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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: 3145/2015

Date heard: 12 March 2019

Date delivered: 09 April 2019

In the matter between:

J[...] A[...] M[...] (Born C[...])

Applicant

and

G[...] S[...] M[...]

Respondent

JUDGMENT

RUGUNANAN, AJ

- [1] This is an application in terms of rule 43(6) in which the applicant seeks a costs contribution from the respondent. The background to the matter is set out hereunder.
- [2] The parties were married to each other on 9 March 1991 in Port Elizabeth out of community of property in terms of an ante-nuptial agreement which

incorporates the accrual system. The divorce action, instituted by the applicant against the respondent on 13 August 2015 proceeds to trial on 5 August 2019 (there being at least three interim postponements of the action, a series of three opposed interlocutory applications and a joinder of some 27 trusts, among them two offshore trusts known as the Christim Trust and the Highway Trust).

- [3] In December 2016 the applicant launched an application for discovery in terms of Rule 35(11). This application was recently heard by Revelas J simultaneously with three others involving an application under Rule 21(4), an application to amend the particulars of claim in the divorce action, and an application for introducing a further affidavit.¹

- [4] On 10 February 2017 the applicant launched a rule 43 application in which she sought maintenance *pendente lite*, a contribution towards costs and ancillary relief. On 2 March 2017 the applicant delivered a supplementary affidavit in the rule 43 application. On 16 March 2017 the respondent launched an application under rule 30 in which he sought an order setting aside the rule 43 application on the basis that it was an irregular proceeding. The applicant opposed the rule 30 application and the matter was heard on 10 August 2017 before Eksteen J. Judgment in the rule 30 application was delivered on 22 August 2017, and an order was made dismissing the rule 30 application with costs, such costs inclusive of the costs of two senior counsel.

- [5] The rule 43 application was heard on 16 November 2017. In terms of the order granted on 5 December 2017, the applicant was awarded an initial contribution towards costs in the amount of R1 million *per* Revelas J.

¹ See J[...] A[...] M[...] (Born C[...]) v G[...] S[...] M[...] (3145/2015) [2019] ZAECPHC 16 (26 March 2019)

[6] On 10 October 2018 the applicant launched the present rule 43(6) application. On 5 March 2019 the applicant launched an application to file a further affidavit in respect of the rule 43(6) application. This application and the rule 43(6) application were heard simultaneously by this court on 12 March 2019. Noting on the one hand that the material raised in the applicant's further affidavit related to the issue of respondent's alleged affordability while on the other hand the respondent stated that the applicant's case in investigating various trusts is speculative, I granted leave to both parties to file their further affidavits such leave being granted to permit a ventilation of the issues. The affidavits deal with documentation pertaining to the respondent's approval for administrative relief under the Exchange Control Special Voluntary Disclosure Programme (to which I revert below).

[7] In her notice of motion the applicant seeks an order in the following terms:

1. *Directing the respondent to pay the applicant's attorneys of record a further contribution towards the applicant's legal costs until the first day of trial, in the amount of R1 200 000;*
2. *In the alternative to prayer 1 above, and only in the event of the above Honourable Court finding that the applicant is bound by the agreement reached with the respondent on 26 June 2018, in respect of a further contribution towards her legal costs, directing the respondent to pay to the applicant's attorneys of record a further contribution towards the applicant's legal costs until the day preceding the first day of trial, in the amount of R625 000;*
3. *Directing the respondent to pay a daily contribution of R125 000 towards the applicant's costs, effective as of the second day of trial in the event of the court granting the relief sought in prayer 1 above*

and from the first day of trial in the event of the court granting the alternative relief in prayer 2 above, each such payment to be made by electronic funds transfer to be received by the applicant's attorneys of record in the trust account by 09h00 on each day;

4. Directing that the respondent shall bear the costs of this application on the scale as between attorney and client, including the costs of two senior counsel.

- [8] The respondent disputes that he is liable to make a contribution of R1 200 000 and further, that he is able to afford to make one. His contention is that the applicant is bound by an agreement concluded between the parties during June 2018 (to which I revert below) and that insofar as the remaining prayers for relief are concerned, the applicant is possessed of sufficient means to make arrangements to pay her own costs in full.

