



THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)
JUDGMENT

Case No: 8698/2019

In the matter between

RNM

APPLICANT

and

AM

RESPONDENT

Coram: Rogers J

Heard: 26 June 2019

Delivered: 10 July 2019

JUDGMENT

Rogers J

Introduction

[1] I shall refer to the applicant, the plaintiff in the divorce action, as the wife, and the respondent as the husband. The wife seeks a contribution to costs of R703 000. The divorce has been acrimonious, characterised by a slew of rule 43 applications and incidental applications concerning, among other things, care of and access to the children

[2] I must record, at the outset, that the affidavits are longer than they should have been. In terms of rule 43 the founding affidavit should be a sworn statement in the nature of a declaration and the opposing affidavit a sworn statement in the nature of a plea. The affidavits need not exhibit narrative elegance. Rhetoric should be avoided. So should repetition. The important facts can usually be conveyed virtually in point form or by way of lists contained in schedules. The affidavits must not stray into extraneous matter. (For example, in the present case the wife's affidavit has several paragraphs dealing with possible changes to the care and contact arrangements but she claims no relief in that regard.) Emotive pejorative allegations are generally irrelevant and serve little purpose because the court can hardly ever base its judgment on them, given the brevity which should mark the affidavits and the absence of oral evidence. (There was a good deal of this in the present case. The parties spilt much ink on the many incidental applications while overlooking certain basic information which would have assisted the court.)

[3] The divorce action was instituted in November 2014. Over the period October-December 2014 the husband voluntarily contributed R131 000 towards the wife's legal costs. In February 2014 she launched her first rule 43 application dealing with care of the minor children, personal maintenance and a further contribution to costs. On 22 April 2015 Le Grange J made an order in terms whereof, among other things, the husband was to pay the wife monthly maintenance comprising a R71 000 in cash and the payment of certain specified expenses which brought the total monthly maintenance obligation to R128 847. The husband was ordered to make a costs contribution of R200 000, which he did. The costs of the rule 43 application were ordered to be costs in the cause.

[4] From a letter written in October 2016 by the wife's attorneys, at a time when the husband was agitating for a reduction in his maintenance obligation, it appears that the wife has allocated R5000 per month from the monthly maintenance towards the costs of counsel. The present application was argued on the basis that I could treat this as a further contribution to costs by the husband. Over the period May 2015 to June 2019 (50 months) this equates to R250 000.

[5] There have been many incidental applications, mostly opposed. Some have been applications in terms of rule 43. Apart from the wife's first rule 43 application, in May 2017 the husband launched a rule 43(6) to reduce the cash component of his monthly maintenance from R71 00 to R27 000. In January 2018 the wife launched her second rule 43 application seeking a further costs contribution of R400 000. Both applications were opposed. For reasons I need not explain, neither was adjudicated.

[6] Other incidental applications have concerned care of and access to the three children born of the marriage and their schooling arrangements. To some extent these incidental applications could be regarded as rule 43 applications

concerning interim access and interim custody, though they have not been so characterised in the papers before me. In the first quarter of 2016 the husband launched an interdict application, two further applications (referred to as the schooling applications), and a related contempt application. In the interdict and contempt applications costs orders were made against the husband. The costs have been taxed and he has paid R120 222 and R159 020 respectively. In the case of the two schooling applications, on which Gamble J made orders on 26 January and 15 March 2016, the costs were ordered to stand over to the trial.

[7] In December 2017 the husband instituted an urgent application to compel the wife to have herself and the children assessed by a social worker engaged by him, Prof Tanya Robinson. An order was eventually made by agreement, with costs to stand over to the trial. At that time the trial was scheduled to start on 14 February 2018. On 7 February 2018 the husband delivered lengthy expert reports from Prof Robinson and an industrial psychologist, Dr Hannes Swart. On 10 February 2018 the wife delivered an application to postpone the trial. The husband's response – in view of the fact that a final determination would seemingly now be delayed – was to deliver a counter-application in which he asked the court to conduct an urgent enquiry into the best interests of the children and to order that they be placed with him on an interim basis.

[8] The matter came before Wille J on 14 February. Over seven days he heard oral evidence on the husband's counter-application. I assume he reserved judgment, the delivery of which was made unnecessary by the fact that on 22 March 2018 the parties agreed to an order, the gist of which was that the children would reside primarily with the husband while the wife would enjoy contact with them supervised by a social worker. The order did not contain any provision concerning the costs of the counter-application.

[9] In March 2018 the wife brought an application to have the children assessed by Prof Astrid Berg. Wille J heard that application on 13 March 2018 and made an order regulating the assessment, costs to stand over. The wife also brought an application to obtain what she refers to as the Form 22 documents (presumably Form 22 prescribed under the Children's Act 38 of 2005 for reporting the abuse or neglect of a child in terms of s 110 of that Act). This was granted with no order as to costs. In the same month the husband delivered applications to admit into evidence the report of an expert, Dr Gisele Rausch, and the assessment notes of another expert, Ms Pam Tudin. Orders were granted accordingly, costs to stand over. Although not so stated in the papers before me, I gather that this flurry of applications was concerned with the counter-application on which Wille J made his order on 22 March 2018.

