IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 7392/2010

DATE: 24 JUNE 2010

In the matter between:

J S	Applicant
and	
J L O S	Respondent

JUDGMENT

DAVIS. J:

This is an application which was brought in terms of Rule 43 of the Consolidated Rules of the High Court, directing respondent to maintain the applicant, *inter alia:*

(a) Paying an amount of maintenance of R136 000 per month to her.

(b) Bearing all her medical expenses.

c) Bearing the costs in respect of the former common home which was registered in both parties' names (Owl's Rest).

d) Bearing the cost of motor vehicle expenses in respect of applicant's motorcar.

e) Funding an overseas vacation for applicant (indistinct) business class, air tickets, the cost of a car hire and accommodation in a five star hotel for a three week period.

In addition application is sought for a contribution towards applicant's costs in the divorce action which is pending, for an amount of R300 000 towards legal costs. It appears that there is also a further request for R150 000 in respect of an investigation by Mazars Moore Roland Forensic Services (Pty) Limited and R10 000,00 in respect of the costs of an industrial psychologist.

The case was argued comprehensively by Ms Gassner. who appeared together with Ms Anderson on behalf of the applicant and Ms McCurdie. who appeared on behalf of the respondent. Given the urgency of the matter, I do not intend to deliver a comprehensive judgment, but will provide brief reasons for the order which I propose to make and if necessary, to amplify upon such reasons if the parties so request.

The very nature of the application which was stoutly resisted by respondent, is unusual to say the least. Courts, in dealing with Rule 43 applications, are not generally accustomed to ordering maintenance payments *pendente lite* in the large amounts which I have already indicated, let alone legal costs in the amount of R300 000, together with further costs to be incurred insofar as expert evidence is concerned. However, Ms Gassner submitted that it is proper for a Court, when determining a claim for maintenance *pendente lite,* to take the same factors into account which have to be considered in terms of section 7(2) of the Divorce Act 70 of 1979, when awarding a spouse or maintenance in divorce. In this connection she referred to the decision in Carstens v Carstens 1985(2) SA 351 (W) 354A-D, where the principle was approved insofar as this submission was concerned.

Further Ms Gassner referred to an English decision in F v F (ancillary relief) [1995]2 FLR48, where the court said the following:

> "So what considerations bear upon the exercise of any discretion? I think that it is very important to recognise that in measuring affluence, extravagance and reasonable needs, there are no absolutes. All these concepts are comparative... Thus, in determining the wife's reasonable needs on an interim basis, it is important as a matter of principle that the court should endeavour to determine reasonableness according to standards of the ultra rich and to avoid the risk of confining them by the application of scales that would seem generous to ordinary people. Thus I conclude it would be wrong in principle to

> determine the application and on some broad conclusion that if a wife cannot manage at the rate of a quarter of a million, she ought to be able to do so. I think that it is necessary to establish a yardstick that more nearly reflects the standard of living which has been the norm for the wife ever since marriage and for the husband for considerably longer."

I have some doubts as to whether this dictum is equally applicable to Rule 43 cases. This is not to suggest that courts should not take account of the standard of living to which a spouse has become accustomed during the course of the marriage in considering the award of maintenance *pendente lite,* but the object of Rule 43 is that it is of a interim nature, pending the dissolution of the marriage by way of a divorce.

Clearly some recognition of the interim nature of the award needs to be taken into account by the Court in coming to its determination. For example, extravagant holidays upon which at least one of the applicant's prayers is predicated may not be justifiable, particularly if it requires the other party to utilise capital as opposed to income to finance such a manifest luxury.

In this case, there is a further consideration, of which account needs to be taken and which lies at the heart of this dispute. Whatever the disputes on the papers as to the wealth of respondent, it is clear that he is a man of considerable means. It is also, however, clear that he funded, what can only be considered to be an extraordinarily lavish lifestyle enjoyed by the smallest percentage of the extravagantly *bourgeoisie* in our society, out of capital as opposed to income. There is no suggestion, on the papers, that respondent is involved in active business operations which generate significant sums of income which would sustain the parties' lifestyle as set out so luminously in the papers of the applicant.

Ms Gassner pressed the point that, whatever the disputes may have been, there was a letter which had been generated by Mr Vukic, the attorney acting on behalf of respondent which confirmed to Investec Bank Limited, which, it appears, acted as respondent's banker, that his asset value is "not less than R60 000 000,00". Mr Vukic also wrote that "I have for the purposes of the exercise ignored motor vehicles, jewellery and personal expenses which Joe may own, taken into account Joe's trust interest".

