IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 23967/2012
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
26 January 2022

In the matter between:

S [....] 1, D [....] L [....] Applicant

and

S [....] 2, J [....] Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This is an application in terms of Rule 43(6) for the setting aside alternately the variation of an order for payment of a contribution towards the costs of a pending trial action.

[2] The applicant, D [....] L [....] S [....] 1, the defendant in the trial action, is married to the respondent, J [....] S [....] 2, the plaintiff in the trial.

[3] The applicant sought the following relief:

3.1 Declaring the order granted on 16 January 2020 for a contribution towards the respondent's past and future costs, (the 'order'), to be a nullity;

3.2 Alternatively, varying the order, with immediate effect, by expunging the order in its entirety; and

3.3 Costs in the event of opposition to the application.

[4] The respondent opposed the application.

[5] The parties married each other on 15 January 2004 out of community of property and subject to the accrual regime. One child was born to the parties.

[6] The marriage having broken down irretrievably, the parties are in the midst of a part heard trial in which the respondent claims a decree of divorce, spousal maintenance, payment of one half of the accrual and relief ancillary thereto.

[7] At the close of the respondent's case, the latter brought an application for payment of a contribution towards her costs (the 'contribution application').

[8] The respondent launched the contribution application after approximately 17 days of trial. At that stage, the trial court had heard the respondent's evidence in its entirety, the applicant's first witness and the applicant's second witness had commenced her evidence. Importantly, the trial court had not heard the evidence of the court appointed referee in respect of the calculation of the accrual.

[9] On 16 January 2020, the trial court ordered the applicant to pay a contribution towards the respondent's legal costs in the following terms:

9.1 In the amount of R3 000 000.00 (three million rand), for the period 4 November 2015 up to and including 13 January 2020, in three (3) monthly instalments commencing on or before 31 January 2020 and thereafter on or before 29 February 2020 and 31 March 2020

respectively, into the trust account of the respondent's attorney, Steve Merchak Attorney;

9.2 In respect of a contribution towards the respondent's future legal costs in the amount of R64 500.00 plus VAT for each day of hearing that the matter proceeds.

[10] On 31 January 2020, the applicant launched an application for leave to appeal the order. That application was heard on 6 July 2020 and dismissed on 9 January 2021. On 7 May 2021, the applicant commenced proceedings for special leave to appeal to the Supreme Court of Appeal that was dismissed on 2 July 2021. On 2 August 2021, the applicant brought an application for reconsideration in terms of section 17(2)(f) of the Superior Courts Act, 10 of 2013 ("the SC Act"), which application was dismissed on 20 October 2021. The applicant launched this rule 43(6) application on 4 November 2021.

[11] The applicant, before me, relied on *S v S.*[1] The relevant facts of *S* are that an interim maintenance order granted in favour of the wife in terms of rule 43 proceedings was considered by the husband to be financially untenable. He sought to appeal the amount of the order.

[12] The Constitutional Court found that the High Court's order in *S* was for payment of an amount 'completely unrelated to the evidence before the Court'.[2]

[13] Furthermore,[3] that a 'patently incorrect maintenance order can be rectified by a Rule 43(6) application' and that 'there may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence is at variance with the interests of justice, a Court may exercise its inherent power in terms of Section 173 of the Constitution to regulate its own process in the interests of justice. …'

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1 *S v S* 2019 (6) SA 1 (CC) para [58] ('*S*').
2 Id at [24].
3 Id at [57] – [58].

[14] Accordingly, the applicant must show that this matter is exceptional in that the order is patently incorrect, 'patently unjust and erroneous … and no changed circumstances exist, however expansively interpreted'.

[15] The applicant relied firstly on the order being unjust and erroneous, secondly, in the alternative, on a material change in the applicant's financial circumstances between 16 January 2020 and the inception of the application in November 2021, and an inability to pay the order.

[16] The applicant's founding papers alone ran to 137 pages. Two separate bundles of documents comprising an updated financial disclosure form with accompanying documents, including a balance sheet and a list of expenses, and a separate bundle of correspondence between the parties' attorneys were uploaded on CaseLines. The respondent's papers were of lengthy in addition.

