IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

REPORTABLE

Case No: 3066/2016

Date heard: 28 October 2019

Date delivered: 31 October 2019

In the matter between:

Z[…] D[…] **Applicant**

AND

T[…] D[…] **Respondent**

JUDGMENT

Beyleveld AJ:

[1] The applicant, the defendant in the divorce action, seeks an order pursuant to Rule 43(1)(b). She claims from the respondent, the plaintiff in the action, an amount of R85 114.00 as a contribution towards her costs[1].

[2] The application was first set down for hearing on 1 October 2019, but, by agreement postponed to 28 October 2019, the same day the action was enrolled for hearing.

[3] By further agreement between the parties the divorce action was postponed *sine die* and the Rule 43 application argued on the morning allocated for the hearing of the action.

[4] The defendant's allegations contained in her sworn statement in terms of Rule 43(2) are, to say the least, sketchy, generalized and lacking necessary particularity.

[5] The reasons advanced by the defendant for not being able to fund the litigation are:

[5.1] That she was previously employed at a Local Municipality at a salary less than that earned by the plaintiff[2];

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[1] For the sake of convenience the parties will be referred to as in the action.

[5.2] She was compelled to relocate to Port Elizabeth with her husband;

[5.3] The plaintiff promised to look after the defendant and pay her "*accounts*" as he was earning more than the defendant[3];

[5.4] Marriage infidelity on the part of the plaintiff caused the defendant to leave the matrimonial home during 2016;

[5.5] The plaintiff ceased paying her accounts and, until she gained employment again in March 2018[4] she was dependent on her mother;

[5.6] By the time she obtained employment she was "*heavily indebted*" to third parties and was compelled to obtain a loan from a bank to settle the arrears on her vehicle;

[5.7] her salary advice[5] is indicative of the fact that she is unable to finance the litigation.

[6] The defendant asserts that she has already incurred an indebtedness towards her attorney for past expenses[6] and she is advised that a future amount estimated as being R42 135.00 would be required to finalize the matter.

[7] In respect of past legal expenses, she annexes an attorney and client schedule prepared by her attorney. A portion thereof relates to withdrawn proceedings in the Regional Court in Mthatha whilst a material portion relates to travel and accommodation[7].

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[2] No particulars are forthcoming as to the amount of any discrepancy, or for that matter the amount earned by the defendant.
[3] "more than me".
[4] She advances no details as to why she was unable to procure employment during this period having particular regard to her excellent qualifications or what steps she took to seek employment.
[5] Annexed to the affidavit.
[6] In the sum of R42 979.00.
[7] The travel and accommodation costs of her attorney.

[8] It is apparent from the court file that the trial, which has previously been set down, has been postponed on more than one occasion.

[9] It is perhaps apposite at this stage to revert to the issues in dispute in the action.

[10] No maintenance is claimed by the defendant[8] whose counterclaim is aimed at obtaining a division of the joint estate.

[11] The plaintiff, on the other hand, asserts that the marriage regime is out of community of property as the parties so orally agreed prior to the marriage.

[12] An "*antenuptial contract*" was concluded between the parties and registered. Such conclusion and registration was clearly non-compliant with the requirements relating to the execution and registration of antenuptial contracts and is an issue raised by the defendant.

[13] Such an issue is, in my view, of no relevance to the essential issue in dispute in the action, namely whether or not, *inter partes*, agreement existed that the marriage would be out of community of property[9].

[14] Our law recognizes the validity, *inter partes*, of an informal antenuptial contract[10].

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[8] There are no children born of the marriage.

[9] The only potential relevance may be to contend that the executing of the power of attorney inferentially support the plaintiff's assertion that a prior oral agreement existed.

[10] Aschen's Executrix v Blythe (1886) 4 SC 136; *Ex Parte* Spinazze and Another N.N.O 1983 (4) SA 751 (T); 1985 (3) SA 650 (A) confirmed on appeal; Schmitz v Schmitz [2015] 3 ALL SA 85 (KZD); Mathabathe v Mathabathe 1987 (3) SA (W).

[15] The real issue in the divorce action is, therefore, an uncomplicated factual issue, namely whether the parties orally agree to be married out of community of property[11].

[16] The trial should, therefore, be of limited duration, certainly not going beyond one day and in my view, would not require an attorney from Mthatha to travel to Port Elizabeth to conduct the trial. Local junior counsel would be more than adequate to assist the defendant during the trial which, in travelling and accommodation alone, would amount to a substantial saving of costs[12].

[17] In his sworn reply, the plaintiff denies being possessed of assets (or income) which would enable him to pay a contribution.

[18] He also contends that the defendant has been reticent in not disclosing what she did with her pension pay-out and the proceeds of the sale of her immovable property.

[19] Justifiably, the plaintiff asserts that the defendant has failed to disclose the nature and extent of her assets and liabilities and meaningfully set out her monthly financial commitments.

[20] The defendant's salary advice indicates a gross salary of R22 795.22, which includes a housing allowance of R1336.22 per month.

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[11] The defendant herself, notwithstanding a contention that she is married in community of property, annexes to her affidavit as "ZD2" a copy of the credit agreement form signed by the defendant when obtaining a loan from African Bank, which records the marital status as married by "ANC" – mysteriously on the form annexed someone has attempted to redact the letters "ANC".

[12] The plaintiff is also represented by junior counsel.

[21] In annexure "ZD2" which is annexed by the defendant, it indicates that as at 29 January 2019 the defendant's gross salary is R20 206.25[13]. It also indicates that the defendant[14] had income available after having regard to monthly expenditure including repayment of the loan. Such free residue[15] has presumably increased in the months subsequent to the date of annexure "ZD2" by virtue of the increase in salary.

