ◆ All other application shall be brought on notice to the other party
- ◆ Applicant must then furnish an address within the designated proximity to the seat of the court where he would receive service of processes.

INTERLOCUTARY APPLICATIONS

- ◆ Are preliminary orders which do not have a bearing on the main issue in the case.

URGENT APPLICATIONS

- ◆ Court may dispense with the forms and requirements for service as per the Rules and may hear such matter according to procedure as is required in the circumstances.

WHAT REMEDIES ARE SOUGHT VIA APPLICATION PROCEDURE?

- ◆ Maintenance pendente lite
- ◆ Contribution towards costs
- ◆ Interim custody of any child
- ◆ Interim access of any child
- ◆ Appointment as curator ad litem

PROCEDURE

- ◆ All applications shall be by way of NOTICE OF MOTION supported by an affidavit which sets out the facts upon which the applicant relies.
- ◆ This notice shall substantially correspond with Form 3 and true copies shall be served upon every party to whom notice must be given

◆ If the respondent wishes to oppose he has 15 court days from date of service of the application in which to file a notice of opposition. (this date will be stated in the notice)

◆ If respondent does not wish to oppose the application within the 15 court day period, the applicant may set the matter down for hearing at least 10 court days after the expiry of the initial 15 court day period.

PROCEDURE – EX PARTE APPLICATIONS

◆ All ex parte applications shall be filed with the registrar and registrar will set down date

◆ Ex parte application shall have a notice of motion which shall substantially correspond with Form 2

◆ An ex parte application may be opposed by a person having an interest and who may be affected by a decision in such an application

◆ Such person may deliver a notice of application to oppose setting forth the nature of their interest and the grounds upon which they wish to be heard.

- ◆ The registrar shall set down such an application for hearing at the same time as the initial ex parte application
- ◆ Any person against whom an order is granted ex parte may anticipate the return date upon the delivery of such a notice within at least 48 hours



DIVORCE & RELATED MATTERS

JURISDICTION PRESENTATION

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JURISDICTION

S2 of Divorce Act 70 of 1979

S1(1)- “divorce action”

- Question of Jurisdiction is relevant in any divorce action
- Includes:-
- Issue of summons
- Pendente lite applications

- Applications for maintenance, custody, control or access,
- Costs and
- Permission to serve summons by way of edictal citation or substituted service

S2(1)(a) :- a court shall have jurisdiction in a divorce action if the parties or either of the parties is **domiciled in the area of jurisdiction of the court on the date on which the action is instituted**; or

▪ S2(1)(b):- the parties are or either of the parties is **ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in RSA for a period of not less than one year immediately prior to that date.**

Domicile

- Intention to stay there is permanent
- The common law principle of the wife adopting the husbands domicile has been abolished into the Domicile Act 3 of 1992

Ordinarily resident

- Requirements are less than the stipulation for domicilium but there still has to be a reasonable degree of permanency.
- “Ordinarily” ie often, usually or habitually contra with temporary or for the time being or a passing resident.

- If one of the parties has moved to another province, the decision out of which court to issue summons is generally one of convenience.
- The party may allege that he/she is not there only temporarily but intends to make the new province his/her place of living and thus is within the area of jurisdiction of the court.

- Where the parties are domiciled in the RSA on the date the action was instituted, the laws of the Republic will be applicable.
- If not domiciled in SA any points in dispute will be settled in accordance with the foreign law applicable had the parties been domiciled in the jurisdiction of the particular foreign court on the date that the divorce proceedings are instituted.

- NB:
- The patrimonial consequences of the divorce are determined by the law of the country where the husband was domiciled at date of marriage. S7(9) of Act 70 of 1979

Variation of Order

- After a final divorce order is made ito s8 of Act 70/1979 a maintenance order or an order with regard to the care or guardianship of, or contact with, a child, made ito the Act, may at any time be rescinded or varied or in the case of a maintenance order or an order with regard to contact with a child, be suspended by a court if there is sufficient reason therefor.

If:- s8(2) of Act 70/1979

- Both the parties are domiciled within the area of the jurisdiction of the court, or if
- Only the applicant is domiciled within the court's jurisdiction and the respondent has assented to the jurisdiction of the court.

BUT IF

- An inquiry is instituted by the Family Advocate in terms of S4(1)9b) or 2(b) of the Mediation in Certain Divorce Matters Act 24 of 1987 such an order with regard to the care or guardianship of, or contact with, a child shall not be rescinded or varied, or in the case of an order with regard to contact with a child, shall not be suspended before the report and recommendation has been considered by the Court.

- See:
- Zorbas v Zorbas 1987 (3) SA 436 W
- Martens v Martens 1991 (4) SA 287 (T)

To declare marriage null and void

- S2(1)(b) of Act 70/1979 do NOT apply
- Common law principles of jurisdiction apply
- Where the marriage is null and void **ab initio**
- The court in whose are of jurisdiction the “marriage” took place
- Or

- The court where the “husband” or “wife” or both were domiciled on the date of the institution of the action.
- Where the marriage is **voidable**, the court of any of the party’s domicilium has jurisdiction.

Damages against third parties

- Ordinary rules of jurisdiction apply ie only the court of which the defendant is an incola has jurisdiction

Recognition of Annulment of Marriages or Divorce orders from Foreign Courts –S13

- The validity of a divorce order or an order for a declaration of annulment of a marriage issued by a court in a foreign country is recognized by our courts if any one of the parties on the date that the order is made:-

- Is domiciled in that particular country; or
- Was ordinarily resident in that country; or
- Had the nationality of the country.



DIVORCE & RELATED MATTERS

GROUNDS OF DIVORCE PRESENTATION

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GROUNDS OF DIVORCE

S3 - DISSOLUTION OF MARRIAGE & GROUNDS OF DIVORCE

- A marriage may be dissolved by a court by a decree of divorce and the only grounds upon which a decree of divorce may be granted is the following:-

- a) the irretrievable breakdown of the marriage;
- OR
- b) the mental illness or the continuous unconsciousness of a party to the marriage

S4 - IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE

- S1 - A court may grant a decree of divorce on this ground if the court is satisfied that the relationship between the parties has reached SUCH A STATE OF DISINTEGRATION THAT THERE IS NO REASONABLE PROSPECT OF A NORMAL MARRIAGE RELATIONSHIP BEING RESTORED BETWEEN THEM

- S4(2) Without excluding any other fact or circumstances which might be indicative of irretrievable breakdown the court may accept evidence of the following as proof of irretrievable breakdown:-
 - a) that the parties 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,

- b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship,
 - c) that the defendant has ito a court sentence been declared a habitual criminal and is undergoing imprisonment as a result of the sentence.

S4(3) – DISCRETION TO NOT GRANT A DIVORCE

- The court still has a discretion not to grant a divorce order but may postpone the proceedings sine die or dismiss the claim if it appears to the court that there exists a **REASONABLE POSSIBILITY** that the parties may become reconciled through marriage counseling, treatment or reflection.