[17] The applicant submitted a supplementary affidavit that comprised, in effect, a replying affidavit to the respondent's answer. The respondent claimed that the supplementary or replying affidavit ought to be struck out, alternatively that the respondent be afforded an opportunity to deal with the allegations in the supplementary affidavit. I allowed the respondent such an opportunity and the matter stood down for hearing until 20 January 2022 pending delivery of the respondent's supplementary affidavit.

[18] The respondent raised various points *in limine* and in substantively opposing the application, including the following:

18.1 The relief sought by the applicant would result in the setting aside of the order retrospectively, effectively nullifying the order;

18.2 The application was an abuse of process;

18.3 The application constituted a prohibited appeal in terms of s 16(3) of the SC Act.;

18.4 The setting aside of the order claimed by the applicant was legally impermissible and incompetent regard being had to the wording of Rule 43, *inter alia*;

18.5 The applicant had failed to display any material change of circumstances justifying a variation of the Rule 43 order as envisaged by Rule 43(6); and

18.6 The applicant failed to disclose material information pertaining to his financial position that justified the applicant being disentitled to the relief sought in the application regard being had to the prevailing legal authorities.

[19] The respondent argued that the order was just and equitable regard being had *inter alia* to the parties' financial positions at the time the order was granted, and at the time that this application incepted.

[20] Furthermore, the respondent alleged that the applicant litigated in bad faith, forcing the respondent to incur what ought to have been unnecessary legal costs. By way of example; the applicant allegedly failed to tender maintenance for the respondent, tendered inadequate maintenance for the child, forced the respondent to expend monies on enforcing maintenance orders, claimed joint residence of the child despite the respondent always having been the child's primary caregiver, approached the Family Advocate's office to investigate the primary residence of the child without justification, alleged that the accrual in the respondent's estate exceeded that in his estate and launched the applications aforementioned aimed at overturning the order.

[21] Similarly, the applicant contended that the respondent litigated in an unreasonable manner, directed at forcing him to incur unnecessary legal expenditure when he could not afford to do so.

[22] It is immediately apparent that the above issues raised by the parties are all matters that can be determined by the trial court only, once it has heard and considered the totality of evidence on behalf of both parties.

[23] The applicant alleged that the order for payment of R3 million equated to 58.8% of the respondent's past attorney and own client costs as at that stage, and, that the order for payment of R64 500.00 plus VAT for each day of hearing that the matter proceeded, amounted to an order for payment of 100% of the respondent's future legal costs.

[24] The applicant contended that the order for past and future costs was an order that ought to have been made by the trial court at the end of the trial, in the exercise of that court's discretion. The applicant alleged that the order was final in effect.

[25] The respondent argued that the order for payment of R3 million arose from the amount that the applicant had expended on his legal costs at that stage. A statement of the applicant's legal costs in respect of the divorce proceedings from 2013 up to and including 2019, including retaining senior counsel, ran to R3 380 675.66.

[26] I am of the view that in order for me to determine this matter justly and equitably, I must do so based on the established principles of applications for contributions towards costs in this Division. Those principles are summarised hereunder.

[27] The purpose of an order for a contribution towards costs is to place the party applying for the contribution, the respondent herein, in a position to adequately prepare and present her case.[4]

[28] The party applying for the contribution is not entitled to the entirety of her costs, effectively in advance, but only to those reasonably required to prepare and present her case adequately up to and including the first day of trial.

[29] The anticipated fees must be reasonable both in respect of their nature and amount.[5]

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4 *Senior v Senior 1999 (4) SA 955 (W) ('Senior').*

5 *Senior* id.

[30] The contribution is for the costs of the pending divorce action. It excludes the costs of interim or interlocutory applications and other disputes between the parties.[6]

[31] Past costs or costs already incurred `by the party applying for the contribution are excluded.[7]

[32] The anticipated costs are not limited to disbursements[8] but may include a contribution towards the fees of the attorney, subject to the following:

> 32.1 An applicant is not permitted to have her attorney and own client costs covered or even substantially covered;[9]
>
> 32.2 The attorney's fees must be the attorney's reasonable fees being fees that are reasonable and ordinarily payable as between an attorney and his/her own client;
>
> 32.3 Not all the fees payable between an attorney and own client should be granted in advance and the attorney is obliged to carry some risk in respect of his/her fees and those fees as between his/her own client;[10]
>
> 32.4 The fees payable as between the attorney and his/her own client must be necessary and such as would be adequate for the applicant to prepare for and conduct her pending trial.

