

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case No: ECD 2182/17

EL882/2017

REPORTABLE

In the matter between:

P. P. T. (N. M.)

Applicant

and

P. W. T.

Respondent

JUDGMENT

TOKOTA J

[1] On 19 October 1990 the applicant and the respondent were married to each other out of community of property in terms of the provisions of the Transkei Marriage Act No. 21 of 1978 and such marriage still subsists. Three sons were born out of the marriage, namely; S. V. born on [...] 1992, L. M. born on [...] 1994 and O. M. born on [...] 1998. All of them are no longer minors, the eldest being 26 years old and the youngest 19 years old. S. and L. have completed their tertiary education and are queuing in the open labour market looking for employment. O. is still pursuing his studies at the University of the Western Cape.

[2] During 2009 the respondent instituted divorce proceedings against the applicant but later withdrew the action. Again during March 2016 the respondent instituted the present pending divorce proceedings against the applicant. It is common cause between the parties that the marriage has irretrievably broken down and that there are no reasonable prospects of a restoration of a normal marriage. The parties have not lived together as husband and wife for approximately more than ten years. The divorce action is pending before this Court.

[3] The applicant has now brought an application in terms of Rule 43 of the Uniform Rules of Court seeking an interim order, *pendente lite*, for the following relief:

- “(a) That the Respondent effect the payment of maintenance pendente lite for the Applicant in the sum of R10 000.00 per month;*
- (b) That the Respondent retain the children on his medical aid, attend to the payment of the premiums payable in respect of their membership on his medical aid and all reasonable and necessary medical expenses incurred which are not covered by the Respondent ‘s medical aid;*
- (c) That the Respondent effect payment of O.’s tertiary fees and related expenses at the University of the Western Cape;*
- (d) That the Respondent effect payment of the bond, rates and services in Ripplemead Road, Nahoon Valley Park, East London;*
- (e) That the Respondent effect a contribution of R14 850.00 to the Applicant towards the repairs to the Corsa motor vehicle, within a period of 5 days of this order being made;*

(f) That the Respondent effect a contribution towards the Applicant's legal costs in the sum of R70 000 (SEVENTY THOUSAND RAND)

(g) Costs in the cause."

Pursuant to the debate we had with Counsel representing the applicant during the hearing of the matter prayers (b) to (e) were abandoned.

I am now only required to determine the issues relating to prayers (a) and (f).

[4] In order to put matters in proper perspective and to determine whether the remaining relief sought is justifiable in the circumstances of this case it is necessary to give a brief historical background relating to personal circumstances of each party as appears from the papers.

[5] The applicant is gainfully employed by the Department of Education in the Eastern Cape Province and occupies a position of a Principal at JJ Njeza High School, Centane district. Her basic salary is R35 580.50 and receives a net salary of R22 794.62. The respondent is a Judge in this Division and earns a gross salary of R153 339.32 and receives a net salary of R72 522.41.

[6] The respondent owns two properties. One is situated at Ripplemead Road, Nahoon Valley Park, East London and the other is at Unit [...] K. G., Port Elizabeth. Both properties are burdened with mortgage bonds which are serviced by the respondent. The respondent is living in the property situated in Port Elizabeth.

[7] The applicant lives in a flat which she is renting in Butterworth where she stays during the week and commutes everyday to school. She pays a rent of R2 500 per month. In the papers she avers that during the week-ends and holidays she stays at the house in Nahoon Park, East London. Although the respondent is not in a position to dispute this he alleges that the applicant has left the common household and has been staying away for approximately ten years. It is not clear from the papers as to when she started staying at this house, regard being had to the fact that for ten years she has not been staying there.

[8] The respondent is responsible for and is paying the mortgage bonds on the properties. S. and L. are staying in the property in East London. When they were studying at Nelson Mandela University they were staying with the respondent.

[9] During the hearing of this matter I asked Mr Wood, who appears for the applicant, whether these children cannot ask for maintenance themselves from the respondent. He quite correctly conceded that it was not necessary for the applicant to make an application on their behalf and that it is not necessary to maintain them via the applicant. He submitted that the applicant only seeks maintenance for herself and contribution for costs in the main action, hence the other prayers were abandoned.

