

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023/01363

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: NO/YES |
| (2) | OF INTEREST TO OTHER JUDGES: NO/YES |
| (3) | REVISED: NO/YES |

25/09/2024 _____

DATE

SIGNATURE

In the matter between:

F[...] D[...] F[...]

C[...] B[...] (born F[...])

(IDENTITY NUMBER: 7[...])

APPLICANT

And

J[...] D[...] M[...]

R[...] B[...]

(IDENTITY NUMBER: 6[...])

RESPONDENT

JUDGMENT

Summary: Rule 43 of the Uniform rules of Court–maintenance and contribution towards costs – punitive costs order not frequently made and only when exceptional circumstances exist before warranted

1 This is an application in terms of Uniform Rule of Court 43. The applicant seeks maintenance *pendente lite* in the amount of R65 000.00 monthly together with an order that the respondent make payment of various claims to creditors for her benefit and an initial contribution towards her legal costs. She initially sought maintenance *pendente lite* for the parties' major daughter, G[...], but that relief was not persisted with. Furthermore, she seeks an order that the respondent pay the costs of the application, including the costs occasioned by the employment of two counsel on Scale C.

2 The respondent opposes the relief sought by the applicant. He seeks an order dismissing the application with an order that the applicant pay the costs of the application on the scale as between attorney and client.

3 The application was instituted on 29 November 2023. The respondent delivered a reply to the applicant's founding affidavit. Some six months after delivery of her founding affidavit the applicant filed a supplementary affidavit together with an amended notice of motion. The respondent has filed an answer to the applicant's supplementary affidavit. Both parties completed Financial Disclosure Forms as required by the practice directives in this division.

4 The parties were in agreement that, subject to me accepting the additional evidence of the respondent set out in his supplementary affidavit, both additional affidavits should be admitted. Accordingly, in the exercise of my discretion, I admitted both parties' additional evidence in terms of Rule 43(5).

5 The parties were married to one another on 12 February 1994, at Germiston, out of community of property in terms of an antenuptial contract which incorporated the accrual system. One child, a daughter, G[...], was born of the marriage on 19 July 1998. G[...]has attained majority and is

presently doing her Medical Internship at Chris Hani Baragwanath Academic Hospital.

6 The parties separated in August 2022 and have lived apart continuously since that time.

7 On or about 28 April 2023, the applicant, as plaintiff, instituted an action against the respondent, as defendant, under the abovementioned case number in which action she sought a decree of divorce, maintenance for herself on divorce in the sum of R150 000.00 monthly, payment to her of one half of the difference between the net accruals of the parties' respective estates and costs.

8 The respondent delivered a plea and counterclaim. In his counterclaim, he sought a decree of divorce, an order that the party whose estate has accrued to a greater extent make payment to the other party of half of the difference between the accrual of the parties' respective estates and costs.

9 The issues for the trial Court to determine in due course are the applicant's maintenance claim and the quantification of any accrual claim and costs.

10 The applicant is 52 years of age. She has been unemployed since March 2009.

11 The respondent was the Managing Director of an International Group of Companies. He recently resigned his employment and intends to relocate permanently to Germany. He alleged that he was financially strained as a result of his resignation and cannot continue to provide for the applicant's maintenance needs on the same scale as he previously did.

12 The parties lived a comfortable, if not lavish, lifestyle. The applicant relied on the respondent for financial support and it appears that he was financially generous towards her giving her expensive gifts including luxury

motor vehicles, jewelry and designer clothing. They lived in an upmarket area and travelled abroad extensively.

13 Following the breakdown of their marriage and separation, the respondent paid a cash monthly amount of R53 000.00 towards the applicant's maintenance together with payment of costs relating to immovable properties and assets owned by the applicant. He furthermore paid all of the direct expenses in respect of the former matrimonial home.

14 Over time the respondent unilaterally reduced his monthly cash contribution towards the applicant's maintenance. In both February and March 2024 he paid the sum of R34 000.00 towards the applicant's maintenance in addition to payment of other amounts for her benefit.

15 It is common cause that the respondent is presently paying maintenance for the applicant and tenders to continue to do so. In addition, he has tendered to pay certain expenses for the benefit of the applicant. Accordingly, the principle of the applicant's entitlement to maintenance *pendente lite*, is not in dispute. What is in dispute is the quantum of maintenance to be paid by the respondent to the applicant on an interim basis as well as his obligation to pay a contribution towards her interim legal costs.

16 The respondent seeks a dismissal of the applicant's application with a punitive order for costs. The respondent's contention is that the sum of R28 000.00 that he has tendered by way of cash contribution is more than sufficient to cover the reasonable maintenance needs of the applicant. The tender of R28 000.00 monthly is in addition to payment by him of other expenses that he tendered to continue to pay *pendente lite* and was paying for the benefit of the applicant.

