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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GQEBERHA**

REPORTABLE/NOT REPORTABLE

Case No: 131/2022

In the matter between:

R[....] A[....] (born G[....])

Applicant

and

M[....] S[....] A[....]

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The applicant, the plaintiff in the main action, sues for spousal maintenance and contribution for costs against the respondent, defendant in the action for divorce. The application is opposed by the respondent on various grounds.

B. Background facts:

[2] The parties were married to each other on 6 January 2001 out of community of property. Two children were born out of their union. The applicant and the children vacated the common home on 20 May 2022 and are currently living in a rented property.

C. Appellant's case:

[3] The applicant is 47 years old and works as a beautician, running her own business. She had been gainfully employed during the subsistence of the marriage with the exception of six years covering the period 2003 – 2009, which was between the births of her two children. She works half days because in the afternoons she has the responsibility of transporting the children from school to extra-mural activities and taking care of them. She attached bank statements to prove her income and expenses. She states that her monthly profit varied from month to month. Realistically her monthly nett income is between R15 000.00 to R18 000.00 per month and often less during quieter months. She attests that her current living expenses since she had moved out of the common home exceed her income by R21 000.00 and that is the reason why she is seeking spousal maintenance.

[4] Regarding contribution to her legal costs, the applicant avers that the legal costs she has incurred to date, excluding the costs for this application, amount to R90 000.00. She has already paid an amount of R15 260.00 and is currently paying an amount of R2000.00 monthly to liquidate the balance owing. Contrasting that with an amount of R42 792.42, which the respondent has already paid to his attorneys, the applicant alleges that she would not be able to litigate at the same scale with him especially because the respondent shall be engaging the services of senior and junior counsel at the commencement of the trial. She contends that the respondent has the necessary resources to litigate at a higher scale than she has and has the financial wherewithal to contribute towards her costs.

[5] Gleaning from the business account of the respondent (M[....] A[....] Physiotherapy Inc.), (the practice) the applicant alleges that the respondent, on the average, transfers an amount of R120 150.00 monthly and receives monthly benefits such as the use of a company motor vehicle, petrol and maintenance of motor vehicle, the costs of his cellular phone and entertainment expenses which total R33 290.33. In all, the applicant argues that the respondent uses the business account for personal expenses interchangeably as he pleases. The applicant further alleges that the respondent's personal expenses amount to R88 085.13, which are exclusive of any expenses incurred by him for which he was reimbursed by his business.

[6] The applicant contends that the value of assets of the respondent (half share in their property at Bushman's and his own being Erf [...] Blue Horizon Bay) excluding the business amounts to R4 100 000.00. The respondent's liabilities amount to R2 015 366.24. Based on the above information, the applicant argues that the respondent is able to contribute towards her legal costs and would be able to afford R20 000.00 for spousal maintenance.

D. Respondent's case:

[7] As aforesaid the respondent is a Physiotherapist operating a physiotherapy practice under the name and style M[...] A[...] Physiotherapy Inc. He submits that his nett salary from the practice historically was R53 000.00 but since experienced a decrease in turnover this year resulting in the practice losing half of its staff. Due to the financial strain currently experienced by the practice, he has been able to draw an average salary of R41 800.00 from December 2021 to April 2022. He denies that he is earning R120 150.00 monthly.

[8] The respondent testifies that his monthly debits like fuel expenses, cellphone, extra medical expenses not paid by the medical aid etc. are debited in his practice loan account. His monthly expenditure is R85 138.68. He denies the value of his assets as estimated by the applicant. He states that he transfers an amount of R25 000.00 monthly from his business account to the bond account as a saving mechanism for VAT and Taxes at the end of the year. These amounts are paid back to the business account for cash flow purposes.

[9] The respondent argues that it appears from the applicant's bank statement that she receives an average income of R42 460.00 per month and her expenses amount to R32 633.54. He therefore submits that the applicant has a surplus of approximately R10 000.00 per month. In the circumstances, he argues that the applicant has failed to demonstrate a need for interim spousal maintenance as all of her actual and reasonable requirements are adequately met by her own earning capabilities plus the maintenance currently paid by him together with the other expenses he pays directly.

