

SOUTH AFRICA / JUDGMENT

A.V.R v J.V.R and Others (4366/2016) [2020] ZAWCHC 134 (23 October 2020)

[2020] ZAWCHC 134

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers

CASE / FILE NUMBER

4366/2016

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THE

HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION)

Case

No: 4366/2016

In

the matter between

AVR

PLAINTIFF

and

JVR

FIRST

DEFENDANT

AVR

N.O.

(in

her capacity as trustee for the time being of

the

[... Trust])

SECOND

DEFENDANT

JVR

N.O.

(in

his capacity as trustee for the time being of

the
[... Trust])
THIRD
DEFENDANT
CS
N.O.
in
her capacity as trustee for the time being of
the
[... Trust])
FOURTH
DEFENDANT
THE
MASTER OF THE HIGH COURT OF
SOUTH
AFRICA – WESTERN CAPE DIVISION
FIFTH
DEFENDANT
LCA
N.O.
(in
its capacity as the trustee of the [...] Trust, Mauritius)
SIXTH
DEFENDANT

Coram:	Rogers J
Heard:	22 October 2020
Delivered:	23 October 2020

JUDGMENT

(rule 43(6) application)

Rogers J

- [1] In my view the husband's [first defendant's] counter-application in terms of rule 30 is without merit. It would not have made practical sense for the wife's [plaintiff's] application for a lump-sum contribution to be heard separately from her application for a daily contribution, and it is conceded that the application for a daily contribution has properly been made to me as the trial judge.

- [2] I approach the application on the basis that the law does not preclude costs already incurred from being taken into account in determining a contribution to costs (see *A G v L G* [2020] ZAWCHC 83 paras 15-17 and cases there cited); that costs incurred or to be incurred in relation to applications which are truly interlocutory to the divorce proceedings must be included (*R M v A M* [2019] ZAWCHC 86 para 24); and that there should be a rough equality of arms (cf *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50C-G; *Cary v Cary* 1999 (3) SA 615 (C) at 620C-621F; *Greenspan v Greenspan* 2000 (2) SA 283 (C) para 17).
- [3] Affordability is not an issue in this case. Although the precise extent of the husband's estate and earnings still need to be proved, they are on any reckoning very substantial. It is not the husband's case that he cannot afford to pay the lump-sum contribution or the daily contribution. There is no allegation that he has been unable promptly to pay his lawyers and experts or that he has run up arrears in respect of costs.
- [4] The wife's rule 43(6) application is distinguishable from the case cited by Mr Pincus, *Greenspan v Greenspan* 2001 (4) SA 350 (C). The present application was brought slightly more than three weeks before the trial, not just three days, as in *Greenspan*. In *Greenspan* the plaintiff's attorney had some months previously filed a compliance certificate indicating that the case was trial-ready,

without foreshadowing a further rule 43 application. Cleaver J also considered that to a large extent the plaintiff was trying to revisit matters which had been dealt with in a previous rule 43 application, since most of the costs for which she was seeking a contribution had been costs at issue in the earlier application. There had been no significant developments in the litigation since the previous application. Furthermore, Cleaver J was not satisfied of the reasonable necessity of some of the costs which the plaintiff intended incurring.

- [5] In the present case, as I have said, the application was launched more than three weeks before trial. Although in August this year the wife agreed to an expedited trial date, neither side could say at that stage that the matter was in truth trial-ready. There were outstanding responses to rule 35(3) notices. The wife's team had only just received the husband's affidavit in response to Slingers J's order of 24 June 2020, and that response spawned further enquiries. The husband subsequently launched an application to have the trial conducted virtually. The most that could be said is that the case would be trial-ready by October if the husband fully and promptly cooperated in the provision of documents and information.
- [6] The wife's legal team has been busily engaged on a number of fronts since July – serving notices for additional discovery and subpoenas, addressing the affidavits filed by the husband in answer to the order of Slingers J on 24 June 2020, settling expert reports and opposing the husband's application for a virtual hearing.
- [7] Although the rule 43(6) application would have added to the pressure of the husband's legal team, his team is experienced and well resourced. If additional resources were needed (and I doubt they were), the husband could well afford to pay for them. The information of