The application to strike out

- [9] The respondent sought to have several paragraphs (i.e. paragraph 10, the last sentence in paragraph 34, and the whole of paragraphs 35, 36, 37, 42, 43, 44 and 45) of the applicant's founding affidavit² struck out mainly on the ground that the material they contain impermissibly refers to 'without prejudice' communications and a settlement agreement pertaining to the divorce action between the parties.
- [10] Ms Dicker SC, who appeared for the applicant, contended that the material in the said paragraphs maintain relevance in the sense that they are indicative the circumstances that have driven the applicant to incur costs to date, this being due to the divorce action having previously settled but for the respondent's failure to have signed a written deed of

² i.e. the founding affidavit in the present rule 43(6) application.

settlement. Relying on ***Gore v Amalgamated Mining Holdings***,³ Ms Dicker contended further that if a party such as the respondent applies to strike out what is alleged to be inadmissible evidence but does not deal with the merits as in pleading over, then he or she stands or falls on the basis of that choice.⁴ In any event, so the argument went, the impugned paragraphs do not disclose detail of the settlement; they are merely broad-based factual averments lending context to the events that culminated in the current status of the litigation between the parties.

- [11] Ms Gassner SC who appeared for the respondent submitted that the respondent's denial of the material contained in the said paragraphs is nothing more than an indication that a settlement was not reached. In this regard the respondent could not be expected to plead over or answer the applicant's allegations where she does not proffer detail of the settlement. But the fact that detail of the settlement agreement is not mentioned does not mean that the material is not without prejudice. In this regard Ms Gassner referred to ***Waste Tech (Pty) Ltd v Van Zyl & Glanville NNO*** ⁵, as authority for the proposition that statements made expressly or impliedly without prejudice in the course of *bona fide* negotiations for the settlement of a dispute cannot be disclosed in evidence without the consent of both parties. The exception to this rule envisages a binding settlement agreement that results in an enforceable compromise of the suit.⁶ Inasmuch as the applicant's founding affidavit indicates that the alleged settlement agreement is unenforceable, I am in agreement with Ms Gassner that the applicant is precluded from disclosing settlement communications relevant thereto. In the circumstances I am of the view that the applicant's allegations in the aforementioned paragraphs are

³ 1985 (1) SA 295 (C) at 295 H-I

⁴ See also *Helen Suzman Foundation v President of the RSA & Others* 2015 (2) SA 1 (CC) at paragraph [136] and *Pienaar & Another v Strauss & Another* (3930/2016) [2017] ZAECPHC (28 March 2017)

⁵ 2002 (1) SA 841 (E) at 846 E; and *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (AD) at 677 A-B;

⁶ *Gcabashe v Nene* 1975 (3) SA 912 (D&CLD) at 914 E

patently not necessary for a determination of the issues in this application and fall to be struck out.

The costs contribution of R1 200 000 until the first day of trial

- [12] There are a number of disputed matters in the papers, which are somewhat lengthier and more involved than is usually the case. Based on fairness and upon a robust appraisal of matters still to be decided at the trial, I must do the best I can in the circumstances to achieve a fair, though perhaps rough and ready, solution to the problem of placing both parties in a position to present their cases properly before the court.
- [13] It is clear from the papers that both the applicant and the respondent are wealthy people and that they enjoyed a luxurious lifestyle during the subsistence of their marriage. The respondent is a businessman who has accumulated wealth both locally and abroad, the bulk of which is held in various trusts. In pursuit of her claim for the division of the accrual, the applicant believes that the respondent is the *alter ego* of the numerous trusts presently cited as defendants in the main action and that he has control of trust assets and has access to substantial trust funds both for his personal benefit and for financing the costs contribution which she seeks. For this reason the applicant sought leave to file a further affidavit attaching documentation pertaining to the Exchange Control Special Voluntary Disclosure Programme.
- [14] The dispute whether the respondent has control of trust assets and access to trust funds is a controversial issue that cannot be determined in favour of the applicant in these proceedings. The issue is triable in the divorce proceedings, for two reasons. Firstly, if regard is had the provisions of the ante-nuptial agreement concluded between the applicant and the

respondent which expressly exclude trust assets from the operation of the accrual. Secondly, the pronouncement by the Supreme Court of Appeal in **REM v VM**⁷ 2017 (3) SA 371 (SCA) wherein it was held that control by a trustee of a trust asset in breach of the trust deed does not change the nature of the trust asset and does not vest ownership of the trust asset in the trustee spouse, nor does it lay a foundation for taking a trust asset into account in determining the accrual of a spouse's estate.

