

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 67591 / 2013

9/3/2018

In the matter between:

O A J

APPELLANT

And

K J

RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] This is an application by the defendant for a contribution towards her costs in an action between her and her husband, which is presently pending before this Court and which was set down to be commenced on 28 August 2015, just about 3 days prior to this application. .
- [2] It is common cause that the husband, an attorney of this Court, is in a much stronger financial position than the applicant, who was in the employ as a secretary of the respondent. The applicant in May 2015 approached this Court for and was granted an order for maintenance *pendent lite*, in an amount of R200, 000. 00 in terms of rule 43. She now approached this Court for contributions towards her legal cost in an amount of R600, 000.

00 in terms of rule 43(6).

- [3] In as much as the respondent, as the husband of the applicant has a duty to support and maintain his wife, this duty includes the liability to contribute towards reasonable costs of legal proceedings by or against her. The purpose of rule 43 (6) is to level the litigation playing field of the respective parties, placing them at the same financial position to engage in the dual as equals.
- [4] The application is highly contested. The respondent contending, *inter alia*, that in principle, he is not averse to contributing towards the cost of the applicant. He however contends that the parties are married with an accrual system, in terms of which at the commencement of the marriage, each party has a zero per cent in his or her account, and 50% each in the subsequent estate generated by virtue of both parties, irrespective of the extent to which each contributed. I agree with the submission, on behalf of the respondent that the cut-of- point of this unique system comes to an end either at the commencement of divorce litigation or at the pronouncement of divorce. This requires that a complete severance of the respective parties' interest in the accrual be pronounced before the determination of their respective 50% interest. It -is common cause that the respondent is involved in a relationship with another woman. It is common cause that he has moved out of the matrimonial home in 2013. He contended and exhorted the applicant to agree to a speedy divorce, subject to the determination of the respective parties' 50% interest. The applicant resist this approach contending, that there would be no benefit to her in adopting this approach, insisting that an all-embracing finalisation of the divorce be proceeded with, irrespective how long it takes. The applicant's stance, is in my view, unreasonable but calculated to delay the finalization of the divorce and extort as much as she wants from the respondent. This should not be countenanced.
- [5] As pointed out earlier these proceedings were brought 3 days away from the date on which the divorce was set down for hearing. This Court was informed that the matter is not trial-ready and will invariably be postponed, for one or other of the following reasons: The respondent will apply for a

separation in terms of rule 33(4), that the divorce be separated from the determination of the accrual interest of the respective parties, the latter to be postponed *sine die*. On the other hand the applicant too will apply for the matter to be postponed *sine die* because of late discovery on the part of the respondent.

[6] A trial date was allocated for the main matter. It turns out that the applicant intended to apply for postponement. It can only mean that the matter is not trial ready. The applicant must satisfy the Court that there were changed circumstances warranting that a contribution towards cost be brought three days from the date of trial. She must also provide cogent reasons why such relief was not sought during the application for maintenance *pendente lite*; vide *Greenspan v Greenspan*.¹ This Court is not satisfied that there are changed circumstances from the date when the initial application was brought, to the stage when this application for contribution towards legal costs was brought. Besides, the applicant during the application for maintenance *pendente lite*, was awarded an amount of R200,000.00 which, in my view, was a substantial amount, from which she could also have met her legal costs. In the premises I am disinclined to exercise my discretion in her favour to order a contribution towards her legal costs.

[7] In the matter of *Ex Parte Burger and Another*² it was held that: The accrual system was introduced in chap I of the Act. It was something completely new, which had no counterpart in the common law. Section 2 of the Act provides that every marriage out of community of property which was concluded after the commencement of the Act is subject to the accrual system. In terms of the Act a claim by one spouse against the other or the latter's estate in respect of an accrual arises only on the dissolution of the marriage.

[8] The approach contended for by the respondent is, in my view, pragmatic. It serves no purpose to retain the umbilical matrimonial strings intact, when for all practical purposes the quintessence of matrimony is non-existent. It

¹ 2001 (4) SA 330 (CPD) at 335H-336D.

² 1965 (1) S A 140 (D&CLD)

is open for abuse and to frustrate the other party from walking away to start, *in casu* the respondent, his new life, while the other party, *in casu* the applicant merely enjoys the financial toil and sweat of the other respondent, after the quintessence of the marriage has evaporated to thin air. This might engender resentment on the other party who might feel frustrated and being held to be a cash comfort zone when he no longer enjoys the warmth and benefits of the marriage.

[9] The parties are *ad idem* that the respondent's legal practice has been a golden-laying egg to the parties. It would take some time to determine its actual value for purposes of making a clean severance of the parties' matrimonial consequences. In my view, once the parties are divorced, there would be greater urgency and co-operation in embarking on resolving the determination of the accrual benefits of each party.

[10] In the premises, the application in terms of rule 43(6) is dismissed with costs.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 09/03/2018

APPLICANT'S ADV : ADV DAVE SMITH.

INSTRUCTED BY : SCHOEMAN ATTORNEYS

RESPONDENT'S ADV : ADV K JOUBERT

INSTRUCTED BY : ADAMS & ADAMS.