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REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE NO: 13495/2011

DATE:14/09/2011

In the matter between:

M C E Applicant

and

J E Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application in terms of rule 43 of the Uniform Rules of Court. The parties were married in community of property on 18 December 2004. There are no minor children born of the marriage. The applicant claims from the respondent: (i) maintenance for herself in the amount of R10 000; (ii) that the respondent re-register her as a dependent on

his medical aid and (iii) a contribution of R10 000 towards her legal costs. A divorce action is pending in this court.

[2] Both parties are salaried employees, earning R8 712.75 (the applicant) and R22 634 (the respondent) respectively. The applicant left the common home of the parties on 2 November 2010 (she briefly returned to the common home for two weeks during an unmentioned period). The applicant estimates her monthly expenses in the amount of R18 972.00. The disputes between the parties are: the principle of interim maintenance; re-registration of the applicant on the respondent's medical aid scheme, and contribution towards the applicant's costs. With regard to medical aid, I am readily inclined to order the applicant's re-registration. The respondent has not proffered any convincing reason why he has removed the applicant therefrom. ! deal now with the other two aspects in dispute.

[3] There is a need in rule 43 applications to set out briefly, the dispute between the parties in the divorce action. That can only be achieved through succinct reference to the pleadings. The necessity therefor, is to ensure that such issues have been genuinely raised with a bona fide intention that they be properly ventilated by the trial court. Put differently, to ensure that sufficient facts are alleged, which if proven at the trial, would entitle the applicant to the relief claimed. In Carstens v Carstens 1985 (2) SA 351 (SE) Mullins J said:

> "Without laying down any rule of practice in this regard, and despite the desirability of keeping the costs of Rule 43 applications as low as possible, I am of the view that the Court should not be required to search for and peruse another file of papers. I am not informed of the case number of the divorce proceedings, nor even whether process

> was issued out of this Court. Furthermore Rule 43(2) requires the applicant's sworn statement to set out "the relief claimed and the grounds therefor". This suggests that Rule 43 proceedings should be self-contained...."

[4] Experience has shown that in some instances, a party armed with an interim order, frustrates the finalization of the divorce action, with full knowledge that the financial benefits derived in terms of the interim order, are unattainable at the divorce action. It is therefore necessary to interrogate whether the disputes are genuinely raised, regard being had to the purpose of rule 43, which is worth restating, in Nilsson v Nilsson 1984 (2) 294 (C) at 295F, the following was said:

> "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 claims 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. The grey area between the two extremes causes problems."

[5] In the present case, the applicant only states that at the time of deposition of her affidavit, she had instructed her attorneys to institute action against the respondent for a decree of divorce and certain ancillary relief, including rehabilitative maintenance for herself in the amount of R10 000 for 3 years from the date of the decree of divorce. In his answering affidavit the respondent only acknowledges that summons containing such prayers had been

served upon him. It appears from the respondent's answering affidavit that the only prayer he joins issue with, is the rehabilitative maintenance for the applicant, post divorce. No basis is set forth in the application why the applicant would be entitled to rehabilitative maintenance from the respondent, post divorce.

[6] It is important to know such basis, since, as a general statement of law, the reciprocal duty of support, which is one of the invariable consequences of marriage, comes to an end when the marriage terminates. However, s7 of the Divorce Act 70 of 1979 (the Act) empowers the Court granting a decree of divorce to make an order of maintenance in favour of one of the spouses after considering the following jurisdictional facts: the existing or prospective means of the parties; the parties' respective earning capacities; their financialneeds and obligations; their ages; the duration of the marriage; the standard of living of the parties prior to the divorce; the parties' conduct insofar as it may be relevant to the breakdown of the marriage; an order for the division of assets and any other factor which, in the court's opinion, should be taken into account.

[7] In each of the cases I have considered where maintenance was granted post divorce, the spouse in whose favour it was granted, was not earning an income as at the date of divorce. See for example Nilsson (supra); Kroon v Kroon 1986 (4) SA 616 (E) Carstens v Carstens (supra); Pillay v Pillay 2004 (4) SA 81 (SE) and Koorvertjee v Koorvetjee 2006 (6) SA 127 (C). In all these cases, what tipped the scales in favour of awarding maintenance seemed to be that there were minor children and the recipient spouses were unemployed.

[8] The general approach of our courts seems inclined to award little or no maintenance at aii where one or more of the following factors are present:

(a) the woman is young or reasonably young;

(b) she is well-qualified;

(c) she has no children;

(d) she has worked throughout her married life and/or is working at the time she applies for maintenance;

(e) she is in good health;

(f) the marriage was not of long duration.

See Nel v Nel 1977 (3) SA 288 (O); Qoza V Qoza 1989 (4) SA 838 (CK) and Pillay v _Pillay 2004 (4) SA 81 (SE) at 87A-B. See however, Brink v Brink 1983 (3) SA 217 (D).

