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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 15793/2023

In the matter between:

H[...] L[...] K[...]

Applicant

and

C[...] S[...] K[...]

Respondent

Heard on: 04 March 2024

Judgment delivered on: 10 April 2024

JUDGMENT

MANTAME J

Introduction

[1] This is a Rule 43 application where the applicant asked that the respondent pays a monthly maintenance of an amount of R10 200.00 and a contribution towards costs of an amount of R250 000.00. The applicant further asked for certain funds made available to their adult daughter J[...] who was said to have completed her final year LLB degree at the University of Western Cape. However, this relief was no longer pursued at the hearing of this matter for obvious reasons. Furthermore, the applicant

did not pursue a Uniform Rule 30A application to declare respondent's answering affidavit an irregular step and/or an abuse of power.

[2] From the onset, it has to be stated that the parties are involved in acrimonious divorce and numerous applications have gone through the lower Court and this Court. Most of these disputes have not been settled despite some Judges of this Court suggesting so.

[3] This application is therefore one of these unresolved applications and the respondent opposed it.

Facts

[4] The applicant and the respondent have been married since 5 October 1996. They were blessed with three (3) children of which all are majors and reside with the respondent. At the onset of their marriage the applicant was a police Constable and the respondent a Public Prosecutor. Currently, the applicant is a police Captain and the respondent is a Relief Magistrate.

[5] When the parties got married, they resided in the Eastern Cape. In September 1998 the respondent resigned his job as a Public Prosecutor in King Williams Town and asked that they relocate to Paarl. According to the applicant, the respondent had an extra – marital affair that threatened him at the time.

[6] After their relocation to Paarl, the applicant had just given birth to her second born child. Since the respondent was unemployed, they resided with the respondent's

parents and survived on her Constable salary. However, the respondent disputes this assertion and stated that he was employed by his father in his taxi business in December 1998 and had an income, though it was not specified. His parents financially maintained them. The main reason he moved to Paarl was to take care of his ailing parents.

[7] Sometime in 1999, the applicant secured a housing subsidy through her employer and moved with her family to their own house. According to her, this was really a tough time financially in her household since she had to secure the services of a day mother for her young children. She was supporting her household single-handedly. As a result of this frustration, she resorted to enquiring from a certain Captain who worked with her if he knew any employment opportunities for her husband (respondent). After their conversation, the respondent secured a position of a Public Prosecutor in Wellington. The respondent on the other hand stated that his father requested him to accept a prosecutor position after he was contacted by a Mr Patrick Ross, the then Head of Magistrate's Court, Wellington to assist the then prosecutor Mr Darryn Engelbrecht who was on sick leave at the time. He was thereafter contacted by a Senior Magistrate in Paarl, Mr Lawrence Cronje to assist them as they were in need of a trained prosecutor. Shortly, thereafter, Mr Mark Wakefield, a Chief Prosecutor came to see him on the instructions of the Director of Public Prosecutions and requested that he become a specialised prosecutor in diving and mining related offences and as a relief prosecutor. He was thereafter appointed Relief Prosecutor. In September 1999 he was trained as a magistrate and thereafter appointed as a Relief Magistrate.

[8] The applicant characterised her marriage as tumultuous. In 2005 – 2006, the respondent fathered a child from an extra – marital relationship. That led her to depression and their relationship deteriorated. It was the applicant's assertion that shortly after the respondent was appointed as a prosecutor in Wellington, the abuse escalated at their home. The respondent would make insinuations that he was earning peanuts. At some point, as no – one was available to take care of the children at home, he asked the applicant to resign her job and take care of the children. The applicant insisted that she should receive the rental income from the flat let which was attached to the house which was an amount of R4 500.00 per month. It is the applicant's contention that the abuse and insinuations continued until the respondent was appointed as a Magistrate. At that point, they lived a very comfortable lifestyle. The respondent gave her a monthly sum to take care of all their monthly expenses.

[9] In 2014, the applicant was approached by the respondent to consent to a sham divorce and she agreed. His motivation was that he required access to his pension fund (GEPF). According to the applicant, the respondent advised her that the most economical way to do so without having to pay penalties was to conclude a Consent Paper in terms of which 50% of his pension funds would be paid to her. Despite this divorce, they continued to live as husband and wife. With the amount of R646 374.51 received from GEPF, they were able to pay creditors and finance their lavish lifestyle.

[10] In 2015, their relationship deteriorated considerably because of economic abuse. The applicant decided to secure employment with the Department of Health as a Basic Life Support Intern earning an amount of R2600.00 per month. At this stage, physical and emotional abuse also started. However, shortly thereafter their relationship started

showing some signs of repairs. In 2016, the respondent asked the applicant to re-marry him. The second marriage was concluded on 5 October 2016.

[11] The respondent stated that the applicant is “delusional” in thinking that they lived a lavish lifestyle. In fact, according to him they rarely ate out. That was done when they received bonuses or celebrated birthdays, and they would split the bill. The applicant is the one who wore branded clothing as she had about six (6) retail store accounts. On the other hand, he had only two clothing accounts. In the respondent’s view, a Magistrate’s salary was inadequate to pay for all their household expenses. Again, he asked for a divorce in 2014 as their marriage was in shambles. He denied that it was a sham divorce. He indeed agreed that he fathered a child outside marriage. He did that as a retaliation to the applicant who got involved with one Carl from Kimberley during 2005. He denied that he caused severe depression to the applicant.

[12] The respondent denied that he deprived the applicant of her motherly duties. In essence, the respondent had no choice but to do these chores as the applicant would go to night clubs frequently and leave him to fend for the children. She would leave home on Saturday evening and come back on Sunday evening sick. From Monday to Thursday she would not be in a condition to prepare the children for school. The pattern would continue until Friday, where she would do all the cooking with a bottle of whiskey in her hand. In fact, it was the respondent’s contention that it was the applicant who was abusive towards him and not the other way. In 2005, she attempted to viciously attack him in front of his family members, and was forced to defend himself by slapping her. Despite this being the case, as a deeply devoted Christian, he decided to remarry her

as he was raised in a family where both parents were present, he wanted his children to grow up in the same environment.

[13] It was the applicant's contention that in 2018, she applied for a Warrant Officer position within SAPS and the position required her to relocate to Biviaanskloof. This was discussed with the respondent and he agreed that she should take the position. She was offered an unfurnished State accommodation and she had to furnish it between 2018 and 2021. During her stay in Baviaanskloof, the respondent demanded that she pays the children's education, contribute to the maintenance costs and improvements to the common home. After paying University tuition fees for both her daughters, she struggled with the rental in her state issued accommodation. At that stage, the respondent retained the income received from the flat let on the property

[14] In fact, it was the applicant's contention that the respondent was more abusive after she accepted the promotion. When visiting the marital home, she always lived in fear of being physically and emotionally abused. During the respondent's time of rage, the applicant sought refuge at a friend's home and at her brother's home. Apparently, the respondent was not pleased with the fact that his abusive and erratic behaviour was known by family and friends. He then resorted to hiding her car keys in an attempt to stop the applicant from fleeing the home. At one instance, the applicant stated that she was forced to lock herself in the bathroom and the respondent broke down the bathroom door and punched holes in the guest bedroom door. The respondent denied these allegations and stated that the applicant fled the common home in order to have her freedom and she evaded her motherly and wifely duties. He denied hiding the keys. He merely admitted kicking the bathroom door after the applicant was highly intoxicated

and attempted to overdose herself with medication (sleeping pills) and attempting suicide before running to the bathroom and locking herself in. This happened after they had an argument about her drinking problem. He broke down the bathroom door in order to save her life. After he gained access to the bathroom, he forced her mouth open to remove the pills which were about a handful amount.

[15] The applicant stated that she again fled home on 29 March 2022 because of emotional, mental and financial abuse. In fact, he isolated her from everyone in the house. She felt like an outsider and she went to reside temporarily with her retired friend. On 30 March 2022 she was admitted at Sereno Clinic in Paarl for severe major depression. After her discharge on 08 April 2022, she could not risk returning to the common home. On the contrary, she travelled to her family in the Eastern Cape. She had to borrow money for fuel and had her clothes on her back. She had to exhaust her credit facilities and applied for top up loans to buy clothes. She also purchased clothes for her younger daughter who was still at University.

[16] The respondent denied that he ever abused the applicant. On 29 March 2022, the applicant left out of her own volition, after she had isolated herself from everybody in the house. Before the applicant left, they agreed that they would not involve any of their children in their divorce. However, he later discovered that the applicant had discussed sensitive information of a sexual nature with their son, which was meant to stay between husband and wife. After finding out about this information, he in turn told his son that the applicant had slept with his brother in law. After the applicant discovered this information, an argument ensued in front of their children. As a result, the applicant isolated herself from everyone.

[17] The applicant stated that she eventually secured a work transfer to Queenstown, Eastern Cape. Prior to the work transfer, she lived out of her vehicle and her office. Eventually, she built up courage to ask her friend and family member for accommodation. This according to her stripped off her dignity and self-worth. The respondent on the other hand refused to assist her and or allow her to collect any furniture or appliances (inclusive of SAPS belongings) from the common home. The respondent told his children not to allow her in the common home. The respondent threatened to evict the children should they allow her to gain access in the common home. Again, the respondent refused to borrow her money and furniture to furnish her current residence in the Eastern Cape.

Rule 43 application

[18] It was the applicant's assertion that the respondent has made no *pendente lite* maintenance payments since she vacated the common home on 29 March 2022. According to the applicant the respondent earns R74 138.08 and receives a rental income of approximately R4000.00 from the flat let. He also has a micro lending business with an undisclosed income. The respondent denied these allegations. The applicant asserted that despite not having full knowledge of his financial obligations, he ought to contribute to her maintenance needs and contribution towards legal costs.

[19] The respondent denied that the applicant does not have the wherewithal to maintain herself. She moved to Queenstown for better employment opportunity, so he said. She was promoted from a Warrant Officer position to a Captain position and has

been in a financially better position since she left home. In fact, it was pointed out that she used her income only for herself.

[20] The applicant indeed accepted that she has obtained a higher position. Despite her gross income being R37 221.63, her nett income remained R25 996.24. This is the same amount she took home before her promotion. Despite her income being said to have increased she remained with a short fall of R10 134.54. She then funded the shortfall by taking personal loans and credit cards. She can no longer do so and requested the respondent to contribute to her maintenance as a spouse. Also, since they are married in community of property, the respondent has an obligation to assist her in settling the loans.

[21] Although she currently resides in state property, she requires the respondent to assist in making monthly contributions to enable her to rent a property and/or pay her debts that she incurred to partly furnish the current residence. The contribution she claimed is much lesser than the expenses they incurred as a family, prior to these proceedings. The respondent paid almost all these expenses. She has never been required to make substantial contributions to their household.

[22] The applicant pointed out that if her means are compared to that of the respondent, she does not have any funds or assets available which she can withdraw or utilize for the ongoing litigation. The respondent has in turn litigated at different forums and this has proved to be expensive, difficult and frustrating on her part. The respondent is litigating in this manner using the funds of the joint estate. She should be afforded an opportunity to litigate at the same level as the respondent in these

proceedings with the advice and representation that she requires. These legal costs should be paid from the joint estate.

Discussion

[23] Counsel for the applicant submitted that the manner in which the dispute between the parties and subsequent divorce suggest that the applicant has been treated so poorly. This poor treatment should be frowned upon by this Court more especially that the respondent is a Regional Court Magistrate who is stationed at Stellenbosch Magistrate Court. The fact that the respondent elected to fight the applicant using a litany of applications clearly suggests that he abused his position as a magistrate. For instance, an example was made when a police official arrived to serve him with a domestic violence order. Instead he instructed the police official to wait for him until he adjourns his Court. Upon the Court adjournment he went to another colleague who issued a similar order against the applicant.

[24] The issue of an abuse of process has recently occupied our Courts. The full bench in *Maughan v Zuma and Others*¹ where the court held that:

“[71] In Lawyers for Human Rights v Minister in the Presidency and Others, the following was said:

¹ (12770/22P) [2023] ZAKZPHC 59; [2023] 3All SA 484 (KZP); 2023(5) SA 467 (KZP); 2023 (2) SACR 435 (KZP) (7 June 2023)

“In Beinash, Mohamed CJ stated that there could not be an all-encompassing definition of ‘abuse of process’ but that it could be said in general terms “that an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to the objective.” The court held:

“There can be no doubt that every Court is entitled to protect itself and others against an abuse of its process...As was said by De Villiers JA in Hudson v Hudson and Another¹⁹²⁷ at 268:

“When the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.”

...It can be said in general terms...that an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”

[72] Our courts have an inherent power to prevent an abuse of court process. Initially the courts intervened to prevent an abuse of process in circumstances where the power to do so was exercised with the greatest caution and only in a clear case. De Villiers JA writing for a Full Court in Hudson v Hudson and Another held the following:

“That every court has the inherent power to prevent an abuse of the machinery for the purpose of expediting the business of the Court admits of no doubt...

...But it is a power which has to be exercised with great caution, and only in a clear case.”

[25] In his defence to the allegations of abuse of Court process, the respondent contended that the applicant has been a driving force towards this litigation. It is the applicant who is litigating at a grand scale. In fact, it was said that she is a vexatious litigant.

[26] It might be so that it is the applicant who is litigating in this Court to assert her rights. In fact, two applications in terms of Rule 43 served before two separate judges (*lis pendens* was abandoned). Strikingly, due to the toxicity that has been displayed by the parties both judges without conferring with each other, implored the parties to rather endeavour to settle the divorce instead of dragging each other to Court in this way. However, it seems all these attempts were in vain as no party is prepared to bow down. A further example of the toxicity of the relationship is the filing of two divorce actions both in Paarl Regional Court and in this Court. This Court had to adjudicate a point of which one had to be stayed on 18 August 2023. A judgment was given by this Court on 29 August 2023 that the Regional Court action be stayed pending the final determination of the divorce action in this Court.

[27] At the hearing of this application, the respondent Counsel informed the Court that the respondent has been diagnosed with thyroid cancer, he tends to be tired a lot, hence he could not attend Court. In addition, despite his gross income was said to be R74 138.06, his nett income is R47 826.57. It is not necessarily that the respondent is refusing to pay maintenance for the applicant. However, his position has been

exacerbated by additional medical costs after he was diagnosed with cancer. No medical expenditure was given in support of this assertion.

[28] Even if this Court were to accept that the applicant is litigating at a grand scale, when the call was made by the judges of this Court to put an end to this acrimony by means of settlement of the divorce, the respondent, as a judicial officer should have been a sounding board in this dispute and made sure that the whole dispute is settled rather than fuelling it. However, this Court was informed that the respondent reneged from settlement negotiation after the matter was last before this Court on 7 November 2023. Though he blames the applicant, the facts before this Court suggest that he is equally to blame.

[29] It is common cause that the parties are married in community of property. It was expected that when the applicant left the common home due to work opportunity in a different Province, she would have clearly had to set up a second home. Despite her employer providing her with accommodation, it was not denied that she had to furnish and contribute towards rent in that accommodation. From the applicant's list of expenses, she has five (5) personal loans that she contributes about R15 000.00 monthly. On the R25 000.00 nett income, this means that she has R10 000.00 per month to pay rent, groceries, water and electricity, fuel, three (3) clothing shop accounts, phone, domestic, medical expenses, legal costs etc. It was the applicant's contention that she has a shortfall of R10 134.54.

