IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)

CASE NO 2267/2012
DATE HEARD: 27/11/2012
DATE DELIVERED: 20.12.2012

In the matter between

BRIGID MARY CARSTENS (born O'REILLY) **APPLICANT**

and

CHRISTIAAN LOUIS CARSTENS **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] This is an application in terms of Rule 43 of the Uniform Rules. The applicant sought an order in the following terms:

> "1. That the Respondent pay Applicant the amount of R8,800.00 per month *pendente lite* in respect of maintenance for Applicant and expenses incurred by Applicant in regard to the dependent child, Laura- Leigh;
>
> 2. That the Respondent pays maintenance to Applicant in respect of the minor child, Ingrid, in the amount of R4,400.00 per month *pendente lite;*

3. That the Respondent continue to provide Applicant with a reliable vehicle *pendente lite*;
4. That the Respondent continue to pay all reasonable and necessary medical expenses in respect of Applicant and the children *pendente lite*;
5. That the Respondent pay a contribution to Applicant's costs in the sum of R385,770.00;
6. That the Honourable Court grant such further and/or alternative relief as may be appropriate.
7. Directing that the costs of this application are to be taxed on the basis that this is an exceptional case in terms of the provisions of sub-rules (7) and (8) of Rule 43 of this Honourable Court, and that such costs are to be costs in the cause of the main action."

[2] The respondent has consented to an order in terms of paragraphs 1, 2, 3, and 4 of the order prayed. Two issues remain: the first, raised by way of a point *in limine*, is whether the applicant is entitled to utilise Rule 43; and the second is whether or not she requires a contribution towards costs.

<u>Application of Rule 43</u>

[3] Rule 43 (1) provides as follows:

43 Matrimonial matters

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

(a) Maintenance *pendente lite*;
(b) a contribution towards the costs of a pending matrimonial action;
(c) interim custody of any child;
(d) interim access to any child.

[4] The circumstances of this case are unusual. The parties were married on 16 August 1991, out of community of property with the inclusion of the accrual

system. In 2004 the applicant instituted an action for a decree of divorce and other relief. On 15 November 2007 a decree of divorce was granted. The minute of the Rule 37 conference held on 12 November 2007 recorded that the interim arrangement which presently existed between the parties with regard to custody of and access to the children, maintenance for the children, and maintenance for the applicant, would continue until finalisation of the whole action. The action has not been finalised and the trial is set down for 5 August 2013. Primary care of the minor child has been resolved. Maintenance and the patrimonial consequences of the divorce remain in issue. The applicant is claiming payment in accordance with the accrual system and the respondent is claiming that she forfeit her share of the accrual of his estate.

[5] It was submitted on behalf of the respondent that the words "*pendente lite*" and "pending matrimonial action" contained in Rule 43, relate to an action that has not been finalised. The marriage between the parties has come to an end by divorce, therefore, so it was submitted, Rule 43 does not apply. It was further submitted that a claim for contribution towards costs is *sui generis* and applies to spouses: the parties are unrelated litigants and there is therefore no obligation on the respondent to contribute towards the applicant's costs.

[6] It is so that the parties are no longer married. However the "matrimonial action" has not been finalised. The status of the applicant with regard to the remaining issues in the action, is that of a spouse. It can be nothing else. The

parties themselves agreed in the Rule 37 minute that interim arrangements would continue until the action was finalised. This agreement could only mean that the respondent acknowledged that the applicant was still a spouse, or was pursuing relief to which she was allegedly entitled as a spouse, for the purpose of adjudication of the remaining issues. The situation is distinguishable from that in *Bienenstein v Bienenstein* 1965 (4) SA 449 (TPD), to which I was referred. In that matter the respondent had instituted an action against the applicant for restitution of conjugal rights and failing which, divorce. A final order of divorce was granted. The applicant noted an appeal against this order and applied in terms of Rule 43 for a contribution towards her costs of appeal. With reference to the contention of the applicant's counsel that the application fell under Rule 43, De Villiers AJ said the following at 451D:

> "I cannot agree with that contention. Rule 43 to my mind clearly refers only to pending matrimonial disputes; that is before the final order of divorce has been granted."

In *Bienenstein*, unlike the present matter, no further matrimonial disputes were pending. The judgment therefore does not assist the respondent.

[7] I am therefore of the view that the applicant is entitled to utilise Rule 43, and the point *in limine* is dismissed.

<u>Contribution towards costs</u>

[8] During 2004 the applicant brought an application in terms of Rule 43 for maintenance and other relief, but did not in that application seek a contribution towards costs. An order was granted in terms of which the respondent was ordered, *inter alia*, to pay the applicant R3 000.00 per month for maintenance for herself, and R3 000.00 per month per child. That order remains in force. During 2007 she brought an application in terms of Rule 43 for a contribution towards costs, but withdrew the application after she received the sum of R986 721.87, following the dissolution of a certain trust. These funds have since been utilised to fund the litigation as well as to meet her living expenses, because her salary and the previous maintenance payments she received from the respondent were insufficient to meet her monthly expenses.