greatest importance to the rule 43(6) application – the financial resources of the husband, the wife and the trusts – is information which would have been prominent in both sides' trial preparations, so it would not have been difficult to marshal it for purposes of the rule 43(6) application. The husband's legal team could readily assess the reasonableness or otherwise of the legal costs which the wife says she has incurred, and would have been able to compare such costs to those incurred on their side.

- [8] There is no question, in the present case, of the wife trying to get an increased contribution in respect of costs which were already at issue in the previous rule 43 application. Her previous application, launched on 17 March this year and in which she sought a contribution to costs of R2 million, was made with reference to costs of R2,649,732 owed as at 28 February 2020, of which around R650,000 related to the rule 43 application and other interlocutory matters. By that stage, so she alleged, she had already incurred costs of R4,167,368, which she had partially funded from her own resources. She said that her claim for a contribution of R2 million should be seen as an initial contribution to cover costs already incurred and those to be incurred in the very near future, and that she might have to approach the court again if the amount proved to be inadequate. She also foreshadowed a request for a daily contribution if the trial proceeded.

- [9] The husband opposed the making of any contribution to costs, but by agreement Gamble J included in his order a provision that the husband would procure payment to the wife of R2 million from the South African trust by not later than 20 July, which amount would be debited against her loan account in the trust. Given the way this was structured, it was not in truth a contribution to costs by the husband, though in effect it gave the wife a sum of money which could meet the costs with which her application was concerned.

- [10] In the current rule 43(6) application, the wife is seeking a contribution in respect of costs which have been incurred as from March 2020, and these costs exclude costs related to the previous and present rule 43 applications. The wife says that as at 31 August 2020 she was indebted to her attorneys in an amount of R1,55 million for fees and disbursements for the period March-August 2020. Some of this relates to the previous rule 43 application. The fees and disbursements unrelated to the rule 43 application over this period total R1,268,862, comprising attorneys' fees of R1,013,681 and disbursements of R255,181 (including fees of counsel and experts).

- [11] In respect of fees and disbursements incurred in September and anticipated to be incurred up to the commencement of trial, the wife gives a sum of R1,15 million, though by my calculation the figures supplied by her under various heads total R1,022,750. This again excludes rule 43 proceedings. It includes R105,000 in respect of the Florida divorce proceedings, which would not be covered by rule 43, so the specific sums covered by the rule would total R917,750.