[10] In July 2018 the husband delivered an application to vary the access and supervision provisions contained in the order of 22 March 2018. On 17 July Wille J postponed the variation application to 6 November but made an interim order which to some extent varied the earlier order. The variation application was argued over two days in November, and on 13 December 2018 Wille J made an order which substantially confirmed his interim order of 17 July. The costs of the variation application were to stand over for later determination.

[11] As far as I can see, the only incidental applications truly interlocutory to the divorce action have been the following: the husband's application to transfer the divorce action to the high court; the wife's application in the latter part of 2017 to compel discovery (Slings AJ made such an order, costs to be paid by the husband); a follow-up application to dismiss the husband's defence (not adjudicated); and the wife's postponement application (which was effectively overtaken by the husband's counter-application). All the other applications were

either rule 43 applications or independent proceedings concerning the best interests of the children.

[12] The divorce action has been set down for trial before Wille J commencing on 12 August 2018. The present application, the wife's third recourse to rule 43, was delivered on 21 May 2019.

[13] The wife's counsel made clear that her client did not seek a contribution to cover any part of her past (and still unpaid) costs, which are very substantial. It was long considered that rule 43 could not be used to obtain a contribution in respect of past costs (and cases to this effect are cited in the husband's heads of argument) though this view has more recently been challenged (*Cary v Cary* 1999 (3) SA 615 (C) at 621G-622F; *Du Plessis v Du Plessis* [2005] ZAFSHC 105 para 9). In view of the wife's counsel stance, I need not enter this debate.

Lis pendens

[14] The husband's attorney submitted that his client had a legitimate defence of *lis pendens*, having regard to the un-adjudicated application which the wife brought in January 2018 for a contribution to costs. I reject this argument. The principles relating to this dilatory defence appear from *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC & others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA). The requirement that the dispute in the two cases should be the same is absent. In the January 2018 application the wife sought a contribution of R400 000 to the costs of a divorce action expected to commence on 14 February 2018. In the event the action did not run, and what she now seeks is a contribution of R703 000 to the costs of a divorce action scheduled to commence on 12 August 2019, taking into account significant events which have occurred since February 2018.

[15] In any event, the defence of *lis pendens* is not an absolute one. The court has a discretion to hear the second case. The January 2018 application was apparently due to be heard on 31 January 2018 but no hearing took place, according to the wife because the court file was lost. The application was then superseded by the events of February 2018. From a practical perspective the parties have treated the January 2018 application as at an end. For a year and a half the wife has made no attempt to prosecute it.

Possible recusal

[16] Without objection from the wife's counsel, the husband's attorney handed in a supplementary affidavit, seemingly with a view to demonstrating that the wife intends or may intend to seek Wille J's recusal, which – if it succeeded – would require a new date to be allocated, with substantial effect on prospective costs. From the husband's heads of argument (drawn by his senior counsel, not the attorney who appeared at the hearing), the contention appears to be that I should dismiss the application for this reason. I reject that argument. As yet no application for recusal has been brought, and the supplementary affidavit does not show that the wife definitely intends to bring one. Even if she does, the husband does not say that he will concede it. The wife will have to prepare for trial on the assumption that any recusal application she may bring might fail.

Should application be heard by Wille J?

[17] In his opposing affidavit the husband stated that the present application should be heard by Wille J who was immersed in the case. Reference was made to para 4 of the judge's order 13 December 2018, reading as follows:

‘That in the event of any party (all the children's legal representatives) launching any application prior to the trial date, then in that event Mr Justice Wille will be approached, on notice to all the other parties, to deal with the matter on such date and in such manner, as may be in the best interests of the children.’

When this matter came before me in Third Division on 26 June 2019, Wille J was on circuit in Swellendam. Term ended on 28 June. As I told the parties during argument, I contacted Wille J on 25 June. I ascertained that his criminal trial would occupy him for the last three days of term. He informed me that he was on recess duty on 15-19 July and would if necessary hear the application then. I think it fair to say that neither of us particularly relished the prospect of having to deal with it. Wille J's capacity to hear the present matter during his week of recess duty would naturally depend on the volume of other work. He also indicated that para 4 of the above order was really intended to cover the case of further applications relating to care and access, as indeed is suggested by the concluding reference to the best interests of the children. I thus concluded that there was no basis for deferring the hearing of the application.