17 In order to determine the applicant's needs I must consider whether such needs are reasonable having regard to the parties' standard of living, her own financial ability to meet her needs as well as the respondent's financial means and his ability to maintain the applicant.

18 As indicated above, there is no dispute regarding the respondent's obligation *pendente lite* to maintain the applicant. The issue is one of reasonable need and, according to the respondent, one of affordability. On the score of affordability, as will appear more fully below, the respondent clearly has sufficient financial means at his disposal to maintain the applicant.

19 The applicant's financial position according to her Financial Disclosure Form (FDF) is as follows:

20 The applicant's disclosed liabilities in her FDF were R333 662.00 being an

	Description of Asset	Value
amo	Interest in family home (50%)	R 2 750 000.00
unt	Money in bank accounts	R 232 773.99
owe	Investments	R 2 394 654.00
d to	Immovable property, investments	R 18 400 306.27
her	and policies, life policies and	
attor	personal belongings	
ney.	Pension interest	R 736 068.00
21 I	Total amount	R 25 549 874
n		
his		

FDF, the respondent disclosed, in summary, the following assets:

Description of Asset	Value
Interest in the family home	R 2 500 000.00
Interest in all other property	R 3 085 000.00
Personal assets	R42 103 924.57
Business assets	R 3 000 000.00
Pension interests	R 2 583 639.00
TOTAL	R53 222 563.57

22 The respondent disclosed no liabilities. His FDF was deposed to on 29 January 2024. The applicant's FDF was deposed to on 23 November 2023.

23 On 29 April 2024, the respondent provided a reply to the applicant's Notice in terms of Section 7 of the Matrimonial Property Act, 88 of 1984. In his Section 7 response, he disclosed:

23.1 immovable properties in South Africa to the value of R9 815 000.00;

23.2 overseas properties to the value of €310 449.75 or approximately R6 164 695.20, depending on the rate of exchange;

23.3 movable assets in South Africa to the value of R51 764 219.04;

23.4 overseas assets being cash in bank accounts with a value of €1 388 452.31 or approximately R27 572 385.81.

24 The respondent's Section 7 reply cannot be reconciled with his FDF. It evidences an estate of substantially greater value than the value he disclosed in his FDF.

25 The respondent's opposition to payment of the cash amount of R65 000.00 monthly claimed by the applicant is broadly as follows:

25.1 The applicant has inflated her expenses;

25.2 There was no need to bring the application because he had always paid certain expenses, would continue to do so and would pay R28 000.00 as a cash contribution to her maintenance;

25.3 He is unemployed and unable to meet the extent of the applicant's claims.

26 In considering the grounds of objection to the applicant's claim, I find that:

26.1 The respondent has by his own conduct in reducing the applicant's maintenance unilaterally, shown a need that the applicant's maintenance *pendente lite* be regulated by a Court Order.

26.2 I do not consider that the applicant's claims are inflated and I have had regard to the lifestyle of the parties.

26.3 In assessing the applicant's claims, I am satisfied that the respondent can and should make payment to the applicant *pendente lite* of a cash amount of maintenance of R65 000.00 each month.

Applicant's claim for an interim contribution towards her legal costs

27 In her supplementary affidavit, the applicant placed before the Court an amended bill of costs. She acknowledged that her bill of costs annexed to her founding statement contained computing and typographical errors. The bill of costs on which she relies reflects a total amount of fees and disbursements, inclusive of VAT in the sum of R2 647 077.50. She has to date paid her attorney the sum of R1 350 690.26.

28 The respondent makes no tender towards the applicant's costs. His case is that the applicant has sufficient assets of her own which she should realise to pay her own costs. Whilst the applicant has significant assets, her estate is not liquid save for her limited cash (R232 773.09) and various investments that she has to the value of R2 394 654.00

29 The claim for contribution towards costs in a matrimonial action is well established in our law and is regulated by Uniform Rule 43. It is based on the reciprocal duty of support between spouses, which includes the legal costs of pending divorce proceedings.

30 In *Griesel v Griesel*¹ the Court held that:

It is trite that the applicant is entitled to a contribution to enable her to adequately put her case before the Court, if she has insufficient means and an inability to fund the litigation.

¹ 1981 (4) SA 270 (O) at 277A.

31 The determination of the quantum lies in the discretion of the presiding judge.² This discretion must be exercised in light of the fundamental right to equality and equal protection before the law. In order for a trial to be fair, there should be equality of arms between the parties.³

32 In *Dodo v Dodo*⁴ the court held:

The test as to the amount awarded by way of contribution is that the applicant 'should be placed in a position adequately to present her case'. What is 'adequate' will depend on the nature of the litigation, the scale on which the husband is litigating and the scale on which she intends to litigate, with due regard being had to the husband's financial position.

