

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 41

PARTIES: MATHILDA NELL

APPLICANT

AND

LOUIS ANDRIES NELL

RESPONDENTS

- Registrar: Case no. **2384/2006**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD: 12 October 2006

DATE DELIVERED: 19 October 2006

JUDGE(S): PICKERING J:

LEGAL REPRESENTATIVES -

Appearances:

- for the State/Applicant(s)/Appellant(s):) Adv. Brooks:
- for the accused/respondent(s) Adv. P. Scott

Instructing attorneys:

- Applicant(s)/Appellant(s): Borman&Botha (Mr. Borman
- Respondent(s): Wheeldon, Rushmere and Cole (Mr. Brody)

CASE INFORMATION -

- *Nature of proceedings* : REASONS FOR JUDGMENT

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: 2384/2006

In the matter between

MATHILDA NELL

Applicant

VS

LOUIS ANDRIES NELL

Respondent

JUDGMENT

PICKERING J:

This is an application in terms of Rule 43 in which applicant claims maintenance pendente lite in the sum of R17 000,00 per month for herself and R3 000,00 per month for her minor daughter, Sophia, as well as a contribution towards her costs in the sum of R100 000,00.

Applicant and respondent were married to each other out of community of property on 5 September 1981. Applicant avers that she left the common home during August 2005 in consequence of respondent having embarked upon an extra-marital affair with another woman. Respondent admits the affair but submits that the marriage had already irretrievably broken down.

Upon leaving the common home applicant moved into a flat owned by respondent at Bliss Apartments, Port Elizabeth. It is common cause that respondent pays the water and lights account; the monthly levy; the taxes and the insurance in respect of this flat.

Applicant alleges that respondent is a highly successful farmer and businessman. The following allegations are made by her:

“9.2. he and I enjoyed a luxurious lifestyle whilst we lived together which included, inter alia:

- 9.2.1 residing in a luxurious home comprising 5 bedrooms, 3 bathrooms, a swimming pool, bar, entertainment area and modern furniture with all modern conveniences;*
- 9.2.2 the exclusive use by the respondent of a Cessna six seater airplane and a four seater R44 helicopter, he being a qualified pilot;*
- 9.2.3 regular holidays overseas, at least once and often twice per annum. Whilst on such overseas visits we stayed in modern hotels and our entertainment was fairly lavish;*
- 9.2.5 Christmas holidays which were mostly spent by us in a flat on the beachfront in Port Elizabeth which is owned by either the respondent or one of the trusts which he has established and to which reference is hereinafter made;*
- 9.2.6 the use of modern motor vehicles;*
- 9.2.7 his motor vehicle which he uses for his personal benefit is a new Isuzu bakkie, but he mainly uses the helicopter for his personal conveyance;*
- 9.2.8 the respondent has recently travelled to France for some two weeks holiday;*
- 9.2.9 amongst the respondent’s hobbies is that of mountain climbing and he has personally travelled to Russia where he went mountain climbing on a mountain known as Albris. In addition he travelled to Kilimanjaro for the purpose of mountain climbing in Kenya. During 2005 he travelled to South America to engage in mountain climbing on the mountain Aconkawa. The respondent informed me that such expeditions cost at least R50 000,00 per trip;*
- 9.2.10 prior to the respondent having purchased a helicopter in or*

about 2005, he owned a BMWX5 motor vehicle, which is a very expensive motor vehicle. Respondent also recently purchased a W220 motorcycle;

9.2.11 he has always lived a lifestyle of affluence.

10.2 he owns and/or has a direct financial interest in 2 garages known as Jansenville Auto and Graaff-Reinet Auto both of which, from my personal observation and knowledge, are highly successful businesses. In addition he owns an earthmoving contracting business, which again, from my personal observation, appears to be very successful. He frequently gets Government tenders for Road Maintenance."

Whilst admitting these allegations respondent, however, adds a rider to the effect that his financial position has deteriorated somewhat. He does not, however, set out to what extent his financial position has deteriorated and he does not allege that he is unable to afford to pay to applicant whatever amount may be awarded as maintenance *pendente lite*. Indeed, he does not dispute being a wealthy man.

Applicant has set out what she says are her monthly expenses in considerable detail. These amount to R18 990,00 in respect of herself and R2080,00 in respect of Sophia.

Apart from taking issue with the amounts claimed by applicant in respect of most of the items set out by her, respondent specifically denies in respect of certain of the items that applicant is entitled any amount at all. I will deal with these latter items.