- Additionally if the court is not satisfied that the interests of dependant and minor children have been properly safeguarded – S6(1) and (2), then the granting of a divorce may be postponed

- The summons will usually contain the averment that further marriage counseling and/or treatment and/or reflection will not lead to any reconciliation.
- Even if the divorce is unopposed this evidence must be tendered.
- If unopposed and the matter is postponed in terms of S4(3) the court may direct that the action be tried *de novo* by any other magistrate

S5-MENTAL ILLNESS OR CONTINUOUS UNCONSCIOUSNESS

- MENTAL ILLNESS – S4(1)
- If the court is satisfied of the mental illness of the defendant the court may grant a decree if
- The defendant in terms of the Mental Health Act 18 of 1973 -
- has been admitted as a patient in terms of a reception order;
- Is being detained as a state patient;

- Is being detained as mentally ill convicted prisoner
- And that he has for a CONTINUOUS PERIOD OF AT LEAST 2 YEARS immediately prior to the institution of the divorce action, not been discharged unconditionally and

- After having heard the evidence of at least 2 psychiatrists (one of whom will be appointed by the court) that the defendant is mentally ill and there is no reasonable prospect that he will be cured.

S5(2)- CONTINUOUS UNCONSCIOUSNESS

- A court may grant a decree on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness if the court is satisfied:-
- That the unconsciousness has lasted for a continuous period OF AT LEAST 6 MONTHS immediately prior to the institution of the divorce action AND

- After having heard the evidence of at least 2 medical practitioners (of whom one shall be a neurologist/neurosurgeon appointed by the court) that there is no reasonable prospect that the defendant will regain consciousness.

- A curator ad litem must be appointed to protect the interests of the defendant
- The court may appoint a legal practitioner to represent the defendant and the plaintiff ordered to pay the costs of such representation.
- The court may make any order it may deem fit in the circumstances with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the dissolution of the marriage.

▪ NB: s9(2) – when the court has granted a divorce on the grounds of mental illness or continuous unconsciousness of the defendant , NO ORDER FOR FORFEITURE of any patrimonial benefits shall be made against the defendant.

▪ NB Customary Marriages may not be dissolved on the grounds of mental illness or continuous unconsciousness s8(1) of Act 120/1998

S5A – REFUSAL TO GRANT A DIVORCE

▪ If it appears to the court that despite the granting of a divorce the spouse/s because of prescripts of their religion will not be free to remarry unless the marriage is also dissolved in terms of the religion or unless a barrier to remarriage is removed the court may refuse to grant a divorce.

▪ Unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the barrier removed has taken all necessary steps to have the marriage so dissolved or the barrier so removed, or the court may make any order it deems just.



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BASIC AVERMENTS PRESENTATION

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BASIC AVERMENTS

- Who is plaintiff
- Who is defendant
- Jurisdiction
- Parties still married, how, when, where. (if ANC attach copy
- Children, if so who are they.
- In KZN practice is that full names, gender and dates of birth of children are set out.
- Averments with regard to care arrangements, custody etc

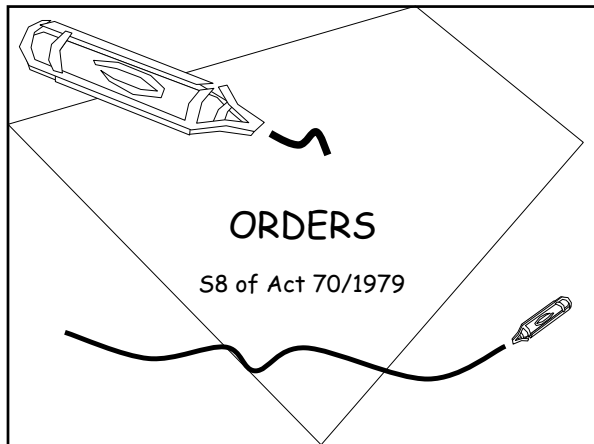
- Attachments ito Mediation Act 24 of 1987 eg Annexure A, affidavit.
- Ground of divorce either irretrievable breakdown or mental illness or continuous unconsciousness
- Proprietary claim/ forfeiture
- Eg claim for damages etc etc
- Prayer

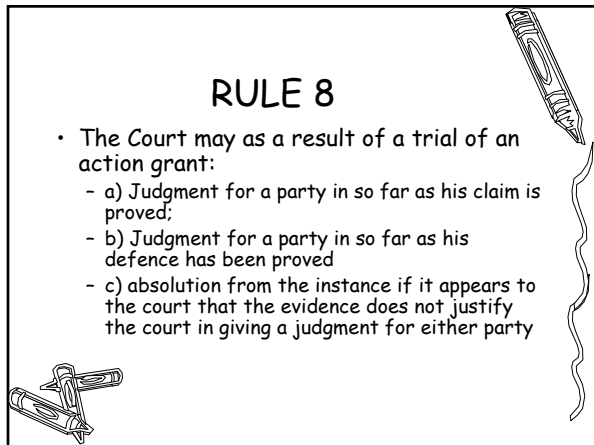


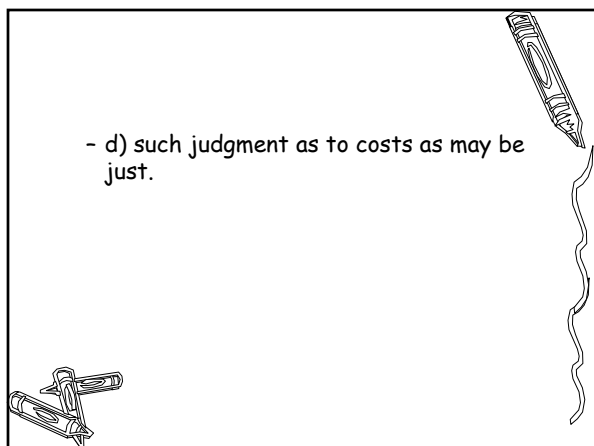
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ORDERS PRESENTATION

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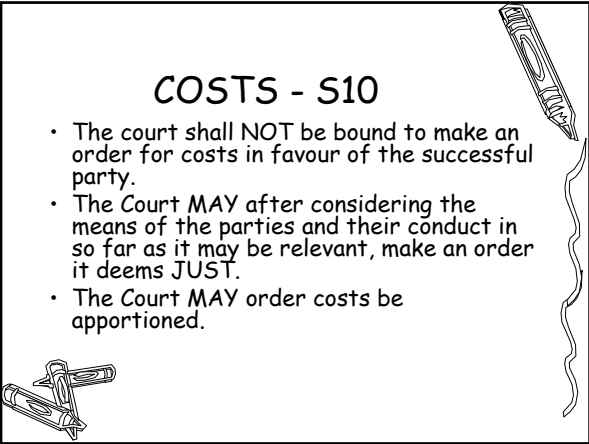




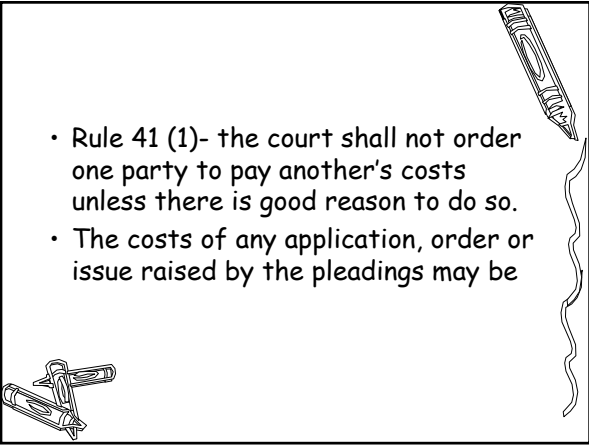


COSTS - S10

- The court shall NOT be bound to make an order for costs in favour of the successful party.
- The Court MAY after considering the means of the parties and their conduct in so far as it may be relevant, make an order it deems JUST.
- The Court MAY order costs be apportioned.