[30] On the other hand, the respondent's nett income is R47 826.57 with a monthly expenditure of R99 598.35 and a shortfall of R51 771.78. It is common cause that the

respondent is residing with his three (3) adult children, one of which is a Social Worker and holds a Managerial position and another is an Engineer. Surely, he could request that they contribute towards their upkeep (food, water and electricity etc.) rather than paying for groceries for R18 451.80 per month alone. That amount is very high given the fact that all three (3) adults go to work during the week. Perhaps there is only one meal that is cooked per day. Like the applicant, the respondent listed about four (4) personal loans which he contributes an amount of R22 000.00. There is approximately R12 000.00 that was said to be the younger daughter's education expenses. The younger daughter was said to have completed her studies, it therefore follows that there are no University fees that are paid by the respondent. Further, the respondent seems to have forgotten about the income that he receives from the flat let of an amount of R4000 – R5000.00.

[31] Notably, if the parties were able to sit down and agree that they would not involve their children in their divorce, (which is not borne out by the facts), clearly, they would have further agreed to coordinate their finances in order for them to stretch through the two households.

[32] To the extent that the parties resist the inevitable and thereby wasting the funds they clearly do not have, this Court is bound to bring this matter to its finality.

[33] The unchallenged facts are that the applicant incurred debts in the form of loans when she relocated for work purposes. Clearly the husband has enough funds to adjust his responsibilities to be workable for both households. Despite the applicant having said to have received promotion, her nett income remained the same. However, it

needs mentioning that it was said that the respondent has assumed a lessor position in Paarl Magistrates Court due to his sickness. None of the supporting documentation was provided to support this allegation. In the absence thereof, this Court will base its findings on the evidence provided. The husband has not explained how his personal loans came about.

[34] With regard to the claim for maintenance, I am satisfied that the applicant has to receive some maintenance contributions, more especially that she incurred extra expenses necessitated by her relocation. Again, the parties have to litigate at the same strength, hence a legal costs contribution by the respondent is warranted. The order that will follow is premised on the fact that the respondent has an amount of R12 000.00 that he has since ceased contributing towards his last born daughter.

[35] As said earlier, this is a matter that is capable of being settled. However, the parties are hell bent on tiring each other with litigation that is completely unnecessary. It is common cause that a claim for a contribution towards costs is *sui generis*. The applicant for a contribution towards costs must *first*, show that she has a *prima facie* case in the main action. In the judgment delivered by Mayosi AJ on 29 August 2023 it was stated that the applicant claims for: (a) maintenance *pendente lite*; (b) an order that the respondent pay maintenance to her until her death or remarriage (c) an order that the respondent maintain their adult dependant daughter until she becomes self – supporting; and (d) the orders sought relating to the parties respective pension interests. *Second*, the applicant must show that she has insufficient means of her own. Clearly, the applicant earns far below that what the respondent earns. She is therefore entitled to litigate in the same strength as the respondent. Our courts have in not so distant past taken into account costs already incurred when issuing a contribution

towards costs, but that is not the case in this matter. In this instance, this Court finds it proper that the respondent contributes a fixed amount for maintenance and 75% towards contribution to the legal costs to be incurred. The applicant will therefore contribute the remaining 25% of the costs to be incurred.

[36] To the extent that this Court has not been furnished with the updated legal costs incurred by the applicant, this Court will issue an order that the said amount be paid on the Trust Account of the applicant's attorneys in instalments. If the parties continue to grow an appetite for litigation, the applicant could approach the Court for a further costs contribution, should the amount ordered be exhausted. The amount to be ordered for contribution towards costs is premised on the fact that the issues involved in this matter are not complicated, and that it is unlikely for the divorce action to be too expensive.

[37] In the result, the following order shall issue:

- 37.1 The respondent is ordered to pay R5 500.00 per month to the applicant towards maintenance.
- 37.2 The respondent is ordered to pay R187 500.00 (R250 000 – 25%) towards contribution to legal costs. Such costs shall be paid by instalments of R7000.00 per month to the applicants attorneys trust account.
- 37.3 The respondent is ordered to pay costs of this application.

WESTERN CAPE HIGH COURT

**Counsel for the Applicant: Advocate Andries Van Aswegen
Instructed by: William Koch Attorneys**

**Counsel for the Respondent: Advocate Mishkah Alexander
Instructed by: Elton Shortles Attorneys Inc.**