IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 1307/2016

Date Heard: 11 April 2017

Date Delivered: 18 April 2017

In the matter between:

A. L. (born K.) Applicant

and

W. D. L. Respondent

JUDGMENT

EKSTEEN J:

[1] The parties in the present matter are embroiled in acrimonious divorce proceedings in which the main disputes relate to money. In the present proceedings the applicant seeks maintenance *pendente lite* and a contribution towards the costs of the litigation.

[2] It is not seriously in dispute that the parties, who have been married for 34 years, enjoyed a comfortable, if not lavish, lifestyle. The applicant was never required to seek employment and has enjoyed a comfortable lifestyle as a housewife. She has

accumulated no significant assets although she has an investment portfolio in the amount of R330 652,37. The respondent has throughout the marriage provided financially for the applicant’s needs and during the subsistence of the marriage they enjoyed overseas vacations including a luxury cruise. The applicant has accumulated a substantial wardrobe, they drove luxury vehicles, dined out in restaurants and enjoyed the fruits of a holiday home on Thesen Island in Knysna.

[3] Although the respondent is in employment earning a salary of approximately R45 000 per month both he and the applicant are beneficiaries in the W. L. Trust, a discretionary trust. Both parties are trustees in the trust and much of their marital lifestyle was funded from the trust.

[4] The respondent is also a trustee in two other trusts and he is involved in a number of other business entities. He denies, however, that he has any financial ownership interests in the business entities or the trusts.

[5] The marital home, which is presently occupied by the applicant, vests in the W. L. Trust and all expenses relating to the maintenance and upkeep of the property are paid from the W. L. Trust.

[6] The pleadings in the main action had previously closed and the matter had been set down for trial. At the eleventh hour the plaintiff amended her particulars of claim so as to join the trusts referred to earlier in the main action contending that the value of the trust assets should be taken into account for purposes of the determination of the

redistribution in terms of section 7(3) of the Divorce Act. This caused a postponement of the matter and I am advised from the Bar that a plea to the amended particulars of claim is ready to be filed and the matter will then re-enrolled without further delay.

[7] In the interim and *pendente lite* the applicant claims payment of:

1. Maintenance to the applicant in the sum of R58 400 per month, such sum to be paid on or before the first day of each month;
2. An amount of R42 000 to the applicant on the first day of December of each year to enable the applicant to rent accommodation in Thesen Island for two weeks over the December/January period, in the event that the applicant is not granted access by the respondent to their family holiday home in Thesen Island during this period;
3. All household expenses which the respondent currently pays, including but not limited to the rates, taxes, water, electricity, wages for the domestic worker and gardener, medical aid, cell phone, telephone accounts and insurance;
4. The sum of R495 888 towards the applicant's costs, which amount is payable within 7 (seven) days from the date of this order.
5. The costs of this application on an attorney and client scale (outside the tariff provided for in terms of rule 43(7) and (8)).

[8] In his answering papers the respondent has tendered to provide the applicant access to the house in Thesen Island as requested. Paragraph 2 of the notice of motion accordingly falls away. The respondent tenders further to pay all the household expenses which he currently pays. Ms **Rossi**, who appeared on behalf of the applicant,

advised from the Bar that the applicant accepts the tender. What remains in issue therefore is the claim for maintenance, the contribution towards costs and the costs order in the rule 43 application.

Maintenance *pendente lite*

[9] I have recorded earlier that the main action will be ready for enrolment shortly and the duration of the order which I am asked to make at this stage is accordingly to be in force for a relatively brief period. The tender by the respondent to continue to pay for all the household expenses which he currently pays for has been accepted. The applicant is maintained on the respondent's medical aid scheme and the respondent has further tendered in his answering papers to pay all medical expenses not covered by the medical aid scheme. The tender is likewise accepted. The maintenance *pendente lite* claimed is accordingly, as I understand the claim, directed solely at the applicant's personal expenses.

