

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

CASE NO: 1549/2012
Date heard: 27 August 2013
Date delivered: 3 September 2013
NOT REPORTABLE

In the matter between:

JANINE PEARL BRIGGS

APPLICANT

and

ARTHUR JONATHAN BRIGGS

RESPONDENT

JUDGEMENT

GOOSEN, J.

[1] The applicant and the respondent are married to each other out of community of property. A divorce action is pending between the parties in which the applicant claims payment of maintenance post divorce, and costs. These issues remain in dispute.

[2] In this application, brought in terms of Rule 43, the applicant seeks payment of interim maintenance in the sum of R10 000.00 per month as well as a contribution towards her costs of R80 000.00.

[3] The applicant is a 49 year old woman who is presently employed as an administrative assistant by Tradelane Management CC. She resides on the farm River Ridge in the district of Addo. The respondent is a 74 year old man who is retired, in ill health and resides in a retirement village in Sunlands. The parties were married to each other, out of community of property and without operation of the accrual system, on 27 July 1985. One child, now a major, was born of the marriage. The applicant instituted an action for divorce alleging that the respondent deserted the common home. This latter allegation is denied by the respondent who pleads that he left the common home because he was no longer able to trust the applicant by reason *inter alia* of alleged financial mismanagement of the respondent's farming operation and because applicant had allegedly developed an unduly close relationship with her employer.

[4] The divorce action was set down for trial in May 2013. Following a formal postponement application brought by the applicant the matter was postponed *sine die*. It has now been set down for trial during March 2014. In July 2012 the applicant brought an application in terms of Rule 43 in which she claimed payment of interim monthly maintenance in the sum of R15 000.00. The matter was argued before Bacela AJ on 24 July 2012 and judgment was handed down on 31 July. The learned judge granted an order directing the respondent to pay maintenance in the amount of R2950.00 per month. In determining the amount of interim maintenance payable the learned judge found that the applicant's

expenses upon which she relied in her claim for interim maintenance are not reasonable and that these had been inflated. She went on to determine those expenses which were reasonable and on the basis of this determined the amount of maintenance payable. I should mention that the learned judge also considered the ability of the respondent to make payment of the interim maintenance and concluded that although his means are restricted some allowance for the payment of interim maintenance should be made.

[5] A party is entitled, in terms of Rule 43(6) to bring a further application in terms of the Rule in which he or she seeks an order varying the order which has already been granted in terms of the Rule. What must be shown is that a material change has taken place in the circumstances of the party seeking the variation. It is well established that the sub-rule is to be strictly interpreted. This is to ensure that the Rule is not abused and that a party, aggrieved by an order, does not in effect bring about reconsideration of an interim order as if on appeal. It is therefore essential that a party relying upon Rule 43(6) should set out in detail those circumstances which it is alleged constitute a material change warranting the variation of the interim order already made.

[6] In this instance the applicant seeks both an interim order of maintenance in the sum of R10 000.00 and an order for a contribution towards costs. The interim maintenance order sought necessarily involves a variation of

the order of Bacela AJ and accordingly the application falls squarely within the ambit of Rule 43(6).

[7] Insofar as the claim for the variation of the interim maintenance order is concerned the applicant does not pertinently address the issue of an alleged material change in her circumstances. The founding affidavit refers to an increase in the Eskom levy and the Levy payable in respect of her occupation of the farm and refers to certain loans which the applicant has allegedly had to enter into in order to survive. She does not however address the change in her circumstances since July 2012 either in relation to specific increases in her monthly expenses or, insofar as relevant, the increase or decrease in her monthly income. Indeed it appears from the schedule of expenses upon which the applicant relies that a great many of the expenses listed are expenses which Bacela AJ specifically found to be unreasonable or unnecessary for purposes of determining interim maintenance. In these circumstances it is difficult to avoid the conclusion that the applicant is in effect seeking a variation of the interim maintenance order by way of a *quasi*-appeal against the findings made by Bacela AJ.

[8] In my view the applicant has not made out a proper case for the variation of that order.