Abuse of process

[18] The husband contended in his counsel's heads of argument that the application should be dismissed as an abuse of process. Reference was made to the length of the founding affidavit and to the inclusion of irrelevant matter. I have already touched on this aspect in which, I must say, the husband's fault is at least as great as the wife's. Suffice to say that I do not think the wife's departure from the requirements of rule 43 to be so egregious as to warrant dismissal as an abuse of process. It is unnecessary to consider to what extent, if any, the strict requirements of rule 43 may in the present era justify relaxation, a matter recently considered by a full court in Gauteng (*E v E and other matters* [2019] ZAGPJHC 180).

Prima facie case

[19] The husband's heads of argument advance the further submission that the wife has failed to deal with her prospects of success in the divorce action and that this renders her rule 43 application fatally defective. With reference to *Jones v*

Jones 1974 (1) SA 212 (R) at 214D, it is contended that an applicant for a contribution to costs must demonstrate a fair and reasonable prospect of success in the main case. Earlier cases differ somewhat in their formulation of what an applicant need show, the most liberal being Selke J's statement in *Stender v Stender* 1938 NPD 125 to the effect that a prima facie case does not require the applicant to show that the probability of success is in her favour, it being sufficient that she makes out a case upon which a reasonable person might find in her favour (at 126).

[20] In my experience of rule 43 applications, prospects of success in the main action are often not addressed in contribution applications. This may be because of changing times. Most of the cases on this subject are older ones from an era where the obtaining of divorce orders was not as uncomplicated as it now is. The cases were concerned with whether the plaintiff had a prima facie case for obtaining a divorce order or an annulment. They were not concerned with prospects of success in regard to disputed claims for ancillary relief arising from a divorce order. And they predated the current rule 43. It may be difficult for a court to make a reasonable assessment of prospects of success in the main case, given the brevity mandated by rule 43.

[21] On the assumption that the wife should have formally addressed the question of prospects of success in her founding affidavit, I am not prepared to nonsuit on this basis. She brought a previous rule 43 application which led to the granting of substantial interim maintenance and a contribution to costs. To some extent this is already an indication of a prima facie case. It appears sufficiently from the present application that she is not employed and has no formal qualifications. The husband is affluent, and during the marriage the wife has no doubt enjoyed a relatively high standard of living. Prima facie she has reasonable

prospects of obtaining a maintenance order, even if it is not as large as the sum she claims.

[22] Regarding care and custody, the wife has engaged experts to present her case. In the husband's heads of argument reference is made to a report by Dr Hetta van Niekerk on behalf of the wife which is criticised on the ground that the expert did not undertake an in-depth investigation, so presumably there is an expert expressing views which to some extent favour the wife. We also know that experts with differing views testified on these matters in February 2018. The interim orders made in this case over the last several years show that appropriate care and contact arrangements in this case are likely to be intricate.

[23] The court hearing the divorce is obliged to enquire into the best interests of the children. I cannot see that this can properly be done if only the husband and his experts provide evidence. Even if the trial court were in due course to award primary care to the husband, the extent of the wife's contact with the children and whether and to what extent it should be supervised are contentious matters of obvious importance to her. In her founding affidavit in the present case the wife expresses the belief that the current interim contact she is allowed should be extended, that the supervision requirements should be partially relaxed, and that in her view it is not in the children's best interests, or reasonable to her, that supervision should persist much longer. I am not willing to deprive the wife, through lack of financial resources, of her opportunity of placing evidence, including expert evidence, on these matters before the court.

Adequacy of contributions already made

[24] Turning to the merits, a contribution to costs in terms of rule 43 is a contribution to the costs of the divorce action. In *Micklem v Micklem* 1988 (3) SA 259 (C) it was said that the costs of interim applications are excluded (263B). The

case cited in support of this proposition, *Service v Service* 1968 (3) SA 526 (D), does not establish it in those wide terms. Miller J in that case excluded the costs of ‘interim applications already made’ (528F). At that time past costs, even those directly concerned with the divorce, were thought not to be recoverable by way of a contribution under rule 43. Interlocutory applications directly related to the divorce proceedings, such as applications to compel discovery and the like, are, in my view, costs of the ‘pending matrimonial action’ within the meaning of rule 43(1)(b). I accept, though, that the costs of rule 43 applications and of freestanding applications relating to the best interests of children are not covered (cf *Winter v Winter* 1945 WLD 16 at 18; *Maas v Maas* 1993 (3) SA 885 (O) at 888I-889B).

[25] The husband’s attorney submitted that the sums already contributed by his client are sufficient. Neither side carefully distinguished between those costs falling within the ambit of rule 43 and those falling outside it. On the basis of authority, almost all the interim applications in the present case fall outside the scope of rule 43. In two instances costs were awarded in favour of the wife. In all the other applications the costs were ordered to stand over. Until those costs are determined, the husband is not obliged to contribute to them. In assessing the adequacy of the contributions he has already made, this principle must also be applied; one must have regard only to those proceedings properly covered by a rule 43 costs contribution.

