IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No: 2272/2020

Date Heard: 9 February 2021

Date Delivered: 25 February 2021

In the matter between:

J[…] M[…] F[….] Applicant

and

P[…] V[…] A[…] F[…] Respondent

JUDGMENT

POTGIETER AJ:

[1] Applicant has instituted divorce proceedings against the respondent. The latter is defending the action and has instituted a conditional counterclaim. It appears that the trial was set down for 26 January 2021 but could not proceed and is presently set down for 8 June 2021. The trial is accordingly ripe for hearing.

[2] The applicant is presently applying in terms of Rule 43 for maintenance *pendente lite* and a contribution towards her costs. After receipt of the respondent's answering affidavit she made application for leave to file a further affidavit. I need to deal with that matter first.

[3] In the application to file a further affidavit, the applicant indicated that after the respondent filed his answering affidavit it became apparent that a significant dispute of fact had arisen and that it was necessary to correct the erroneous impression created by the respondent in his answering affidavit. The applicant relies on Rule 43(5) for this relief. The sub-rule empowers the court to hear such evidence as it considers necessary in adjudicating a Rule 43 application. The applicant is seeking leave to adduce such further evidence in the form of an affidavit.

[4] It is trite that Rule 43 only allows two sets of affidavits mainly to promote an expeditious determination of the matter. There is no right to adduce further evidence or to file a reply. The applicant is required to establish special circumstances for this indulgence or it would be allowed where this is demanded by justice and equity (*Barclay v Barclay* Case No EL961/2019 dated 31 March 2020; Dodo v Dodo 1990(2) SA 342 (W) at 79 C-E; JAW v GSMW Case No ECP 3145/2015 dated 22 August 2017 at para [18]).

[5] I agree with the submission of Mr Nepgen, who appeared on behalf of the respondent, that the further affidavit in fact amounts to a replying affidavit. It does not purport to deal with anything not reasonably foreseeable when the founding affidavit was filed or facts that were not available to the applicant at that time. The disputes of

fact referred to in the further affidavit were foreshadowed in the exchange of correspondence between the respective attorneys representing the parties which preceded the launching of the Rule 43 application.

[6] I had regard to the submission by Mr Dyke SC, who appeared on behalf of the applicant, that there has been a move away from the traditional approach towards greater flexibility regarding the number of affidavits and the need to make full disclosures in Rule 43 proceedings. He relied in this regard in particular on the judgments of Spilg J in *TS,R v TS,T* Case No GJ28917/2016 (7 August 2017) and of the Full Bench of the Gauteng Local Division, Johannesburg in *E v E & Other Matters* Case Nos 12583/17, 20739/18 & 5954/18 (12 June 2019).

[7] The judgment in *TS,R v TS,T* dealt with the inadequacy of Rule 43 proceedings effectively to deal with the issues that had arisen before that court. In an illuminating judgment, the court dealt extensively with the practical difficulties in some cases to come to a fair and just decision within the confines of brevity and expedition required by the rule. The actual issue before the court was whether parties to a Rule 43 application can be required to make material disclosures especially with regard to their financial positions to facilitate the resolution of issues that had arisen between the parties in particular the concealment of sources of income and failure to make proper, full and frank disclosure of the parties' financial circumstances. The court invoked Rule 43(5) and ordered both parties to make disclosure of specified further financial information and documentation. Closer to the present matter, the applicant sought leave to introduce an additional set of affidavits. This was allowed to enable the applicant to deal

with a change of circumstances. While the judgment is informative, it was not particularly helpful in dealing with the matter before me.