- [12] It follows that there is a grand total for the period March-October 2020 of R2,186,612, excluding the rule 43 and Florida proceedings. The wife seeks a contribution of R850,000. Given that this is less than half of the fees and disbursements of which she has given particulars, it is not necessary to carefully examine those particulars for reasonableness. Mr Pincus in argument did not attack any particular items. I consider a contribution of R850,000 to be reasonable.
- [13] Although the husband in his opposing affidavit did not tender a daily contribution, in argument Mr Pincus did not seriously resist it. Although the wife seeks a daily contribution of R125,000, at the commencement of argument I expressed a *prima facie* view that R75,000 might be closer to the mark. I arrived at this figure on the following basis. The wife says that Ms Buikman's daily fee is R35,650, and this is accepted by the husband's team as reasonable. Unlike Mr Pincus, Ms Buikman does not have the assistance of junior counsel. Instead she is supported by a senior and junior attorney, whose combined daily fees amount to R49,335. The husband challenges the reasonableness of these fees, stating that his junior counsel and attorney collectively charge R38,000 per day. If the latter figure is added to Ms Buikman's daily rate, one gets R73,650, which I had in mind to round up to R75,000. Mr Pincus did not resist an order in that amount.
- [14] Ms Dicker, who argued the rule 43 application for the wife, said that from time to time experts would need to be present, and there would be other incidental expenses incurred during the course of the trial. She thus urged me to build in a buffer, by awarding R100,000 per day. I accept that the daily running costs will not be limited to the hours of 10:00-16:30 for counsel and two attorneys. A Mauritian legal expert testified yesterday afternoon and the wife's forensic accountant will testify on Monday. There will also be evidence from a Florida legal expert. It will probably not be necessary for the wife to call her property valuation expert, since I understand the husband to admit the valuations. Similarly, the actuarial evidence may well not be contested. The bulk of future court time will probably be spent hearing the evidence of the wife and the husband.
- [15] In the circumstances, and since my rounding-up already includes an additional amount per day of R1350, I will adhere to my *prima facie* view. This will probably not cover in full the daily running costs, but the wife is entitled to a contribution, not necessarily to a full indemnity.
- [16] In advance of argument, I asked the parties to consider whether the request for a lump-sum contribution could not be pragmatically resolved by a payment on account to the wife. It is apparent from the papers that the husband expects the wife to receive a redistribution order of at least R10 million plus transfer of the former matrimonial home worth R5,5 million. I had in mind that he might at this stage pay her R850,000, on the basis that it could be argued at the end of the case whether it would be just to treat this as a contribution to costs or as a payment on account of a redistribution of assets. The wife's team was amenable to this way of resolving the matter, but the husband was not.

- [17] The question is whether I should now structure the lump-sum contribution in this way. I have come to the conclusion that I should not. My proposal was a pragmatic one, designed to avoid the necessity of arguing the rule 43 application. This objective was not achieved. On the papers, I am satisfied that the wife is entitled to a lump-sum contribution to costs of R850,000 in discharge of the husband's duty of support. Apart from the fact that the sum is justified in itself, I take into account that the previous sum of R2 million came from the South African trust, and not as a contribution to costs by the husband personally.
- [18] If the wife in due course obtains a costs order against the husband, a contribution to costs of R850,000 would then be regarded as a payment on account of those costs. If the wife does not get a costs order in her favour, I accept that the husband will not be able to recover the costs contribution, though perhaps the fact that it has been made could still feature in argument as a factor relevant to an appropriate redistribution order.
- [19] I see no point in deferring my decision on the costs of the present application. In my view, the husband should pay them.
- [20] I make the following order:
- (a) The first defendant's counter-application in terms of rule 30 is dismissed.
 - (b) By 16:00 on Wednesday 28 October 2020 the first defendant must pay to the plaintiff's attorneys a sum of R850,000 as a contribution to her costs up to but not including the first day of trial (19 October 2020).
 - (c) By 09:00 on Tuesday 27 October 2020 the first defendant must pay to the plaintiff's attorneys a sum of R300,000 as a contribution to the first four days of the trial (ie in respect of the days 19-22 October 2020 at R75,000 per day).
 - (d) By 09:00 on Monday 26 October 2020 and on each further day of the trial thereafter the first defendant must pay to the plaintiff's attorneys a sum of R75,000.
 - (e) All payments as aforesaid must be paid by way of electronic funds transfer into the plaintiff's attorneys' trust account.
 - (f) The first defendant must pay the plaintiff's costs of the rule 43(6) application and rule 30 counter-application, the employment of senior counsel being warranted.

O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Plaintiff L Buikman SC Instructed by Catto Neethling Wiid Inc Ground Floor, 35 on Rose 35 Rose Street Bo-Kaap For First Defendant B Pincus SC (with him C Small) Instructed by Maurice Philips Wisenberg Attorneys 20th Floor, 2 Long Street Cape Town For Third and Fourth Defendants D Goldberg Instructed by Norton Rose-Fulbright South Africa Inc Norton Rose House 8 Riebeeck Street Cape Town

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