

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

CASE NO: 32624/2015

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
Date: 22/1/2021

In the matter between :

M, D C

Applicant / Plaintiff

and

M, C C

Respondent / Defendant

JUDGMENT

STRYDOM J:

[1] This is an urgent Rule 43(6) application for a further contribution to the costs of the applicant in her divorce action in an amount of R4,500,000.

[2] I am the presiding Judge in the part-heard divorce action which has been set down for continuation from 2 November to 12 November 2021.

[3] The applicant filed this application one month before the date of the continuation of the trial. This is very late considering the extent of the applicant's

claim and, further considering, that the applicant already received the respondent's addendum expert reports on or about 30 November 2020. One would have expected that applicant would have obtained an estimate of the further cost of her expert to reply to respondent's addendum reports before she settled her previous demand for a cost contribution. Yet, she waited until the last moment to approach this court for a further contribution towards her costs.

[4] There is an indication that the addendum reports were considered by Crowe Forensics before the settlement dated, 17 December 2020, in terms of which her previous claim for a cost contribution was settled. Crowe Forensics billed many hours for perusal of the addendum reports of the respondent after receipt but before the settlement.

[5] The applicant received a further estimate from Mr Sacks by 3 August 2021 to complete his addendum report. In this estimate, a further and complete breakdown was provided of the estimated cost of Mr Sacks and his office. Despite this, the applicant delayed to bring this application until after receipt of the addendum expert report of Mr Sacks on 28 September 2021. A delay of 2 months.

[6] This court was called upon to assist and case manage the matter as by 23 September 2021 the applicant has failed to file the report of Mr Sacks which by then was overdue.

[7] At this case management meeting an undertaking was provided by the applicant to file the report by 28 September 2021. This was done. Only thereafter the applicant filed her Rule 43(6) application.

[8] This application is in essence an urgent application which in my view should have been brought in the ordinary course in an opposed application court as the estimated duration would have been more than one hour for argument. Before this court the argument took closer to two hours.

[9] A case for urgency should have been made out and the applicant should have explained why the urgency, which is presumably the upcoming trial date, was not self-created.

[10] This court is aware that applications for a contribution for costs could, depending on the circumstances, be sought shortly before a trial date and even on the first day of trial. But each case should be considered on its own merits. Here the applicant knew about the trial date long in advance and knew, or ought reasonably to have known, the needs and extent of her cost requirements. Yet she claimed R4.5 million on short notice, payable in tranches, which extend to months well after the allocated trial date.

[11] If there was a dire need for money to continue with the trial one would have expected a timeous application for payment to be received in advance of the trial date.

[12] This is not a case where settlement negotiations failed at the last moment and a trial had to proceed. In such a case a last moment request for a contribution towards costs may be warranted.

[13] In my view the lateness of this application remains unexplained.

[14] This court needs to express its disapproval with the manner in which the applicant pursued this application. In urgent court this application would have been dismissed on this ground alone.

[15] In the interests of making progress with this matter, the court will nevertheless grant the applicant the indulgence and decide the matter on its merits.

[16] This is a fourth application for a demand for a costs contribution towards the costs of the applicant in the divorce action. The first was made in the original Rule 43 application and despite a request for a contribution for costs no order was made in this regard. The court will only consider the three demands made dated 8 May 2020, 11 August 2020 and 1 October 2021.

[17] On 8 May 2020, the applicant claimed for a contribution towards her legal costs in an urgent application in an amount of R4,500,000. The demand included the costs of senior counsel at the rate of R62,341.50 per day, junior counsel at the rate of R43,205.50 per day; attorneys fees at R25,550.00 per day and importantly, a provision for the costs of the expert, Mr Sacks, in the amount of R1,339,337.38.

[18] This urgent application was filed shortly before the trial which was set down for hearing was due to begin during June 2020. The trial in fact started and ran for six days. Prior to the commencement of the trial, the parties settled this claim in the amount of R1,500,000 payable in monthly instalments of R300,000 from 15 May 2020 to 15 September 2020. These amounts were fully paid.

[19] On 11 August 2020, in anticipation of the further trial date which was allocated for 10 days during April 2021, the applicant demanded in writing a second contribution towards her legal fees in an amount of R4,178,552.82. In the demand senior counsel's fees came down substantially to R39,000 per day and that of junior counsel to R26,000 per day. The attorneys rate however went up to R36,500 per day. This claim also included a provision for the fees of Mr Sacks in the amount of R1,472,236.69. When this demand was made the applicant already knew that the respondent was going to file addendum expert reports and that Mr Sachs will have to file his addendum reports.

[20] This second contribution towards costs was settled on 17 December 2020 for an amount of R1,350,000 payable in four equal instalments of R337,500 from 18 December 2020 to 18 March 2020. These amounts were duly paid before the allocated trial date during April 2021.

[21] The trial date never commenced as the applicant sought and was granted, a postponement by this court which included a costs order in her favour.

[22] Pertaining to this settlement and payment which followed, it should be noted that it settled the applicant's claim, including her claim for costs for Mr Sacks. As this trial never proceeded during April 2021, this money should still have been available for the applicant to utilise for her upcoming trial.

[23] The *causa* behind the demand for a contribution for costs dated 11 August 2020 was for the applicant to obtain funding from the respondent to allow her to effectively pursue her claim. The *lis* between the parties pertaining to her claim for a contribution for costs was extinguished. After settlement, a party cannot rely on the same cause of action to again make a similar claim for the same expenses. So much has been conceded by the counsel on behalf of the applicant during the course of the hearing of this matter.

