

SOUTH AFRICA / JUDGMENT

S v S (2014/04605) [2016] ZAGPJHC 357 (22 February 2016) [2016] ZAGPJHC 357

COURT

South Gauteng High Court, Johannesburg

BEFORE

M.B. Mahalelo

CASE / FILE NUMBER

2014/04605

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION

CASE

NO. 2014/04605

Reportable:

No

Of

interest to other judges: No

Revised.

22/2/2016

In

the matter between:-

S

B T

E APPLICANT

and

S,

M

L RESPONDENT

JUDGMENT

MAHALELO, AJ

- [1] This is an application in which the applicant who is the defendant in the divorce action seeks an order for a further contribution towards her legal costs in terms of Rule 43(6) and a departure from the restrictions in Rule 43 (7) and (8) of the Uniform Rules of Court.

BACKGROUND

- [2] The parties were married to each other on the 8 October 1995 in community of property and one (1) child now a major, was born of the marriage.
- [3] During 12 February 2014 the respondent instituted divorce proceedings against the applicant. The action is still pending.
- [4] On 11 April 2014 the applicant launched an application in terms of Rule 43 for inter alia, maintenance pendent lite for herself and the child as well as a contribution towards her legal costs. On 13 November 2014 the parties reached an agreement which was later made an order of court wherein, inter alia, the respondent was ordered to contribute an amount of R30 000.00 towards the applicant's legal costs.
- [5] Pursuant to the above, pleadings in the divorce action have closed and a trial date was allocated. In the meantime the applicant amended her plea and counter-claim in terms of which she included a claim for the appointment of a receiver and liquidator.
- [6] The question involving the matrimonial properties owned, the equitable division thereof and maintenance of the applicant post-divorce appears to be in dispute. Following the agreement between the parties, on the day of trial the action was postponed sine die pending the appointment of a liquidator. Until the present none has been appointed. There seems to be a dispute regarding whether a forensic investigator should be appointed.
- [7] It appears that it will be inevitable that the parties will have to go to trial on a defended basis in respect of these issues.

This amongst others, has caused the applicant to apply for a very substantial contribution towards her legal costs in the amount of R250 000.00. It is of course trite that a party seeking a contribution towards costs in pending matrimonial litigation must show, in the first instance that she / he has a prima facie case for the particular relief sought and that she / he has insufficient means with which to prosecute the matter. In the event that these requisites are established the court determines the quantum of the contribution to be made having regard to the circumstances of the case, the financial position of the parties and the issues to be determined at trial.

[1] A party is entitled, in terms of Rule 43(6) to bring a further application in terms of the Rule in which he or she seeks an order varying the order which has already been granted in terms of the Rule. What must be shown is that a material change has taken place in the circumstances of the party seeking the variation. It is well established that the sub-rule is to be strictly interpreted. This is to ensure that the Rule is not abused and that a party, aggrieved by an order, does not in effect bring about reconsideration of an interim order as if on appeal. It is therefore essential that a party relying upon Rule 43(6) should set out in detail those circumstances which it is alleged constitute a material change warranting the variation of the interim order already made.

[8] According to the applicant she has to date incurred legal costs amounting to R585 501.00. The costs include various applications

to compel against the respondent and preparation for trial. The applicant does not deal with how these have been funded to date. No accounts were attached and there is no indication as to how the amounts were arrived at.

[9] It is common cause that the applicant is not employed. She holds no tertiary educational qualification. She is financially dependent on the respondent. She currently receives inter alia an amount of R30 000.00 per month (as per the court order) as maintenance

pendente lite in respect of herself and the child. According to her she has no other source of income. She avers that as a result of the respondent's stance in the divorce action she requires sufficient funds to put her case before court as well as to expend on experts in order to determine the value of the joint estate.

Even if I accept – upon a generous interpretation of the applicant's papers – that she has made out a prima facie case entitling her to substantial success in her claims, and that her papers disclose an inability to fund her own litigation costs, I cannot accept that she has made out a case for the scale of the contribution she seeks. An applicant seeking a contribution towards costs must set out the anticipated reasonable legal expenses with sufficient detail to enable the court to properly assess what is reasonably required in order to do justice between the parties.