33 The Court in *AF v MF*⁵ stated it best when it held:

The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse - usually the wife - will be forced to settle for less than that to which she is legally entitled simply because she cannot afford to go to trial. On the other hand, the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the Law, and access to courts requires that courts come to the aid of spouses who are without means to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.

The right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow fund for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees – in

² *AF v MF* 2019 (6) SA (WCC) at 27.

³ *Ibid* at [37].

⁴ 1990 (2) SA 77 W.

⁵ *Ibid* at [42].

effect to act as her “banker”. The primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to her husband, if he has sufficient means, to fund her reasonable litigation fees.

34 The Courts also recognize that litigation can be conducted either luxuriously or economically and an applicant cannot be expected to exhaust all of her assets before she can apply for a contribution from her spouse.

35 The respondent contends that the applicant is not financially constrained as she claims to be, which is evidenced by her recent purchase of an Audi Q5 RS worth R1 500 000.00. However, it appears that the applicant sold two other vehicles and used an amount received from the sale to acquire the Audi motor vehicle and to pay her attorney R1 million towards her past and future costs.

36 The applicant argues that although she possesses assets of value, she has very limited liquid resources and no access to any income (even from her own assets) save for the maintenance paid by the respondent.

37 The Court in *Glazer v Glazer*⁶ dealt with this particular issue, holding that:

He cannot call upon her to realise all she has, which is very small in any event, and pay everything out of that and then only, if she has exhausted her assets, apply for a contribution. The scale upon which she is entitled to litigation in my view is a scale commensurate also with the means of the parties. People in this position are not expected to litigate upon the basis that they have to watch every penny that is spent in litigation. Litigation can be conducted luxuriously or economically. I do not say that she is entitled to every luxurious expense in litigation, but she is entitled to litigate upon the basis you would expect rich people to litigate. She is the wife of a rich man who is

⁶ 1959 (3) SA 928 (W) at 932A-E.

obviously going to litigate against her upon a luxurious basis. In this comparatively simple preliminary application he has appeared through senior counsel and junior counsel. I think she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate.

...

If he is to employ the best possible legal assistance obtainable by means of his wealth, she is entitled to be assisted upon a somewhat similar scale.

38 In my view, it has been established on the evidence before me and in argument presented before me that the respondent is a man of considerable financial means. He also has excellent prospects for future employment

39 In addition to the ordinary costs of litigation, the applicant alleges that she will need to employ the services of other experts such as an industrial psychologist to evaluate her future employability and income prospects and an actuary to determine her future financial needs to enable her to enter into meaningful settlement discussions or mediation with the respondent.

40 Further, the applicant will need the services of sworn valuers to value at least 9 immovable properties and a forensic accountant to express his expert opinion as to the causal connection between the respondent's assets and inheritances that have been received by the respondent during the marriage and which would be excluded in terms of the provisions of the Matrimonial Property Act.

41 The applicant cannot be expected to liquidate her assets (which are meagre when compared to the respondent's) to fund her litigation.

42 In all the circumstances having regard to the financial position of both parties, the bill of costs presented by the applicant in her supplementary affidavit and the issues involved, the applicant's claim for a contribution to her legal costs in the sum of R1 million is reasonable.

Punitive costs

43 Before concluding this matter, it is worth taking a moment to address the contention by the respondent that the applicant has abused the process of Court and that she should accordingly pay his costs on an attorney and own client scale.

44 The basis of this claim, is the contention by the respondent that the application was unnecessary (because of his tender) and that the applicant can and should fund her own legal costs.

45 The respondent further contended that the applicant has not been honest with the court by attempting to cure a defective application by filing a further defective supplementary affidavit some 6 months after filing her founding papers. He contends that she has done this without providing an explanation for the delay. Additionally, he alleges that the applicant's claim is inflated and cannot be justified or substantiated. As to the filing of further affidavits it was common cause between the parties (subject to what I set out above) that the evidence should be admitted. I have already addressed the reasonableness of her maintenance claim.

46 A cost order on an attorney and own client scale is a punitive order made under exceptional cases. The Constitutional Court in *Mkhatshwa*⁷ held

Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted.

In *SARB*⁸, this Court affirmed the following guiding principles in relation

⁷ 2021 (10) BCLR 1182 (CC)

⁸ *Public Protector v South African Reserve Bank* [2019] ZACC 29, 2019 (6) SA 253 (CC), 2019 (9) BCLR 1113 (CC) at paras [224] and [227] and *Limpopo Legal Solutions v Eskom Holdings (Soc) Limited* [2017] ZACC 34, 2017 (12) BCLR 1497 (CC) at para [20].

to punitive costs, elucidated by the Labour Appeal Court in *Plastic Converters Association of SA*:⁹

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

47 The respondent has not provided this court with any evidence that the applicant has conducted herself in a clear and unquestionable vexatious and reprehensible manner. To the contrary, the applicant has substantially succeeded in her application.