[9] The other aspect concerns the contribution towards costs. It appears that in the previous application the request for a contribution towards costs

was abandoned at the hearing. I am therefore at large to deal with this aspect *de novo*.

[10] The applicant seeks a very substantial contribution towards costs in the amount of R80 000.00. It is of course trite that a party seeking a contribution towards costs in pending matrimonial litigation must show, in the first instance that she / he has a *prima facie* case for the particular relief sought and that she / he has insufficient means with which to prosecute the matter. In the event that these requisites are established the court determines the *quantum* of the contribution to be made having regard to the circumstances of the case, the financial position of the parties and the issues to be determined at trial.

[11] It is common cause that the principal issues in the trial action concern the applicant's claim for maintenance. This claim is apparently based on the allegation that the applicant is a 49 year old woman who has limited work experience and qualifications and therefore limited employment prospects in the future. It may be gathered from the applicants' papers that in addition to her maintenance needs, the issue of the respondent's ability to afford maintenance payments to the applicant is also in issue.

[12] The applicant's case for the substantial contribution to costs which she seeks is stated in very terse terms in her papers. Her claim for a contribution is essentially stated in a single paragraph which reads:

In order to properly prepare for trial my Attorney of Record needs to peruse and consider many documents and financial statements of the Respondent. As stated herein above, the Respondent's life expectancy is also in issue. The Respondent is consulting a physician. Once a report is received, it will have to be properly considered and discussed with a further impartial expert. The Respondent also filed an expert notice regarding the evidence of his financial planner in respect of his earning capacity. Once the Respondent's report of the physician is received I will also have to discuss it with a financial expert, compile a further report and file the required notices. I will have to incur the costs of these consultations, investigations and reports. I also need to lead expert evidence regarding my employability and earning capacity, which is very limited. Should I not be able to properly place my case before this Honourable Court, I will suffer severe and irreparable harm.

[13] In my view this is wholly inadequate. Much of the envisaged expert investigation appears to be based on speculation as to what may or may not emerge from the report of the respondent's physician. The schedule of anticipated legal expenses annexed to the papers also does explain what investigations will necessarily be required.

[14] What is striking is that the applicant does not explain, at all, what steps have already been taken in respect of preparation for trial. The application papers appear to ignore the fact that the matter was previously enrolled for trial in May 2013 and that, having regard to the court file of which this Rule 43 application forms part substantial pre-trial preparation has already been completed, including the filing of a notice in terms of rule 36(9) qualifying a recruitment expert to testify on behalf of the plaintiff regarding her earning capacity. The applicant also does not deal with what legal expenses have already been incurred and how these have been funded to date.

[15] Even if I accept – upon a generous interpretation of the applicant's papers – that she has made out a *prima facie* case entitling her to

substantial success in her claims, and that her papers disclose an inability to fund her own litigation costs, I cannot accept that she has made out a case for the scale of the contribution she seeks. An applicant seeking a contribution towards costs must set out the anticipated reasonable legal expenses with sufficient detail to enable the court to properly assess what is reasonably required in order to do justice between the parties. It is not good enough simply to assert the alleged need to employ certain experts and then to provide no substantiated basis for estimating the costs associated with the employment of such experts. That, regrettably, is the state of the applicant's papers. The result is an estimate of costs which, in my view, is excessive and speculative. This court is left with no basis upon which it can determine the applicant's reasonably anticipated legal costs, whether she is able to meet those costs herself either wholly or in part and therefore the quantum of any contribution to which the applicant may be entitled.

[16] It was submitted on behalf of the respondent that in the event that I am inclined to dismiss the application I should not restrict the respondent to recovery of the costs permitted by rule 43. The submission was advanced on the basis that the applicant's application constitutes an abuse of process.

[17] The fact that a party has not advanced a meritorious claim does not mean that she or he is guilty of an abuse of process. I am unable, upon a proper consideration of the papers filed in this matter, to find that the

The application is dismissed with costs.

APPEARANCES:

Adv. B Dyke, for Respondent
Instructed by Kaplan Blumberg Attorneys