[26] This principle, it seems to me, applies to the husband’s voluntary contribution of R131,000 and the contribution of R200,000 ordered by Le Grange J in April 2015. At the time the husband made his voluntary contribution the divorce action was about to be, or had just been, instituted. No rule 43 applications or freestanding applications relating to children were in mind. I am

entitled to assume that the husband was making a contribution which might otherwise have been ordered in terms of rule 43.

[27] The monthly amounts of R5000 stand on a different footing. The order for the monthly payment of R71 000 was an order for the payment of maintenance, not a contribution to costs. Indeed, it seems that at the time the order was made the wife had not indicated that a contribution to the costs of counsel was included in the calculation of the maintenance. Even if it was, the wife has had legal costs which are not directly related to the divorce action but which she has been obliged to cover. These include the first rule 43 application and future rule 43 applications and applications relating to the best interests of the children.

[28] The first question, thus, is whether the husband's contributions of R301 000, which were paid over the period October 2014 to April 2015, are sufficient to cover the past and prospective divorce costs up to the first day of trial. The past divorce costs up to the time the action was originally scheduled to begin, namely 14 February 2018, cover the following matters (I have had regard, inter alia, to a pro forma bill of costs annexed to the husband's affidavit as a reconstruction of the costs incurred by the wife):

- preparing particulars of claim and issuing summons;
- pleading to the husband's counterclaim;
- the wife's discovery (according to the pro forma bill she discovered 55 pages);
- responding to notices for better discovery (according to the bill she disclosed a further 71 pages);
- calling on the husband to make discovery and considering the husband's discovery affidavit;
- calling for better discovery from the husband, bringing an application to compel better discovery, an appearance before Slingers AJ when an order for

better discovery was made, and considering the husband's eventual response (285 pages according to the pro forma bill, 820 pages according to the husband's affidavit in the present case);

- requesting further particulars for purposes of trial and considering the husband's reply;
- considering and replying to the husband's request for further particulars for purposes of trial;
- obtaining, settling and serving of expert reports by Messrs Fourie and Tutt;
- four pre-trial conferences;
- preparing for the trial scheduled to start on 14 February 2018;
- considering the extensive expert reports from Prof Robinson and Dr Swart which the husband served in early February 2018;
- engaging experts on short notice to consider these reports;
- preparing and serving an application for a postponement;
- the first day of the aborted trial.

[29] There is a dearth of information as to what has been done since February 2018. I can find little more than reference to a pre-trial conference held in September 2018 and, in the husband's supplementary affidavit (handed up at the hearing without objection), to meetings of the legal teams with the Judge-President on 31 January and 18 April 2019 for purposes of discussing the allocation of a trial date and whether Wille J should hear the trial.

[30] In the light of the information supplied by the wife regarding payments made by her to her attorneys and counsel, it seems likely that a large part of the husband's contributions of R331 000 was paid for attendances relating to the first rule 43 application and the interdict and schooling applications of early 2016. I must disregard this use of the contributions and instead consider whether the sum

of R331 000 would by now have been exhausted if it had been applied in the payment of divorce costs.

[31] The wife can be criticised for failing to provide the details of the costs incurred in the divorce action to date. The only figure definitely mentioned is a sum of R200 000 which she says she had to borrow to fund the costs of the experts engaged to respond to the husband's late expert reports of February 2018. She says the experts needed about 50 hours. The wife's attorney and counsel would also have had to be involved in briefing and considering the reports of the experts. It is a reasonable assumption that the costs the wife incurred in January and February 2018 to prepare for trial – the costs of her attorneys and counsel and the costs of engaging new experts on short notice – exceeded R200 000.

[32] It also seems to me that the other costs incurred by the wife in the divorce action from November 2014 to date (excluding the preparation costs of January and February 2018) would comfortably exceed the balance of R131 000. This would include the costs of the experts engaged in 2017 and R50 000 as a fee for the attorney and counsel for the first day of the aborted trial of 14 February 2018 (the wife says that her attorney and counsel each charge R25 000 per day and the husband's pro forma bill has been drawn on the same basis).

[33] When I speak of the costs incurred by the wife, I am referring to the costs incurred as between attorney and client, to the extent that such costs are reasonable. The husband's pro forma bill seems to allow, in respect of most of the attendances, costs on only the party and party scale. However, there should be a rough equality of arms (cf *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50C-G; *Cary v Cary* supra at 620C-621F; *Greenspan v Greenspan* 2000 (2) SA 283 (C) para 17). The husband is a wealthy man and has litigated on a reasonably luxurious scale, often using one or two attorneys from his attorneys' Johannesburg

office. The bill is also, for present purposes, unhelpful in other respects: it was evidently drawn in response to the wife's aborted rule 43 application of January 2018, and thus does not incorporate actual known attendances since that date; and it makes no allowance for the fees charged by the experts. I may also mention that it excludes altogether the costs of the rule 43 and incidental applications relating to the children. As a bill confined to the costs of the divorce action, such exclusion is correct, but it must be understood that the bill is by no means a full statement of the wife's actual party and party costs in all the proceedings in which she has been embroiled.

