

SOUTH AFRICA / JUDGMENT

Dorfling v Dorfling (3197/2005)

[2011] ZAECPEHC 6 (8 March 2011)

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COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

3197/2005

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 3197/2005 Date heard: 25 January 2011 Date delivered: 8 March 2011 In the matter between: STEPHANUS GEORGE DORFLING Plaintiff and HESTER ALETTA DORFLING (born JACOBS) Defendant

J U D G M E N T

TSHIKI, J:

I shall refer to the parties herein as they are referred to in the main action.

This is an application brought by the defendant in terms of Rule 43 for an order in the following terms:

[2.1] That the plaintiff make a contribution of R70,000.00 towards the defendant's costs in their divorce action.

[2.2] That the plaintiff be directed to pay defendant a further contribution of her legal costs of the main action in the amount of R17,500.00 per day in respect of each additional day the main action runs.

[2.3] That the plaintiff be directed to pay the costs of this application, alternatively that the costs thereof be costs in the main action.

[2.4] That the defendant be granted alternative relief.

Plaintiff is a pensioner and receives a monthly pension of R7,068.56. From that amount plaintiff contributes monthly a sum of R2,250.00 towards the maintenance of the defendant. Defendant is not employed and has no income except for the sum of R2,250.00 she receives as maintenance

from the plaintiff. Plaintiff's assets are mainly immovable property, a house worth R850,000.00 in which defendant is living, furniture and other household movables worth about R22,676.61. In addition to the pension amount plaintiff earns interest of R199.74 from his Money Market account with ABSA. His monthly expenses amount to R8,952.20. He has an overdraft facility of R30,000.00 in his bank account with ABSA. According to his income and expenditure account he has a monthly debit balance which is a loss in the sum of R1,763.90. In his Money Market account with ABSA bank plaintiff has an amount of

R20,000.00 to his credit. Defendant is unable to explain how plaintiff will be able to afford the amount she is claiming as contribution towards costs except for what she says that plaintiff enjoys an overdraft facility in the sum of R30,000.00 in his Gold Cheque account with ABSA. Defendant suspects that plaintiff must be secured by investments or assets that plaintiff owns. Defendant

contends that plaintiff can utilise this facility to contribute towards her legal expenses. According to defendant plaintiff

supplements the cheque account from one of his two savings accounts he has with ABSA and that plaintiff receives a regular monthly

payment of at least R7,000.00. I am tempted to believe, though it is not clear from the evidence, that the R7,000.00 referred to is the pension he receives monthly. Defendant's further contention is that plaintiff is able to afford his legal costs incurred for the divorce action.

Plaintiff denies that he can afford the amount claimed by the defendant and that he currently owes his attorneys of record an amount of R27,171.38 in respect of services rendered in the present matter. In this regard he annexes an invoice as proof. Plaintiff contends that defendant cannot seek to be able to litigate on the same basis as himself, especially if one has regard to the fact that she has obtained the services of an attorney and advocate with far greater seniority in comparison to the attorney and advocate employed by him. He prays that the application be dismissed with costs on the scale as between attorney and client.

In an application of this nature the applicant (defendant) is entitled, if respondent (plaintiff) has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the respondent (plaintiff) is litigating and the scale on which the applicant (defendant) intends litigating. This all depends on the respondent's financial position as well as what is reasonable having regard to what is involved in the case.

[Nicholson v Nicholson 1998 (1) SA 48 (WLD).]

In my view, unless otherwise specifically stated, *prima facie* when an amount is given as a contribution to costs, that means party and party costs. [Glazer v Glazer 1959 (3) SA 928 (WLD).]

If one has regard to the facts of this case, the parties' income and expenditure as well as the surrounding circumstances, it is not clear to me how the defendant arrives at the amount she has claimed. The assets of the plaintiff are those listed in the papers. However, according to the defendant there is a suspicion that the plaintiff has some assets or investments which assist

plaintiff to secure his overdraft facility of R30,000.00 which is available to him. A suspicion in my view cannot be a basis for saddling a litigant with an obligation to pay a huge amount of money without proof that in fact he will afford such amount. It could be that the bank has afforded the plaintiff the overdraft facility on the basis of the R20,000.00 in his bank

account together with the monthly pension which is sure to be deposited into his account. Any other suggestion on how he maintains

his overdraft facility would be a dangerous speculation.

The parties here are married out of community of property and that the defendant has filed a counterclaim in the main action. Defendant has filed a counterclaim for her share in the estate on the basis that she had, throughout the marriage, contributed towards the plaintiff's increased estate. However, the claim for a contribution towards costs in a matrimonial suit is sui generis. It has its origin in Roman-Dutch procedure and has been sanctioned through many decades in our own practice. The basis of such claim is the duty of support which the spouses owe each other and the main consideration for liability in the duty of support is need and ability.

Notwithstanding what I have said above the fact that the plaintiff has a sum of R20,000.00 in his bank account, in addition to his monthly pension and the defendant has no other income other than the contribution of R2,200.00 by plaintiff, is an indication that defendant is in need of the contribution towards litigation costs and that the plaintiff is able to afford to make some contribution albeit far less than what is claimed by the defendant.

It is not the practice in Rule 43 applications to give detailed reasons for arriving at the quantum of relief granted to an applicant and I shall simply say that in watering down the defendant's claim I have eliminated a considerable amount. I am of the view that the plaintiff can afford to contribute a total amount of R10,000.00 towards the total costs incurred or to be incurred by the defendant in the divorce litigation. Such amount should be paid to the defendant not later than the 30th of April 2011. The costs of this application shall be costs in the cause. It is so ordered.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv O Ronaasen SC instructed by Roelofse Meyer Inc of Port Elizabeth

For defendant: Adv A Moorhouse instructed by Kaplan Blumberg of Port Elizabeth

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