[10] The purpose of Rule 43 is to relieve, temporarily, the applicant spouse who feels the pinch of maintaining the children alone and, if she unable to do so, for the maintenance of herself as well whilst the divorce proceedings are still pending. The basis of the order for contribution on costs emanates from the duty of support which the spouses owe each other.

[11] The Rule was designed to protect the innocent spouse who has been neglected by the guilty spouse who is not willing to fulfil his legal obligations to maintain the family. The applicant must show that she is in need of reasonable maintenance and is unable to maintain herself. Where

the wife seeks maintenance for herself she must demonstrate further that it is just and equitable to make such an order. The ordinary grammatical meaning of 'just' is, *inter alia*, appropriate, fair-minded, sound, deserved or appropriate in the circumstances, fitting, reasonable, justified, and 'equitable' means, *inter alia*, fair and impartial, reasonable and right.

Where the children, as in this case, are grown up adults they are free to seek maintenance for themselves from the spouse who neglects them.

Section 28 of the Constitution of the Republic of South Africa Act, 1996 and section 1 of the Children's Act No. 38 of 2005 define a child as “...a *person under the age of 18 years*”.

[12] Section 7(2) of the Divorce Act No. 70 of 1979 provides that when making an order with regard to the maintenance of one spouse by the other regard must be had to the existing or prospective means of each of the parties, their various respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage and any other factor which in the opinion of the Court should be taken into account. The Court may then make an order which it finds just and

equitable in respect of the payment of maintenance by the one party to the other for any period until death or remarriage.

Although the section deals with maintenance after divorce, it is, in my opinion, proper to take some of the factors into account in determining maintenance of the other spouse *pendente lite*.

[13] It was submitted on behalf of the applicant that the applicant has no rights to the assets of the respondent in terms of their marriage regime. She will therefore claim a rehabilitative maintenance from him.

[14] In making an interim order for the maintenance of the spouse by the other, one cannot turn a blind eye to the prospects of such rehabilitative maintenance order being made when the marriage is finally dissolved. The applicant is gainfully employed as a Principal of a High school. She earns a decent salary. She has not disclosed any asset which she is maintaining other than a car which she alleges is in a state of disrepair. She uses a car belonging to the respondent with his consent. She has not disclosed the reason for leaving the common marital house for the past ten years and why she did not claim maintenance during this period. The

maintenance claim has been instituted only during the divorce proceedings

[15] Without laying down any rule of practice in this regard, and I accept the desirability of keeping the costs of Rule 43 applications as low as possible, I am of the opinion that an application of this nature should contain sufficient information to enable the Court to determine properly the desirability or otherwise of making an order for the maintenance of another spouse. Furthermore, Rule 43 (2) requires the applicant's sworn statement to set out "*the relief claimed and the grounds therefor*". This suggests that Rule 43 proceedings should be self-contained. Submitting a list of monthly expenditure without proper motivation is not enough. It must be obvious from the list of expenditure furnished that the expenditure is realistic and reasonable. The applicant has motivated the following monthly expenditure:

- (a) Rent;
- (b) Electricity and municipal charges;
- (c) Cell phone;
- (d) Groceries and toiletries
- (e) Transport contract;

- (f) Petrol
- (g) Domestic worker;
- (h) Garden service;
- (i) Air time/ pocket money
- (j) Toiletries
- (k) O.
- (l) Gym;
- (m) Medical aid
- (n) DSTV
- (o) Motor vehicle insurance
- (p) Sanlam loan
- (q) Liberty
- (r) RCS card
- (s) Credit card
- (t) Tracker

[16] Most of the above items can easily be discarded. I mention a few hereunder.

She does not have to pay any municipal rates as this is paid by the respondent. Domestic worker and garden services relate to the property in East London. The two sons are there to maintain the garden and do not need a house helper to cook for them. The contribution towards the maintenance of O. is voluntary and emanates from her duty of support as the parent. However, the respondent is willing to maintain him alone as he has done so in respect of S. and L.. There is no obligation to pay a tracker for a vehicle which is in a state of disrepair including its insurance, which in any event is a luxury which the respondent has gratuitously afforded the applicant by giving her his car. Debts arising from credit cards and loans are self-created and do not last forever. The balances owing have not been disclosed. It has not been explained why there is a transport contract if the applicant is using the respondent's car. The medical aid is usually deducted from the salary and there is no explanation why this is not so in the case of the applicant.