[8] The issue that prompted the Full Bench in *E v E & Others* to deal, on referral from the Judge-President, jointly with three Rule 43 applications as court of first instance was the apparent failure of the parties to comply with the provisions of Rule 43(2) and (3) that require a founding statement in the nature of a declaration and a reply in the nature of a plea. The complaint was that the papers in some instances were too voluminous. The Full Bench considered the divergent approaches adopted in their division by Tsoka J in *Van Beest Van Andel v Van Beest Van Andel* Case No 27869/2007 (dated 7 October 2009) and Spilg J in *TS,R v TS,T supra*. The Full Bench held that the Practice Directives be amended to provide, *inter alia*, for the completion of a prescribed financial disclosure form at the direction of the Judge hearing a Rule 43 application. The judgment states *en passant* that the applicant in a Rule 43 application should have an automatic right to file a replying affidavit, but no provision was made for this in the order that was issued. The judgment is only of peripheral relevance to the present matter.

[9] Having considered the matter and the arguments advanced on behalf of the parties as well as the applicable legal position, I am not persuaded that there are special circumstances justifying the filing of a further set of affidavits nor is this demanded by justice and equity. This application was argued together with the Rule 43 application and has not significantly added to the total time spent on dealing with the Rule 43 application. It would accordingly be fair and just that there be no order as to

costs in respect of the application to file a further affidavit. I proceed to deal with the merits of the Rule 43 application.

[10] It is common cause that subsequent to the separation of the parties, the respondent continued making payment of various amounts for the benefit of the applicant directly to her relevant service providers. The applicant indicated in her founding affidavit that the value of these contributions is R36590.00 per month. The respondent in addition makes a cash payment of R14217.78 per month to the applicant. It is readily apparent from the papers that the applicant bears little personal knowledge of the exact amounts that the respondent is paying to some of these service providers. It is clear that the respondent has been in charge of the financial affairs of the common home as well as of the parties and that the applicant had acquiesced in this arrangement. By way of example, the applicant was unaware that she was the beneficiary of a retirement annuity until this was disclosed in the respondent's answering affidavit where she learnt of this for the first time. There are accordingly discrepancies between the amounts listed by the applicant as payments directly to some of the service providers and the actual amounts of such payments being made by the respondent. A few examples would suffice. It is common cause that the respondent has been making the bond payments in respect of the house that is registered in the applicant's name, directly to the bondholder. In listing her monthly expenditure, the applicant has indicated that the bond payment amounts to R18 000.00. The respondent indicated in the answering affidavit that the actual payments amount to R15 176.03 per month. The applicant indicated that the rates and taxes (including water) paid directly

by the respondent amount to R3 800.00 per month while the respondent indicated that the actual payment amounts to R2 345.00 per month. The applicant furthermore indicated that the short term household content insurance (which is also paid directly paid by the respondent) amounts to R2 500.00, while the respondent indicated that this payment actually amounts to R2 731.25 per month. This affects the total monthly expenditure in the sum of R81 904.41 provided by the applicant. The expenditure would be overstated in those instances where the actual payments being made by the respondent are less than the amounts indicated by the applicant in her list of monthly expenses. This would by the same token decrease the shortfall of R31 096.63 on her monthly expenses as provided by the applicant.

[11] The applicant indicated that she was unemployed, has no income and is seeking an order that the respondent continue to make payment of the items of expenditure directly to the service providers. In addition, she claims payment of the above shortfall of R31 096.63 between the total amount of her monthly expenses and the value of these direct payments taken together with the cash sum of R14 217.78 presently being paid by the respondent.

[12] The respondent has decided to continue with the current contributions which he is making towards the applicant's maintenance including the direct payments to service providers. The issue essentially is the amount of any further cash contribution which the respondent has to make towards the shortfall on the applicant's monthly expenses.