[9] In Kroon (supra) the court stated three broad principles: First, no maintenance would be awarded to a woman who can support herself. Second, in considering whether maintenance should be ordered post divorce, the court's aim should be to ensure a "clean break" between the parties. Third, the court may, however, award "rehabilitative" maintenance to middle-aged women who have for years devoted themselves full-time to the management of the household and the care of the children of the marriage. Such maintenance is awarded for a period sufficient to tide them over while being trained or retrained for a job or a profession.

[10] The applicant is clearly excluded from the category of spouses for whom "rehabilitative" maintenance was meant for: (i) she has not been a housewife; (ii) there are no minor children; (iii) she is very young (only 28 years old); and (iv) she is employed. Moreover, she has not alleged any of the jurisdictional facts upon which maintenance, post divorce, could be granted in her favour, in any event, having regard to those jurisdictional facts I am convinced that no court would award rehabilitative maintenance for the applicant.

[11] With regard to contribution towards costs, similarly no basis has been laid for a proper consideration. All the applicant states is a bald and terse allegation that:

> "Ek beskik nie oor die finansiele-vermoe om die litigasieJn die egskeidingsaksie_ te finansier nie en benodig 'n voorlopige bydrae vanaf die respondent in die bedrag van R10 000."

[12] The applicant has not informed the Court the basis of the R10 000 she claims, e.g. how it is are arrived at; what unpaid costs have already been incurred, the projected amount up to and including the first day of trial, etc. There can be no better manner of placing such information before court than a draft bill of costs, or at the very least, a summary of fees schedule. This is how courts considering applications for contribution towards costs have, over the years, approached the matter. See for example Van Rippen v Van Rippen 1949 (4) SA 634 (C); Service v Service 1968 (3) SA 526 (D); Micklem v Micklem 1988 (3) SA 259 (C); Nicholson v Nicholson 1998 (1) SA 48 (W); Cary v Cary 1999 (3) SA 615 (C); Greenspan v Greenspan 2001 (4) SA 330 (C).

[13] In Van Zyi v Van Zyi 1947 (1) SA 251 (T) it was held that to succeed in an application for contribution towards costs, the applicant must set out sufficient facts which if established by her at the trial on the hearing of the evidence would justify the court in granting an order for restitution of conjugal rights[1]. In the present case, I have already found that the applicant has not set out any facts which would justify the court in granting her rehabilitative maintenance.

[14] In the recent past a trend has developed in this Division, in terms of which excessive and unmotivated amounts for contribution towards costs are claimed in rule 43 applications. The idea clearly is underpinned by the hope that the court would simply order an amount midway the high and the low. It is even common for counsel to submit that "the practice in this Division is to allow an Rx amount for contribution towards costs." I am not aware of such "practice". If it indeed exists, it is manifestly wrong. A blanket, proximate, "one size fits all" approach, encroaches on the Court's discretion to consider each case on its own facts.

[15] Lastly, an observation. The applicant is heavily indebted. She earns R8 712.75 net. Well over half of her income (R4 800) is spent on servicing debt in the form of credit cards and clothing accounts. According to her schedule of credit card and clothing accounts, she owed a whopping R87 750 at the time of deposing her affidavit. She has, as a result, applied for debt review. She states that some of the debts have been incurred jointly with the respondent. That may be so but that aspect cannot be resolved through a rule 43 application. It falls to be dealt with in the process of division of the joint estate, in terms of which joint liability for those debts

1 An action for restitution of conjugal right was abolished with the promulgation of the Divorce Act 70 of 1979.

is assumed ex lege, I see no reason why the divorce action should not be settled immediately. The parties' estate is too small and heavily indebted to incur any further unnecessary costs in litigation.

[16] To sum up: the applications for interim maintenance and contribution towards costs should be refused. Pendente lite, the applicant should be re-registered on the respondent's medical aid scheme.

[17] In the result, the following order is made:

1. Pending the finalization of the divorce action, the respondent is ordered to re-register the applicant as a dependent on a medical aid scheme to which he is a member, at his cost, and to pay all excesses which are not covered by the medical aid scheme;

2. The applications for interim maintenance and contribution towards costs are dismissed,

3. The costs of this application are costs in the divorce action.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 10 MARCH 2011

JUDGMENT DELIVERED : 14 SEPTEMBER 2011

FOR THE APPLICANT : ADV D MEYER

INSTRUCTED BY : SHAPIRO & SHAPIRO INC, PRETORIA

FOR THE RESPONDENT : ADV Z SCHOEMAN

(PRACTICE NOTE SIGNED BY ADV N. ERASMUS)

INSTRUCTED BY : T GERHARD DE BEER ATTORNEY, PRETORIA