[34] I thus conclude that the husband's contributions totalling R331 000 have by now been exhausted on legitimate costs relating to the divorce proceedings. My further assumption is that, to the extent that the wife has used any part of her maintenance towards legal costs, she has legitimately applied them to the many incidental applications not directly concerned with the divorce action.

Estimate of wife's prospective costs

[35] The next matter to consider is the likely costs to be incurred by the wife up to the first day of the trial scheduled to start on 12 August 2019. Once again, the wife has failed to provide relevant detail. She gives estimated amounts, under various headings, likely to be charged by her counsel and attorneys but does not state the number of hours and the hourly rates at which these amounts have been estimated. Without this information, it is hard for the court to know whether the provision is reasonable or not. One might infer, from the daily rate provided for counsel and the attorney (R25 000 each), that the hourly rate would be R2500 (that relationship between a daily and hourly rate was quite common when I was at the bar), but the amounts allowed for non-daily attendances – which I must assume were calculated along rational lines, ie by applying an hourly rate to an estimated number of hours – are not sensibly divisible by R2500. The only

number by which all the amounts allowed for counsel and the attorney are sensibly divisible is R1750. If this is less than what the wife's counsel and attorney actually charge, she has only herself to blame for not providing the relevant information.

[36] The next difficulty with the wife's estimate of prospective costs is that she has provided very little information about the future attendances that will be reasonably required by her attorneys and counsel. The same difficulty bedevils her assessment of the costs to be incurred by the experts in updating their reports and for related travel costs. The court has not been told how many experts she will be leading at the trial, where they are based, to what extent they will need to travel to update their reports or what their hourly charges are. Although the wife may have more than three experts, I shall assume two experts relating to the best interests of the children and one expert relating to the wife's earning capacity. I assume an hourly rate for each expert of R2000. (In February 2018 the husband's expert, Prof Robinson, had an hourly rate of R1750 for in-office consultations and R3000 for out-of-office consultations.)

[37] Since the wife's application is one for a contribution to costs, one would have expected her to use the short space allowed to her by rule 43 to provide the type of information I have summarised above rather than writing pages about the incidental applications. Clearly she will incur quite substantial costs up to the first day of the trial. I also accept that she will lead expert evidence concerning the best interests of the children and that those experts will need to update their reports. The wife cannot complain, however, if – given the absence of relevant detail – my estimates are conservative. The table which follows sets out the number of hours estimated by the wife ('W'), derived from the assumed hourly rate of R1750 for attorney and counsel and R2000 for experts; the hours allowed by the husband ('H') in the pro forma bill; and the hours the court will allow ('Ct'). In each case

the rand total is furnished in an adjoining column. The superscript numbers are notes dealt with in the paragraph following the table.

Counsel	W (hrs)	Total	H (hrs)	Total	Ct (hrs)	Total
Amendments	2	3 500	---	---	--- ¹	---
Perusing discovery	12	21 000	---	2 215	6 ²	10 500
Request for TPs	9	15750	---		--- ³	---
Reply to H's Req for TPs	8	14 000	---		--- ³	---
Experts: perusal + cons	15	26 250	4	10 000	9 ⁴	15 750
Pre-trial conferences	15	26 250	---	---	2 ⁵	3 500
Subpoenas	4	7 000	---	---	--- ⁶	---
Consultations + prep	37	64 750	25	62 500	30 ⁷	52 500
Miscellaneous	5	8 750	---	---	2	3 500
<i>Sub-total for counsel</i>						85 750
First day of trial	---	25 000	---	25 000	---	25 000
<i>Total for counsel</i>						110 750
Attorney						
Amendments	4	7 000	---	---	--- ¹	---
Perusing discovery	34	59 500	---	2 215	6 ²	10 500
Request for TPs	11	19 250	---	---	--- ³	---
Reply to H's Req TPs	8	14 000	---	---	--- ³	---
Experts – perusal + con	15	26 250	4	10 000	9 ⁴	15 750
Pre-trial conferences	15	26 250	---	---	3 ⁸	5 250
Subpoenas	9	15 750	---	---	--- ⁶	---
Consultations + prep	34	59 500	25	62 500	25 ⁷	43 750
Misc	30	52 500	---		10 ⁹	17 500
<i>Sub-total for attorneys</i>						92 750
First day of trial	---	25 000	---	25 000	---	25 000
<i>Total for attorney</i>						117 750
Expert fees+travel						
Updating reports	30	60 000	---	---	13 ¹⁰	26 000
Travel	---	30 000	---	---	--- ¹¹	15 000
Total		607 250¹²		199 430		269 500

[38] Notes to the table:

Note 1: No amendments are foreshadowed in the rule 43 papers. If they arise, they must come from the allowance for trial preparation and/or the 'miscellaneous' allowance.

