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THE REPUBLIC OF SOUTH AFRICA



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

Case number: 26912/2017

(1) REPORTABLE:
(2) OF INTEREST TO OTHERS JUDGES:
(3) REVISED

DATE SIGNATURE

In the matter between:

W E

Applicant

and

W S

Respondent

JUDGMENT

Molahlehi, J

- [1] The applicant in this matter seeks an order for interim maintenance by her husband pending the finalisation of the divorce in their short-lived marriage. The marriage which is out of community of property has a lifespan of only for two years and is childless. The applicant seeks monthly maintenance of R37 500.00 and contribution to the costs of litigation in the sum of R100 000.00.
- [2] The respondent opposed the application, contending that the applicant has not made out a case for the relief sought. The respondent has also applied to have certain averments relied on by the applicant struck-out on the bases those were proposals made during the settlement negotiations.
- [3] It is trite that as a matter of public policy the courts always encourage parties to engage in settlement negotiations as a means of resolving their disputes amicably and avoiding litigation, if at all possible. In *Naidoo v Marine and Trade Insurance Co. LTD*¹ Trollip JA in dealing with the issue involving correspondence exchanged between the parties on a “without prejudice” basis during the negotiation said:

“It appears from the above letters that all the correspondence starting with and subsequent to appellant's letter of 25 June 1973, RSC, 8, was conducted “without prejudice” in the *bona fide* efforts by both parties to settle the appellant's claim for compensation. The *bona fides* of the parties in that regard was not the questioned. At the first blush, therefore, it would appear that, in accordance with the general “without prejudice” rule, such correspondence, once the respondent objected to its [sic] been adduced in evidence, was wholly inequitable. The

¹ 1978 [3] SA 666 [8]

rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses. "(nowadays very high"), delays, hostility, and inconvenience, it usually entails, by resolving their differences amicably in full and frank discussion without the fear that, if the negotiations failed, any admissions made by them during such discussions will be used against them in their ensuing litigation."

- [4] I do not deem it necessary to analyse in any detail the statements and documents which the respondent contended should be struck-out for being privileged. I do however agree with him that the statements and most of the annexures relied on by the applicant are based on statements made in the course of the *bona fide* and genuine attempt at resolving the dispute without resort to litigation. In this context, allowing the use of the same would fly in the face of the very policy which the court seeks to promote which is a process of open and frank discussions, between the parties without fear that whatever is said during the negotiations cannot later be held against any one of them.
- [5] I agree with the respondent that it is inappropriate for the applicant to seek to make a case based on statements made and documents generated in the course of a *bona fide* attempt at settling the dispute.
- [6] In my view, putting aside the technical point about the admissibility of privileged information, the key issue that needs to be determined is whether the applicant has made out a case for the relief sought.
- [7] It is trite that the onus in a claim for maintenance *pendente lite* is on the applicant to show that he or she is entitled to maintenance. Furthermore, the applicant has

to prove the quantum for the maintenance.

- [8] The purpose of rule 43 of the Uniform Rules of the High Court (the Rules) was stated in *Nilsson v Nilsson*², in the following terms:

"Primarily Rule 43 was envisaged to provide temporary assistance for women, who had given up careers or potential careers for the sake of matrimony with or without maternity, until such time as at a trial, and after hearing evidence, maintenance claim and, if children had been born, custody claims could be properly determined. It was not created to give an interim meal – ticket to women who quite clearly at the trial would not be able to establish a right to maintenance."

- [9] In *Kroon v Kroon*,³ although dealing with the issue of maintenance post-divorce, the court held that it could not award maintenance to a woman who can support herself. To succeed in an application such as the present one the applicant would have to be open and transparent with the court as concerning her income, investments, and the bank statements. It is not a matter of mentioning these matters in passing. The applicant is required to take the court into his or her confidence so that it can assess in a fair manner and balancing the interest of both parties, whether indeed the relief sought should be granted.

- [10] The applicant in her founding affidavit stated that she sold her property at Chaka's Rock for R529 003.26. The one at Namotoni for the sum of R863, 738.90. The funds were placed in a money market account.

- [11] The applicant has not indicated in her papers whether there is any interest accrued

² 1984 [2] SA 294 at 295F

³ 1986. [4] SA 616 (E),

from that investment. There is thus no information concerning the interest that may or may not have accrued from the capital and why she could not use that to support herself. There is no explanation as to why this was not disclosed in the founding affidavit.

[12] It is apparent that for three months after the separation with her husband, the applicant continued to support herself. She has not disclosed how she managed that, and what her source of income was.

[13] Contrary to her version that she is unable to maintain himself there is evidence that indicates that during January 2017 she renovated the kitchen and upgraded the driveway at a significant cost. The only reasonable inference to draw from these facts taken together with those discussed earlier is that it cannot be said that the applicant cannot afford to support herself.

[14] I was informed during the argument that pleadings in this matter have closed and what remains is to set the matter down for trial. It follows therefore that it should not be too long before the matter serve before the court for a determination.

[15] In light of the above, I am of the view that the applicant has failed to make out a case deserving of the relief she sought. Accordingly, the application stands to fail.

Contribution to costs.

[16] The applicant has again failed to be transparent with the court about the relief for the contribution of costs for the litigation. She has not disclosed as to how the litigation was funded before 29 September 2017.

Order

[17] In the premises, the applicant's application is dismissed with costs.

E Molahlehi
Judge of the High Court,
Johannesburg.

Representation:

For the Applicant: Adv. N Strathern

Instructed by: Richardson Attorney Inc

For the Respondent: B.A Fourie SC

Instructed by: Ellis Coll Attorneys

Heard on: 22 February 2018

Delivered on: 08 March 2018