

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

08/02/2017

CASE NO: 66405/2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

S, H M

Plaintiff

And

S, T

Defendant

JUDGMENT

TSHABALALA AJ

This is an application for contribution towards the Applicant's legal expenses in a pending divorce matter between the parties in terms of Rule 43 of the Rules of Court. The Applicant has approached this Court to seek an order that the Respondent make a contribution to costs in the sum of R202 120,00. The Applicant also seeks an order that the Respondent pay travelling costs of her attorney and counsel. The Respondent has filed a counter-application seeking an order for the discharge of the order handed down on 20 March 2014.

APPLICANT'S CASE

[1] The Applicant and the Respondent were married to one another on 7 April 1973, out of

community of property, with the exclusion of the accrual system.

- [2] The Applicant, Plaintiff in the main action, instituted divorce proceedings against the Respondent during October 2013 in this Honourable Court. The Applicant has claimed 50% of the Respondent's assets in the divorce action. The Applicant contends that she is entitled to half of the estate of the Respondent due to the fact that the marriage is in excess of 40 years. The said marriage was concluded prior to 1984 and, is subject to section 7(3) of the Divorce Act, No. 70 of 1979 as contended by the Applicant.
- [3] The Respondent has defended the divorce action and claimed forfeiture of the Applicant's right to share in his estate as well as an order that the Applicant transfer her half share in the matrimonial home to him, free of consideration.
- [4] A rule 43 order was granted on 20 March 2014. It is also common cause that the Respondent is in contempt of the Rule 43 order of 20 March 2014.
- [5] According to the Applicant, the Applicant has as a result of the Respondent's contempt of the Rule 43 order, issued a writ whereafter an attachment of R145 125,00 (one hundred and forty five thousand one hundred and twenty five rand) was made. The Respondent remains in arrears, and a further writ has been issued.
- [6] The Applicant contends that she has also been forced to institute contempt of Court proceedings in respect of the Rule 43 order as well as three applications to compel due to the Respondent's attitude.
- [7] The Applicant's application for a request for further particulars was successful in that the Respondent complied therewith but refused to tender wasted costs , necessitating the matter being heard in Court whereafter a costs order was granted in the Applicant's favour.
- [8] The Applicant contends that the Respondent's attitude towards litigation against the Applicant is vexatious and frivolous.

THE RESPONDENT'S ASSETS

- [9] The Applicant contends that the Respondent's estate was valued as follows as at May

2012:

[9.1] R11 011 856,00 excluding insurance and funeral policy accounts;

[9.2] R10 261 856,00 nett value, that is less R750,000.00 being the Applicant's half share to the immovable property. The Applicant further contends that the above was the version of the Respondent as at May 2012;

[9.3] Further, on the Respondent's version as submitted by the Applicant, the total value of the Respondent's investments and shares as at 30 May 2012 was R1 559 002,00. The Applicant has annexed "HMS11" being a copy of a schedule of assets drafted by the Respondent in May 2012.

[10] The Applicant is of the view that the Respondent has, at the very least, assets which can be converted to cash, with a value of not less than R1 559 002,00. The Applicant states that she has convertible assets in the amount of R224 646,37, and that she owes her attorneys legal fees in the amount of R48 065,83.

[11] The Applicant has filed a breakdown of legal costs for trial, annexure "HMS10" for trial preparation and consultation up to and including the first day of trial for a total of R202 120,00. The hourly rate charged by each of the Applicant's attorney and counsel is indicated as R2 000,00 plus VAT per hour.

RESPONDENT'S CASE

[12] The gist of the Respondent's reply to the Applicant's claim is the following:

[12.1] It is common cause that the Respondent and the Applicant were married to each other on 7 April 1973 out of community of property with the exclusion of accrual.

[12.2] He avers that he separated with the Applicant in December 2012, when the Applicant vacated the matrimonial home.

[12.3] He is aware of the Rule 43 Order of October 2013 made by the Honourable Phathudi J

- [13] Regarding the valuation of his assets, the Respondent states at paragraph 5 of his answering affidavit and counterclaim that:

"The Court will glean from the list that I hold assets including a pension fund of approximately R4,77m. It includes a claim against the Applicant of R900 000.00, a claim that she disputes".

