

SOUTH AFRICA / JUDGMENT

Hutton v Hutton (1619/08) [2008] ZAECHC 198 (20 November 2008)

[2008] ZAECHC 198**COURT**

High Courts - Eastern Cape

BEFORE

Jones

CASE / FILE NUMBER

1619/08

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Source record**FORM A****FILING SHEET FOR SOUTH EASTERN
CAPE LOCAL DIVISION JUDGMENT**

PARTIES:	JACQUELINE MARY HUTTON And KEITH JOHN HUTTON
Registrar:	1619/08
Magistrate:	High Court: SOUTH EASTERN CAPE LOCAL DIVISION DATE HEARD: 04/11/08 DATE DELIVERED: 20/11/08
JUDGE(S):	JONES J LEGAL REPRESENTATIVES –
Appearances:	for the Applicant(s): ADV: A. Beyleveld for the Respondent(s): ADV: Spruyt Instructing

attorneys: Applicant
(s): CECIL
KERBEL ATTORNEYS
Respondent(s): FRIEDMAN
SCHECKTER ATTORNEYS
CASE
INFORMATION -
Nature

of proceedings : RULE
43 APPLICATION
Not
reportable
In the High Court of
South Africa
(South Eastern Cape Local Division)
(Port Elizabeth High Court) Case No
1619/2008

Delivered: In the matter between
JACQUELINE
MARY HUTTON Applicant
and
KEITH JOHN HUTTON Respondent
SUMMARY: Rule
43 application – contribution towards costs – the need
for a contribution by the applicant wife and the ability
to provide a
contribution by the respondent husband were established on the papers
– a substantial contribution of R70 000
was justified because
the likelihood of the matter proceeding to trial on a defended basis,
requiring extensive preparation, was
conceded by both parties –
leave was given to the applicant to approach the court on the same
papers for a further contribution,
if need be.

JUDGMENT

JONES J:

- [1] The parties in this matter are embroiled in divorce proceedings. This is an application by the applicant-wife, the plaintiff in the divorce, for a contribution towards costs in terms of rule 43.
- [2] The pleadings are now closed and reveal that three issues remain in dispute, namely maintenance for two of the children, maintenance for the applicant, and questions involving the equitable division of the matrimonial property. It seems to me that the first issue is likely to be settled. The second and third issues are related, and the parties are agreed that they

will probably have to go to trial on a defended basis in respect thereof. This has caused the applicant to apply for a substantial contribution in the sum of R90 000-000, which includes the costs of the first day of the trial, the costs of a forensic investigation into the assets of the parties, the costs of valuing their assets, and the costs of determining whether the assets held by a family trust should be deemed to be part of the respondent's estate for the purposes of an order for redistribution of matrimonial assets. There is no dispute that an investigation into some at least of these issues is necessary. It will be a lengthy, complicated and expensive investigation. For these reasons the applicant alleges that she is entitled in law to a contribution towards her costs in the amount claimed.

- [3] The respondent disputes that he is liable to make a contribution and, further, that he is able to afford to make one. His contention is that the applicant is possessed of sufficient assets to make arrangements to pay her own costs in full.
- [4] There are a number of disputed matters in the rule 43 papers, which are somewhat lengthier and more involved than is usually the case. This may possibly be thought by some to be a contravention of the rule requiring that the affidavits be in the form a declaration and plea. Neither party has, however, argued before me that I should follow *Visser v Visser* 1992 (4) SA 530 (E), where the court refused to hear the application on grounds of the prolixity of the papers. I must do the best I can in the circumstances to come to a fair, though perhaps rough and ready, solution to the problem of placing both parties in a position to present their cases properly before the court. To that end I have been referred to the judgments in this division of *Chasen v Chasen* (unreported 2 August 1999 SECLD No 1623/99) and *Scribante v Scribante* (unreported 4 November 2008 SECLD No 2040/08) and the cases cited therein (e.g. *Senior v Senior* 1999 (4) SA 955 (W) and *Cary v Cary* 1999 (3) SA 615 (C)) which restate the principles underlying contributions towards costs and the impact, in applying those principles, of the constitutional

requirement of equality before the law in matrimonial disputes, so that a wealthy spouse does not enjoy unwarranted advantage over the other, less wealthy, spouse. It is common cause that the respondent is not litigating frugally. He has taken legal advice from senior counsel in relation to some of the issues between the parties. Clearly, the applicant is also entitled to advice from able and experienced counsel.