[22] The defendant's disclosure of her financial position and ability to fund litigation is at best lacking in particularity and substance, but more realistically falls far short of a full and frank disclosure of her financial position.

[23] In ***Du Preez v Du Preez***[16] the following was stated:

> ". . . there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs."

Further,[17] the court said:

> "A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrimae fidei*) and to disclose fully all material

[13] The salary advice annexed as "ZD1" indicates an increase in gross salary.
[14] At a lower salary.
[15] Which was in excess of R2 500.00 per month.
[16] 2009 (6) SA 28 (TPD) at para [15]
[17] At para [16]

> information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with 'clean hands' and, on that ground alone, the court will be justified in refusing relief."

[24] In the present instance, the defendant's disclosure falls far short of what is required. An example of what is considered proper financial disclosure is contained in the disclosure form annexed to the Full Bench decision in ***E v E and Others***[18]. It would, in my view, be considered a prudent practice in Rule 43 applications for the parties (in cases where the financial ability of the parties is an issue) to annex to the affidavit a spreadsheet or form similar to the disclosure form referred to above. This would not offend the underlying principle in Rule 43 applications that the affidavits are in the nature of a declaration or plea. Pleadings often contain annexures setting out how a claim is calculated and computed. This necessary annexure would, in fact, result in the affidavits themselves being less prolix as the deponents to the affidavits could simply confirm the contents thereof and, where necessary succinctly elaborate on certain issues.

[25] Not only would a proper disclosure such as contemplated in the disclosure form not offend against the underlying principle of such applications[19] but would activate the parties to embark on earlier settlement negotiations[20].

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[18] [2019] JOL 44933 (GJ)
[19] Speedy and expeditious interim relief
[20] *E v E supra* at para [56]

[26] Applying a procedure as set out above, I do not believe it is appropriate to emasculate the provisions of Rule 43 by allowing the filing of affidavits "*without restrictions*" and to allow a replying affidavit as an "*automatic right*"[21]. Perhaps that is something best left to the Rules Board to consider.

[27] The issue of a compulsory disclosure form in Rule 43 applications may also form the subject matter of a debate and/or deliberations on amending our practice directives to include the necessary provisions and/or guidelines in respect thereof.

[28] In the defendant's sworn statement, for instance, there is no disclosure at all of her monthly expenses[22].

[29] The defendant's attorney, faced with this difficulty sought leave to file a supplementary affidavit. The reason advanced for seeking leave to file a further affidavit[23] was that the defendant *". . . omitted to give details of my expenditure as I though (sic) these are expenses that are ordinary to everyday life and Rule 43(5) also empowers this Honourable Court to call for further evidence if need.*"

[30] This explanation is unsatisfactory, ill-conceived and opportunistic. A contribution is not awarded merely because it is asked for but only when a proper case has been made out in the sworn statement[24].

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[21] *E v E supra* at paras [59] and [61]
[22] And leaving aside for the moment disclosures of her assets and/or realization thereof.
[23] Rule 43 contemplates only two sets of affidavits – *Mather v Mather* 1970 (4) SA 582 (E); *Boulle v Boulle* 1966 (1) SA 446 (D); *Maree v Maree* 1972 (1) SA 261 (O).
[24] See PA Van Niekerk, A Practical Guide to Patrimonial Litigation in Divorce Actions at para 6.3

[31] The lack of cogency for the reason advanced militates against a ruling that a further affidavit be filed. In the exercise of my discretion, I decline to accept the supplementary affidavit.

[32] Even if the affidavit were accepted, it would not improve the defendant's position.

[33] There is no explanation why the expenses listed are markedly different to the expenses listed in annexure "ZD2".

[34] In my view, even the supplementary affidavit falls short of the disclosures expected.

[35] It is trite law that litigation costs are part of the duty to support[25].

[36] The test to be applied in considering the amount necessary to place the other litigant in a position to adequately present her case is set out in ***Senior v Senior***[26].

[37] As indicated above, however, I am not persuaded that the defendant has made out a proper case, more particularly where she does not claim to be reliant on the plaintiff for any maintenance.

[38] On the papers, it is also not apparent that the plaintiff is in a better position to litigate than the defendant. Even if I were to find otherwise, the defendant's

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[25] Heaton and Kruger, South African Family Law, 4th Edition 199; *Chasen v Chasen*, Unreported judgment by Kroon J in this division under case number 1623/99; *Glazer v Glazer* 1959 (3) SA 928 (W) at 931G; *Dodo v Dodo* 1990 (2) SA 77 (W) at 96F and *Nicolson v Nicolson* 1998 (1) SA 48 (W) at 50B.

[26] 1999 (4) SA 955 (W) at 963H-964A. See also the extensive exposition by Kroon J in *Chasen supra*.

estimated future costs are not verified and in any event, could only be a reasonable contribution to costs up to the first day of trial[27].

[39] Insofar as past costs are concerned, a material portion relates to Regional Court proceedings where the defendant had the right to insist on payment of her taxed costs.

[40] The costs relating to the attorney travelling to Port Elizabeth and accommodation are in any event, in my view, not recoverable. In any event, an appropriate adjustment may, where necessary, be made in a cost order issued by the trial court[28].

[41] In conclusion, the defendant has not made out a proper case entitling her to a contribution towards costs.

[42] In the result I make the following order:

[39.1] The application is dismissed.

[39.2] The costs of the application are reserved for determination by the trial court.

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A. BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

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[27] Lategan v Lategan, Port Elizabeth High Court case number 1307/2016 at para [15].
[28] Griesel v Griesel 1981 (4) SA 270 (O) at 277A

Appearance:

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