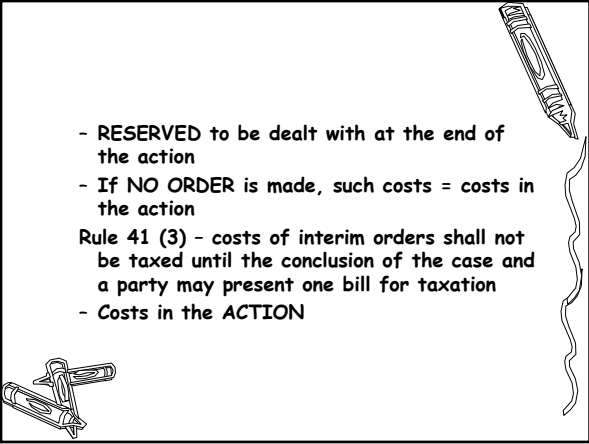
- Rule 41 (1)- the court shall not order one party to pay another's costs unless there is good reason to do so.
- The costs of any application, order or issue raised by the pleadings may be

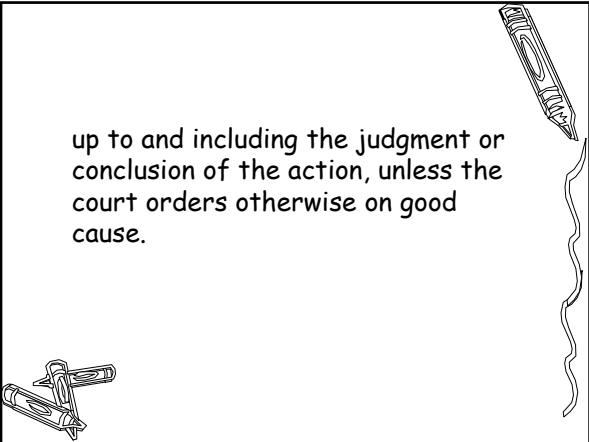


- RESERVED to be dealt with at the end of the action
- If NO ORDER is made, such costs = costs in the action

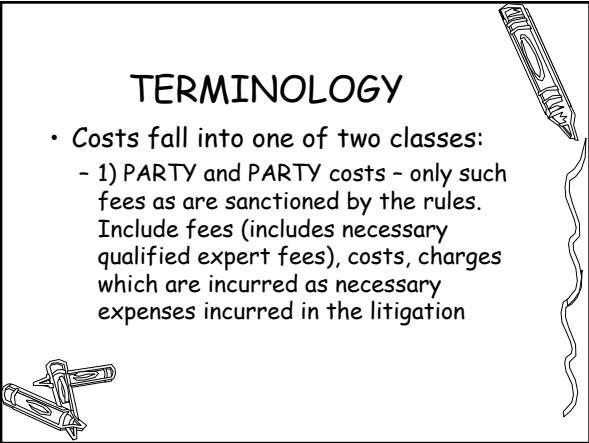
Rule 41 (3) - costs of interim orders shall not be taxed until the conclusion of the case and a party may present one bill for taxation

- Costs in the ACTION



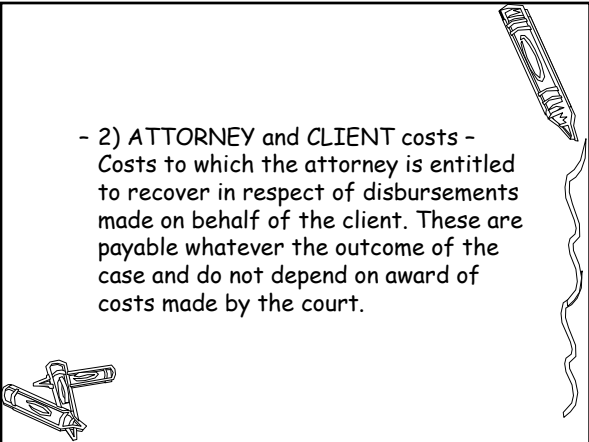


up to and including the judgment or conclusion of the action, unless the court orders otherwise on good cause.

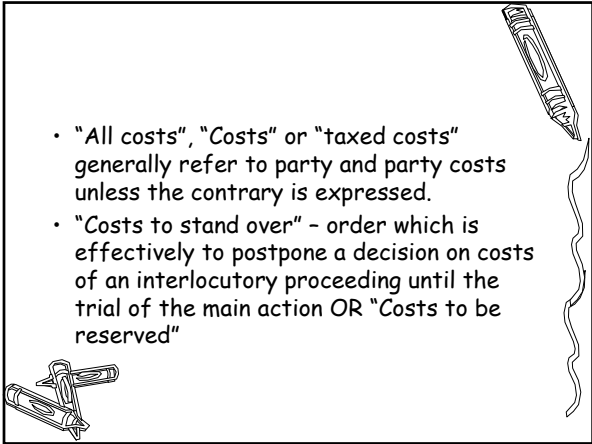


TERMINOLOGY

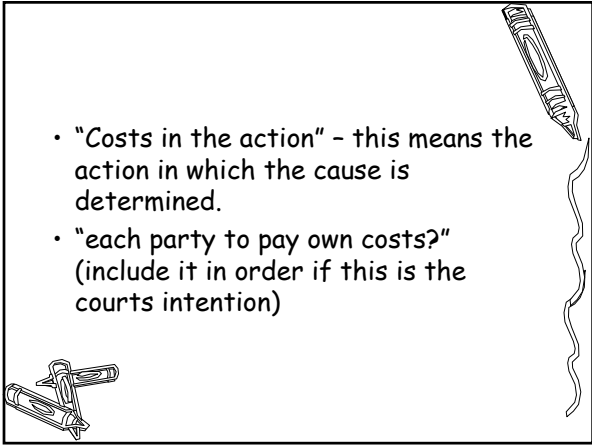
- Costs fall into one of two classes:
 - 1) PARTY and PARTY costs - only such fees as are sanctioned by the rules. Include fees (includes necessary qualified expert fees), costs, charges which are incurred as necessary expenses incurred in the litigation



- 2) ATTORNEY and CLIENT costs - Costs to which the attorney is entitled to recover in respect of disbursements made on behalf of the client. These are payable whatever the outcome of the case and do not depend on award of costs made by the court.