[10] Regarding a contribution for costs, the respondent has tendered an amount of R100 000.00 of the R180 000.00 required by the applicant. The respondent argues that the applicant is not entitled to all her anticipated costs, even though the respondent may be able to afford to pay them, but only a contribution.

E. Contribution towards legal costs:

[11] The guiding principle in regard to contribution for costs is that the amount which an applicant should be given for a contribution towards costs is in the discretion of the court. In the exercise of the discretion the court should have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before court¹. A spouse is entitled to a contribution towards costs which would ensure the equality of arms in the divorce action².

[12] Similarly, in this matter, the applicant has to be allowed to litigate in the same footing with the respondent. In the papers, the respondent has admitted that "(i)t is so that I have briefed Senior Counsel in respect of the divorce action". The services of a senior counsel do not come cheap. I am alive to the offer of R100 000.00 the respondent has tendered. It is difficult for a court to assess with any degree of mathematical precision what is, or is not adequate as a contribution towards the legal costs of an applicant³. I shall have to exercise my discretion. In doing so I find that the amount of R100 000.00 is inadequate.

F. Spousal maintenance:

[13] Hart AJ made the following profound statement in *Taute v Taute*:⁴

"The applicant spouse (who is normally the wife) is entitled to reasonable maintenance *pendente lite* dependant upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified".

¹ *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 639.

² *Cary v Cary* 1999 (3) SA 615 (C) at 621 (D).

³ *Van Rippen supra* at 640.

⁴ 1974 (2) SA 675 at 676 E

[14] Likewise, I must have regard to the facts placed before me by the parties. This is a very difficult exercise because in cases of this nature, the versions are conflicting and invariable make the task difficult. I find reason in the words of Ludorf J, in *Levin v Levin*⁵ as cited also in the *Taute* matter that:

“To decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously, my findings are in no way binding in the trial court and indeed after hearing of evidence it may emerge that some or all of the inferences I have drawn are wrong. . .”.

[15] From the papers, it does not emerge that the applicant ever complained in their 21 years of marriage about lack or inadequacy of the maintenance for her and the children. It is common cause that she did for a considerable number of years receive an extra R10 000.00 from the respondent. I am live to the dispute between the parties in this regard, with the respondent claiming that he had paid her the amount as an employee of the practice. Be that as it may, the applicant as far as I can deduce from the papers, received the R10 000.00 from the practice for some time, until she was “expelled” from the practice in December 2021, after a “disciplinary process”. This, seemingly was after the applicant and the children moved out of the common home and shortly before the issue of the summons on 21 January 2022. I am of the view therefore, that the applicant was used to the amount when they lived together and it would not be unreasonable of this court to order the respondent to continue contributing that amount to the applicant *pendent lite*.

[16] Consequently, I make the following order:

1. The respondent shall pay a contribution towards the applicant’s legal costs in the amount of R130 000.00 for which the applicant shall be obliged to account from time to time and which shall be paid as follows:

1.1 R55 000.00 by 30 November 2022;

1.2 the balance of R15 000.00 shall be paid in equal monthly instalments for 5 months, the first such instalment shall be paid no later than 15 December 2022.

⁵ 1962 (3) SA 330 (W) at 331 D.

2. Spousal maintenance of R10 000.00 monthly starting from 1 December 2022.
3. The costs of this application shall be the costs in the divorce.

M MAKAULA

Judge of the High Court

Appearances:

Counsel for the applicant: Adv A White
Gqeberha

Instructed by: Moya Rossouw Inc.
Gqeberha

Counsel for the respondent: Adv L Ellis
Gqeberha

Instructed by: Kaplan Blumberg Attorneys
Gqeberha

Date heard: 01 November 2022

Date delivered: 01 December 2022