

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

Case No: 878/2019

In the matter between:

E[...] C[....] D[...] (born D[...] S[...]) Applicant

And

B[...] D[...] D[...] Respondent

JUDGMENT

BESHE J:

[1] The applicant instituted divorce proceedings against the respondent in January 2018. She is now seeking a further contribution of R1 000 000.00 towards her legal costs in the divorce action until the first day of the trial. Also sought by the applicant is costs of application, including costs of two counsel.

[2] The following factors appear to be common cause between the parties:

In April 2018, respondent paid a R1 000 000.00 contribution towards applicant's cost but due to the exchange rate the amount actually paid over to the applicant was R93 800.00.

In April of the following year, being 2019, applicant launched an application similar to the present one in respect of which she was seeking a contribution towards her costs in the sum of R 500 000.00. The matter was settled

between the parties and respondent agreed to an order in the amount sought by the applicant, namely R 500 000.00.

The parties are married to each other out of community of property. The accrual system is applicable to the marriage.

At the time when the order for a contribution of R 500 000.00 was made in April 2019, the divorce action had been set down for hearing on 27 May 2010, but postponed *sine die*. It was thereafter set down for hearing on 11 May 2020. Once again it did not proceed, having been removed from the roll by agreement between the parties. Even though a new trial date in December 2020 had been set, I was advised that the matter was not going to proceed on the appointed date.

[3] If I understand applicant's case properly, it is that even though she had sought a contribution towards her costs in the action up to the first day of trial previously, even though the trial has not taken off – she has exhausted the costs contribution of R 500 000.00 that was previously paid by the respondent. That is due to the fact that a number of events have occurred since April 2019 when the contribution was made by the respondent *inter alia*: Pre-trial conference was held. Requests for further particulars were made by both parties. Replies thereto by both parties.

[4] This prompted respondent's counsel *Ms Dicker SC* to argue that applicant is seeking a costs contribution in respect of the same legal services / disbursements which the previous costs contribution was intended to cater for. Further that costs orders were made in respect of certain interlocutory applications applicant refers to, and that those fall to be disregarded for purposes of this application. Also, that applicant's legal expenses are

exorbitant and in many instances unreasonable and unnecessary submitting that she has conducted this litigation wastefully.

[5] Applicant describes herself as an adult unemployed female. She lives in a house that is valued at R6 700 000.00 and situated in Jeffrey's Bay with one of their two daughters. She states that the respondent is a successful businessman who has built up a substantial estate during the course of their marriage. Further that he established a number of trusts and companies. That however the respondent has not made a proper disclosure of his assets and liabilities. That therefore the dispute between them relates to the patrimonial consequences of the divorce but also to a large extent to whether the assets of the trusts are in reality those of the respondent. Consequently, she has appointed a panel of experts to render reports and give evidence at the hearing of the divorce. She may also need to appoint a valuer in Australia to evaluate the properties that are in Australia. According to the applicant, her total legal costs for which she was billed in respect of the divorce action until 22 May 2020 amount to R767 000.00. That however, she has not been billed for all the work performed on her behalf. Her attorneys having last rendered a debit note for their fees in November 2019.

[6] Applicant estimates that fees from May 2020 to first day of trial will amount to R1 342 470.00. Her legal cost until May 2020 are said to be R 767 000.00 and fees due to her attorneys from November 2019 R 550 686.00. From the total of the abovementioned figures, she subtracts the contribution she has received which she puts at R 593 800.00. She puts the shortfall at R2 066 356.00.

[7] To support her assertion that the respondent is possessed of the means to pay the amount she is claiming, applicant makes the following averments:

Respondent receives a gross remuneration of ± 35 880.00 Australian Dollars a month which, according to her translates to R 360 000.00 per month.

Regarding what respondent communicated through his attorney in April 2020, namely that she has substantial funds available to her in Australia, she explains that there are certain bank accounts and loan accounts that are nominally registered in her name in respect of which she has no access thereto, with respondent exercising effective control over them.

[8] The papers filed in this application are by no means brief, with the main index running into 194 pages. Applicant's founding affidavit comprising of 71 pages, with annexures thereto. It is trite that prolixity in *Rule 43* applications is an abuse of the process because it defeats the purpose of the rule. The purpose of *Rule 43* applications is to decide the applications provided for by the rule as inexpensively and as expeditiously as possible.

[9] Applicant's counsel, *Mr Buchanan SC* justified this by submitting that the underlying issues in this matter are not straight forward. Unlike the run of the mill *Rule 43* applications courts usually deal with.