[33] The claims made must be for amounts that can reasonably, necessarily and properly be required in order for the party to prepare for and conduct the litigation in an adequate manner.

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6 *Winter v Winter* 1945 WLD 16; *Service v Service* 1968 (3) SA 526 (D); *Micklem v Micklem* 1988 (3) SA 259 (C); *Maas v Maas* 1993 (3) SA 885 (O) at 888I; *Senior* id.

7 *Nicholson v Nicholson* 1998 (1) SA 48 (W) ('*Nicholson*') *Senior* id.

8 *Senior* id.

9 *Nicholson* note 7 above at 51H-J.

10 *Senior* note 4 above para 10.

[34] The scale upon which the parties litigate and the trial proceeds must take account of the parties' means.[11]

[35] The wealth of the husband, usually the party ordered to make the payment, is not determinative of the amount ordered as the intention of a contribution is to cover the applicant's reasonable needs of preparation for trial up to and including the first day of trial.[12]

[36] The quantum of the amount ordered is determined regard being had to the prevailing circumstances of the matter, the parties' respective financial positions and the issues in dispute before the court.

[37] The scale upon which the opposing party, usually the husband, is litigating and intends to litigate is relevant as the parties ought to be placed in approximately equal positions to conduct the litigation and present their cases.[13]

[38] An applicant may apply for additional contributions if the initial contribution ordered proves insufficient.[14] Application may be made on the principles articulated hereinabove for a daily contribution on each day that the trial continues.[15]

[39] Rogers J, as he then was, in *AR v JR,*[16] relying on *A G v L G,*[17] adopted the approach that an application for a contribution towards costs does not preclude costs already incurred from being taking into account in determining a contribution to costs, and that costs incurred or to be incurred in respect of applications that are truly interlocutory to the divorce proceedings must be included as per *R M v A M.*[18]

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11 *Glazer v Glazer* 1959 (3) SA 928 (W) ('*Glazer*').
12 Id.
13 *Dodo v Dodo* 1990 (2) SA 77 (W) (*'Dodo'*) at 98; *Carey v Carey* 1999 (3) SA 615 (C*) ('Carey'); Senior* note 4 above para 10.
14 *Service v Service* 1968 (3) SA 526 (D); *Maas v Maas* 1993 (3) SA 885 (O).
15 *Mühlman v Mühlman* 1984 (1) SA 413 (W); *Dodo note 13 above*; *Nicholson v Nicholson* 1998 (1) SA 48 (W) ('*Nicholson')* at 51.
16 *AR v JR* (unreported) WCC Case No 4366/2016 dated 23 October 2020.
17 *A G v L G* [2020] ZAWCHC 83 paras [15] – [17] and the cases there cited.
18 *R M v A M* [2019] SAWCHC 86 para [24].

[40] Whilst the cases relied upon by Rogers J were all decided in the Cape and do not reflect the prevailing position in this Division, the time may have come for this Division to incorporate the approach reflected in *AR v JR*[19] in respect of costs already incurred being taking into account in determining a contribution towards costs, and that costs in respect of applications that are truly interlocutory to the divorce proceedings be included in addition. It is not appropriate to deal with such an extension of the prevailing practice in this Division, in this judgment.

[41] Both parties contended for the rights of access to court and equality. I am acutely aware that the respondent is entitled to approximate parity of arms,[20] that the parties are in the midst of highly contested litigation and that a period of approximately two and a half years has elapsed since the order was granted.

[42] Moreover, I am bothered by the fact that a trial in divorce proceedings endured for 17 days during which the evidence of only one of the parties,' in effect, was heard, that the extent and duration of the trial proceedings to date apparently failed to take account of the respondent's alleged financial means and that the contribution application was launched so late in the trial proceedings.

[43] As stated afore, the respondent launched the contribution application once the respondent closed her case in the trial. As a result, the contribution application included a claim for the costs incurred by the respondent from inception of the matrimonial proceedings up to and including the close of the respondent's case, an amount in excess of R5 million.

[44] The trial court determined the contribution application after the respondent had a full opportunity to present the entirety of the evidence she considered relevant before the trial court whilst the applicant was deprived of a similar opportunity. As a result, the trial court heard all of the respondent's evidence, the applicant's first witness and part of the evidence of the applicant's

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19 *AR v JR* (unreported) WCC Case No 4366/2016 dated 23 October 2020.