[13] The respondent is described in the papers as a farmer and businessman who is involved in various business entities, mostly in the farming sector, which he described as the Endulini Entities. The applicant's case is that respondent is a person of substantial means leading a lavish and extravagant lifestyle which she was part of during the subsistence of their consortium. They have since separated. She contends that it is this standard of living that renders her maintenance claim reasonable and affordable by the respondent. The respondent on the other hand indicated that the family lived beyond its means leaving him with substantial debts. He had a limited interest in the Endulini businesses and earned a relatively modest income out of his involvement in these businesses. He emphasised that these businesses were owned and being conducted by legal entities and none of the businesses belonged to him. There were a number of other family members and third parties involved in these businesses. His total nett monthly earnings were R122 137.04 being salaries that he earned from three of the Endulini Entities. His total monthly personal expenditure was R87 081.72. The value of his assets is R2 980 200.00 and his liabilities amount to R6 897 509.00. The bulk of his liabilities consist of a loan from Endulini Fruit (Pty) Ltd in the amount of R5 454 163.00 and a loan due to Pieter Van Aarde Familie Trust in the amount of R1 435 826.00. He suggested that it was these loans that financed the lifestyle of the family. He indicated that if the present contributions that he is making towards the applicant's maintenance is added to his own monthly expenditure his total expenditure is R132 066.55 per month. His liabilities therefore exceeded his assets and his expenditure his income.

[14] This is the basis of the dispute of fact in this matter.

[15] I am required to ensure a just and expeditious resolution of this matter. To this end Rule 43 has created a robust procedure to deal with issues in the interim pending the final determination thereof at the trial, which in this instance is set down to proceed in a relatively short period of time. It is not required that material disputes be finally determined at this stage. The court is required to come to a fair and just decision within the confines of the process established by the rule. I am also not persuaded that there is a need in this matter to systematically trawl through the minutiae of income and expenditure, but rather that I should take a holistic view of the matter in coming to a decision.

[16] Without pre-judging any of the issues finally to be determined by the trial court, it suffices for present purposes to indicate that in my view the applicant is not left without any residual earning capacity, while the respondent is able, without having to suffer any serious financial detriment, to make a higher contribution than at present towards the applicant's maintenance *pendente lite.*

[17] Insofar as the claim for a contribution towards costs is concerned, I bear in mind that the issue between the parties in the divorce action is effectively confined to whether maintenance should be lifelong (the respondent having tendered limited rehabilitative maintenance) and the quantum thereof. These are issues in my view that are capable of being settled or adjudicated without the need of proceeding to a drawn out trial.

Insofar as the quantum of maintenance is concerned the principal consideration is that this is limited to the reasonable needs of the applicant. The fact that the respondent might be able to afford to pay even more than the applicant's reasonable needs due to some or other concealed wealth, is strictly speaking irrelevant, once it is established that he is able to afford to make the required contribution towards the applicant's reasonable needs. A determination of exactly how wealthy the respondent or the Endulini Entities are and the exact nature and extent of the businesses being conducted by the Entities, cannot be essential in deciding the issues between the parties in the divorce action. These matters are accordingly not strictly speaking germane to the determination of the pertinent issues for trial and cannot have any material impact on the amount of legal fees reasonably to be incurred by the applicant.

[18] Having carefully considered the matter, the arguments advanced on behalf of the parties, and the abovementioned approach required in matters of this nature, I make the following order:

1. The application to file a further affidavit is refused and there shall be no order as to costs in that application;
2. Pending finalisation of the divorce action between the parties under case number 1111/2020:

2.1 The respondent shall continue to pay the following service provider directly:

(a) The bond;

(b) rates and taxes including water;

(c) cellular phone;

(d) domestic worker;

(e) gardener and gardening services;

(f) short term insurance (car and house contents);

(g) tracker;

(h) Atlas alarm;

(i) hospital plan premium;

(j) medical expenses not covered by the hospital plan;

(k) motor vehicle repairs and maintenance;

(l) house maintenance; and

(m) DSTV.

2.2 The respondent shall make a cash contribution to the applicant in the sum of R30 000.00 per month.

2.3 The respondent shall pay a contribution towards the applicant's legal fees in the sum of R120 000.00.

2.4 The costs of the application shall be costs in the cause.

D POTGIETER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv B Dyke SC instructed by Anthony-Gooden Inc, Port Elizabeth

For Respondent: Adv J Nepgen instructed by Schoeman Oosthuizen Inc, Port Elizabeth