48 Accordingly, there is no basis for any award of costs in favour of the respondent let alone a punitive cost order in his favour.

49 The applicant has been substantially successful in the application. There is no reason why costs should not follow the result. In my view however, the matter is not one of such complexity that warrants the employment of two Counsel.

ORDER

In all of the circumstances, I make the following order *pendente lite*: -

1 The respondent shall make payment of R 65 000.00 monthly to the applicant, the first payment to be made on 1 October 2024 and thereafter on the first day of each and every succeeding month. All payments shall be made directly into the applicant's bank account, held with ABSA Bank Limited under cheque account number 4[...]

⁹ *Plastic Converters Association of South Africa (PCASA) v National Union of Metalworkers Union of South Africa and others* [2016] ZALAC 39, (2016) 37 ILJ 2815 (LAC)

2 The respondent shall retain the applicant, at his cost, as a dependent on his medical aid scheme, held with Discovery Health, namely the Classic Comprehensive Plan.

3 The respondent shall pay all the applicant's excess medical, dental and related expenses not covered by the benefits of such medical aid scheme and shall reimburse any excess expenses paid by her within 7 Court days of production of an invoice to him.

4 The respondent shall pay on due date:

4.1 The applicant's monthly cellular telephone and data costs, and any increase thereof, directly to the service provider, Vodacom .

4.2 The monthly insurance premiums payable to Discovery Insure in respect of the motor vehicle driven by the applicant, being an Audi Q3RS with Registration Number F[...]

4.3 The annual motor vehicle licensing fees in respect of the motor vehicle driven by the applicant and referred to above.

4.4 The following expenses in respect of NO [...] G[...] ROAD, B[...], JOHANNESBURG ("the matrimonial home") directly to the service provider concerned on due date:

4.4.1 Domestic worker;

4.4.2 Gardener;

4.4.3 Armed response;

4.4.4 Road closure levies;

4.4.5 Openserve Fibre;

4.4.6 Vox Telecom;

4.4.7 DSTV;

4.4.8 Streaming subscriptions: Netflix, iTunes and Disney Plus;

4.4.9 TV License;

4.4.10 Postal Box fees; being P.O. BOX 1[...] B[...] 2[...];

4.4.11 Recycle service conducted by EcoMonkey;

4.4.12 Water delivery undertaken by Aquazania.

4.5 The maintenance of and repairs to the former matrimonial home, including but not limited to the swimming pool, fishpond, roof, back-up power systems, electrical and plumbing and ancillary maintenance items.

- 4.6 Monthly window cleaning.
- 4.7 The insurance premiums in respect of the policy held with Discovery Insure for the building, household contents including inter alia the jewelry and watches at the matrimonial home.
- 4.8 The municipal accounts that inter alia include the monthly rates, taxes, water, sewerage, levies and other imposts in respect of the following immovable and sectional title properties:
 - 4.8.1 [...] G[...] ROAD , BEDFORDVIEW, JOHANNESBURG.
 - 4.8.2 UNIT 3[...], T[...] P[...], [...] M[...] ROAD, B[...], JOHANNESBURG.
 - 4.8.3 UNIT 4[...] [...], T[...] N[...], 4[...] [...] N[...] ROAD B[...], JOHANNESBURG
 - 4.8.4 UNIT 2[...] S[...], [...] S[...] C[...], G[...] H[...], EXT. 2[...]
 - 4.8.5 UNIT 1[...] S[...], [...] S[...] C[...], G[...] H[...], EXT. 21.
 - 4.8.6 UNIT 2[...] G[...] R[...], [...] S[...] C[...], G[...] H[...], EXT. 21.
 - 4.8.7 UNIT 2[...] S[...], [...] S[...] C[...], G[...] H[...] EXT. 21
- 4.9 All monthly premiums in respect of the applicant's:
 - 4.9.1 Classic Life Plan held with Discovery Accelerator under policy number 5[...]
 - 4.9.2 Life policy held with Momentum Myriad under policy number 2[...]
- 5 The respondent shall pay a first and initial contribution towards the applicant's legal costs in the sum of R 1 000 000.00 (one million Rand), which amount shall be paid into the trust account of the applicant's attorneys of record by way of 5 (five) equal instalments of R 200 000,00, commencing on 1 October 2024 and thereafter on the first day of every succeeding month until payment is made in full.
- 6 The respondent shall pay the costs of this application, including the costs of senior counsel, on scale C of the applicable scales published.

B GUNDELFINGER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

25 SEPTEMBER 2024

APPEARANCES:

For the applicants: A De Wet SC, A Saldulker

For the respondents: GT Kyriazis