20 *Nicholson* note 15 above; *Carey* note 13 above.

second witness only. Importantly, the court appointed referee, tasked with determining the accrual, had not yet given evidence.

[45] *Audi alteram partem* is a cornerstone of our justice system. It is fundamental that an order or a judgment is not granted until both sides have been afforded an adequate opportunity to present their arguments for or against a particular outcome. Compliance with *audi alteram partem* did not take place in this matter as the trial court granted the order prior to the applicant having the same opportunity to present his case as the respondent had. The parties were not heard or treated equally or given equal access to the trial court prior to the order being made.

[46] The trial court did not hear the applicant's version of his financial means and ability to pay the order or his version of the respondent's financial circumstances and ability to contribute towards her legal costs, prior to granting the order. Nor did the trial court hear the evidence of the court appointed referee in respect of the respondent's accrual claim. The trial court heard only the respondent's version of the parties' respective financial circumstances and the respondent's accrual claim, presented by the respondent's financial expert.

[47] In the circumstances, the trial court could not consider, fairly and reasonably, the reasonableness of the order, or reasonably assess the parties' respective financial circumstances and the applicant's ability to pay the order, based on a consideration of both parties' evidence, equally and justly.

[48] The respondent sought justification for the order in the parties' respective financial circumstances at the time that the order was granted by the trial court. Given the absence of *audi alteram partem* prior to the granting of the order, the parties' respective financial positions were not before the trial court.

[49] Furthermore, the respondent argued that the order for payment of R3 million resulted from the applicant's spend of approximately R3 million on legal costs at that stage and the need for parity of resources between the parties. The applicant incurred legal costs of R3 380 675.66 from 2013 to 2019,

or, calculated from 2015 to 2019 (in accordance with the order for past costs), R2 925 109.06.

[50] However, the applicant's legal costs of R2 925 109.06 from 2015 to 2019, comprised his attorney and own client costs in their entirety at that stage of the proceedings.

[51] The respondent is not entitled to payment of her attorney and own client costs or to the entirety of her costs in terms of a contribution application. The respondent's claim is limited to a contribution in respect of the party and party costs of her disbursements and a contribution towards her attorney's reasonable costs as abovementioned,[21] in respect of preparation and presentation up to and including the first day of trial and thereafter if necessary.

[52] In addition, the respondent is not entitled to a contribution for past costs or costs already incurred by her and those in respect of interlocutory applications.

[53] There is no authority that I am aware of, no principle and no case precedent that allows for an award for payment of a contribution towards pasts costs, made in the middle of a trial, effectively for payment of past costs and costs already incurred in the trial. The reason is that costs incurred in a trial are the preserve of the trial court upon consideration of the entirety of the evidence led in the trial.

[54] Regard being had to the absence of *audi alteram partem* in particular as well as the principles and factors set out afore, the order of R3 million for past costs is, in my view, manifestly unjust as envisaged in *S*.

[55] In respect of the order for future costs of the pending action, the fact that it provides for payment of 100% of the respondent's costs for every day that the trial proceeds, results in the respondent's future costs of trial being secured fully. Security for the entirety of the respondent's future trial costs is not the purpose of an order for a contribution towards costs.

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21 *Senior* note 4 above para 10; *Nicholson* note 15 above at 52B.

[56] Additionally, given that the trial endured for 17 days in respect of the respondent's case alone, the order for future costs probably serves to inhibit the respondent's consideration of a reasonable settlement of the matter as a whole, or various of the issues in dispute. As to the order for future costs resulting in the trial enduring further for a potentially unreasonable and unlimited period of time, the applicant is at liberty to raise the issue in argument before the trial court at the appropriate time.

[57] This is in circumstances where the issues in dispute are relatively uncomplicated and ought to be resolved between the parties, given the appropriate will on their part duly advised by their attorneys, to do so.

[58] Whilst the order for future costs is equally subject to my concerns around the absence of *audi alteram partem* and the factors and principles abovementioned, the order for future costs relates to the costs of a pending action as envisaged in s 16(3) of the SC Act.

[59] Accordingly, the order for future costs is subject to the absolute prohibition against appeals in terms of s 16(3), which provision withstands constitutional scrutiny.[22]

[60] As to the applicant's alternate claim based on an alleged material change in his circumstances in terms of Rule 43(6),[23] this is a factual matter.