[17] The respondent submitted that there is no basis for this claim. I am of the opinion that no sufficient grounds have been advanced to support the claim as required in Rule 43. I conclude therefore that the applicant is able to maintain herself and is not entitled to the relief sought in prayer (a), at least at this stage.

[18] The claim for contribution of legal costs is *sui generis*. In order for the applicant to demonstrate that she is entitled to an order of this nature she must show that she has a bona fide defence in the action. The Court has to determine an amount which will enable the applicant to adequately place her case before the Court hearing the divorce. The contribution cannot be made by the mere asking. The basis of the claim is the duty of support the spouses owe each other. See ***Chamani v Chamani 1979 (4) SA 804 (W) at 806F - H***. I. The manner of assessment of quantum of the contribution was dealt with in the case of ***van Rippen v van Rippen, 1949 (4) SA 634 (C)*** at p. 638 and the position is set out at p639, where the learned Judge says:

“The quantum which an applicant for a contribution towards costs should be given is something which has to be determined in the discretion of the Court. In the exercise of that discretion, the Court should, I think, 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 the Court.”

[19] In **Nicholson v Nicholson 1998 (1) SA 48 (W)** at 50C - G Wunsh J said the following:

“The applicant is entitled, if the respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the respondent is litigating and the scale on which the applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the respondent's financial position.”

[20] The purpose of the order for contribution is to equalise the scale of litigation between the spouses. Section 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 guarantees the right to equality before the law and to equal protection of the law. In **Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 (E) (1994 (2) SACR 340) at 642 (SA)** Froneman J suggested that the right of an accused in a criminal trial to information from the State flowed from the fact that equality before the law requires equality of arms in order for a criminal trial to be fair. By similar reasoning, where circumstances justify it, the applicant is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her husband.

[21] It is common cause that the marriage is over and what is lacking is a decree of divorce to officially dissolve it. The marital regime presently, dictates that the applicant has no claim against the assets of the respondent. I asked Counsel for the applicant during the hearing of the matter why the divorce is contested and I was informed that the parties are waiting for the outcome of the case of **Holomisa v Holomisa** which is pending in the Constitutional Court otherwise the only issue will be a claim for rehabilitative maintenance.

[22] On the limited facts disclosed in this application I am not in a position to say that the application for rehabilitative maintenance in the main case will be successful or not. However, I was also informed that the divorce proceedings will be held in abeyance pending the decision of the Constitutional Court in connection with the consequences of the impact of Marriage Act, Extension Act No 50 1997 (the Extension Act) which extended the operation of the provisions of the Marriage Act, 1961 (Act 25 of 1961), to apply to the whole of South Africa. The extension of these provisions is, in terms of the Extension Act, deemed to have come into operation on [...] 1994. How these provisions will affect the marriages

entered into in terms of the Transkei Marriage Act before 1994 remains to be seen.

[23] Without predicting the outcome of the **Holomisa** matter I deem it expedient to comment on the impact which it may have on this matter. I do so because the delay in finalising the divorce in this matter is pegged on that case. The case is set down for hearing in August 2018. That case concerns the legal consequences of the Extension Act on the matrimonial property regime of the Transkei Marriage Act solemnised after [...] 1994. In particular the issue is whether the retrospective operation of the Extension Act did not have the effect of altering the matrimonial property regimes of parties whose marriages were solemnized after [...] 1994. Holomisa's marriage was solemnised on 16 December 1995.

[24] The Extension Act is short and provides:

“1 Extension of operation of Marriage Act to whole of South Africa

(1) The operation of the provisions of the Marriage Act, 1961 (Act 25 of 1961), is hereby extended to the whole of South Africa.

(2) The provisions of subsection (1) shall be deemed to have come into operation on [...] 1994.”

[25] The marriage between the parties in this matter was solemnised on 19 October 1990 more than three years before [...] 1994. I have reservations as to whether the interpretation of the Extension Act will, insofar as the case of Holomisa is concerned, affect the marriages solemnised in Transkei before [...] 1994. Consequently, it does not appear to me that the Constitutional Court judgment will affect the case of the parties in this matter.

