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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT.

PRETORIA (THE REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 33221/10

DATE:14/02/2013

In the matter between:

E M M

APPLICANT

and

T S M

RESPONDENT

JUDGMENT

RAULINGA J,

[1] The applicant approaches this court in terms of Rule 43(1) and 43(6) seeking relief for a contribution towards the costs of a pending matrimonial action. She also seeks a variation of the earlier decision this court made. The respondent disputes the claim.

[2] On 31 March 2011 the applicant launched a similar application to this court and it was dismissed with costs. Another application was set down for the 13 April 2012, but was postponed sine die. The matter was again set down for hearing on 22 November 2012 and was postponed sine die. On the 24 January 2013 the matter was heard before me.

[3] The applicant and the respondent are married according to customary rites in terms of the Recognition of Customary Marriages Act 120 of 1998. The said customary marriage was consummated on the 14 October 2008. There is one minor child born out of the marriage. It is common cause that the proprietary consequences of the said marriage are community of property and of profit and loss.

[4] The applicant left the common home on the 9 December 2009 at the instance of the respondent after he locked her out. She now lives with her parents. Since giving birth to their child the applicant stayed at home after the respondent insisted that she must be a stay-at-home mom. Before she was chased from their common home, the respondent used to provide for her and their child. He used to give her an allowance of R3500.00 per month and he would at times increase it to R10 000 to R20 000 per month. He bought her a C200 Mercedes Benz and they would at times spend R45 000 a weekend. He even absorbed her into his company, Bohlale Enterprises. They lived a high lifestyle. She has an income of R2000.00 per month. Although she is still a member of certain close corporations, she derives no income from them, because most of them are dormant. The respondent earns +-R31 581.85 per month as an engineer. He also draws money from his many companies. The respondent's assets are valued at more than R5 million. He has employed very expensive lawyers.

[5] On the other hand the respondent disputes that his assets are worth more than R5 million. He also denies that he has hired expensive lawyers. While he denies any knowledge of the financial status of the applicant, he however admits that he was obliged to support the household given the applicant's precarious financial state. He funded the applicant's studies and offered to support her business ventures. He bought a town house cash and he owns other houses. He admits that he was paying an allowance of R3500 per month to the applicant. He also registered her as an employee. He bought her C200 Mercedes Benz. He however denies that he gave her R10.000 to R20.000 per month. He never lived a high lifestyle.

[6] The standard of proof in Rule 43 applications is based on a balance of probabilities, and the onus is placed on the applicant. In casu, the applicant has indicated the amounts paid to the respondent's attorneys. She has also annexed a cost towards her Auditors should the court allow same. Her legal costs have been calculated by her attorneys, be they in the past, present or future. Her attorney's pro forma tax invoice reflects a fatal amount of r 209620,42.- She claims an amount of R180 000,00 contribution towards legal Cost. There is an indication that from time to time the respondent draws money from his companies. This was not disputed. It is also evident that the respondent lives a high lifestyle.

[7] My perusal of the papers convinces me that the application is not premature. Rule 43(1) and (6) clearly provided that two or more such applications could be made before the first date of trial. As in Dodo's case, the applicant had to be put into a position to present her case adequately and, in light of the fact that the respondent had embarked on litigation on a luxurious scale by paying exorbitant amounts to his attorneys - Dodo v Dodo 1990(2)SA 77(WLD). In deed, in exercising its discretion in the determination of the quantum of the

contribution towards costs to be awarded, the court was bound by section 9(1) of the Constitution, Act 108 of 1996, to guarantee both parties the right to equality before the law and equal protection of the law - the equality of arms -Cary v Cary 1999(3) SA (CPD).

[8] The applicant is a person of straw. She is a female person living with the respondent's child. Respondent sold her motor vehicle and did not give her a cent. She lives with her parents and sister who are maintaining her. She is not in a position to pay her lawyers unless assisted by the respondent. On the contrary, the respondent is a rich man, with expensive cars and luxurious immovable properties. He can afford expensive lawyers. It is for that reason he must be ordered to make a substantial contribution towards the legal costs of the applicant. Whether the costs are in the past or future is immaterial. This is so because contributions towards costs in matrimonial suit are sui genesis.

[9] I make the following order.'.

The respondent is ordered to pay a contribution towards the applicant's legal costs up to and including the first day of the trial 22 April 2013 in the amount of R120 000.00 payable as follows:

- (a) R60 000.00 on or before 28 February 2013;
- (b) R60 000.00 on or before 28 March 2013;
- (c) The restrictions of Rule 43(7) and (8) are not applicable
- (d) Costs of this application shall be costs in the cause.

T. J. RAULINGA

JUDGE OF THE HIGH COURT NORTH GAUTENG HIGH COURT