- "All costs", "Costs" or "taxed costs" generally refer to party and party costs unless the contrary is expressed.
- "Costs to stand over" - order which is effectively to postpone a decision on costs of an interlocutory proceeding until the trial of the main action OR "Costs to be reserved"



- "Costs in the action" - this means the action in which the cause is determined.
- "each party to pay own costs?" (include it in order if this is the courts intention)




DIVORCE & RELATED MATTERS


MATRIMONIAL PROPERTY REGIMES PRESENTATION

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MATRIMONIAL PROPERTY
REGIMES
by Kemi Behari



DIVORCE-EFFECTS



"It's finally over -- Frank's lawyer got the apartment and my lawyer got the two cars and the beach house"

MARRIAGES IN COMMUNITY OF
PROPERTY

- Prior to 1993 the husband had marital power over the wife which was abolished in 1993.
- Since then the provisions of the Matrimonial Property Act regarding equal administration of the joint estate by the husband and the wife, applied to all marriages in community of property, irrespective of whether they were concluded before or after 1 November 1984.

- The assets in the joint estate were to be divided equally between the parties, unless some form of forfeiture was ordered by the court in terms of section 9 of the Divorce Act.
- A forfeiture order however cannot be granted mero motu by the court by implication then it has to be specifically prayed for.
- The criteria which the Court will use to make such an order is: - the duration of the marriage, the circumstances leading to the break-down, or the substantial misconduct of one of the parties.
- The duration of a marriage is considered the most important factor.

- The basic test is whether if the order is not granted the one party will in relation to the other be unduly benefited. In this regard see Botha v Botha 2006 (4) SA 144 SCA .
- In this case, the Supreme Court of Appeal set out the provisions of section 9(1) of the Divorce Act in terms of which the court granting the decree of divorce may order that the proprietary benefits of the marriage be forfeited by one party in favour of the other, either wholly or partially, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down of the marriage and any substantial misconduct on the part of either of the parties.
- It must be satisfied that, if the forfeiture order is not made, the one party will be unduly benefited in relation to the other party. The forfeiture order can be up to 100% of the benefits.

MARRIAGES OUT OF COMMUNITY OF PROPERTY WITHOUT ANY FORM OF ACCRUAL AND CONTRACTED BEFORE THE 1ST OF NOVEMBER 1984.

- Based on the principle that each spouse has his or her own separate estate.
- Any donations made in terms of an ante-nuptial contract can be enforced and donations already made, remain the property of the receiver.
- In this situation forfeiture may also be requested and then donations already made must be returned, alternatively donations in terms of an ante-nuptial contract, which are not yet executed, cannot be enforced anymore. See Matyila v Matyila 1987 (3) SA 230 W and Klerk v Klerk 1991 (1) SA 265 W.



APPLICATIONS IN DIVORCE
AND RELATED
PROCEEDINGS

Applications on notice:

- With the exception of ex parte applications all applications to the court must be brought on notice to the other party.
- The applicant then has to furnish an address within a designated proximity to the seat of the court where he would receive notices.

Interlocutory
applications:

- An interlocutory order is a preliminary order which does not have a decisive bearing on the main issue of the case.
- It is an intermediate application wherein an interim order is made and does not determine the main issue in the action.

- Section 7 subsections 3 and 4 of the Divorce Act - the Court has a discretion in appropriate circumstances to make an order that a spouse must transfer a portion of his or her estate to the other spouse, if the court is satisfied that the spouse did directly or indirectly, financially or otherwise (for example by rendering services or effecting savings), contribute to the increase or maintenance of the other spouse's estate. [Only marriages contracted out of community of property before the 1st of November 1984.]
- The Court can also lay down terms for the transfer of such assets, the period wherein it must be done as well as the rendering of security in the interim period.

RELATED CASE LAW

- In *Bezuidenhout v Bezuidenhout* [2004] 4 All SA 476 SCA, the Supreme Court of Appeal held that, "though comparative legal study has great value, English cases should be approached with circumspection."
- They emanate from the application of statutory provisions different from ours which, in turn, are to be construed against an entirely different common law system.
- Our common law provides for marriages in community of property as the norm, while the English system does not."

- The formulation of section 7(3) of Act 70/1979 shows a deliberate choice on the part of the legislature to limit the courts' discretion in interfering with the contractual election - good or bad - made by the parties when they entered into their marriage.
- The courts cannot go further than the legislature allows them to go. The legislature does not allow them to treat all marriages upon divorce as if they were in community of property and without an ante nuptial contract.

- In of Childs v Childs and Others NNO 2003 (3) SA 138 (C) Judge Foxcroft awarded the plaintiff 50% of her husband's net estate as a redistribution of assets in terms of section 7(3) of the Divorce Act.
- The Court approved the approach adopted in England of moving towards equality of distribution of assets between spouses on divorce and held that there was no reason to depart from the equality principle in the present case.

Other claims/ issues applicable to a marriage under this regime:-

- a party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he claims that he is entitled to such division, transfer or forfeiture.
- Details of the Plaintiff's, as well as the Defendant's estate must be provided.

- Apart from the usual allegation "that it would be just and equitable that the Honourable Court order the Defendant to transfer to the Plaintiff one half or such portion of the Defendant's estate as the Honourable Court may find to be just and equitable
- The pleadings may reflect that in terms of the provisions of section 7(3) read with section 7 subsections 4 & 5 of the Divorce Act , it would be just and equitable that the Honourable Court order the joinder of the parties' estates for purposes thereof and that the Defendant be ordered to transfer to the Plaintiff one-half or such portion of the conjoined estates of the parties as the Honourable Court may find to be "just and equitable".

- A spouse also has a claim in terms of section 23(3) of the Matrimonial Property Act 88 of 1984 for the payment of necessary expenses of the common household which exceed his/her pro-rata responsibility after considering his/ her income.
- For marriages contracted after the 1st of November 1984 such right of recourse does not exist anymore, unless otherwise agreed between the parties in terms of section 23(4) of the Matrimonial Property Act.

MARRIAGES OUT OF COMMUNITY OF PROPERTY AND WITH EXCLUSION OF THE ACCRUAL, CONTRACTED AFTER THE 1ST OF NOVEMBER 1984.

- In this case there is no claim for transfer of assets.
- The argument is that there are three choices of matrimonial property dispensations and if parties willingly decide to marry out of community of property and without the accrual system, one of the parties can not later request a redistribution of assets.