Ms Gassner also referred to an affidavit deposed to by Mr Tappolet, a Swiss attorney, who appears to have been the executor of the estate of respondent's father-in-law and a trustee of two Lichtenstein foundations established during the lifetime of the father-in-law, Dr Zoellner, in which the respondent appears to be a beneficiary. According to Ms Gassner. there was more than sufficient capital for the respondent to pay the amounts so sought in this application.

Ms McCurdie strenuously contended to the contrary. She submitted that the only funds which were forthcoming by way of capital were from a trust, in which, it was common cause, the respondent is a beneficiary, the Russet Trust, in an amount of 1.75 million euros. Given the liabilities already incurred by the respondent, it could not be said that he could sustain the claims sought by applicant without significant financial difficulty. Ms McCurdie also pointed out that, on applicant's own papers, she has assets. There is an amount in excess of R200 000 in her bank account. She has assets which can be realised, including a Maserati motor vehicle and a considerable amount of jewellery which, it appears from the papers, was purchased on the basis that such jewellery could be employed to realise liquid cash, if so required.

In short, if these assets are taken into account, together with the cash which, on applicant's own version, she can utilise, together with further amounts which respondent avers applicant accessed and where the amounts remains unexplained. For example respondent, in his affidavit, avers that applicant withdrew a sum of R1 million from the mortgage bond registered against the De Wilde Gans property a few days after their marriage and has failed to account for such monies. Respondent avers that applicant's ex-husband repaid a sum of R800 000 of a R4 million amount received by him from respondent in respect of a debt due to her and in respect of a sale of shares.

It would thus appear that applicant does possess assets which she can also employ and which it would be unfair to the respondent for this Court to ignore, within the context of this particular application. However, there are a number of expenses which, in my view, have to be paid, given the nature of the assets owned by the two parties during the period of this application until the divorce proceedings, which I was informed in court will take place in February 2011.

I have, therefore, in making an award, taken account of the claim as revised by the applicant (JS-7 which was annexed to applicant's papers). I have, in so doing, examined the amounts which it appears to me would be reasonable expenses generated in the interim, particularly those to preserve the major asset: the valuable domestic property. Some expenses do not however appear in the light of the parties' present financial positions, viewed respectively, to be justified.

For example, applicant is not justified in her claim for a personal assistant or for more than one domestic worker, or for lavish entertainment expenses and treatments such as facials, beauty therapists etcetera, or overseas holidays or even extensive local holidays during the interim. From these set of calculations I have fashioned the order which I will presently make. Before I do that, I must turn to the other principle disputed issue, namely the question of legal costs. Here again I was entertained by submissions by both parties as to the nature of amounts to be paid insofar as legal costs are concerned.

In this connection, I found an unreported judgment of Setikowitz, J in Synott v Synott (14 December 1993) to be extremely useful. Selikowitz J examined, in his judgment, the jurisprudence which had been generated to that point and which is still applicable in this case. In particular, it appears that the issue of costs to be paid by the other spouse was considered to form part of the necessary expenses to which such a spouse should make a significant contribution. However, in coming to this decision, Selikowitz. J had regard to the applicant spouse's income, expenses and capital. These are significant considerations of which account must be taken.

In addition, it appears that the reasonable nature of the claim must be examined. Applicant seeks to litigate a dispute which involves no more than money, not children, nor custody, and hence the exquisitely difficult issues which vex courts in these matters she still litigates on a lavish scale, already having spent, according to the papers, approximately R1.2 million which is in significant excess of the amounts which respondent avers that he has expended in his answering affidavit. Some contribution to costs should be made, but in my view, this amount must be significantly reduced from the claims which have been made by applicant.

In the result, therefore, I find that applicant is entitled to be paid a cash amount of R60 000 per month and R100 000 towards legal costs. These amounts are in addition to the payment of the costs incurred on the investec loan facility homeowners insurance premiums, the Silvahurst Home Association levies and water account, rates and taxes, municipal levies and charges upon the property, service and repairs to the home automation system, garden services, pool and pond maintenance costs, window cleaning services, pest control, carpet cleaning, service and repairs to household appliances. Insofar as payment of medical expenses are concerned, they are awarded, but the order distinguishes between item 32 in JS-7, which is for medical expenses, which is granted, and the pharmaceutical purchases of vitamins and supplements which is excluded. There will be no award as to costs of this application.

DAVIS, J