[26] Turning to the point now under consideration the question is whether the applicant in this case has established that she has justifiable grounds, regard being had to the means of the parties, the prospects of success in the main action by a party seeking the relief, her conduct during the subsistence of the marriage, especially relating to the causes of breakdown thereof and whether she has bona fide defence. I have already alluded to the fact that there were scanty facts to assist me in determining the desirability or otherwise of the order sought. The respondent simply denied that the applicant is entitled to the contribution.

[27] In **Smith v Smith 1963 (3) SA 84 (SR)** it was said: *“There is some uncertainty about the test to be applied in determining the right of a spouse to obtain an order for contribution. See Hahlo S.A. Law of Husband and Wife, 2nd ed. pp. 497 - 8 and n. 49. The weight of authority seems to be that the test is whether the applicant has a 'fair and reasonable prospect of success', that is ultimate success. In addition, the authorities show that the situation must be judged in the light of the information available at the time the application is heard and also that, in general, an applicant who is a defendant may succeed on rather less than must be shown by an applicant who is a plaintiff. See **Turkstra v Turkstra, 1946 CPD 774 at pp. 780 and 781**, following inter alia *Butterworth v Butterworth, 1943 W.L.D. 127 at p. 131.**

The learned judge continued and said:

“The only other point I need mention in this connection is that it has often been said that the defence sought to be put up must be a bona fide one. This, it seems to me, is an essential foundation of any case made by an applicant for the kind of relief now sought. If a defence is mala fide, then it is obvious that an application must fail.”

[28] In my view if the marriage has irretrievably broken down to the extent that there are no reasonable prospects of a restoration of a normal

marriage, unless there are obvious justifiable grounds for defending the action, a party who decides to defend such action should do so at the peril of suffocating herself into legal costs concomitant therewith. She should not expect the other party to salvage her especially if she has the means to defend herself. Without deciding that the applicant will not succeed in the main action, contribution orders for legal costs *pendente lite* should be preserved for those spouses who, due to lack of means, cannot afford legal costs to put them on an equal footing to enable them to put up their defences. I am not persuaded that this is such a case.

[29] The last aspect which is disquieting is the conduct of Counsel who was briefed to appear on behalf of the respondent. I was informed in the morning of the hearing of the matter that Advocate Ngadlela who was initially briefed and who held the brief until a day before the hearing was not available to argue the matter. This necessitated briefing another Counsel at the last moment a night before the hearing. Mr Kotze who accepted the brief, had to ask that the matter stand down for him to peruse the papers and prepare for argument. I must commend him for his efforts and submissions, regard being had to the limited time he had to prepare for argument.

[30] The inconvenience caused by the last moment withdrawal is self-evident. The Uniform Rules prescribed by the GCB describe such conduct as improper. Rule 2.6 thereof provides;

“2.6 It is improper for counsel :

(i) to accept a brief unconditionally; or

(ii) to retain a brief previously accepted by him;

if the circumstances are such that he should reasonably foresee:

(i) that he will not be able to attend to the brief within a reasonable time; or

(ii) that he would have to surrender the brief for whatever reason;

and

(iii) that the surrender of such brief could cause inconvenience

and/or embarrassment and/or prejudice to:

(a) his client; and/or

(b) colleague who is to succeed him in the brief; and/or

(c) instructing attorney.” (Emphasis is mine)

[31] The conduct of Mr Ngadlela was incompatible with this sub-rule. He did not even have the courtesy to apologise to the Court for his conduct and I am not sure if he did so to his client or attorneys. Conduct of this nature from an officer of this Court is reprehensible. Counsel has a duty to Court, which overrides that of his client.¹ Unless it is beyond his ability by virtue of unforeseen circumstances Counsel has a duty to inform his attorney timeously of his inability to continue with the brief.

[32] Regard being had to all the circumstances relative to the merits of the application I make the following order:

- 1 The application is dismissed.
- 2 There is no order as to costs.
3. A copy of this judgment shall be forwarded to the Chairperson of the Bhishe Society of Advocates.

B R TOKOTA
JUDGE OF THE HIGH COURT

¹ See LAWSA Vol. 14 para.132 p.136

Counsel for the applicant : Adv C Wood

Instructed by : Difford Underwood Inc.

Counsel for the respondent : Adv Kotze

Instructed by : IC Clark Inc

Date Heard : 3 May 2018

Judgement Delivered : 17 May 2018