- [14] Insofar as the investments of the Applicant are concerned, the Respondent states at paragraph 17 as follows:

"It is clear from Annexure "HMS6" that the Applicant can afford to litigate, even at the luxurious scale that she claims in this application. She has two Sanlam policies which in total is worth more than R770 000,00 which she can utilise to pay her attorneys. She has the financial means to pay for her own legal expenses".

- [15] The relief to contribution to costs is available to a spouse *pendente lite* and is founded on the duty to support.

See: Chamani v Chamani 1979 (4) SA804 (W)

- [15.1] An Applicant for a contribution towards costs must show that, if she is the Plaintiff in the main action, that she has a *prima facie* case, if she is a Defendant that she is defending in good faith. See Lyons v Lyons 1923 TPD. The Applicant must further show that she has insufficient means of her own.

In **Van Rippen v Van Rippen 1949(4) SA 634(1)** the Court held that:

"In the exercise of that discretion in regard to a costs contribution the Court should, I think, have the dominant 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 Court. In any such assessment the question of essential disbursements must necessarily be a very material factor... The paramount consideration is that, as I have indicated, the Court should have as its object the determination of an amount which in its discretion it considers necessary for the wife adequately to place her case before the Court".

- [15.2] In this matter the parties have been married for a considerable amount of time, that is

in excess of 40 years. The parties have placed before the Court their financial ability which the Court has to consider. The Court has to consider the complexity of issues in the matter and all the circumstances of the case. The Court has to exercise its discretion judiciously.

- [16] It is important to mention that the Respondent does not challenge the Applicant's right to approach the Court for contribution to legal costs, the Respondent contends that the Applicant is employed and has assets of her own. The Respondent concedes that the "parties are entitled to the right to equality before the law and to equal protection before the law".
- [17] The Respondent in this matter has stated that he earns the monthly amount of R14 460,00. It later comes to light that the Respondent earns a total amount of R21 786,00. This is not due to misrepresentation but due to further amounts that the Respondent earns as a lecturer. The Respondent has assets worth approximately R4 774 887,00. The Respondent states that he pays the amount of R8 900,00 per month towards his legal costs. The Respondent's monthly expenditure was R13 936,00 per month, it has now risen to R36 959,09 per month.
- [18] The Applicant earns R23,959.00 per month, her expenses are R26,190.00 per month. The Applicant's nett value of her assets is R1 289 931,00.
- [19] It is common cause that the Applicant was compelled to bring various applications against the Respondent due to Respondent's attitude of non-compliance with requests for information. The Respondent is also in contempt of the Rule 43 order of October 2014.
- [20] The Respondent currently pays the amount of R8 900,00 per month for his legal fees. It is the view of the Applicant that the Respondent has been paying this amount but there is no conclusive evidence before this Court. It is fair that the Appellant has access to funds to contest the legal action on an equal basis as required by S 9 of the Constitution of the Republic of South Africa. Having regard to the circumstances of this matter and the financial position of the parties, especially the fact that the Respondent has far more considerable assets than the Applicant, I am satisfied that the Applicant has shown a prima facie case in this matter. The Respondent must not be punished though for having more assets than the Applicant. The parties have employed junior counsel in this matter, there is no reason to charge fees at a higher scale at this stage.

I am also of the view that the Applicant is not entitled to all the costs set out in her Annexure "HMS10". I consider it reasonable in the circumstances that the Applicant be awarded contribution to costs in the amount of R75,000,00 up to the first day and including all necessary preparation.

In the result, I make the following order:

1. That the Respondent is to make an interim contribution to costs of preparation to the Applicant in the sum of R75 000,00.
2. That the Respondent pay the amount as follows:
 - 2.1 R40, 000.00 on or before 28 February 2017.
 - 2.2 R35, 0.00.00 on or before 31 March 2017.
3. That the costs of the application be costs in the main action.

D. B. TSHABALALA
ACTING JUDGE OF THE HIGH COURT
6/7/2017

Matter heard on: 12 December 2016

Delivered on: