REPUBLIC OF SOUTH AFRICA

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

CASE NO. 2014/2941
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

P, L. S **Plaintiff/Applicant**
(born T)

And

P, R. S **Defendant/Respondent**

Judgment

Thupaatlase AJ

Introduction

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court. The application is launched by the plaintiff in a pending divorce action. The application is opposed. Plaintiff brought this application on an urgent basis wherein she seeks; firstly, an order condoning her non-compliance with the Rules and secondly that the

defendant pays a contribution of R 711 337.00 towards costs of the pending divorce litigation or such other amount as the Court may deem meet.

[2] The plaintiff further seeks an order granting her leave to apply for the striking out of the defendant's plea and counterclaim on the same papers supplemented as may be necessary in the event that defendant fails to comply with an order of contribution to costs. It is also prayed that the defendant be ordered the costs of this application on the attorney and client scale.

[3] The plaintiff instituted divorce proceedings against her husband in January 2014.The parties are married out of community of property and have concluded an antenuptial contract. The marriage still subsists. From the union between the parties, two children were born. The children are still minors.

[4] The matter was previously set down for trial on 8 March 2018 and was postponed *sine die*. Eventually the trial was re-enrolled and set down for hearing on 31 January 2020. Unfortunately, on the weekend preceding the hearing the defendant was seriously injured whilst riding a bicycle. This necessitated a further postponement by agreement. The trial is now set down for 20 November 2023.

[5] According to plaintiff the divorce proceedings have been acrimonious and resulted in two Rule 43 applications. The first application related to the children as contemplated in Rule 43(1) (a) and (b) and the second to an order preventing the defendant from dissipating or concealing proceeds of his pension fund. This is the first instance that an application for contribution towards legal costs has been made.

The plaintiff's financial position.

[6] The plaintiff resides with the minor children at her parents' house in Durban, as she cannot afford accommodation of her own. She is currently receiving monthly maintenance of R 3 000.00 per child from the defendant. The plaintiff submits that the maintenance is not enough to provide for the needs of the children.

[7] The plaintiff's income as supported by payslips is R 46 327.79, with her total monthly expenditure amounting to R 55 873.85. The expenses submitted are for the general household. The expenditure appears to be modest.
[8] There is a shortfall of R 6 500.00 in her monthly budget. She also points to the fact that she was forced to sell her engagement ring and that she is being sued by her attorneys for professional services rendered.

[9] The plaintiff has already incurred legal costs amounting to R 345 637.63 and that if the defendant does not contribute to her legal costs for the pending divorce trial, she stands to suffer extreme prejudice and irreparable harm.

[10] plaintiff's Financial Disclosure Form (FDF) shows that the matrimonial property bond is paid for by the defendant and holds 100% equity in the property. The value of the plaintiff's interest in the family home is subject to accrual calculation. She has no immovable property registered in her name. The balance in her Standard Bank current account as of 24 October 2023 was –R 35662.79. She has no investments and no recoverable loans and no policies. At the time she prepared FDF she had no cash to disclose.

[11] The plaintiff does not own a motor vehicle or have any business interests. She has a pension interest of R 575 179.56 and owes her attorneys an amount of R 446 990.00. She is also indebted to Standard Bank for a credit card facility in the amount of R 165 000.00.

The defendant's financial position
[12] The defendant has stated through his answering affidavit that he is unemployed. He details the injuries sustained during a mountain bike incident. He suffered a spinal cord injury which has paralysed him from chest down and with no use of his legs and very little of his arms. He will be wheelchair-bound for the rest of his life.

[13] The defendant goes to lengths in explaining the litigation history between the parties. He confirms numerous interlocutory applications launched since the inception of the divorce proceedings in 2014.

[14] He lists assets consisting of money held in Trust; equity in his matrimonial property; motor vehicle; household furniture; personal goods; jewellery and positive balances in his bank accounts. The defendant puts his assets at R 4 573 173.00 and of that amount R 3 878 223.91 is held in trust by Court order.

[15] The defendant receives a rental income of R 17 000.00, and his monthly expenses amount to R 108 798.00. The bulk of these are medical expenses. He has had a monthly shortfall of R90 161.00 since 2020.

[16] The defendant concedes that prior the accident that caused his paralysis he had good prospects for the future, but that changed since the accident.

Defendant's financial transactions

[17] Analysis of the financial transactions of the defendant during the period the period of separation reveals that he granted his girlfriend an interest free loan of R 2.9 million on 20 October 2023. He is the sole director of a company called Body 20 Dainfern Square. In his previous affidavit deposed in 2018 he denied any involvement in the company. He previously loaned the company an amount R 3 453 000.00 during 2018 and further a R 500 000.00 on 11 May 2011.

[18] A conspectus of the evidence illustrates that post his accident, during the periods 20 January 2020 and 31 December 2022, the defendant ~~has~~ received large sums of money as deposits or transfers into his Standard Bank current account. As of 3 January 2023, the said account had a positive balance of R 575 947.52. An amount R 99 900.00 was deposited in the same current account and a further sum of R 40 000 was deposited on 2 October 2023.

[19] The defendant also has Standard Bank Home Loan account and analysis of the account also that there has been transactional activity into that account. On 01 March 2019 the account had an opening balance of R 728 661.50. On the 23 March 2020 an amount R 400 000.00 was transferred into this account.

The law contribution towards legal fees in matrimonial suites

[20] The claim for a contribution towards matrimonial suit is *sui generis*. Its basis is the duty of support and should not be regarded as providing 'sinews of war' the other party. The guiding principle in in considering claims for contribution towards legal costs was formulated as follows in *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at page 639: 'the quantum which the applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court. In the exercise of that discretion the Court should, I think have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties and in particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the_Court. In any assessment the question of essential disbursements must necessarily be a very material factor. Equally it seems to me that it is inevitable in the procedure that the solicitor acting for the wife must run some potential risk, to this extent that he is not fully secured in advance; he has not, in the usual phrase, full cover for his fees. That appears to me unfortunate, but also to be inevitable. The paramount consideration is that, as I have indicated, the Court should have as its object the determining of an amount which in its discretion it considers necessary for the wife adequately to place her case before the Court. Beyond that, it is my view, undesirable to attempt to state any more specific rules. In matters of discretion, it is not desirable to attempt to propound detailed rules'.

[21] The above exposition was confirmed in *HS v H* [2022] 2023 (1) SA 413 (GJ) at para 82 where the court stated that 'in respect of rule 43 applications Van Rippen is old authority for the rule that the discretion in determining quantum of contribution to costs must be exercised such that 'wife must be enabled to present her case adequately before court'.

[22] Whilst the language by the learned Ogive-Thompson J (as then was) is reflective of a social milieu where 'wives' were subject to marital P, and there was no equality of gender; the principles propounded therein are still applicable to present day nuances where gender disparities are still rife. Notwithstanding, a spouse of either gender is entitled to this relief if the circumstances so demands.

[23] In the case of *AF v MF* 2019 (6) SA 422 (WCC) para [27] the court restated the position as follows: 'The claim for a contribution towards costs in a matrimonial action originated in Roman-Dutch procedure and is well established in our procedure- Rule 43 regulates the procedure to be followed where a contribution to costs is sought. The

substantive basis of the claim is the reciprocal duty to support between spouses which include the costs of legal proceedings'.

[24] The court continued as follows at para [41] that 'The importance of equality of arms in divorce litigation should not be underestimated. Where the is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse- usually the wife- will be forced to settle for less than that which she is legally entitled, simply because she cannot afford to go to trial. On the other hand, the husband who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote constitutional rights to equal protection and benefit of the law and access to courts requires that courts come to the aid of spouses who are without means, to ensure that they are equipped with the necessary resources to come to court to fight what is rightfully theirs'.

[25] In our current constitutional dispensation it is even a more imperative that this relief is favourably considered to ensure access to courts as a fundamental right entrenched in section 34 of the Constitution. Denying a deserving party this relief will amount to denial of basic human right, same can be said of the right to equality in section 9 of the Constitution.

[26] As succinctly put in *AF* supra at para [42]: 'The right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs or forced to be beholden to an attorney who is willing to wait for payment of fees- in effect to act as her 'banker'. The primary duty to support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he means, to fund her reasonable litigation costs. The same applies if the husband is indigent and the wife affluent. And where an impecunious spouse has already incurred debts, in order to litigate, whether to family or to an attorney, I consider that a court should protect the dignity of that spouse by ordering a contribution to cists sufficient to repay those debts (at least to the extent that the court considers the expenditure reasonable'.

Analysis

[27] The sum to be contributed is to be determined by the court's analysis of the amount necessary for the applicant adequately to put its case before court. The financial position of the parties must be objectively considered.

[28] In applying this test to the present case, it is apparent that plaintiff has very limited financial resources. She currently depends on a salary and maintenance money that she receives from the defendant. I am satisfied she has made a full and honest disclosure of her financial position~~,~~ can safely be described as dire. The situation has been exacerbated by the delays in finalising the matter.

[29] The defendant's financial position in contrast to the plaintiff's, appears to be stable. As indicated above, the defendant ~~is~~ operates various bank accounts and all with considerable positive balances. The defendant has not engaged with the evidence which was been placed before the court regarding his strong financial position. The argument that the plaintiff is relying on old transactions cannot stand in the face of recent transactions; including an interest free loan advanced to his girlfriend.

[30] It has not being denied that the defendant has bought art worth R 80 000.00 in December 2022. The defendant has been found to have dissipated assets thus, the current anti-dissipation order against him. He has been unable to disclose the source/s of large sums of money that are from time to time transferred or deposited into his banks accounts.

[31] In addition, plaintiff has demonstrated that the defendant is an heir to his mother's Will, and he has not denied this with any form of conviction.

[32] I have been apprised of the state of health of the defendant and huge medical bills he is required to pay; however, I am satisfied that he is able to contribute to the costs of the plaintiff as outlined in the preceding paragraphs. It is clear that the plaintiff is not able to fund the divorce litigation.

Prolixity

[33] The defendant has complained that plaintiff has bedevilled him with voluminous documents in support of this application. Whilst I accept the principle that courts should frown upon such practice; I take the view that a practical approach needs to be adopted. A strict approach may have the effect of denying a party a right to vindicate a legitimate right or procedural entitlement.

[34] The matter of prolixity has been authoritatively answered by a full court of 3 senior judges of this division in the case of *E v E; R v R; M v M* (12583/17; 20739/18; 5954/18) [2019] ZAGPJHC 180; [2019] 3 All SA 519 (GJ); 2019 (5) SA 566 (GJ) (12 June 2019). The conflicting decisions emanating from this division were comprehensively analysed and in the end the court made an order that: 'Affidavits filed in terms of Rule 43(2) and (3) shall only contain material or averments relevant to the issues for consideration. It shall not be competent for a court to dismiss an application in terms of Rule 43, only on the basis of prolixity. If the court finds that the papers filed by a party contain irrelevant material, the court only has the P to strike off the irrelevant and inadmissible material from the affidavit in question and make an appropriate cost order'.

[35] Before granting order the court quoted with approval the remarks of Spilg J in *TS*[1] that: '"While many Rule 43 applications may not require more than a succinct set of affidavits to enable a court to make a proper determination that will serve the best interest of the child, in my respectful view, a one- size-fits-all approach to the sufficiency of evidence that should be placed before a court may in a given case have difficulty either in passing constitutional scrutiny or being capable of meeting the requirements that the outcome will serve the child's best interests. [63] The adjudication of maintenance for children pendente lite involves establishing the actual expenditure requirements that have been incurred historically, establishing whether there is any change and if so, why." The argument that the application be struck off for prolixity is dismissed.

Finding

[36] I am satisfied that the plaintiff has shown that she has insufficient means, and that the defendant is in a better financial position to contribute towards the costs of her litigation.

[1] **case number 28917/2016** (7th August 2017)

[37] Having found as aforementioned, it follows that the defendant's counterclaim must fail.

[38] Lastly, I am not satisfied that that the court hearing an application brought under the purview of Rule 43(6) is competent to grant relief sought by the plaintiff in prayer 2 of the notice of motion.

Order

[39] In the circumstances, it is ordered as follows:

1. The defendant is directed to forthwith to pay R 711 337.00 towards cost of the pending divorce trial action instituted under case no. 2014/2941.

2. Prayer 2 is hereby dismissed.

3. The defendant's counterclaim is dismissed.

4. The defendant to pay costs of the application on attorney and client scale.

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THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 31 October 2023
Judgment Delivered: 09 November 2023

For the Applicant: Adv. M Nowitz
Instructed by: Hirschowitz Flionis Attorneys .

For the Respondent: Adv. G Olwagen-Meyer

Instructed: Cummings Attorneys