[10] To make matters worse, applicant has sought permission to file a supplementary affidavit following the filing of the opposing affidavit. This is on the basis that respondent's opposing affidavit is replete with unsubstantiated and speculative allegations which are irrelevant, scandalous, abusive and defamatory and false. That in the interest of justice and in order for her not to be prejudiced, she should be permitted to respond to these allegations. She also seeks an order for costs against the respondent in respect of the application to file a supplementary affidavit, as between attorney and client. This in turn prompted the respondent to request that in the event of the filing applicant's supplementary affidavit being allowed, he be allowed to file a response thereto. This clearly is not what is envisaged in *Rule 43*. This does not lend itself to a simple and expeditious decision of the application.

[11] What does respondent allege in his opposing affidavit:

The applicant refuses his suggestion of mediation which he believes may resolve the issues in dispute between them. The applicant has always had access and continues to have full access to certain banking accounts. Throughout their marriage, applicant was fully involved in their affairs. These are some of the allegations that seem to have been raised applicant's ire. Respondent contends further that he is not hiding any assets. He confirms having made the following payments to the applicant since the institution of the divorce action:

R1 000 000.00 paid directly to the applicant. R 500 000.00 as a contribution to her costs per a court order agreed to. That there are existing costs orders in applicant's favour. Applicant's attorneys have litigated on an extraordinary scale, adopting a technical uncompromising and obstructive approach to the matter. Costs claimed by the applicant are unreasonable, exaggerated and in some instances duplicated. He then points out to items in annexures B and C to applicant's founding affidavit he alleges amount to duplication or an excessive. Applicant's refusal to provide actual invoices and bills as per respondent's request speaks volumes of and is indicative of applicant's tendency not to take the court into her confidence and to mislead the court. That the R 500 000.00 contribution was made on the basis, as claimed by the applicant, that it will cover her costs up to and including the first day of trial. Respondent complains that applicant does not provide any details as to how the amounts of R 93 800.00 and R 500 000.00 paid to her as contribution to her costs in April 2018 and May 2019 respectively were used. There is no logic in her averment that her attorneys have not rendered a bill since 5 November 2019. He denies the trusts are only for his benefit. That applicant is a trustee of the trusts. They are family trusts created for the ultimate benefit of their children. Provision was made in the previous *Rule 43* application for valuers and experts to conduct investigations in Australia so was provision for Mr **Honeyball's** costs. Mr **Honeyball**, an auditor, is assisting the applicant to value the respondent's asserts. He assails some of the costs claimed as well

as some items in the bill of costs and abbreviated party and party bill of costs. He insisted that applicant has access to funds that she has in fact withdrawn from the bond account. Further that she has significant funds available to her in the form of Australian bank accounts and shares.

[12] Respondent points out that his legal costs, excluding the costs of Senior Counsel and attorney's costs for June / July 2020, do not exceed R 400 000.00. That therefore applicant's costs are exorbitant. His monthly expenses exceed his monthly income. In this regard, he annexes a list of his estimate of his monthly expenditure. Respondent complains that applicant does not provide details regarding amounts drawn from the access bond. He further raises concerns about items listed in exhibit B and C which are Debit notes and Draft abbreviated part and party bill of costs 22 March 2019 to 22 May 2020, respectively. Respondent denies that applicant requires contribution to her cost in the amount she claims or that she does not have the financial means to finance her litigation.

[13] It was necessary for me to go through applicant's supplementary affidavit to determine whether she was justified in seeking its admission. All that the supplementary affidavit does is raise further debates about who does what in regard to filing of tax returns, who signs what and why, why the trusts were established, the role of the applicant in the running of those trusts, motive behind opening of certain bank accounts. Alleged attempts by respondent to avoid paying certain taxes – it just perpetuates the counter-accusations between the parties. But most importantly what emerges from the supplementary affidavit is that applicant has managed to have access to certain accounts and draw money therefrom, which according to her, she believed were only nominally held in her name. As to what led her to believe the accounts were only nominally held in her name is to me unclear. This has led to her reducing the amount sought towards the contribution to her costs to almost half the amount that she initially sought, to R 422 376.69.