- (i) Applicant claims an amount of R200,00 per month in respect of a so-called "*women's club*". Respondent states that it is not necessary for her to be a member of any such club.

- (ii) Applicant claims R200,00 per month in respect of “*garden and pots upkeep and plants/soil, fertilizer etc.*” Respondent alleges that it is not necessary for her to spend any money in this regard because the flat has a very small garden and which is in any event tiled. This latter averment overlooks the fact that the claim includes “*pots*”.
- (iii) Applicant claims R60,00 per week in respect of flowers to which respondent replies that she does not need flowers.
- (iv) In respect of applicant’s claim of R120,00 for “*car wash*” respondent states that she can wash her own vehicle.
- (v) In respect of an amount of R1 000 ,00 per month for a domestic worker respondent replies that applicant can clean her own flat.

Mr. Brooks, who appeared for applicant, submitted, with specific reference to these items, that bearing in mind that respondent is a wealthy man his attitude towards applicant is parsimonious and mean-spirited. I agree. The parties had been married for nearly 24 years at the time that applicant left the common home in consequence of respondent’s affair. She had been entitled to a very high, if not luxurious, standard of living whilst with respondent. I do not believe that in these circumstances she should be required to wash her own car, clean her own flat and be deprived of the solace of pot plants and flowers.

Mr. Scott, who appeared for respondent , did not seek in his argument to take issue with the quantum of each and every item claimed. He submitted, however, that taking into account the fact that, over and above the expenses paid by respondent in respect of the flat, he also paid applicant’s cell phone account and her DSTV subscription and provided her with meat from the farm, her claim as a whole was extravagant. He stated that respondent was

prepared to tender to the applicant an amount of R12 000,00 per month for her maintenance and R2 080,00 per month for Sophia's maintenance.

Again, having regard to the luxurious standard of living previously enjoyed by applicant and having regard also to the specific amounts claimed by her, none of which appear to me to be extravagant, I am of the view that applicant's claim for maintenance in the sum of R17 000,00 per month is reasonable. Respondent has further agreed to pay such expenses as may be incurred in respect of Sophia's medical and educational needs.

CONTRIBUTION TOWARDS COSTS

There were some considerable debate during argument as to the necessity for a contribution towards costs in light of the fact that, according to respondent, a full financial report valuing his estate was in the process of being prepared. According to respondent this would obviate the need for the appointment by applicant of any forensic auditors. It is not necessary to deal any further herewith because it is clear from applicant's own papers that she is at this stage able to fund her own litigation. She has readily available to her the amount of R100 000,00 on the money market. In these circumstances what was said in Griesel v Griesel 1981 (4) SA 270 (O) is apposite. The head note thereof reads as follows:

"A contribution towards costs in favour of a wife married out of community of property has often been described as an extension of the 'remedy' available in the case of a joint estate. There is no justification for carrying the extension of the remedy further so that the Court has a general discretion to measure the separate estates (of the husband and wife) against one another and even to grant to the wife, who is able to finance her own litigation, an amount from someone else's assets. Common law authority indicates that a contribution was only

granted to someone who could not herself afford the costs. There is no reason for introducing s 10 of the Divorce Act no 70 of 1979 into an application for such a contribution."

It is clear therefore that applicant at this stage is able to fund her litigation and accordingly her application for a contribution towards costs must be dismissed.

Mr. Brooks applied that a special order be granted in respect of costs of the Rule 43 application directing that the provisions of Rule 43 should not be applicable thereto. This was opposed by Mr. Scott. I have given consideration to the arguments advanced by Mr. Brooks but I am not satisfied that any circumstances exist which justify a departure from the usual costs.

In the circumstances the following order is made:

1. Respondent is ordered to pay maintenance *pendente lite* to applicant in the sum of R17 000,00 per month with effect from 1 November 2006.
2. Respondent is ordered to pay maintenance *pendente lite* for the minor child, Sophia, in the sum of R2 080,00 per month with effect from 1 November 2006.
3. Respondent is directed to pay all costs relating to the tertiary and secondary education of the said child, including books, stationery, sporting gear and equipment, sporting activities and school clothing.
4. Respondent is directed to pay all reasonable medical expenses incurred in respect the said child and without limiting the generality thereof, including all reasonable pharmaceutical, ophthalmic, orthodontic and dental expenses.

5. The application for a contribution towards applicant's costs is dismissed.
6. The costs of this application are to be costs in the cause of the action for divorce.

J.D. PICKERING
JUDGE OF THE HIGH COURT