[61] The applicant alleged that he was not financially able to meet the order and was not so able even at the time that the order was granted. As proof of the latter, the applicant referred to the respondent's attorney's attachment of the applicant's major assets, being his member's interests in Truval, United Merchants and Lovar Investments CC, the sole asset in respect of which was the immovable property in Norwood, being the erstwhile marital home.

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22 *S* note 1 above para 51

23 CL 0009-5 para 12.

[62] The applicant alleged that United Merchants had been forced into liquidation as a result and that various sureties executed in favour of the United Merchants' creditors could not be enforced as a result.

[63] Attorney Steve Merchak allegedly set a reserve price of R4 500 000.00 in respect of the applicant's member's interests in the businesses aforementioned.

[64] I am well aware that the parties are in the middle of a part heard trial in which only the respondent's evidence and version of events has been heard.

[65] In the circumstances, it would be wrong on my part to make an order that pre-empts or serves to supplant the trial court's determination of the evidence regarding the parties' financial circumstances, the applicant's financial ability to pay the order and any material change in the applicant's financial circumstances.

[66] As a result, it is my view that the trial court is the court best placed to determine these factual issues once that court has heard and considered all of the evidence. At that stage, the trial court will have before it the oral evidence of the parties themselves in respect of their financial affairs, the relevant documentary evidence together with the evidence of the respective financial experts, including the court appointed referee, and the evidence of the parties' respective witnesses.

[67] Hence, it is the trial court that is best placed to determine the factual issues raised by this application, including whether or not the applicant is financially able to meet the order and whether or not the order is one that should stand, in the light of the entirety of the evidence before the trial court at the close of the trial proceedings.

[68] The question is how do I deal, fairly and justly, with the order for past costs in the light of the prohibition in terms of s 16(3) of the SC Act, the pending trial and the critical need for parity between the parties' in respect of their trial resources.

[69] As a result, and, in an attempt to strike a fair balance between the parties regard being had to the principles aforesaid, I am not inclined to nullify or vary the amount of R3 000 000.00 (three million rand) ordered by the trial court. Instead, I intend to suspend payment thereof pending finalisation of the evidence in the trial, and reconsideration of the order for past costs by the trial court in the context of the overall costs order/s to be made by that court upon the close of the trial proceedings.

[70] It may well be that upon finalisation of the trial, the trial court, having heard the totality of the parties' evidence as well as argument by the parties, including on the parties' respective alleged unreasonable conduct of the litigation, determines that the order for payment of R3 million towards the respondent's past costs stands to be varied in one way or another or not at all.

[71] In respect of the order for payment of the respondent's future costs, it is subject to the prohibition in terms of s 16(3) of the SC Act. The order is interlocutory in nature and capable of variation by the trial court in terms of rule 43(6).

[72] There is no reason why the costs of this application should not be costs in the cause of the divorce proceedings and I intend to grant such an order.

[73] I intend to admit the parties' respective supplementary affidavits.

[74] By reason of the aforementioned, I grant the following order:

1. The parties' respective supplementary affidavits are admitted.

2. Payment by the applicant of the amount of R3 million in respect of a contribution towards the respondent's past legal costs, ordered by Moosa J ('the order for past costs'), is suspended pending reconsideration of the order for past costs by the trial court, in terms of the overall costs order/s to be made by the trial court in respect of the trial proceedings.

3. The application for the nullification, alternatively, the variation of the order of Moosa J for payment by the applicant of a contribution towards the respondent's future costs of trial, is dismissed.

4. The costs of this application are costs in the cause of the pending trial action.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 July 2022**.

APPEARANCE FOR THE APPLICANT:	In person

Heads of argument prepared by Attorney Tanya Brenner.

COUNSEL FOR THE RESPONDENT:	Ms A de Wet SC
INSTRUCTED BY:	Steve Merchak Attorney
DATE OF THE HEARING:	17 & 20 January 2022
DATE OF JUDGMENT:	26 July 2022

<u>Authorities</u>

The Civil Practice of the High Courts of South Africa, Herbstein & Van Winsen, Cilliers Loots Nel, 5th Edition, Vol 2;
The Law of Divorce and Dissolution of Life Partnerships in South Africa, Heaton, Juta, 1st Edition;
Superior Court Practice, Erasmus, 2nd Edition, Juta, Vol 2.