[14] In my view, respondent had every right to put the record straight in so far as these accounts are concerned and the accessibility thereto by the applicant. That is exactly what an opposing affidavit is meant to achieve. The applicant seeks an indulgence by seeking leave to file a further affidavit that is otherwise not provided for in *Rule 43*. She had not made out a case why the respondent should be ordered to pay the costs of her application to file a supplementary affidavit. The applicant does not deny much of what respondent states in the opposing affidavit, save to try and explain some of the aspects raised by the respondent in his opposing affidavit. Even though I have had regard to the applicant's supplementary affidavit, no case has been made out why I should award costs to the applicant in this regard on any scale. Applicant seeks costs on an attorney and client scale. All what applicant sought to achieve via the supplementary affidavit was to try and prove that she has not been less than candid in the founding affidavit.

[15] Both parties are *ad idem* about the need to achieve / ensure parity of arms between parties to a litigation, in keeping with *Section 9 (1)* of our Constitution. A contribution towards costs in a divorce action is meant to enable the applicant party to be in a position to present their case fairly. That it is usually the wife who is forced to settle for less than she is entitled to because she lacks the financial resources required to pursue her claims.

[16] In *casu*, respondent contends that there is equality of arms between the parties. That the applicant has sufficient income and assets at her disposal to meet her reasonable past, present and future legal expenses.

[17] I am satisfied that the applicant does have financial means at her disposal to finance her legal costs. I however take cognisance of the fact that it is not required of an applicant to exhaust all her assets before the respondent can be required to contribute towards her legal costs. Respondent denies that the contribution towards costs that is sought is reasonable. There is merit in respondent's contention that the contribution that was made by him

was meant to cater for legal costs until the first day of trial. Even though applicant claims that a lot has happened since the last trial date that was set. Apart from the Pre-trial Conference, there does not seem to be much else that happened. In respect of the interlocutory applications mentioned, there are costs orders in place. The commissioning of reports by experts in respect of the aspects in respect of which applicant requires reports were catered for to a large extent by the previous contribution. It also does not assist the court in making an assessment regarding a contribution to be made, for applicant to state that her legal costs until 22 May 2020 are R 767 000.00, which excludes the fees of her attorneys since November 2019.

[18] It is not clear what led to applicant to believe that the bank accounts in question were nominally opened in her name and that she could not access them. It is also concerning that the applicant is reluctant to attend mediation which may help to resolve the issues between the parties and therefore reduce costs. Respondent makes a point about what he regards as exorbitant and in many instances unreasonable and unnecessary legal expenses. He complains that these are depleting his savings to the detriment of both parties and their children. There is no doubt that the parties are expected to litigate responsibly to avert the depletion of their assets. It is so that in the period between the institution of the divorce proceedings in January 2018 and April 2019 the respondent has made a contribution towards applicant's legal costs amounting to ± R1 500.000.00. In regard to the 2018 payment, even though he paid R1 000.000.00, only R 93 000.00 was paid over to the applicant. It was only in respect of the second amount paid towards a contribution to applicant's legal costs that applicant instituted an application for such. This was granted by agreement between the parties. This paints a picture of a respondent who is not unwilling to make a contribution towards applicant's legal costs.

[19] Granted that respondent is possessed of financial means, which he states are not limitless, just as the applicant is not expected to exhaust her resources in footing the bill for the divorce, so too is the respondent not expected to exhaust or deplete his savings on the divorce.

[20] For the following reasons, amongst others, I am not persuaded that the applicant has made out a case for the amount she seeks as a contribution towards her legal costs: Since the last trial date was set, not much has happened. Provision was made in relation to the last contribution for her legal costs up to the first day of trial, including for the appointment of experts to a large extent. It has been shown by the respondent that she has access to banking accounts held in her name. In my view, a contribution of R 300.000.00 will be adequate to cater for applicant's legal costs up to first day of trial.

[21] Accordingly, the respondent is ordered to pay a further contribution of R 300.000.00 towards applicant's costs in the divorce action to be paid within sixty (60) days from date of this judgment.

Costs of this application to be costs in the cause.

Costs for the application for leave to file a supplementary affidavit are to be borne by the applicant, including the costs of two counsel.

**NG BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Applicant	:	Adv: R. G. Buchanan SC & Adv: T. Zietsman
Instructed by	:	SCHOEMAN OOSTHUIZEN INC. 167 Cape Road Mill Park PORT ELIZABETH Ref: Dr JS Oosthuizen/ah/C02357 Tel.: 041 – 373 6878
For the Respondent	:	Adv: Dicker SC & Adv: M. Morgan
Instructed by	:	BDLS ATTORNEYS 60 2 nd Avenue Newton Park PORT ELIZABETH Ref: Ms A Gomes/MAT/24254 Tel.: 041 – 373 9693
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Date Reserved	:	3 November 2020
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