

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 1378/2022

In the matter between:

C[...] J[...] H[...] (born A[...])

Applicant

and

C[...] F[...] H[...]

Respondent

JUDGMENT

ELLIS, AJ

[1] In this opposed application in terms of rule 43 of the Uniform Rules (“the application”), only two issues remained for determination after the parties came to an agreement on 18 July 2023 as to the following issues *pendente lite*:

- 1.1 the primary care of their minor children;
- 1.2 the Respondent’s contact with the children;
- 1.3 the maintenance amount payable by the Respondent to the Applicant, *pendente lite*; and
- 1.4 the payment of the children’s school fees.

[2] The remaining issues in dispute are in respect of:

2.1 The Applicant's application for a contribution to her costs of the divorce action; and

2.2 The costs of the application.

[3] At the hearing of the matter, the Respondent, Mr H[...], appearing in person, conceded that the Applicant's legal costs which had already been incurred and still due to the Applicant's attorney (as per the statement provided as annexure "CH6" in the rounded amount of R35 000) could be paid to the Applicant's attorney from the proceeds of the sale of the matrimonial home. I understand that the proceeds are being retained by the conveyancer responsible for the transfer pending the division of the joint estate.

[4] Ms Van Schalkwyk, appearing on behalf of the Applicant, did not persist with her argument in respect of the Applicant's further anticipated future legal costs (in the amount of R65 000 as claimed in the notice in terms of rule 43) and the Applicant accepted the R35 000 contribution tendered for legal fees already incurred.

[5] The only remaining aspect therefore is the costs of the application.

[6] The usual order in rule 43 matters is that costs are ordered to be costs in the divorce action. Ms Van Schalkwyk argued that such an order would ultimately be paid from the joint estate, and that the application could have been avoided if the Respondent engaged more meaningfully in settlement negotiations prior to the hearing date.

[7] It is trite that the court has discretion in awarding costs and such discretion is to be exercised judicially upon a consideration of the facts in each case and the decision is a matter of fairness to both sides. The general rule is that a successful party is entitled to their costs, but this rule is not absolute and, in fact is rarely applied in applications in terms of rule 43.

[8] The Divorce Act 70 of 1979 contains a provision dealing with the aspect of costs in a divorce action.

Section 10 reads as follows:

“In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs for proceedings be apportioned between the parties.”

[9] I am of the view that the court dealing with the divorce action will be better placed to determine the costs of the application as evidence can be placed before it, which can be taken into account when exercising its discretion on costs. There were insufficient facts placed before me for me to exercise my discretion in a manner that is fair to both parties and which would suggest a departure from the usual practice that costs in this type of application are ordered to be costs in the divorce action.

[10] Having carefully considered the papers filed of record and the submissions advanced by the parties, and the draft order containing the agreement between the parties the following order shall issue *pendente lite*:

1. The minor children shall primarily reside with the Applicant, subject to the Respondent's right of reasonable contact with the minor children at all reasonable times.

2. The Respondent shall contribute to the Applicant and the minor children's maintenance as follows:

- 2.1 A monthly cash contribution in the amount of R21 300 to be paid from the Respondent's share of the proceeds of the sale of the immovable property, which proceeds are held in the trust account of Botha Labuschagne Attorneys and who are hereby directed to make

payment of the cash contribution, without set off or deduction, to the Applicant's nominated bank account as follows:

2.1.1 R21 300 to be paid on or before 31 July 2023; and

2.1.2 R21 300 to be paid on or before the last day of each subsequent month.

2.2 Payment of half of the children's school fees and school related expenses directly to the school and/or service provider.

3. Botha and Labuschagne Attorneys are hereby directed to make payment of R35 000 from the proceeds of the sale of the immovable property held in their trust account directly to the Applicant's attorneys being Annali Erasmus Inc, with bank account details as below on or before 31 July 2023:

ANNALI ERASUMUS INC

NEDBANK

ACCOUNT NO.: 1[...]

BRANCH CODE: 198 765

REFERENCE: MAT13842

4. The costs of the application shall be costs in the divorce action.

L ELLIS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Van Schalkwyk

Instructed by: Annali Erasmus Inc

For the Respondent: Mr C H[...] in person

Date heard: 18 July 2023
Date delivered: 20 July 2023