[24] Despite this, the applicant on 1 October 2021 again brought an application for a further contribution towards her legal costs in the amount of R4,500,000, which claim included costs for senior counsel on trial, costs for junior counsel on trial, costs of an attorney and articled clerk on trial and a provision for the costs of Mr Sacks. The figures pertaining to the legal representatives remained more or less the same, but the claim on behalf of Mr Sacks escalated to an amount of R2,285,568.44. This is roughly R800,000 more than the previous claim which was settled.

[25] The reason advanced for the further and increased claim was that it was not foreseen that it will take so many hours to compile the 127 page addendum report of Mr Sacks in reply to the 180 pages of reports filed by the respondent.

[26] The applicant's claim in an amount of R4,500,000 is exorbitant for at least two reasons. The first reason is that the claim for legal fees on trial has already been previously settled. Further, the claim contains grossly inflated amounts.

[27] The court does not intend to go into minute detail to show the extent of the inflation of the amounts claimed. The following are examples of either *bona fide* mistakes when the claims were calculated, and/or a straight forward over-statement of the value of the claims claims:

27.1 When the claims are added up for attorney, junior counsel and senior counsel it becomes apparent that the applicant has over-claimed by an amount of R500,000.

27.2 There is an error and duplication in Mr Sacks' cost estimate. The error is an amount of R57,600, charging for 13 court days instead of 10. More importantly, an amount of R444,800 has been duplicated.

27.3 There is a charge for 3 days each for senior and junior counsel for preparation of heads and argument. This is a claim beyond the existing allocated court dates. Although these amounts are estimates, this should not have been included in an application for a costs contribution at this stage.

27.4 The applicant has failed to deduct the amounts standing to the applicant's credit in her attorneys' trust account, which on her version, amounts to R431,594.10.

27.5 It was indicated on the applicant's costs estimate that Mr Sacks would afford her a 25% discount. This discount has however not been applied to the cost estimate claimed. The effect of this is an over-claim in the amount of R445,792.11.

[28] If these amounts are calculated, the over-claim contained in the an amount of R4.5 million is R2,092,336.21.

[29] The R502,400 representing the error and duplication in Mr Sacks' cost estimate should be deducted from the amount of R2,285,568 which is now claimed for his costs. This leaves a total of R1,783,168. From this amount must be deducted the proposed discount of 25%. This then leaves an amount of R1,337,376. This amount is lower than the amount which was claimed on 11 August 2020 which formed part of the claim which was settled between the parties.

[30] Apart from this, I am in agreement with the argument advanced on behalf of the respondent that Mr Sacks' cost estimate is also inflated. More particularly so in relation to the claim for the estimated costs of Ms Nel, his junior accountant, which increased by 475% representing 409,5 hours of work. This translated to more than 51 days at 8 hours per day. Her charge rate has since increased to be similar to that of Mr Sacks, being R3,200 per hour. Apart from this, she plans to charge a further 116 hours in preparation for trial. In total, this will amount to 65 days of work if calculated on 8 hour work days. In my view, this is unreasonable considering the issues in this matter.

[31] Then there is a claim for four days preparation for trial by these experts. This is after the expert report was filed a month before the trial and one would expect the issues to be fresh in the memory of these experts.

[32] The court cannot but to conclude that the extent of the current claims are exorbitant and over-stated. The onus was on the applicant to estimate her true and real costs to continue with the trial on an equal playing field with the respondent.

[33] There is a duty on litigants in Rule 43 applications to make full and proper financial disclosure and to claim according to their real needs and requirements. This was unfortunately not done by the applicant as she totally ignored the previous settlement and payments made, which, during argument was conceded on her behalf, plays a significant role in the consideration of her current claim. As soon as a court is left in a position to speculate what the *quantum* of a claim should be it will affect an applicant's claim negatively. The applicant, in claiming an excessive amount left the court with the impression that she inflated her claim substantially in the hope to get at least something. This is not a *bona fide* approach in Rule 43 proceedings. The court is not persuaded that applicant has proven her case for a further contribution after she already received a contribution of R2,85 million.

[34] Apart from anything else, the applicant in my view has also failed to prove on a balance of probabilities, on the paper before this court, that the respondent is currently in a financial position to pay the applicant R4.5 million after he has already contributed R2.85 million towards her costs.

[35] How applicant expended this R2.85 million is not properly explained by her. If this amount is added to the R5.2 million which she alleges is owing to her father for legal costs, her expenses in this divorce matter adds up to be well over R8 million. In my view a contributing factor to her alleged enormous costs must be the fact that she has employed one set of attorneys after the other. New attorneys must always catch up and for this they will charge.

[36] The respondent was attacked during argument that he has not made a full disclosure of his financial position, dissipated his assets and increase his debt to the detriment of applicant's claim. This is disputed by the respondent. On the evidence before this court such a finding cannot be made. These are some of the issues which forms part of the subject matter of the dispute in the divorce action. It remains to be decided upon after oral evidence was lead. It cannot be decided on paper, even if a robust approach is adopted, as this court is not in a position to make a finding that the respondent's version pertaining to affordability is so far-fetched and improbable that it can be rejected outright.

[37] The fact that the applicant in her application refers to the wealth of the parents of the respondent and made reference to their motor vehicle collection is indicative that the applicant accepts that the respondent does not have immediate realisable assets or cash to pay the substantial contribution claimed. The suggestion is that the respondent can obtain such funding from them. There is no obligation on the respondent's parents to further provide funding, via the respondent, to the applicant.

[38] Considering all the evidence and the onus which rests on the applicant to prove her case, the court is of the view that the applicant failed to show that she is entitled to a further contribution towards her costs at this stage.

[39] Consequently, the applicant's claim is dismissed with costs.

**JUDGE RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of hearing: 21 October 2021

Date of Judgment: 22 October 2021

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