

SOUTH AFRICA / JUDGMENT

S.I.M v S.P.M (14191/2020) [2021] ZAGPPHC 761 (8 November 2021) [2021] ZAGPPHC 761

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

14191/2020

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

8 November 2021

CASE NO: 14191/2020

In

the matter between:

S[...]

I[...]

M[...]

APPLICANT

And

S[...]

P[...], M[...]

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for relief under Rule 43. The parties are married in community of property. The marriage was concluded on 15 July 1994. Divorce action was instituted in February

2020. The applicant previously instituted a Rule 43 application on 12 April 2021 and the application was heard on 28 September 2021. That application was in respect of maintenance pendente lite. The parties still await judgment. In this application the applicant seeks a contribution for legal costs in the amount of R 341 500,00 and leave to apply on a daily basis for a contribution to daily trial costs.

[2] I must express my dissatisfaction at parties approaching the court for relief in terms of Rule 43 on a piecemeal basis. The first Rule 43 application is dated 12 April 2021. The present application is dated 20 September 2021. It is difficult to phathom why an applicant who is in need of a contribution for legal costs, failed to include prayers in that regard in an application issued a few months earlier, particularly since this aspect is not addressed in the founding affidavit to the second application, and the court is referred to the financial statements attached to the first application.

Parties' respective cases

[3] The applicant avers in his founding affidavit that:

- i. He is 60 years of age, the managing partner and chairman of [...] and earns a net monthly income of R56 699.00. His monthly expenses total R191 349.00;
- ii. The respondent, 56, is a CEO of the freight division of [...] who earns an after-tax monthly income of R269 333.14. Counsel for the applicant submitted that it is evident from the financial disclosure that the respondent's total monthly income amounts to R342 213.86;
- iii. Investment and retirement benefits in the applicant's name, and funds 'irregularly' accessed out of a home loan were used to finance an unsuccessful venture the respondent embarked on. The applicant was left with over R500 000.00 worth of credit card debt;
- iv. He has good prospects of success in his forfeiture claim;
- v. He is not able to borrow money, or access any funds, but the respondent has access to substantial liquid assets to finance her and his legal costs, in addition to her presumed substantial disposable income;

vi. He obtained the services of one Bremmer, a senior lawyer who runs her own practice and is not assisted by any other professional in her office. He briefed junior counsel to act on his behalf for court appearances and at the pre-trial conference;

vii. The respondent has engaged a senior attorney, a junior attorney and senior counsel;

viii. The applicant has had to default on certain expenses to finance his litigation during the past eighteen months;

ix. The main issues between the parties are the reasons for the breakdown of the marriage, his forfeiture claim, and the identity of the receiver of the joint estate as the parties agreed in principle to appoint a receiver to wind up the joint estate. The applicant instructed his legal representative to file a substantive application for an order for the separation of issues and the appointment of an independent receiver in the absence of the parties coming to an agreement in this regard;

x. A costs estimate of R341 500.00 was prepared by his attorney which outlines the work still to be performed to proceed to trial;

xi. He will be severely prejudiced if he is not granted a contribution towards costs.

[4] The respondent opposes the relief sought, and denies that the applicant is in need of, or entitled to a contribution towards his legal costs. She avers that:

i. The joint estate will be liable for the parties' respective legal costs;

ii. The court hearing the divorce action will be in the best position to make a decision regarding the liability for costs;

iii. The applicant's claim that she forfeits 'patrimonial benefits equal to 75% of the joint estate' is bad in law as it is only 'patrimonial benefits arising out of the marriage' which are capable of being forfeited under specific circumstances. It is this erroneous pursuit by the applicant which creates the dispute in the divorce. The claim is also unfounded;

iv. A contribution to costs should not be awarded to an applicant who embarks on frivolous litigation, and the applicant must satisfy the court that he has a prima facie case against the respondent in the main action;

v. The applicant failed to indicate the amount which he has expended on financing his legal costs;

vi. The applicant is dragging out the divorce and causing unnecessary and unreasonable costs;

vii. Her legal team consist of an attorney, a candidate-attorney and senior counsel;

viii. She denies having access to substantial liquid assets and do not have a substantial disposable income as her monthly expenses are high;

ix. She denies that the applicant cannot access any more money and that he made a full and proper disclosure of all his resources;

x. She is willing to agree to the appointment of an impartial, competent and experienced receiver;

xi. She agrees to a separation of issues and tenders a draft order in this regard;

xii. There is no indication in the founding affidavit that the applicant's attorney will stop representing him if the applicant cannot afford her legal costs. This is so, submits the respondent, because the joint estate comprising 'many millions of rands which will become liquid if made liquid by a liquidator' will be responsible for these costs;

xiii. The applicant is an astute businessman and has had the use of a credit card account in [...] which he has used to supplement his personal living and entertainment expenses.