Note 2: The documents discovered by the parties, including those produced pursuant to requests for better discovery, were all disclosed prior to the scheduled trial date of 14 February 2018 and would have been perused at that time. My allowance of six hours covers the documents which the wife expects to obtain pursuant to subpoenas and a limited amount of time for the legal team to refresh their memories regarding the documents already disclosed.

Note 3: There have already been request and replies. There is nothing to show that further requests are needed.

Note 4: I allow one hour to peruse updated reports and two hours in consultation with each expert. Experts are independent witnesses who provide testimony to assist the court. Extensive consultations with the legal team should not be needed and may be undesirable.

Note 5: In the absence of further information, I assume that the wife's enigmatic reference to 'pre-trial' is to pre-trial conferences with the husband's legal team. There were four such conferences prior to 14 February 2018 and at least another one in October 2018. The matter has already been certified trial-ready. It seems that the parties are so alienated and far apart that not much will be achieved in pre-trial conferences.

Note 6: The subpoenas have already been issued. I think in any event that counsel's input on subpoenas can be subsumed in a general preparation allowance.

Note 7: The husband's bill assumes 25 hours of consultation and preparation for the attorney. Using that as a starting point, counsel should be allowed at least another five hours for matters such as preparing an opening address, preparing questions in the leading and cross-examining of witnesses, legal research etc.

Note 8: I allow an extra hour for the attorney for drafting minutes.

Note 9: I make a higher allowance for the attorney to deal with correspondence, liaising with the experts, making travel arrangements, organising and copying trial bundles etc.

Note 10: I assume that two experts, concerned with the children, may need to spend five hours each, while an employment expert might require another three hours.

Note 11: The wife has given no particulars of these disbursements. It may well be that, since the parties live in George, which is where the children are based, the experts – certainly those concerned with the children – are based there too. Consultations with the experts will either require them to travel to Cape Town or the legal team to travel to George. On the other hand, none of the experts are likely to testify on the first day. There will be an opening address after which, I assume, the wife will be put in the box. My allowance of R15 000 may not cover all these disbursements up to and including the first day of trial, but in the absence of more precise detail I must necessarily make a conservative estimate.

Note 12: It is unclear to me on what basis the wife claims R703 000. The wife's counsel disavowed any right to claim a contribution for past costs.

[39] For the reasons summarised above, I consider that R269 500 would be a reasonable contribution towards the wife's prospective divorce costs. A final observation, in this regard, is that the husband has said very little about his own past legal costs or the costs he expects to pay up to the first day of trial. This coyness on his part may well reflect that any disclosure of the scale at which he has litigated and intends to litigate would cast the wife's claim in a favourable light.

Can wife fund this estimate?

[40] The next question is whether the wife can afford to fund a reasonable allowance for prospective costs in the amount of R269 500. She has alleged that she currently owes her past and present counsel R334 198 and her attorneys R1,5 million. I am entitled to assume that her present attorney and counsel, who can be expected to have personal knowledge of the unpaid fees, would not have settled the affidavit or relied on it if they knew this information to be false. It is unlikely that the wife would have allowed R1,8 million in fees to go unpaid if she had the wherewithal to settle at least some of it. It is also unlikely that the wife's present attorney and counsel would be willing to continue representing her without payment of their past fees if they knew she had resources from which to settle them.

[41] It is not in dispute that the wife, who is now 36, has not worked since the age of 19 when she and the husband began dating. There is a dispute as to whether, since the breakdown in the relationship, she could and should have undergone vocational training so as now to be in a position to earn a modest salary. I cannot prejudge that question. As a fact she is not currently employed.

[42] The husband has alleged that the wife received substantial sums from the realisation of certain assets: R765 308 from the sale of a Tygervalley property donated to her in terms of the antenuptial contract; and R150 000 from the sale of an Audi vehicle which he bought for her and which he later replaced with another vehicle. This being a rule 43 application, there is not a replying affidavit from the wife. However, it appears from the husband's papers that the proceeds from the sale of the property were received in October 2014 while the Audi was sold in early January 2015. The husband was presumably aware of these transactions when he answered the wife's first rule 43 application in March 2015. Since the court in April 2015 ordered him to pay a contribution of R200 000, I think it is too

late now to say that these realisations represent a source from which she could fund her prospective legal costs. Quite conceivably they have been used to settle some of the wife's costs in the various incidental applications.

[43] The husband says that in November 2014 he paid R44 050 for his wife's enrolment at a design college, that she did not thereafter attend the college, and that in June 2016 the college refunded the money directly to her. If that is so, it may well have been expended, quite possibly on incidental applications.