- [15] Ms Gassner submitted, and correctly in my view, that in seeking to justify the costs contribution she seeks the applicant has nowhere in her papers identified *prima facie* evidence from which it can reasonably be inferred that the trust assets are beneficially owned by the respondent, nor has she identified or particularised any assailable transactions regarding the respondent's alleged handling of trust assets as personal assets notwithstanding extensive forensic investigations by her accountant one Greyling. Absent any *prima facie* evidence, alternatively fact-specific evidence, the claim for a further costs contribution cannot be supported by speculative inferences which appears to be the approach adopted by the applicant. In this regard the applicant's further affidavit, which introduced the respondent's application for administrative relief under the Exchange Control Special Voluntary Disclosure Programme⁸ in terms of which the respondent was permitted to repatriate to this country US\$ 678 486.00 worth of assets, does not assist in advancing the applicant's case for a costs contribution. The respondent maintains that these are not his personal funds but funds held by the Highway Trust and that the dispute concerning these funds cannot be ventilated in the present rule 43 proceedings.

⁷ 2017 (3) SA 371 (SCA)

⁸ per Regulation 24 of the Exchange Control Regulations

- [16] Dealing with the various interlocutory applications mentioned earlier; in a broad sense, these were brought by the applicant to establish *inter alia* the financial position of the trusts, the respondent's level of involvement in the affairs of the trusts, and the extent of their assets and liabilities. In respect of these interlocutory applications the applicant seeks a costs contribution approximating R1 200 000.⁹
- [17] Although a rule 43 costs contribution order may not be limited to party and party costs and may include attorney and client costs,¹⁰ it is a well-established principle that an applicant seeking a contribution under the rule is not entitled to obtain a contribution to, or recover, costs in interlocutory applications.¹¹ The rationale for this principle is that spouses who are successful in interlocutory applications in divorce actions will generally be awarded costs of the interlocutory application. If a successful spouse, in addition, is awarded a costs contribution in terms of rule 43 for the same interlocutory application, the result would be a duplication of the costs award which is clearly inequitable.
- [18] Ms Dicker contended that this principle emanates from pre-constitutional jurisprudence and that in deciding the issue this court should adopt the "equality of arms" approach based on the constitutional prescript of equality before the law. In this regard, I was urged to make a costs contribution award in respect of the interlocutory applications launched by the applicant to date. I am not convinced that this is what I should do. The order by Eksteen J dismissing the rule 30 application on 22 August 2017 incorporated a costs order in favour of the applicant which included the costs of two counsel. According to the applicant, these costs are in the process of being taxed. On this basis there is no reason to depart from the

⁹ Founding affidavit rule 43(6) application, page 2, paragraph 102

¹⁰ *Dodo v Dodo* 1990 (2) SA 77 (WLD) at 99 H-I

¹¹ *Micklem v Micklem* 1988 (3) SA 259 (CPD) at 263 A; *Service v Service* 1968 (3) SA 526 (D); and *Maas v Maas* 1993 (3) SA885 (O)

established principle even if it is the applicant's gripe that the costs order is limited to party and party costs. In addition, the recent judgment by Revelas J in respect of the rule 35(11) application (along with the others) incorporated an order to the effect that the costs of the rule 35(11) application be reserved for determination by the trial court. It is considered unfeasible to make provision for a costs contribution at this stage when the applicant's entitlement to those costs is yet to be determined. Incorporating what has been stated above, and for reasons that follow hereunder, I am of the view that a costs contribution of R1 200 000 until the first day of trial is not justified.