ASSESSMENT OF THE VALUE OF ESTATES:
In valuing the respective Estates the following principles are applicable:-

- The right to claim transfer of fixed property from an employer in terms of a housing subsidy provided to employees is a commercial asset in an estate. (Mathee No v Koen 1984 (2) SA 543 CPD)
- The right, title and interest in a leasing contract of a house in a municipal housing scheme is also a propriety right which must be dealt with in the estate. (Persad v Persad 1989 (4) SA 685 D)
- Insurance Policies: The surrender value of endowment and life policies as at the date of divorce is an asset in the relevant estate.

- Pension/ Annuities: In terms of section 7 (7) of the Divorce Act, a party's pension interest or interest in an endowment/ annuity fund, will be taken into account for the calculation of the value of the assets – this interest is deemed to be an asset in the estate although not yet payable.
- The pension interest value is calculated as if the member terminated his membership upon date of divorce and with respect to an annuity, a calculation is made including all the contributions made to the fund up to the date of divorce.

Provisions regarding Pension Interest:

- The value of a pension interest is determined by the definition in the Divorce Act, read with rules of the particular Fund.
- The Act does not provide for interest or growth on a share of the pension interest.
- The Fund cannot be required in a Deed of Settlement to add interest or growth from date of divorce until final payment of same.
- The member spouse may however be obliged to pay such interest or growth if he/ she had agreed to such in a settlement incorporated with the final order.

- If an allocation is not taxed before payment to the non – member spouse, provision is made that if any tax is payable due to the inclusion in the income of the member of the portion paid to the other spouse then such member may recover the amount paid for tax from the non – member spouse – see paragraph 2B, Schedule 2 Income Tax Act 58 of 1962 which provision came into operation on 24 November 1999.

PENSION INTEREST – DEED OF SETTLEMENT

- The correct name and registration number of the Fund to which the member spouse belongs;
- The reference number or member number of the spouse;
- Whether it is Plaintiff's or Defendant's member interest that is involved;
- The percentage (up to 100) of the pension interest, in which an order has to be made, alternatively expressed as a fixed amount;
- The time, manner and identity of the person to whom payment must be made;
- Requesting an order that the Fund must endorse the division of the pension interest on its records;

- Therefore in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall then, be deemed to be part of his assets.
- The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, in a previous divorce-
- was paid over or awarded to another party; or
- for the purposes of an agreement was accounted in favour of another party.



DIVORCE & RELATED MATTERS

APPLICATIONS INTERIM RELIEVE PRESENTATION

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Urgent applications:

- In the case of emergency, the court may dispense with the forms and requirements for service provided for in the rules and may hear the matter at such time and place and in such manner and according to such procedure as circumstances require. The rules should however be applied in so far as is practicable.
- Urgency would have varying degrees and it may be possible to have to hear a matter after court hours and in the absence of properly filed documents and in such circumstances oral evidence is most likely to be led. However in many cases this would not be necessary. Each case should be looked at according to its merits.

Counter applications:

- This would be a situation where the respondent wants to go further than merely having the application dismissed with costs. These specific prayers could be included in the answering/ opposing affidavit.

Remedies that could be sought by way of application are:-

- Maintenance pendente lite,
- contribution towards costs,
- interim custody of any child,
- and interim access to children,
- appointment as curator ad litem
- Edictal Citation
- Substituted Service

Procedure

- Generally the person launching an application i.e. the applicant shall deliver an affidavit setting out the relief claimed and the grounds upon which such relief is claimed, together with a notice to the respondent which shall substantially correspond with Form 6 of Annexure 2 to the rules of the Divorce Court.
- This notice and affidavit must be signed by the applicant or his or her legal representative. The must be a service address and because it is an initial document (process of court) launching the proceedings in court, such document must be served on the respondent by the sheriff.

- The respondent if intending to oppose such application may do so by delivering an affidavit in the nature of a plea, signed and giving an address for service, within the stipulated time period and should the respondent fail to deliver the opposing documents timeously then he shall be barred from doing so and the applicant may thereafter obtain the relief applied for by default.
- Once an application is opposed, the Registrar would set the matter down for hearing on not less than ten (10) court days notice to the parties.
- The court may then hear such evidence as is considered necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.
- The court may also, again using the same procedure, vary the decision referred to above in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

Application Process:

The application process then is as follows:-

- Every application (except those brought ex parte) shall be brought on notice of motion supported by an affidavit setting out the facts upon which the applicant relies for relief.
- When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person.
 - Every notice of motion shall conclude with the form of order prayed.

• An application may also be brought ex-parte and such application shall be filed with the registrar and set down on a day to be fixed by the registrar. An ex-parte application shall have a notice of motion:-

- The notice of motion shall set forth the form of order sought, specify the affidavit filed in support thereof, request the registrar to place the matter on the roll for hearing, and shall substantially correspond with Form 2 of Annexure 2.
- Any person having an interest which may be affected by a decision on an application being brought ex parte may deliver notice of an application by him or her for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he or she desires to be heard, whereupon the registrar shall set such application down for hearing at the same time as the application first mentioned.
- At the hearing the court may grant or dismiss either of or both such applications, as the case may require, or may adjourn the same upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.
- Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 48 hours' notice.

• Every application other than one brought ex parte shall be brought on notice of motion, which shall substantially correspond with Form 3 of Annexure 2, and true copies of the notice and all annexures thereto shall be served upon every party to whom notice thereof is to be given.

• The court after hearing an application, whether brought ex parte or otherwise, may refrain from making an order thereon, save as to costs, if any, but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.

• In urgent applications the court or the president of the division or a presiding officer assigned by him or her may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure, which shall as far as practicable be in terms of these rules, as it or the said president or presiding officer deems fit.

- For an urgent application, the applicant shall:-
- Set forth explicitly the circumstances which he or she avers render the matter urgent and,
- the reasons why he or she claims that he or she could not be afforded substantial redress at a hearing in due course.
- The court may on application, order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client: Provided that the application shall not be granted unless the court is satisfied that the applicant will be prejudiced in his or her case if it be not granted.
- NOTE: Any unopposed application may be heard in chambers.



DIVORCE & RELATED MATTERS

DIVORCE CHECKLIST

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C H E C K L I S T (UNOPPOSED DIVORCE)	
	1. MARRIAGE CERTIFICATE AND ANTENUPTIAL CONTRACT
	2. SIGNED ANNEXURE "A" (IF CHILDREN INVOLVED)
	3. PARTIES' CERTIFICATES I.T.O "FICA"
	4. SIGNED DEED OF SETTLEMENT
	5. STATISTICS FORM
	6. ORIGINAL SUMMONS
	7. RETURN OF SERVICE <ul style="list-style-type: none"> • PERSONAL SERVICE • DATE OF SERVICE • DATE DIES EXPIRES
	8. FAMILY ADVOCATE'S REPORT <ul style="list-style-type: none"> • DEED OF SETTLEMENT FORWARDED TO FAMILY ADVOCATE • FAMILY ADVOCATE'S APPROVAL
	NOTICE OF SET DOWN

CHECK LIST: DIVORCE ACTIONS	
SUMMONS	
Summons issued	
Service	Personal service on Defendant If not personal – request for condonation?
Dies inducia	10 days: defendant same province (Court days) If Defendant is in different province:

PARTICULARS OF CLAIM	
Parties	Plaintiff - full particulars
	Defendant - full particulars
Jurisdiction	<p>Averment why Court has jurisdiction</p> <p>S 2(1)(a) Act 70 of 1979 - Parties are/either is</p> <ul style="list-style-type: none"> - domiciled in area of jurisdiction on the DATE action is instituted - ordinarily resident in area of jurisdiction on date action is action OR ordinarily resident in RSA for at least one year prior to date action is instituted <p>s 2(1)(b) Act 70 of 1979 – If court has jurisdiction in terms of s 2(1)(a) also jurisdiction in respect of claim in reconvention or counter-application</p>
Particulars of the marriage	Date, place and matrimonial dispensation - civil law, civil union, customary marriage
	<p>Civil law: in community of property / out of community of property - agreement inter partes / registered ANC</p> <p>Married after 1 Nov 1984: accrual system expressly excluded in ANC?</p> <p>Married before 1 November 1984: did they change matrimonial property system in terms of s 21 of Act 88 of 1984 or s 22 of Act 88 of 1984</p>
	Civil union / customary marriage: did they apply to change applicable matrimonial regime?
Children	Averment about children born (or not) and whether still minors or not
	If minors: averment that affidavit in terms of s 2 of the Mediation of Certain Divorce Matters Act 24 of 1987 is attached as Annexure ("A")
Causa	Averment motivating "irretrievable breakdown" of marriage - s 4 Act 70 of 1979
	Mental illness or continuous unconsciousness of one party - s 5 Act 70 of 1979
Forfeiture / accrual / s 7(3) Act 70 of 1979 / other claims	<p>Averments to fully motivate</p> <p>Forfeiture - s 9 of Act 70 of 1979 (no differentiation between marriages in or out of community of property)</p> <ul style="list-style-type: none"> - ancillary relief to claim for divorce <p>Forfeiture of benefits if married out of community of property - s 9 Act 88 of 1984</p> <p>Considerations:</p> <ul style="list-style-type: none"> - duration of marriage - factors leading to breakdown of marriage - any substantial misconduct on part of any of the parties
	<p>Other claims: restrictions on parties married in community of property</p> <ul style="list-style-type: none"> - cannot claim on contractual basis (all assets & liabilities shared equally) - if married after 1 November 1984 - no right to claim repayment of an excess to household contributions (s 23 Act 88 of 1984)
	S 18 Act 88 of 1984 - damages caused by delictual actions

	(for ex assault), excluding patrimonial losses may be claimed by party married in community of property
	S 7 (3) Act 70 of 1979 - transfer of assets - fully motivated
	Civil union, civil marriage or customary marriage after 5 November 2000: if not entered into ANC, married in community of property Claimable relief: either order for division of joint estate or order for forfeiture of benefits of marriage in community of property
	Civil marriage out of community of property before 1 November 1984: can claim transfer of assets in terms of s 7(3) Act 70 of 1979 (introduced by s 36 Act 88 of 1984) (Claim not available to parties in civil union or customary marriage)
	Civil marriage after 1 November 1984 or parties in civil union or customary marriage that entered into ANC: - if ANC did not expressly excluded accrual system, accrual system in terms of Chapter 5 of Act 88 of 1984 applies - if ANC expressly excluded accrual system in marriage out of community of property the parties will not have any claims against each other in terms of either Act 88 of 1984 or Act 70 of 1979, regardless of the type of marriage or union
Maintenance	S 7 (2) Act 70 of 1979 considerations: <ul style="list-style-type: none"> - existing or prospective means of parties - respective earning capacities, financial needs and obligations - duration of marriage - standard of living of parties prior to divorce - conduct insofar it may be relevant to breakdown of marriage
Prayers	Divorce Ancillary orders Costs
DEED OF SETTLEMENT (incorporated into order of divorce)	
Children	Custody
	Access
Maintenance minor Children	Amount
	Escalation
	Medical cost
Maintenance Plaintiff/Defendant	Amount
	Nominal / Rehabilitative
	Dum casta
	Escalation
Division of estate	Immovable property
	Movables (furniture, vehicles etc)
	Pension interests, annuities
	Life / endowment policies

	Investments, shares
	Other assets (interest in business etc)
Costs	
Full and Final settlement	No-further-claims clause and a non-variation clause



DIVORCE & RELATED MATTERS

USEFUL & RELEVANT CASE LAW

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FORFEITURE OF PATRIMONIAL BENEFITS OF MARRIAGE- S9(1) of Divorce Act 70 of 1979

BOTHA V BOTHA 2006 (4) SA 144 (SCA)

In order to determine in terms of s9 (1) of the Divorce Act 70 of 1979 whether a party will be unduly benefitted should a forfeiture order not be made, the court must, in the exercise of its value judgment, confine itself to the factors mentioned in s9 (1). The three factors governing the value judgment to be made by the court fall within a relatively narrow ambit: they are limited to a) the duration of the marriage, b) the circumstances which give rise to the breakdown thereof; and c) any substantial misconduct on the part of either of the parties. Conspicuously absent from s9 is a catch-all phrase, permitting the court, in addition to the factors listed, to have regard to “any other factor”. A factor such as the motivation for taking out an insurance policy, paid out to the respondent and thus forming part of his accrual, falls outside the scope of s9.

KLERK V KLERK 1991 (1) SA 265 (W)

In an action for a divorce the plaintiff applied inter alia for an order compelling the defendant to pay up the bond on the house which had been registered in her name into an ante-nuptial contract. The defendant in turn asked the court to exercise its discretion into s9(1) of the Divorce Act 70/1979 to order that he be relieved of his obligation of paying up the bond. Plaintiff contended that the discretion to grant a forfeiture of the patrimonial benefits of the marriage arose only where the prerequisites as set out in s9(1) were present and there was no substantial misconduct on her part and as such the court was not entitled to make such an order. The court held that it was not the intention of the legislature that substantial misconduct or any of the other factors mentioned in s9(1) had to be present before the court could grant an order of forfeiture: what the court had to do was ask itself whether one party would be unduly benefitted if an order of forfeiture was not made and in order to answer that question regard should be had to the factors mentioned in s9(1). In casu the court held that because of the short duration of the marriage the plaintiff would be unduly benefitted if an order of forfeiture was not made. Accordingly the defendant was discharged from any further obligations arising from the ante-nuptial contract between the parties.

MATYILA V MATYILA 1987 (3) SA 230 (W)

After granting a decree of divorce on the grounds of irretrievable breakdown of the marriage, the court has discretion with regard to the making of an order of forfeiture in favour of either of the spouses with respect of all or only a portion of the patrimonial benefits of the marriage. The section will only come into operation if there in fact patrimonial benefits of the marriage in existence at the time when the divorce action is instituted. All 3 factors justifying an order of forfeiture should both be alleged and proved. It should in addition be alleged and proved that undue benefit may accrue to one party in relation to the other should an order for forfeiture not be granted.

