IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case No.: EL 514/2025

Reportable	Yes / No

In the matter between:

J[…]VW[…] Applicant

and

PC[..]VW[…] Respondent

JUDGMENT

Cengani-Mbakaza AJ

[1] The parties are embroiled in a divorce action currently before a different court, with patrimonial benefits and the accrual system being central to the proceedings. Before me is an application for a further contribution towards legal costs following invocation of Rule 43 (1) (b) and (6) of the Uniform Rules of Court, which reads,

> '(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
> (a) …
> (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

(c) …

(d)…

(6) The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.”

[2] The relief sought in the notice of motion specifically pertains to a contribution of 75% of R278,070, intended to facilitate the continuation of the trial scheduled for 02,03 and 04 June 2025. The respondent opposes the application. It is common cause that on 26 July 2023, the respondent was ordered to pay a contribution towards legal costs of the pending action in the amount of R132 000 (the previous judgment). Furthermore, on 09 May 2024, the respondent was ordered to pay 75% of the amount of R62 790 per day for a period of 02 and a half days towards the applicant’s litigation.

[3] At the heart of the application before me is whether the applicant has proven that there is material change in her circumstances and that she has inadequate means of her own to fund the litigation.[1] To resolve this dispute, the court is empowered by the provisions of Rule 43(5) which reads,

> ‘(5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.’

[4] A plethora of cases finds application and relevance in the proceedings before me. Mr Kotze, counsel for the respondent referred to the case of *A.L.G v L.L.G*[2] which sets out the correct approach to be adopted in determining a contribution towards legal costs. The court emphasised that the quantum to be awarded to an application for a contribution towards legal costs is a matter to be determined at the discretion of the court. In *Rippen v Van Rippen*[3] Ogilvie Thompson J (as he then was), articulated the guiding principle for the exercise of that discretion as follows:

[1] B v S (16158/16)[2018]ZAGPJH 534 (16 August 2018] at para [22].
[2] (9207/2020 [2020] ZAWCHC 83(25 August 2020) at para [18] and [19]
[3] 1949 (4) SA 634 (C).

'(T)he 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, the wife must be enabled to present her case adequately before court'.

[5] This guideline was recently dissected by Kumalo J in *H.E.D v D.D*[4] (H.E.D), as follows:

'[42] This formulation neatly encapsulates the twin criteria of reasonable needs and financial means which feature in the test for ordinary maintenance. When assessing a spouse's reasonable litigation needs, a court will have regard to what is involved in the case, the scale on which the parties are litigating or intend to litigate, and the parties' respective means.'

[6] In support of the applicant's application, Mr Cole SC prepared brief heads of argument which were presented by Mr Wood in court. Counsel referred to the previous judgment and argued that the respondent, as the sole beneficiary of all income from the Close Corporation, has a monthly income of R40 000, being the amount he chooses to draw for his own purposes. Put differently, so he argued the respondent is fixated on a monthly income he chooses to draw from the business, while ignoring the extensive value of the properties, which he could readily utilise to create liquidity.

[7] In support of this proposition, counsel further referenced to paragraph 23 of the previous judgment and averred that the position remains unchanged. The relevant position which remains a point of contention is what the previous court highlighted which is as follows: '*Despite the attention being drawn to the failure to disclose these financial details, the respondent has persisted in seeking to hide these values: what income does AC motors generate? What does it own? What is its overall value?'* Counsel's argument therefore is that the respondent's claim of lack of means to pay a further contribution towards legal costs is to be rejected particularly because he is demonstratable able to pay his own legal representation.

[4] (2022/14582) [2025] ZAGPJHC 465 (13 May 2025).

[8] In her founding affidavit, the applicant avers that she is a part-time contract worker with Ronnies Motors where she assists in dealership with finance and insurance for the purchase and sale of motors. The applicant indicates that she frequently travels to England and America to visit her children and grandchildren. She finances these trips using the revolving credit card facility. She explains that visiting her aunt, whose health is compromised necessitates her trip to England. Additionally, despite her son being married, she considers it essential to visit her grandson to retain a strong bond with them.

[9] In contrast, the respondent avers that the applicant has said nothing about her own financial means, has made no disclosure of her monthly income or her other sources of funding available. The respondent further notes that there has been a change in the applicant's employment capacity, notwithstanding this, no source of income has been disclosed.

[10] Further to his affidavit, the respondent avers that he continues to pay R20 000 per month to the applicant, despite having returned to the matrimonial home, where she resides without incurring rental expenses. Below is a summary of the respondent's financial position as detailed in his sworn affidavit: He draws a monthly salary of R40 000 and claims not to have freely available funds to finance the litigation.

[11] The respondent has presented a detailed report compiled by an associate which currently shows a shortfall of R22, 093 based on a statement of income and expenses drawn up in April 2024. Furthermore, he has been unable to meet the monthly repayment of R71 000, towards a facility held with FNB. The respondent avers that their joint owned property is at risk because FNB has called up the entire facility of R4, 732. 239.07 as of April 2025. The respondent has further filed an updated disclosure in terms of s 7 of the Divorce Act, which shows a net value of the accrual estimated at R1,7000.000.

[12] I subscribe to the views expressed by Kumalo J in the recent judgment in *H.E.D*[5] where he explained that in cases of this nature the parties' respective means

[5] Fn 4 supra.

is one of the key considerations. Notably, in a broader context, the assessment should focus on whether the applicant has proven that there is material change in circumstances and that she has inadequate means of her own to fund litigation. The enquiry is fact-based hence Rule 43 (5) encompasses the discretionary hearing of evidence by the court.

[13] In this instance, Mr Wood reminded the court to consider that the net value of the accrual system is a point of adjudication in the divorce action and may not reflect the true state of affairs. Notwithstanding this, there are significant conundrums in the applicant's application. She appears to rely on the previous judgment and orders including the findings that were made without reflecting her current state of affairs, as typical in proceedings of this nature.

[14] I emphatically agree with the applicant that the bond between her and family who live outside the country deserves to be maintained. However, the issues of full financial disclosure and the material change in her own circumstances which are at the heart of her application lack detail. To illustrate this, her failure to disclose the credit facility amount, her bank statements, her monthly salary and the source of repayment for her credit facility militate against her case.

[15] I acknowledge the importance of providing a clear pathway for spouses who cannot afford litigation, in ensuring that they have the necessary resources to assert their rights in court. In the present matter, I am unable to assist the applicant due to the lack of significant information regarding her financial means. Therefore, this application cannot stand.

[16] Mr Kotze argued that if the court rules against the applicant, she should be mulcted with costs. However, this argument is not persuasive, particularly in light of the provisions of s 10 the Divorce Act 70 of 1979 which provides,

> 'In a divorce action, the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the party, and their conduct in so far as it may be necessary, make such order

as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.'

[17] As previously noted, these are interlocutory proceedings in a pending divorce action. The applicant's lack of resources is a contentious issue that she may revisit once she has obtained sufficient information. Given the circumstances, I find no basis for a cost order against the applicant as there is no evidence of untoward conduct on her part.

Order

[18] In the result, the following order is issued:

1. The application is dismissed.

2. There shall be no order as to costs.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv. S. H. Cole SC with Adv C. Wood
Instructed by	:	STIRK YAZBEK ATTORNEYS
		EAST LONDON
Counsel for the Respondent:		Adv. Kotze
Instructed by	:	ABDO &ABDO ATTORNEYS
		EAST LONDON

Date Heard : 13 May 2025

Date Delivered : 27 May 2025