[11] The applicant alleges that the respondent is an extremely wealthy and a successful businessman. The respondent does not seriously dispute the allegation by the application that he holds 50% shares in a close corporation, JK & M Properties, which is a property owning entity, that he has a number of assets, such as the matrimonial home, sectional unit situated at Freeway Park in Johannesburg, valued at approximately R850 000.00 from which he earns a monthly rental of R6 000.00, a sectional unit situated at Ballito in Kwa-Zulu Natal, valued at approximately R2,500,000.00. All of these properties have been paid for in cash, 2 luxurious motor vehicles, (one used by the applicant) valued R480 000.00 and R2 000 000.00 (Lambogini). The Lambogini was recently sold for R1 500 000.00. An amount of R514 651.54 is currently held in the respondent's current account. The respondent owns business namely the Star Butchery and Jansens Meat Market.

- [12] The respondent does not allege the contrary as far as his assets are concerned. He however alleges that he is currently in a negative cash flow position. He was forced to close the Star Butchery due to criminal activities. The business was his main source of income, he is presently merely an employee of Jansens Meat Market as the business is owned by his brother and he receives a monthly income of R44 000.00 per month.

On a consideration of all the facts it becomes clear that the respondent is a man of substance. Further that he is the one in control of the joint estate.

- [15] The applicant is entitled to a contribution towards her legal costs which would ensure that she litigates on the same scale with the respondent. In the matter of *Cary v Cary* 1999(3) SA 615(C) it was held that:

“The claim for contribution towards costs in a matrimonial suit was sui generis. The basis of such claim was the duty of support which the spouses owed to each other. In assessing the quantum of the contribution to enable the party seeking the contribution to present her case adequately before the court, the court had to have regard to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation. The question of essential disbursements was a material factor to be considered, as was the scale on which the party from whom the contribution was required was litigating. In the exercising its discretion in the determination of the quantum towards costs to be awarded, the court was bound by Section 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 to guarantee both parties the right to equality before the law and equal protection of law. This has to be interpreted in context to mean that the applicant was entitled to a contribution towards her costs which would ensure equality or arms in the divorce action against the respondent. The applicant would not be able to present her case fairly unless she was empowered to investigate the respondent’s financial affairs through forensic accountant appointed by her”

- [16] The test to be applied in considering the amount is that the applicant should be placed in a position adequately to present her case. The fact that the respondent may be wealthy does not entitle the wife to unlimited spending, there being a difference between what she wants and what she needs. See *Dodo v Dodo* 1990 (2) SA 77 (W). What is ‘adequate’ would depend on the nature of the litigation, the scale on which the husband is litigating and the scale upon which she intends to litigate with due regard being had to the husband’s financial position. *Dodo*,’s case supra at 98C. The applicant is not entitled to all here costs of the trial but merely a ‘contribution towards’

her costs up to first day of the trial. See *Nicholson v Nicholson* 1998 (1) SA 48(W), *Dodo v Dodo* supra

- [17] Upon weighing the facts of the present matter, it becomes clear that the applicant is entitled to a further contribution towards her costs which would ensure that she litigates on the same scale with the respondent in a divorce action. However she is not entitled to have her entire legal costs covered in advance. She is entitled to a contribution only. It is open for her to approach the court for a third and further contribution in due course if need be. But a substantial contribution is now necessary to ensure that she is not disadvantaged as a

litigant.

[18] In Rule 43 applications the parties are discouraged from filling prolix affidavits. Notwithstanding the submission that the applicant's affidavit is an abuse of process, I have found that special circumstances exist justifying condonation thereof. The applicant was substantially successful, there is no reason why I should not order costs against the respondent.

[19] In my view circumstances of this matter justify a departure from the provisions of Rule 43 (7) and Rule 43(8)

In the result I make the following order:

1. The respondent is ordered to make a further contribution towards the applicant's legal costs in the sum of R90 000.00.
2. That the limitation prescribed in Rule 43 (7) and Rule 43 (8) be departed from.
3. The respondent is ordered to pay the costs of this application.

M.B. MAHALELO

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel of the applicant : Adv. A.E Willcock

Instructing Attorneys : Jurgens Bekker Attorneys

Counsel for the respondent: Mr A. Christophorou

Instructing Attorneys : Biccari Bollo Mariano Inc.

Date of hearing : 1 February 2016

Date of judgement : 22 February 2016

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