**MARRIAGE IN COMMUNITY OF PROPERTY – LOAN AGREEMENT
ENTERED INTO WITHOUT CONSENT OF OTHER SPOUSE – S15 (2) (b) of
Matrimonial Property Act 88 of 1984**

GOUNDER V TOP SPEC INVESTMENTS (Pty) Ltd 2008 (5) SA 151 (SCA)

The issue was whether a loan agreement entered into by one spouse without written consent of the other falls within the ambit of S15(2)(b) of the Matrimonial Property Act 88 of 1984 where the agreement incorporates an agreement to register a mortgage bond over the parties fixed property as security for the loan. S15(2) prohibits the alienation or mortgaging of immovable property forming part of the joint estate without the consent of the other party to the marriage in community of property. S15(1) does not prohibit one spouse from entering into a loan agreement without the consent of the other. In casu, there were two separate agreements viz a loan agreement and secondly another agreement to secure the loan with a mortgage bond. The court found that the 2 agreements were separate agreements and one independent of the other. It therefore concluded that a loan agreement is not one contemplated in s15(2)(b) of the Act.

PROCEDURE

EX PARTE INKLEY AND INKLEY 1995 (3) SA 528 (C)

In so far as in proceedings for a decree of divorce, the applicable procedure is in terms of s11 of Act 70/1979, that prescribed by the uniform rules of court and Rule 1 makes it clear that an action, including one for divorce, is initiated by way of a summons, the intention of the legislature is unequivocal, except for certain specified matrimonial relief which may be claimed by way of application, a decree of divorce must be claimed by action.

**JURISDICTION - VARIATION OF ORDER – S8(2) OF Act 70 of 1979
ZORBAS V ZORBAS 1987 (3) SA 436 (W)**

The court confirmed again that it is better if the court where the children are resident has jurisdiction to hear an application. In casu the parties were domiciled in South Africa but the children were resident in Greece.

MARTENS V MARTENS 1991 (4) SA 287 (T)

The South African court held that it is not bound by the decision of a foreign court where the interests of minor children are at stake.

**GROUND FOR DIVORCE – S4 OF ACT 70 OF 1979
LEVY V LEVY 1991 (1) SA 614 (A)**

The appeal court held that where irretrievable breakdown has been proved the court has no discretion to deny a divorce

IRRETRIEVABLE BREAKDOWN

KRUGER 1980 (3) SA 283 (O)

The court held that the plaintiff's adamant refusal not to resume life with the defendant was a strong indication of irretrievable breakdown.

SINGH V SINGH 1983 (1) SA 771 (C)

The court held in quoting Hahlo and Sinclair: Whether the fact that both spouses desire dissolution of the marriage is, unsupported by other evidence of marriage breakdown, sufficient proof that the marriage has irretrievably broken down. It would seem from observation of what is happening in the courts, that some Judges are reluctant to grant a divorce unless there is some "objective" evidence of the irretrievable breakdown: adultery, cruelty, year's separation. Others are prepared to accept the fact that both spouses are united in the conviction that their marriage is at an end and ought to be dissolved, as proof of the irretrievable breakdown of the marriage. This it is submitted is the preferable view for what better evidence of the irretrievable breakdown of a marriage could there be than that both parties are at one in their desire to have it terminated.

SCHARWITZ V SCHARWITZ 1984 (4) SA 467 (A)

"OBJECTIVE TEST" – In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties, it is important to have regard to what has happened in the past ie the history of the relationship up to date of trial and also to the present attitude of the parties to the marriage relationship as revealed by the evidence. It is not logical or legitimate to determine whether or not a marriage has broken down irretrievably by reference to what would or might occur if and after a decree of divorce has been refused on the ground that irretrievable breakdown of the marriage has not been established.

NAIDOO 1985 (1) SA 366 (T)

The court granted a decree despite the fact that the parties continued to cohabit and even had sexual intercourse 3 days before the divorce hearing. The court held that the defendant's failure to work, his dagga smoking habits, the neglect of his children and the humiliation to which he subjected his wife established a case of irretrievable breakdown.

VERMEULEN AND BUFFEL 1989 (2) SA 771 (NC)

It was suggested that the words "irretrievable breakdown" conveys the idea of a process of protracted disintegration.

Contra **COETZEE 1991 (4) SA 702 (C)**, where this process seemed to have absent where there was no difference in the pattern of the parties marriage between the time of the action and a time, months or years in the past from which it could be inferred that the marriage had broken down. In casu, the parties still shared the same bed; it was a dreary and unattractive marriage and had always been so. There was no discernible change in this pattern and the court

accordingly declined to grant the divorce. This was not a case of the court exercising its discretion: the court was not satisfied that the marriage had broken down irretrievably.

MENTAL ILLNESS OR CONTINUOUS UNCONSCIOUSNESS

DICKINSON 1981 (3) SA 856 (W) – CURATOR AD LITEM

It was accepted that a “legal practitioner” has functions identical to that of a curator ad litem even though s5(3) makes no mention of the curator ad litem. No service upon the defendant but on the legal representative. No expert testimony before the court on the alleged mental illness of the defendant. Divorce not properly before the court. Contra **Krige** below

HACKERT 1985 (1) SA 717 (C) - MEDICAL EVIDENCE

Although S5(1)(b) states that the evidence of 2 psychiatrists should be “heard” the court held that the “heard” could be interpreted to mean “receive”. Thus the evidence may be tendered by affidavit.

RELATIONSHIP BETWEEN S4 AND S5

OTT V RAUBENHEIMER 1985 (2) SA 851 (O)

Plaintiff’s wife had been in a mental institution for some 18 months and had been certified as mentally ill into the then Mental Health Act. It was improbable that she would ever be discharged. On the evidence however and applying the objective test as per Schwartz the court found that she had been mentally ill for a number of years and that resulted in the marriage breaking down irretrievably even before her admission to the institute. Accordingly the divorce was granted. It was determined obiter that the one ground did not exclude the other ie not mutually exclusive.

KRIGE V SMIT NO 1981 (4) SA 409 (C)

Plaintiff instituted divorce action against defendant in terms of s4, irretrievable breakdown alternatively the physical disorder of the defendant who was in a state of continuous unconsciousness into S5. It appeared that the defendant had suffered incurable brain damage due to an aneurism and was hospitalized. He was not in a state institution for 2 years as was required by s5(1). He had also not been unconscious for 6 months as provided by S5(2). He was paralyzed and in a semi-conscious state. A curator bonis was appointed as defendant was unable to manage his affairs and thereafter a legal representative was appointed by the court into s5(3) to represent the defendant in this action. The summons was served on the representative and not on the defendant. The legal representative opposed the divorce on the grounds that the Act 70/1979 did not cater for the situation.

The court held that the factors envisaged by s5(1) and (2) did not exist and that irretrievable breakdown had been proved. It was common cause that the defendant’s condition was both mentally and physically incurable. It would be

senseless to oblige the plaintiff to postpone the divorce for 2 years and to admit the defendant who was being cared for in a hospital to a state institution.