Legal principles

[5] The question that needs to be answered is whether the applicant is entitled to a contribution to his costs, and if so, in what amount.

It is trite that a claim for contribution to costs is *sui generis*, deriving originally from Roman Dutch law.[1] It originates from the duty of support spouses owe to each other. The spouse claiming a contribution towards costs is required to show that he or she has inadequate means of his or her own to fund the litigation.[2] Keightley J aptly summarised the position as follows:

'23. Whether or not an applicant is entitled to a contribution towards costs, and if so in what amount, is a matter for the discretion of the court. The paramount consideration is that the party claiming a contribution should be enabled adequately to place his or her case before the court. This remains the essence of the claim even though a court may more liberally assess the requirements of a spouse married in community of property as opposed to one married out of community. The object is not to release the whole half of the joint estate to the applicant, nor is it to require the respondent to make over to the applicant's legal advisers the sum they would be entitled to receive if the applicant were ultimately to be successful, as this may be to the prejudice of the respondent spouse should the applicant not achieve that success. This means that an applicant is not entitled to all their costs even if the respondent can afford to pay them. Attorneys are expected to bear some risk with regard to their fees, although attorney's fees may be included.

24. The quantum of the contribution will depend on the financial position of the parties, the issues involved in the pending litigation, the scale on which the respondent spouse is litigating, and the disbursements essential to the applicant's case. The court must factor into its discretion the constitutional injunction to guarantee the right to equality before the law and the equal protection of the law.' (Footnotes omitted).

[6] The applicant avers that he had to default on some expenses to be able to fund his legal costs, he fails, however, to provide any detailed information substantiating this claim. The court has no idea as to what his legal expenses to date entails, or how he succeeded in financing same. The applicant likewise fails to explain how he was able to finance monthly expenditure of R191 349.00

when earning an income of R56 699.00, since the separation. This unexplained situation gives credence to the respondent's claim that the applicant is not forthcoming regarding his resources. I am of the view, that the applicant would have included a claim for a contribution to his legal costs in the first Rule 43 application if he was indeed in need of such, it would not have been issued as an afterthought.

[7] It also needs to be considered that judgment is pending in the Rule 43 application wherein the applicant claimed maintenance pendente lite from the respondent. The outcome of that application may radically alter both parties' financial position in the near future.

[8] As for the extent of future litigation, after having regard to the respondent's affidavit and her counsel's

submissions

the only issue that is truly in dispute revolves around the forfeiture claim. If a contribution for costs is required in this regard, and a case can be made out for such a contribution, the court can be approached nearer to the trial date.

[9] A party embroiled in a divorce action is entitled to a contribution for legal costs that would allow such party to litigate on an equal basis with its spouse. The mere fact that one party earns substantially more than the other, does not mean that the former is entitled to a contribution to costs. Such a party needs to prove that he or she cannot litigate on an equal basis without such

contribution. The applicant indicated that the attorney representing him is a senior lawyer, and that he appointed junior counsel to represent him. He does not, however, claim that the counsel is inexperienced, or that he would have appointed senior counsel if he had more funds available.

ORDER

In the result, the following order is made:

1. The application is dismissed with costs.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 8 November 2021.

Counsel for the applicant:

Adv. G Kinghorn

Instructed by:

Tanya Brenner Attorneys

For the respondent:

Adv. M Haskins SC

Instructed by:

Couzyn, Hertzog & Horak

Date of the hearing:

5 November 2021

Date of judgment:

8 November 2021

[1] B v S (16158/16)

[2018] ZAGPJHC 534 (16 August 2018) para [22].

[2] Greyling v Greyling 1959

(3) SA 967 (W).

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