REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/40348

DELETE WHICHEVER IS NOT APPLICABLE

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

…….. DATE

…….. SIGNATURE

In the matter between:

R, I Applicant

And

R, H Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant who is the plaintiff in the main action, brings this application in terms of Rule 43 for a contribution towards her costs in the amount of some R5,3 million. The respondent was previously ordered to pay a contribution towards the costs in a total amount of R680, 000. The contribution has been used up.

[2] The parties were married to each other on 26 January 1991. Prior to the marriage they concluded an antenuptial contract which incorporated the accrual system. The respondent excluded assets having a value of R626 000 from the determination of the accrual. The assets excluded property valued at R293 000, life insurances and retirement annuity funds valued at R73 000, ordinary shares and other marketable securities valued at R1 025 000 and an investment in an aircraft owning partnership valued at R100 000. The respondent's liabilities comprised a mortgage bond over fixed property valued at R127 000 and other secured loans valued at R738 000.

[3] The parties were divorced on 29 April 2015. The issues in the action other than the divorce were postponed *sine die* and remain to be determined. Those issues include:-

3.1 whether the applicant should forfeit the benefits arising out of the antenuptial contract;

3.2 how much, if anything should be paid by the respondent to the applicant arising out of the accrual;

3.3 maintenance for the applicant, including the amount and duration thereof;

3.4 whether the assets of certain companies and trusts be taken into account in determining the value of the respondent's estate for purposes of the accrual;

3.5 costs.

[4] Over the years up until the divorce the respondent amassed an estate valued at approximately R412 million. The applicant's estate is worth approximately R1 million less debts amounting to approximately R860, 000. Both the applicant and respondent are skilled graduates; the respondent has worked over the years and continues in employment. The applicant is 64 years old and is unemployed. She is financially dependent on the respondent. The applicant's financial status is not seriously contested and it is common cause that to litigate she needs a contribution towards costs.

[5] The applicant bears the onus to establish the value of the respondent's estate at the date of divorce.[1] The respondent bears the onus to establish what assets are to be excluded from the calculation and the reason for such exclusion.[2] At the trial the applicant must accordingly be in a position to identify all the respondent's assets and value them at the date of the marriage and the date of divorce. The applicant must also be able to deal with the evidence which will be forthcoming from the respondent's experts concerning the excluded assets both as to what they are and what their value is. In order

[1] *ST v CT* 2018 (5) SA 479 (SCA) para 37- 40
[2] *ST supra*

to do this the applicant must be able to identify and value excluded assets at the date of marriage and track such assets as they were converted into other assets over the period of the marriage. She must in particular, be able to cogently deal with the evidence given by the highly skilled expert the respondent proposes calling to explain why his opinion and reasoning, as well as the facts on which he relies, should not be accepted.

[6] While the parties lived together their expenses were commensurate with the high income earned by the respondent. They lived in a property in Sandhurst on some 2,9 ha on which was constructed a house of some 3400 m². The applicant continues to live on the property and over the past 5 years since the divorce the respondent and one of the trusts has paid an amount in excess of R17 million for the running maintenance and upkeep of the property. This asset and the money it has consumed over the period is indicative of the respondent's wealth.

[7] The issue in this case is not whether the respondent can afford to pay the contribution, it is rather whether the applicant requires the contribution to reasonably prosecute her case.

[8] It is common cause that the applicant is entitled to be placed in a position to adequately present her case and that relevant factors include the

scale on which the respondent is litigating and what is reasonable for her needs to adequately arm herself to present her case.[3]

[9] The scale upon which the applicant is entitled to litigate must be measured against the parties' financial circumstances. If the parties are wealthy the applicant is entitled to litigate upon the basis you would reasonably expect rich people to litigate.[4]

[10] Section 9(1) of the Constitution guarantees parties the right to equality before the law and equal protection of the law. In *Cary v Cary*[5] it was held that the guarantee meant that an applicant was entitled to a contribution towards her costs to ensure the quality of arms in the divorce action. The obligation to make payment is a function of the maintenance obligation of the respondent. The quantum of the maintenance obligation will be established by the ability of the respondent to make payment of the reasonable needs of the applicant. As the respondent is well able to pay, the only question to be determined is what the reasonable needs of the applicant are in the context of the applicant exercising her right to formulate and develop the case as she sees appropriate.

[11] The fact that the respondent's complaint is directed only towards whether or not the costs are being reasonably incurred and not towards the fact that he either cannot afford them or that they are out of keeping with the

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[3] *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50C-G; see also *Van Rhyn v Van Rhyn* a judgment delivered in this court by Van der Linde J in case number 30947/2016 para 17
[4] *Glazer v Glazer* 1959 (3) SA 928 (W)
[5] 1999 (3) SA 615 (C) at 616B – E

expectation of what such costs would be in the type of litigation is indicative that the costs claimed are commensurate with the standard of living of the parties. The defence is that it is not necessary to incur costs as the expenditure is wasteful, not that it is not necessary to incur the costs to achieve the desired result. It is of course difficult to assess wastefulness without knowledge of all the facts. If the process followed does not produce all the facts there is a risk that the exposure of the additional facts will cast a different light on the result. It is this risk the process proposed by the applicant's expert seeks to reduce.

[12] The applicant is entitled to formulate and develop her case as she sees fit. The only limit on this is that if she, in formulating and developing a case acts unreasonably, the respondent is not obliged to pay for such unreasonableness. The applicant's financial position is parlous. She needs to ensure that the best case reasonably possible is placed before court to obtain to the fullest extent her financial entitlement as that order will form the basis of her funding for the rest of her life.