[10] In arriving at her claim for R58 400 per month the applicant set out her monthly expenses as follows:

Groceries	R18 000
Medical Expenses	R 3 000
Pets	R 3 000
Gardening expenses, gas and home maintenance	R 6 500
Clothing	R 5 000
Make-up, creams and perfumes	R 2 000
Hairdresser, beauty treatments and massages	R 3 900
Restaurants	R10 000

Petrol and other vehicle expenses	R 4 000
Gifts	R 3 000
TOTAL	R58 400

[11] By virtue of the tender relating to medical expenses the amount of R3 000 contained in the calculation falls away. The costs incurred in respect of gardening expenses, gas and home maintenance is covered by the tender relating to the household expenses and the figure of R6 500 in this respect similarly falls away.

[12] As recorded earlier the respondent earns approximately R45 000 per month from his employment. He alleges that the expenses which he has tendered, and which he has thus far paid, amount to approximately R50 000 per month. In addition he has over the past year contributed an amount of R25 000 to the applicant in respect of her personal expenses. He accordingly contributes an amount of R75 000 to the applicant's maintenance, the bulk of which emanates from the W. L. Trust. He contends that the applicant has comfortably maintained herself for the past year on such maintenance and tenders to continue to pay an amount of R25 000 to the applicant in respect of her personal expenses. This the applicant considers to be inadequate.

[13] I have recorded earlier that it is not in dispute that the parties maintained a very high standard of living prior to their separation. Subject to the available means of the parties, the applicant is entitled to expect to be maintained at a similar standard. In my view, however, the respondent's tender in respect of maintenance *pendente lite* is a generous one even to an affluent person. Whilst I do not intend to analyse the individual expenses listed in the applicant's monthly expenditure I consider the demand

to be excessive in the circumstances. I further have regard to the fact that the order which I make will be of limited duration and that the applicant's lavish accommodation remains fully maintained in the same manner as it was prior to the separation of the parties by the trust. I consider that a contribution of R25 000 in respect of the personal expenses of the applicant without dependants constitutes an adequate provision.

Contribution towards costs

[14] It is the applicant's case, as alluded to earlier, that the assets of the various trusts ought to be considered in determining the extent of the redistribution of the respondent's estate. She contends that the respondent controls the trusts as his alter ego. She accordingly requires what she termed "a forensic audit". It is not explained what the forensic audit entails nor why it is necessary in respect of the issues in dispute. The respondent is represented by senior counsel in the litigation and the applicant contends, rightly in my view, that she is entitled to litigate on a similar scale. The claims made are substantial and, *prima facie*, I am of the view that she would be justified in seeking to employ two counsel.

[15] In making a claim for a contribution towards costs it is the intention to enable the applicant to present her case and to bring the matter to court. She is entitled therefore to a reasonable contribution to the costs up to the first day of trial. In the event that the matter proceeds to trial a further application may be made on the first and every subsequent day for additional contributions.

[16] She has set out in her founding papers her calculation for the amount which she requires as a further contribution. It is computed as follows:

1.	Pre-trial contributions (8 hours)	R45 048
2.	Attendance of pre-trial conference (2 hours)	R11 262
3.	Preparation of pre-trial agenda, response thereto by counsel (3 hours)	R11 421
4.	Preparation of pre-trial minutes by attorney (1 hours)	R 1 824
5.	Reply to possible notice in terms of rule 35(3) by respondent by counsel (2 hours)	R 7 614
6.	Preparation of request for trial particulars by counsel (3 hours)	R11 421
7.	Perusal of discovered documents (6 hours)	R33 786
8.	Trial preparation (1 day)	R56 310
9.	Forensic auditor (including first day of trial)	R300 000
10.	First day of trial in respect of counsel	R38 070
11.	First day of trial in respect of attorney	R18 240
	Sub-Total	R534 996
	Less contribution already made by respondent	R30 000
	TOTAL	R504 996

[17] At the hearing of the matter, however, Ms **Rossi** advised that she sought only the contribution in the amount of R495 888 set out in the notice of motion as opposed to the R504 999 in the affidavit.