[44] The wife says that the change in care and custody arrangements (which has resulted in the children spending less time with her) has not reduced her monthly requirements. The husband says that this is not credible. He also says that, of the R71 000 monthly maintenance, R10 000 is being applied by the wife to pay her mother's mortgage bond, another R10 000 to meet the mother's living expenses and R5000 as a 'salary' to the mother for performing au pair services. (This latter information appears from the wife's attorneys' letter of October 2016 to which I made earlier reference.) These amounts, totalling R25 000, are not, the husband says, expenses for which he is responsible. Since he is paying them, the wife could use these amounts towards legal costs.

[45] There are several difficulties in the way of deciding, at this stage, that a substantial portion of the monthly maintenance of R71 000 is available to meet the wife's respect of legal costs.

(a) First, unless she and (effectively) her legal team are being untruthful about the amounts she currently owes her lawyers, the wife would be entitled to apply any surplus funds from her monthly maintenance to settle her past obligations. For all I know she has done so to some extent.

(b) Second, it appears from the papers that there is likely to be a dispute relating to the mother's position. The wife's attorneys, in their letter of October 2016,

stated that it was the husband's idea that the mother should resign her job and relocate from Johannesburg to George to assist with the children; that he promised to include the mother in his medical aid scheme, which never happened; that the wife was been paying her mother's medical expenses as the mother had been ill for the past year; and that the husband had offered to meet the mother's living expenses and mortgage bond.

(c) Third, as matters currently stand the sum of R71 000 has been ordered as an amount payable to the wife as maintenance, not as a contribution to costs. The husband brought a rule 43(6) application in May 2017 to have the amount reduced. Although he may (as he says) have jettisoned this application in October 2017 because he expected a final determination of the divorce action by way of a preferential trial date in February 2018, he has not subsequently renewed the application.

[46] The husband states that the wife was for some time in a relationship with a wealthy Turkish businessman and disbelieves her allegation that the relationship has terminated. This is not a matter which I can resolve on the papers. Possibly the Turkish gentleman would have been willing, may even still be willing, to help her with her divorce costs, but I do not know this as a fact, and he is not under any legal obligation to do so.

Can husband afford to fund the estimate?

[47] I thus find that the wife is in need of a further contribution to costs. The final question, therefore, is whether the husband is able to pay the amount I have determined as reasonable. Unsurprisingly this is contested terrain, the wife painting a picture of fabulous wealth, the husband portraying his monthly expenditure as substantially exceeding his monthly income. I accept that the protracted matrimonial proceedings have put some strain on the husband's resources. In addition to his conventional legal expenses (including expert

witnesses), he has had to fund a range of other costs, such as the ongoing role of a senior advocate as the court-appointed representative of the children, the short-lived panel established by the order of 22 March 2018 and the cost of the social workers involved in the wife's supervised contact with the children.

[48] The husband states that his monthly income from his four Super Spar stores is R306 090 while his monthly expenses total R392 596 (this includes the monthly cash maintenance of R71 000 and R67 169 in respect of the wife's additional expenses costs forming part of the monthly maintenance), leaving a monthly shortfall of R86 506 (he does not state how this monthly shortfall is currently funded). Included in his monthly expenses are mortgage bond payments totalling around R170 000 in respect of his Victoria Bay farm (where he resides) and a unit at Fancourt (where the wife resides). Also included are expenses in respect of his mother (R9110 for her medical aid and vehicle insurance; and monthly credit card expenditure of R25 000 which is said to include expenditure on his mother). Over and above the credit card expenditure (the make-up of which does not appear), he allocates R8000 for groceries, R4000 for clothing, R2100 for pet food and R3000 for fuel.

[49] The wife states that the husband has failed to disclose financial documentation he should have discovered. She has thus issued subpoenas to banks, accountants, SARS etc. At this stage, it seems, there is no way of testing, with reference to discovered documentation, whether the husband's earnings accord with his allegation. The wife says that according to his 2016 tax return he earned 'directors income' of R2,88 million and income from the Secunda Spar (presumably only one of the four Spars) of R987 486, which in total represent a monthly income of R322 920. Since he receives directors it appears that one or more of his businesses are conducted through companies. One does not know whether those companies made profits which they have declared or could declare

as profits (ie over and above the remuneration he drew as part of the company's deductible expenditure).

[50] In paras 64-65 of her founding affidavit the wife says that the respondent is able to pay the contribution she seeks, and attaches in that regard (as 'RM5') an extract from her answering affidavit, filed in June 2017, in answer to the husband's application to reduce his maintenance. In that attachment she alleges the following concerning his resources:

(a) His 'five-star' Super Spar in Secunda trades from a commercial complex which he owns and from which he or entities controlled by him earn rent from numerous tenants.

(b) He owns other property in South Africa – a home in Sandton valued at R9 million and on which he recently expended R3 million; a property in Sandhurst worth R3,5 million, previously occupied rent-free by his mother and now occupied rent-free by the husband's sister and her family; the unit in Fancourt where the wife resides, currently worth R6 million; and fractional ownership of another Fancourt unit purchased for R1 million and rented out at R3000 per day.