[13] The respondent some time ago obtained a report from an expert, Professor Wainer. When the matter came before me at the time of the previous Rule 43 application it appeared to me that an approach to the matter could be to consider the report of Wainer and use it as a tool to assist in the investigation of the assets and liabilities of respondent. The applicant employed an expert Abrahams whose view was that the Wainer report contained certain anomalies; was fatally flawed in that it did not deal with the

flow of the respondent's capital and fruits from the excluded assets; did not attempt to ascertain whether or not all the assets over the period were the only assets acquired and whether the expenses were the only expenses. His view is that the appropriate methodology to the forensic investigation involves a consideration of a vast series of documents. In particular he believes it will be necessary to identify and separate the assets and liabilities of the parties at the date of marriage, the co-mingling of assets and liabilities which took place thereafter, various foreign assets and undisclosed income, the flows of monies through the various bank accounts, a determination of which assets were to be included in the accrual and which are to be excluded as they were purchased with excluded assets and the contingent assets.

[14] Abrahams devised a plan by which the process could be executed; it is contained in a memorandum (at page 63 to 74) and a document entitled "Certain additional steps to be taken and areas still to be covered" (page 44 to 46). I do not propose to deal in detail with the plan Abrahams devised. The investigation to be undertaken requires detailed examination of various cash books, bank statements, books of account of the respondent, the trusts and companies, detail of the amnesty application filed by the respondent relating to unauthorized transfers offshore, employment contract of the respondent, share purchase schemes and housing loan schemes, the financial statements of the various companies and respondent's tax information of the various companies and trusts, additional documentation the nature and extent of which will be determined during the investigation. Only in this way, according to Abraham's evidence will it be possible to segregate the assets and

liabilities of the parties, the mingling of the assets and liabilities, the mingling of capital from excluded assets and income from excluded assets with other assets and income. It is apparent that the investigation, if it is undertaken will successfully separate included and excluded assets, identify them and value them. The investigation will further place the applicant in a position to deal with the reports filed by Professor Wainer as well as contentions made by him concerning the state of the respondent's financial affairs and in particular his valuation of the accrual. Once the investigation is complete she will be able to establish the accrual and identify the excluded assets. She will also be able to deal with her claim for maintenance.

[15] The respondent suggests that such an exhaustive investigation is excessive and overly expensive. His contention is that the investigation is simply uneconomic and involves unreasonably incurred expense. The respondent does not suggest that adopting the applicant's expert's methodology will not achieve the result which is sought namely, the proof of those facts the onus upon which lies on her and the ability to cross-examine the respondent's witnesses both as to opinion and fact. The respondent suggests that the approach I had considered appropriate at the hearing of the first Rule 43 contribution for costs application was the correct way for the applicant to prepare a case. The first problem with the respondent's suggestion is that it does not take into account that the applicant is unable to make any proper assessment of the Wainer report unless she has facts of her own with which to compare the facts and findings of Wainer. In order to obtain such facts the applicant must conduct an investigation. The second problem

with the respondent's suggestion is that it overlooks the right of the applicant to conduct the case as she deems fit. It does not appear to me to be unreasonable for the applicant to seek to obtain a definitive answer to the problem by using the methodology proposed by Abrahams. On the face of it she has difficulty with the Wainer report which according to her expert has deficiencies. She could easily be misled if she relies on a report containing secondary information rather than relying on a report containing actual information and facts which she could use at the trial to establish the inaccuracies both as to fact and opinion her expert states exist in the Wainer report. The third problem with the respondent's submission is that it is common cause that there are voluminous documents created over a lengthy period and hence the investigation will be lengthy and costly. The issues are complex and will require a sharp mind to unravel. For example, the respondent at a point in time became the owner of assets which existed in a foreign country. He brought an amnesty application which presumably involves the confession of facts for which he required amnesty. The respondent's books and documents need to be considered to discover what the source of the income/asset is which existed in the foreign country and how the transfer took place.

[16] I deliberately do not embark upon a detailed examination of each and every issue as in due course there will be a trial and comments which I make today may affect the assessment of the evidence at the trial. It appears to me to be reasonable for the applicant to embark upon the course suggested by Abrahams. The fact that it is lengthy and expensive is overcome by the ability

of the respondent to pay and the right of the applicant to litigate at an appropriate level to achieve an accurate result.

[17] Once I accept that Abrahams methodology is acceptable the respondent's defence, which was limited to an attack upon the appropriateness or otherwise of Abraham's methodology falls away.

[18] The costs for the other experts is not seriously in dispute.

[19] The quantum of the contribution which I propose to make is high. If the applicant is successful it will have been worth it from her point of view to undertake the Abrahams investigation. If the applicant is unsuccessful it seems likely that she will still be awarded something as and by way of an accrual. If the applicant is awarded something as and by way of an accrual the respondent will be able to successfully motivate the recovery of all or at least some of the contribution I propose to order if the court believes the costs were unreasonably incurred once it has considered all the evidence.

[20] The contribution which the applicant seeks to pay attorneys' fees is in my view unjustified at the present time. I propose to order R1 million under this claim.

[21] The applicant stated that if she received the contributions claim for the experts she would have sufficient to prepare a case properly and ensure the presence of the experts at court when the matter is heard. No further

applications for contribution will be permitted for experts of the nature currently being considered. The attorneys' in due course can bring whatever application may be necessary if they do not have sufficient funds.

[22] I amended the draft order prepared by the applicant to reflect the appropriate order and I make an order in terms thereof. The draft order annexure X is made an order of court.

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C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

ATTORNEY FOR THE APPLICANT:	**Billy Gundelfinger**
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COUNSEL FOR RESPONDENT:	**Adv. A. Subel SC** **Adv. D.N. Lundström**
DATE/S OF HEARING:	**4 February 2020**
DATE OF JUDGMENT:	**12 February 2020**