The costs contribution agreement of June 2018

- [19] During June 2018 the respondent made an offer, which the applicant accepted, that in addition to the R1 million costs contribution that the respondent had previously paid in terms of the order granted on 5 December 2017, he would pay a further amount of R1 250 000 in two instalments towards the applicant's costs up to but not including the first day of trial. The costs contribution agreement relied on by the respondent is evidenced by a series of emails exchanged between the parties' attorneys.¹² The costs contribution was to be paid by the respondent in two equal instalments of R625 000; the first instalment payable on 5 July 2018 and the second on 31 July 2018. The applicant's acceptance of the respondent's tender was conveyed in an email dated 26 June 2018 and is not disputed. It is common cause that the first instalment was paid by the respondent and accepted by the applicant, but that the second instalment, despite him seeking an extension for payment until the end of September 2018, remains unpaid to date. This amount is currently held in the respondent's attorneys' trust account. In failing to make payment of the second instalment when it became due the respondent has breached the

¹² Founding affidavit rule 43(6) application, Annexures JAM2, JAM3 and JAM4 pp 50-58

costs contribution agreement. Notwithstanding this, the applicant did not cancel the agreement, nor does she seek cancellation of the agreement in her founding affidavit in this application, this despite her contention that the respondent repudiated the agreement.

[20] It is evident from the relief sought in the notice of motion and in the founding affidavit¹³ that the applicant elects to enforce the costs contribution agreement on the one hand while on the other, also seeking to pursue a claim for a costs contribution of R1 200 000.

[21] On facts indicating that the applicant retained the first instalment and not having cancelled the agreement on the ground of repudiation but claiming enforcement thereof, Ms Gassner contended that the application of the doctrine of election precludes the applicant from claiming a remedy inconsistent with the terms of the costs contribution agreement. The essential characteristics of the doctrine of election appear from the following *dictum* in ***Bekazaku Properties (Pty) Ltd V Pam Golding Properties (Pty) Ltd*** 1996 (2) SA 537 (C) at 542 E-F:

*“When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party. Election is a species of waiver; an election to pursue one remedy involves the waiver or abandonment of the other.”*¹⁴

[22] I accord recognition to this statement of the law and am of the view that the applicant is bound by the terms of the costs contribution agreement. This also stems from a recognition that a costs contribution is akin to a

¹³ Founding affidavit rule 43(6) application, page8, paragraphs 16-19

¹⁴ Approved in *Merryhill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) at 550 B-H

claim for maintenance which rests on the duty of support between spouses¹⁵ and that a court is not empowered to vary an undertaking or agreement for the payment of maintenance in respect of which no order has been made.¹⁶

The alternative further contribution of R625 000 plus the daily contribution of R125 000 with effect from the first day of trial

- [23] Tritely, a claim for contribution towards costs in a matrimonial suit is *sui generis*. The contribution is towards the costs of the action.¹⁷ The basis for such a claim is the duty of support which the spouses owe to each other.¹⁸ In assessing the quantum of the contribution to enable the party seeking the contribution to present his/her case adequately before the court, the court would have regard to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation.¹⁹ Impacting on the considerations underlying contributions towards costs is the constitutional requirement of equality before the law in matrimonial disputes, so that a wealthy spouse does not enjoy unwarranted advantage over the other, less wealthy, spouse.²⁰
- [24] From what becomes apparent hereunder, the applicant is possessed of sufficient means to ensure that she litigates against the respondent on an equal footing. Quoting directly from the founding affidavit, this is what the applicant says:

Paragraph 82:

¹⁵ *Glazer v Glazer* 1959 (3) SA 928 (WLD) at 931 G-H

¹⁶ *Schutte v Schutte* 1986 (1) SA 872 (AD)

¹⁷ *Maas v Maas* 1993 (3) SA 885 (O) at 888J-889B

¹⁸ *Glazer v Glazer* *supra* at 931 G-H

¹⁹ *Carey v Carey* 1999 (3) SA 615 (C)

²⁰ *Carey v Carey* *supra*

*“I have three Investec accounts, two local, which have balances of R43 341 and R87 010 and an Investec UK account which has an investment of £45 101 **as at 2 October 2018.**”*

Paragraph 83:

*“My ABSA account has R4 046 **at 2 October 2018.** My RBS accounts have approximately £16 and £2 851 respectively.”*
(The emphasis in bold is mine).