Distinguishable from Dickinson supra in that the expert evidence led in casu in the application to appoint a curator bonis was accepted in the present case and service on the defendant would be an unnecessary formality.

**REFUSAL TO GRANT DIVORCE – S5A
AMAR 1999 (3) SA 604 (W)**

The court held that where a defendant was deliberately withholding his co-operation from obtaining a religious divorce, the court ordered that the defendant pay what was effectively a punitive amount in maintenance until such time as the marriage was dissolved on religious grounds.

**COST ORDERS – S10
BUTTNER V BUTTNER 2006 (3) SA 23 (SCA)**

The court may not order as to costs iro of the appeal after having considered the nature of the issues raised, the relevant circumstances of the parties. As to the costs of the proceedings in the trial court, even though the amount awarded to the respondent in her claim in reconvention was reduced she would have been substantially successful in the trial proceedings and is entitled to the costs of such proceedings.

TREATMENT ACTION CAMPAIGN V MINISTER OF HEALTH 2005 (6) SA 363 (T)

TAC applied for annexures iro Promotion of Access to Information Act 2/2000 when Dept withheld the information. The court held that the Dept of Health did not comply with their constitutional obligation. They published references to annexures in an operational plan when such annexures were not part of the plan. This was available on their website until late October 2004 shortly before this application was made. TAC withdrew its prayers for substantive relief which was originally sought when the Dept indicated that the annexures were not part of the plan but were included in error. Court held that Depts conduct was the cause for the litigation. In the circumstances ie iro constitutional principles of appropriate relief and just and equitable redress for unconstitutional conduct and common law principles of liability for costs that respondent ordered to pay costs even though TAC withdrew prayer.

**ORDERS
ODGERS V DE GERSIGNY 2007 (2) SA 305 (SCA)**

Held that S7(1) of Act 70/1979 conferred a power upon the court to make an agreement between the parties an order of court. The settlement agreement not made an order of court. Court held that parties still bound by it contractually- the essence of the agreement remained the same and to be interpreted in line with contractual principles.

THUTHA V THTHA 2008 (3) SA 494 (TKH)

From headnote:

The principles applicable in deciding whether a deed of settlement should be incorporated into a court order and be enforceable are well established in all divisions of the High Court of South Africa.

1. The purpose of a court order, as a final judgment, is, among other things, to allow a party to proceed directly to execution. If the order cannot or should not be enforced for whatever reason, it should not be made an order of court.
2. The wording of judgments and orders should be clear and unambiguous. If not, the order is incapable of enforcement.
3. Court orders should not be formulated in such a way that compliance is left to the discretion of the person who is bound thereby and to the discretion of the sheriff or his deputy (or any other enforcement officer). Such a discretion would offend against the elementary principle that orders should be capable of ready enforcement.
4. As a matter of principle if a consent order does not comply with the above requirements it should not be made an order of court. The purpose of a court order is not to record the terms of an agreement between the parties, but to give final effect to the judgment which brings the dispute to closure.
5. It is now established law that the order must be one *ad factum praestandum* before it can be enforced. When the order is for the payment of money *simpliciter* (*ad pecuniam solvendam*) it cannot be enforced by a committal for contempt, and the remedy is execution.
6. For reasons of public policy, the payment of maintenance is regarded as an order *ad factum praestandum* which may be enforced, under certain circumstances, by a committal for contempt.
7. For the same reasons, and also by virtue of the operation of s 6 of the Divorce Act 70 of 1979, issues such as custody of children and the payment of maintenance should expressly be dealt with in a court order, and not left to the terms of a settlement agreement.
8. Conversely, issues relating to the division of assets in a divorce action, the settlement of the parties' proprietary rights, and incidental matters arising from the dissolution of a marriage should best be left to the terms of a settlement agreement upon which an aggrieved party may sue, rather than incorporating those issues into an order of court readily capable of execution. This principle is collateral to the principle that court orders which cannot be enforced should not be made.
9. If a court is asked to enforce its order, the first question is, as stated above, whether the court is faced with a valid court order. If not, and if found that it is merely a recording of a settlement agreement between the litigants, without an element of a court requiring obedience with its terms as a court order, it cannot and should not be treated as a court order. In such a case the remedy of an applicant/plaintiff is to sue on the contract and for the court to decide the matter on contractual principles. If the applicant elects to treat the contract as an

order of court and asks for enforcement of the order, the application will fail simply on the ground that 'the order' which the applicant seeks to enforce is not an order of court, but a contract.

10. Finally, a rule of practice can never reign supreme over substantive law. (Paragraphs [52] - [53] at 506H/I - 508G.)

The practice of making or incorporating deeds of settlement into a court order should not be followed. The rules of practice, or the proposed joint rules of the Transkei Division or of the Eastern Cape do not compel a court to do so, and nor do the decided judgments in those divisions constitute authority for this proposition. This does not mean that a court should not, in appropriate circumstances, embody certain terms of a settlement relating to custody, maintenance and the settlement of certain proprietary rights, in a court order. However, when it does so, those terms must be capable of ready enforcement by execution without redress to further litigation. It is inevitable that a court will nevertheless, from time to time, be asked to enforce a court order which incorporates a deed of settlement. In such event it can only do so if it is satisfied that those terms it is asked to enforce constitute terms of a court order intended to carry the authority of the court. If not, the application should be dismissed.

OLD MUTUAL LIFE ASSURANCE CO (SA) LTD AND ANOTHER V SWEMMER 2004 (5) SA 373 (SCA)

The instant case illustrates cogently the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully in order to ensure that they fall within the ambit of ss 7(7) and 7(8) of the Divorce Act 70 of 1979. If this is done, then all that would be required of the pension fund in question would be to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings. (Paragraph [26] at 387C/D - E.)

STASSEN V STASSEN 1998 (2) SA 105 (W)

The instant uncontested divorce action contained a prayer that the 'toesig en beheer' ('custody and control') of the minor children be awarded to their mother, the defendant. The Court pointed out that the Divorce Act 70 of 1979 used only the words 'custody' and 'bewing', which were recognised and established concepts, while the word 'control' had no clear meaning in the context of this type of case. The Court held that control or 'beheer' of children should not be awarded without sufficient motivation and a precise definition of the term by the plaintiff, and that it would henceforth replace the phrase 'toesig en beheer' with the word 'bewing' ('custody'). (At 107B--C/D, 108D and 109C/D--D). The Court also objected to the description of parties as 'volwassenes' ('adults'), pointing out that locus standi was dependent on majority, not adulthood. (At 108G--I.) The practice of providing in consent papers that maintenance shall be adjusted annually 'in accordance with the (inflation) value of currency' when what was

actually meant was that the sum had to be adjusted in proportion to variations in the consumer price index, all items, as published monthly in the Government Gazette by the Head: Central Statistical Service, was also criticised: if this were the intention, it had to be so stated. (At 109A/B--C.)