(c) In Greece he owns an apartment in Athens valued at R3 million-R4 million. He owns other properties in Greece, close to the city of Trikala, comprising farmlands, at least one residential property and at least one commercial property.

(d) He also has a collection of vehicles – a Mercedes SL and an Alpha Duetto (both collector's pieces), a VW Amarok, a VW Kombi, a Toyota Hilux, a 2014 Harley-Davidson worth R400 000 and various other vehicles of which she can no longer recall the particulars.

(e) She alleges that he owns or is the beneficiary of various 'illegal casinos' and that he often arrived home with travel bags filled with cash which he preferred not to deposit.

[51] In his answering affidavit the husband traversed para 64-65 of the founding affidavit (together with others) by denying that he is in a position to pay any contribution. He has not answered any of the wife's detailed allegations concerning his assets and income.

[52] The husband has also not disclosed what he expects his own legal costs to be from the present time up to the first day of trial and how he intends to fund them. He does not say that his legal team are acting on contingency or that any part of their past fees remain unpaid.

[53] In the circumstances, I find that the husband has the means, whether by way of undisclosed income or the realisation of assets or by borrowing against the security of his assets, to fund not only his own legal expenses to the first day of trial but also the wife's. I think it very likely that the resources he will apply to his own legal expenses will substantially exceed those I intend to award the wife.

Conclusion and order

[54] VAT will need to be added to the amount I award. I do not intend to order a daily contribution beyond the first day. The daily rate of R25 000 per counsel and attorney seems uncontentious but there may be further developments which show that it would not be reasonable for the husband to be ordered to pay a contribution beyond the first day. The daily contribution can be dealt with by the trial judge.

[55] I think it appropriate to take steps to ensure that the husband's contribution is expended in a manner consistent with the way in which I have arrived at the amount. This I shall do by ordering that the amount be paid to the applicant's attorneys' trust account and that no more than specified amounts may be released in respect of the fees of counsel, the attorneys and the experts respectively. Within these three broad categories I shall not be prescriptive (for example, counsel may

spend less time on one type of attendance and more than another; one expert might charge less and another more, etc).

[56] As to the costs of this application, the wife will be awarded only 38% of the amount she claimed. On the face of it, her claim was excessive. At any rate, she was at fault in failing to provide the sort of information which would have helped the court to arrive at a more accurate assessment. While her affidavit, at around 20 pages (with another 29 pages of attachments), was not necessarily too long given the unusual circumstances of the case, too much space was occupied by irrelevant matter, while highly relevant matter was omitted. The husband's affidavit, at 52 pages (with another 95 pages of attachments and confirmatory affidavit), was definitely too long and repetitive. Although to some extent he can be forgiven for responding to irrelevant material raised by the wife, he did so at a length which was not justified. He, too, has not been forthcoming with relevant information, such as his own anticipated legal costs; and he has not responded to the relevant material concerning his resources.

[57] I have thus been tempted to order that the parties bear their own costs. However, since the trial is now just over a month away, and since the evidence which the trial judge hears may show that one or other, or perhaps both, of the parties have been untruthful in their affidavits, it seems preferable to leave the costs for determination at the trial.

[58] I make the following order:

(a) The respondent must pay a further contribution of R269 500 plus value-added tax towards the applicant's costs in the divorce action, of which R100 000 plus value-added tax must be paid by 16:00 on Monday 15 July 2019 and R169 500 plus value-added tax by 16:00 on Monday 22 July 2019.

(b) The said amounts must be paid to the applicant's attorneys' trust account, and may not, without the respondent's attorneys' written permission or the court's directions, be released from the trust account except in payment of fees and disbursements for work performed on or after 21 May 2019 in respect of the pending divorce action (not in respect of the present rule 43 application) and subject to the following limits (plus value-added tax in each case):

- (i) R85 750 in respect of counsel's fees, excluding the first day of the trial;
- (ii) R25 000 in respect of counsel's fees for the first day of the trial;
- (iii) R92 750 in respect of attorneys' fees and disbursements (but excluding disbursements for the fees of counsel and experts, and excluding the attorneys' fees for the first day of the trial);
- (iv) R25 000 in respect of attorneys' fees for the first day of the trial;
- (v) R26 000 in respect of experts' fees;
- (vi) R15 000 in respect of travel and accommodation expenses (whether for experts or the legal team).

(c) If any balance of the said amount remains in the applicant's attorneys' trust account when the divorce action is finally determined, such balance shall, subject to any contrary term in a settlement agreement or order of court, be repaid to the respondent's attorneys.

(d) The costs of this application shall stand over for determination at the trial.

Judge O L Rogers

APPEARANCES

For Applicant

Ms F Gordon-Turner

Instructed by

Spencer-Pitman

24 Dreyer Street

Claremont

For Respondent

Mr C Bollo (attorney)

BBM Attorneys

c/o 5 Leeuwen Street

Cape Town