[25] Although unemployed, the applicant in addition, owns three immovable investment properties and presently resides on a property owned by the respondent (23 H[...] Road). She owns two luxury motor vehicles, a Mercedes and a Porsche having a value of R250 000 and R800 000 respectively. Her net asset portfolio approximates to R13 million.²¹ She has also remained silent about disclosing whether an agreement has been concluded with her attorneys in terms whereof she ceded her potential accrual award as security for legal costs. Correspondence directed to the applicant’s attorneys was met with a refusal to make such disclosure. Considering that the applicant’s attorneys concluded a similar agreement with another client, the respondent draws the inference that the applicant had indeed provided her attorneys with security for costs. The refusal to make such disclosure is certainly a relevant factor in deciding whether the applicant may be awarded a costs contribution.

[26] The respondent has net assets approximating R8.6 million comprising primarily of eight immovable properties (among them 23 H[...] Road), a shareholding and a retirement capital portfolio.²² He does not own a motor vehicle. His monthly income after tax is R164 000. From this amount should be deducted a monthly amount of R137 000. The latter amount is the sum total of what it costs him to service the maintenance order of 5

²¹ Calculated in rounded off figures : R15 million less R1,8 million in liabilities and less R50 000 expenses - per Annexure JM5, page 47 of the rule 43 application

²² Sworn reply, page 135, paragraph 45 a.r.w. Annexure “GMW 15” pages 226-227

December 2017. What the respondent is effectively left with is R27 000 to cover his personal expenses. He contends that he is unable to afford the contribution/s that the applicant seeks.

- [27] The sum total of the alternative contribution of R625 000 plus the R125 000 from first day of trial amounts to R750 000. The applicant's UK investment of £45 101 converts to the conservative equivalent of R845 192.²³ This amount exceeds the sum total of R750 000 by a considerable margin. Nowhere does the applicant state that she is unable to access this investment nor does she state that she is unable to repatriate these funds. The applicant, self-evidently, has the means for ensuring that she has sufficient cover to meet the costs of her preparation for trial (R625 000) and to cover the costs she requires for the first day of trial (R125 000). She is capable of litigating without a contribution. Regard being had to her available resources I am satisfied that the applicant, by her own showing, is capable of placing herself in a position of equality before the law without a costs contribution for the amount/s claimed. It has not been demonstrated that the applicant has a need for the contribution/s which she claims, and in the circumstances I do not consider it appropriate to exercise a discretion in her favour at this stage.²⁴ I regard the applicant's personal wealth and resources as also the speculative nature of her accrual claim as weighty considerations militating against a further costs contribution in her favour. However should circumstances necessitate the applicant may seek a daily costs contribution either when the trial in the main action commences or after the first day of trial.²⁵

²³ See calculation in respondent's sworn reply at page 143

²⁴ *Amanda Lategan (Kolesky) v Wessel Daniel Lategan (1307/2016) [2017] ZAECPHC (15 April 2017)* and cf. *Marie Doninique Edwige Synott v David James Pierce Synott (Unreported) CPD Case No 14525/93, 14 December 1993*

²⁵ *Brown v Brown 1970 (2) SA 625 (W); Amanda Lategan (Kolesky) v Wessel Daniel Lategan supra at paragraph [15]*

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

[28.1] In accordance with the agreement concluded between the parties during June 2018, the respondent shall pay to the applicant, within 10 days from the date of this order, the amount of R625 000 (six hundred and twenty five thousand Rand) plus interest calculated with effect from 31 July 2018 to date of payment;

[28.2] The applicant is given leave to approach the trial court on the same papers for a further contribution, if so advised;

[28.3] The applicant shall pay the respondent's costs in respect of the application to strike out;

[28.4] The costs of the application in terms of uniform rule 43(6) and the costs of the applicant's application to file one further affidavit in support of the said application are reserved for determination by the trial court.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv. T. A. Dicker SC, instructed by Catto Neethling Wiid Inc., Cape Town, c/o Greyventeins Inc., Port Elizabeth.

For the First Respondent: Adv. B. Gassner SC, instructed by Miller Du Toit Cloete Inc., Cape Town, c/o Kaplan Blumberg Attorneys, Port Elizabeth.