[18] In respect of the cost of a forensic audit the applicant has annexed a "quotation" from Messrs Grant Thornton which records:

> "I hereby provide a quotation for fees for performing work relating to the abovementioned divorce matter.
>
> Forensic audit to be charged at an average rate of R1 500 per hour. The time can only be estimated once we have received a copy of the latest annual financial statements. The costing of this could range from R200 000 to as much as R300 000.
>
> This fee is excluding VAT and disbursements."

[19] It is readily apparent from the letter that Messrs Grant Thornton give no more than an illustrative indication of what auditing fees may entail. They are unable to give any indication as to the likely costs of their intended mandate and are unable to venture any estimate as to the time required until they have had sight of the annual financial statements. In these circumstances I did not consider that a great deal of weight can be attached to the figure of R300 000 set out in the estimate of costs in the applicant's affidavit. (The figure of R300 000 presupposes 200 hours of work.) In view of the nature of the dispute between the parties it seems to me *prima facie* that the work which they would be required to do is likely to amount to a substantially lower bill.

[20] The costs of counsel's fees for preparation of trial and the first day trial fee similarly requires comment. Counsels' fees at the Eastern Cape Society of Advocates are generally payable sixty days after the delivery of the first account. The costs of preparation for trial by attorney and counsel and first day fee, which together amounts to

more than R100 000 of the estimate will not be payable prior to trial and may similarly be dealt with in a further application brought on the first day of trial.

[21] In all the circumstances I consider that a more realistic assessment of the applicant's financial needs to bring her case to trial would, on the information currently available, be in the vicinity of R250 000 to R300 000.

[22] Ms **Rossi** has referred me to authority which provides that an applicant possessed of assets should not be required to sell her assets in order to raise money for her defence where there are sufficient means available in the defendant's estate to pay for the costs of trial. I agree entirely with the principle. The same, however, cannot apply where the applicant is possessed of money sufficient to cover her costs of the preparation of trial. Where the applicant is possessed of money to pay for the preparation of trial she should, absent other material considerations, do so and an appropriate adjustment may, where necessary, be made in the order issued at the trial. (Compare in this regard ***Griesel v Griesel*** 1981 (4) SA 270 (O) and in particular at p. 277A.)

[23] In the present instance the applicant is possessed of a sum of approximately R330 000 in cash invested in an investment portfolio. In these circumstances I do not consider that the applicant is entitled to at this stage the further contribution which she claims.

<u>Costs of application</u>

[24] Rule 43 is designed to provide an expeditious and inexpensive manner to deal with issues *pendente lite* listed in the rule. For this reason costs recoverable by legal practitioners are limited by the rule itself. In exceptional matters the court is justified in granting a deviation from the tariffs set out in the rule.

[25] The present matter does not relate to any issues more complex than those encountered in the run of the mill application for maintenance *pendente lite* and a contribution towards costs. No particular complex legal issue has arisen in the matter and I am unpersuaded that there are grounds set forth in the papers to justify a deviation from the tariff.

[26] In the result I make the following order *pendente lite*:

1. The respondent is ordered to pay maintenance to the applicant in the sum of R25 000 per month such sum to be paid on or before the first day of each month.
2. The respondent is ordered to pay all household expenses, which the respondent currently pays, including not limited to the rates, taxes, water, electricity, wages for the domestic worker and gardener, medical aid, cell phone, telephone accounts and insurance;
3. The respondent is ordered to retain the applicant on his medical aid scheme and to pay all medical costs incurred by the applicant which are not covered by the scheme.

4. The respondent is ordered to grant the applicant access to the holiday home on Thesen Island for two weeks over the December/January holiday period each year.

5. The costs of this application will be costs in the main action, to be taxed on the tariff set out in rule 43.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Rossi instructed by Greyvensteins, Port Elizabeth

For Respondent: Adv Beyleveld SC instructed by Friedman Scheckter, Port Elizabeth