[9] She stated that she presently owes the estimated sum of R76 000.00 to her attorneys and R37 905.00 to a forensic auditor. In addition, she has already paid R715 312.25 for counsel's fees.

[10] It is anticipated that the action will run for a number of days. Both parties have instructed Senior Counsel and experts will be called to testify with regard to the value of the accrual of the respondent's estate. The onus will be on the applicant to prove this value. There is also a dispute about whether the assets of a trust known as the Ardingly Estate Trust (the Trust), are to be taken into account in determining the value of the accrual of the respondent's estate. The applicant maintains that the Trust is the *alter ego* of the respondent, which the

respondent denies. They are both trustees of the Trust, together with three other trustees. The applicant alleges that the respondent has dealt with the Trust assets as his own and mentioned various instances in support of her allegation. The Trust has been joined as the second defendant in the action, and according to the applicant, is represented by Senior Counsel. The trial will therefore involve a number of issues, some complex, and substantial costs.

[11] The applicant works part-time as a nursing sister and earns a gross monthly salary of R7 736.10. The respondent is a medical practitioner who has a number of business interests. He stated that his average monthly income during the first half of 2012 was R59 433.75 and that his monthly expenses are R70 118.31. There is a dispute about the value of the respondent's estate but he stated it to be R10 281 609.75 as at November 2007. The applicant stated that the value of her estate as at the date of divorce was agreed at R955 070.00, but the respondent disputes this amount and says that in 2010 the value was agreed at R1 349 207.51.

[12] The applicant set out her estimated future costs. They include valuator's fees of R25 000 (she disputes the respondent's valuation of some of his assets), consultation and trial fees of a forensic auditor (R1 250.00 per hour consultation fees and R10 000.00 per day at trial), and Senior and Junior Counsel and attorneys' fees for four days preparation, as well as five days at trial. She estimates her total costs at R514 160.00.

[13] The applicant says that she does not have the financial means to pay all these expenses.

[14] The respondent opposed the application for a contribution towards costs on the grounds that the applicant has the available means to meet her future costs. Firstly the trustees of the Trust have resolved to repay her loan account in the Trust, in the sum of R116 200.00. Secondly, she has two costs orders in her favour, which the respondent estimates to be in the sum of R250 000.00. These costs orders follow from a point *in limine* raised by the respondent and the Trust at the trial on 1 September 2010. The point *in limine* concerned the applicant's entitlement to have the Trust assets considered in determining the value of the accrual of the respondent's estate. The point in *limine* was dismissed with costs. An appeal to the Supreme Court of Appeal was struck off the roll and the respondent and the Trust were ordered to pay the costs of the appeal. The applicant has not yet taxed her bills of costs.

[15] It was submitted on behalf of the applicant that because she contends that the Trust is the *alter ego* of the respondent, and the Trust is a party to the litigation, it would be inappropriate for her to accept payment of her loan account. I do not see how the applicant would be compromised if she accepted such payment. It would not prevent her from persisting in her claim that the Trust assets should be taken into account in determining the value of the accrual of the respondent's estate. On the other hand I do not see why she should not be

allowed to retain some portion of the repayment, given her present financial situation.

[16] It was submitted on behalf of the applicant that the costs orders in her favour are for past costs. The applicant did not deal in her affidavit with the manner in which payment of these costs by the respondent will be appropriated. I assume that attorney and client fees already incurred will be accounted for, as well as disbursements which she has not already covered. It does seem however that the applicant has paid counsel's fees and I should make an allowance for some amount which may be left over following payment by the respondent and accounting by her attorney.

[17] Taking into account all the above considerations I am of the view that an amount of R250 000.00 is an appropriate contribution towards the applicant's costs.

[18] It was submitted that this was an exceptional case where fees should not be limited to the tariff prescribed in terms of Rule 43 (7) and (8). I do not consider it to be an exceptional case. The point *in limine* was not complex. The amounts involved are large but the further grounds of opposition were limited to a consideration of the applicant's own means.

[19] It is therefore ordered as follows:

[19.1] That the Respondent pay Applicant the amount of R8,800.00 per month *pendente lite* in respect of maintenance for Applicant and expenses incurred by Applicant in regard to the dependent child, Laura- Leigh;

[19.2] That the Respondent pays maintenance to Applicant in respect of the minor child, Ingrid, in the amount of R4,400.00 per month *pendente lite;*

[19.3] That the Respondent continue to provide Applicant with a reliable vehicle *pendente lite*;

[19.4] That the Respondent continue to pay all reasonable and necessary medical expenses in respect of Applicant and the children *pendente lite*;

[19.5] That the Respondent pay a contribution to Applicant's costs in the sum of R250,000.00;

[19.6] That the costs of the application are to be costs in the cause.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv C Mey, instructed by G P van Rhyn, Minaar & Co Incorporated, Uitenhague.

For the Defendant: Adv J D Huisamen, instructed by Kaplan Blumberg Attorneys, Port Elizabeth.