- [5] I am satisfied that the applicant has shown on the papers that she needs to be put in a position of equality before the law by a contribution towards costs. It is clear from her allegations that she is not in a position to finance this litigation out of the income from the business she operates through a close corporation. To do so she will have to sell or encumber assets. She is able to raise a loan of R300 000-00 on the security of the immovable property where the business is conducted, but is unable to finalize her arrangements without the additional security of a suretyship from the respondent, which he refuses to give. Her

inability to finance the litigation without encumbering assets is accepted by the respondent, who suggests that she mortgages the

property for R600 000-00 with his conditional assistance, which will enable her to use the proceeds of the loan (a) to repay certain debts (including debts owed by the business to the respondent); (b) to prevent her business from failing by purchasing stock; and

(c) to pay for the trial. In the eyes of the applicant some of the conditions are unacceptable, and she cannot afford the repayments on a loan of R600 000-00. On the papers before me I must accept, therefore, that the applicant cannot finance the litigation adequately because she cannot, realistically speaking, encumber the assets of her closed corporation. Nor can she, realistically speaking, be expected to sell the assets because that would cut off her income entirely. Her only other asset is the matrimonial home. The respondent suggests that she can raise a loan on her unencumbered half share. The evidence underlying this suggestion is unsatisfactory, and in some respects does not make sense. As I read the respondent's attorneys' letter disclosing his assets, this property has a value of R1 125 000-00 with a bond of R800 000-00. These figures may, however, be intended to relate only to his half share. But if so, I cannot understand the statement in his affidavit that he cannot afford a contribution without encumbering his half share of the immovable property, which suggests (a) that his half share is presently unencumbered and (b) it is unreasonable for him to be obliged to encumber it if she is not obliged to encumber hers. But what, then, of a bond of R800 000-00?

[6] The respondent was married to the applicant on 5 May 1979 in accordance with the laws of United Kingdom. He does not dispute a reciprocal duty of support between spouses which underlies the duty to contribute towards the costs of litigation. He accepts that his estate was built up during the course of the marriage, and that a redistribution of matrimonial property must take place in the form of a transfer of such portion of his estate to the applicant as the court considers just and equitable.

[7] The respondent offers no contribution whatever. I am unable to accept on the affidavits that he is unable to make one. He is clearly a man of substance. He has a monthly salary of R65 000-00. It would appear that he has interests, probably controlling interests because he does not allege the contrary, in six engineering and construction companies which have the capacity of undertaking large contracts. One of them was recently awarded a R20 000 000-00 contract. These companies are referred to as the Omega Group. He does not seriously dispute the applicant's allegation that his interest in the Group is worth more than the R3 000 000-00 which he disclosed, but states, somewhat coyly and without putting a figure to it, that this was merely an estimate. The family

trust, in respect of which he has absolute control, owns 50% of the shares in five of the companies in the Omega Group, and 30% in the sixth. He does not refer to other shareholders, or state specifically that he personally holds no shares. He says nothing about loan accounts or loans. One is left with the strong impression, because he does not suggest otherwise, that he is in a position to fix the amount of his monthly salary, pay dividends, distribute profits, repay loans,

and realise assets if he chooses to do so. The statement of assets and liabilities furnished by his attorneys indicates that he has a number of other assets, such as the matrimonial home, unit trusts, three motor vehicles (one used by the applicant), a boat, and certain insurance investments. Some of these would appear to be readily capable of realisation or use as security for loans. The trust also owns a number of immovable properties, some of them unencumbered. The applicant says that the trust was not established with his assets, but he does not explain the sources of its funding, and I cannot on present information exclude the possibility that, if its shareholdings and properties were not acquired directly from him, they were acquired for less than full value, or from donations, or from loans from the respondent which he may be entitled to call up. This much is clear from the total picture: the applicant is a man of substantial means, with a considerable number of assets and income producing entities at his disposal or under his control.

[8] I am forced to conclude as a matter of probability that the respondent is able to afford the contribution that the applicant claims. That does not mean that she is entitled to be awarded the full amount of her claim. The respondent alleges that the applicant's estimates of future costs are in some respects exaggerated. I am not in a position to resolve this kind of dispute on affidavit. Furthermore, once discovery is made, the trial particulars have been analysed, and all financial documents are available, it may be possible for the legal teams of the parties to agree upon whether it is really necessary to embark upon different and independent expensive forensic investigations and valuations, and whether it is possible to isolate issues which can be determined more cheaply than by evidence and cross-examination, for example by way of a stated case, which has already been suggested. I must not lose sight of the principle that the applicant is not entitled to have her entire legal bill covered in advance. She is entitled to a contribution only. She has coped up to now without one. It is open to her to approach the court for a second or further contribution in due course, if need be. But a substantial contribution is now necessary. In the circumstances and in the light of the information in the papers as a whole, it seems to me that a contribution of R70 000-00 is fair at this stage of the proceedings and will put the applicant in a position to take her through most of the preliminary preparation necessary for trial, so that she is not disadvantaged as a litigant vis-à-vis the respondent. She may in the future need more than that as a further contribution towards the costs of the first day. I should therefore give her leave to approach the court for a further contribution on the same papers, suitably brought up to date, should she be so advised. I hope that this will save expense.

[9] I make the following order:

1. The respondent is ordered to make a contribution towards the applicant's costs in the sum of R70 000-00.
2. The applicant is given leave to approach the court on the same papers, suitably amplified, for a further contribution, if so advised.
3. The respondent is ordered to pay the costs of this application.

RJW JONES

Judge of the High Court

14 November 2008

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Prepared on 9 October 2026 · Esheria