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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/9405

NOT REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

28.04.23

In the matter between: -

BJM

Applicant

and

WRM

Respondent

Neutral citation: *BJM v WRM (Case number: 9405/2022) [2023] ZAGPJHC 401 (24 April 2023)*

JUDGEMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 26 April 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] This dispute initiated in terms of rule 43 mainly centres around the quantification of the cash component of the applicant's spousal maintenance and a contribution towards her legal costs.
- [2] Affordability on the part of the respondent is not in issue.
- [3] The applicant sought leave to file a further affidavit in terms of Rule 43(5). The application was not vehemently opposed by the respondent. The further affidavit speaks to *inter alia* rental income earned by the applicant which is information relevant to the disputed issues between the parties. Leave was accordingly granted and the further affidavit accepted in evidence.

THE RESPONDENT'S TENDER

- [4] The respondent has tendered to continue maintaining the dependent major children born of the marriage as he has done historically, although he avers that two of the three major children are self-supporting. He has also undertaken to continue paying the costs associated with the former matrimonial home where the applicant and the children (some permanently and others intermittently) still reside, to retain the applicant and the children on his current medical aid scheme, the pay for the applicant's current cell phone contract and all costs associated with her motor vehicle.
- [5] The applicant claims an amount of R 100,000.00 as a cash component

towards her monthly maintenance. The respondent tenders to pay an amount of R 50,000.00. The applicant claims an amount of R 2,926,693.96 as a first contribution towards her legal costs. The respondent tenders an amount of R 200,000.00.

SALIENT BACKGROUND FACTS

- [6] The applicant and the respondent married each other on the 26th of August 2002 in community of property. The applicant was 29 and the respondent 32 years of age at the time.
- [7] The applicant is currently 49 years of age, and the respondent is 53 years' old.
- [8] Three children were born of the relationship. Whilst all three of them have reached the age of majority, they all remain financially dependent on their parents.
- [9] It is common cause that the marriage relationship has broken down irretrievably. The respondent vacated the former matrimonial home during March 2022.
- [10] It is also common cause that the respondent has always maintained the applicant and the children at an opulent standard, and that the applicant has never been gainfully employed throughout the 20-year marriage relationship. It is not disputed either, that the respondent is a very successful senior advocate with various business interests.

ISSUES IN THE DIVORCE

[11] The respondent instituted divorce proceedings against the applicant in early March 2022. He claims a decree of divorce and a division of the joint estate.

[12] The applicant served her plea and counterclaim on the 3rd of May 2022. She claims the following relief: -

[12.1] An order declaring that the Trust is a sham and set aside and that the assets of the Trust and the assets ostensibly transferred to the Trust by the respondent are assets of the joint estate;

[12.2] In the alternative, an order declaring that the assets of the Trust and the assets ostensibly transferred by the respondent to the Trust are not Trust assets and are assets of the joint estate;

[12.3] An order directing that the respondent and his co-trustee render an account to the applicant of the management of the Trust's affairs in respect of all transactions between the respondent and the Trust, including all donations and/or alienations and/or transfers of assets between the respondent and the Trust;

[12.4] An order directing the respondent to render a statement of account reflecting all the transactions between him and the three children and other third parties of whom the full particulars are not at present known;

[12.5] An order setting aside in terms of the provisions of section 15 of the

Matrimonial Property Act, 1984, all the donations and/or alienations and/or transfer of assets between the respondent and the Trust, the three children, and other third parties, the full particulars of whom are not at present known;

[12.6] In the alternative, an order effecting an adjustment in terms of section 15 of the Matrimonial Property Act in favour of the applicant upon the division of the joint estate in an amount equal to half of the value of the assets donated and/or alienated and/or transferred by the respondent to the Trust, to the three minor children, and other third parties;

[12.7] Division of the joint estate;

[12.8] An order for the payment of maintenance to the applicant in the amount of R100 000.00 with an annual escalation of 10 % and an order in terms whereof the respondent shall retain the applicant on a fully comprehensive medical aid scheme and pay all medical and related expenses of the applicant not covered by the medical aid scheme;

[12.9] An order that the respondent shall contribute to the maintenance of the major dependent children in the amount of R40 000.00 per month per child with an annual escalation of 10 % and an order that he retains all three dependent children on a fully comprehensive medical aid scheme and pay all medical and related expenses of the children not covered by the scheme;

[12.10] An order that the respondent shall pay all of the children's educational expenses, including but not limited to private school and tertiary education fees.

[13] In replication, the respondent avers that the dependent children do not form part of the divorce proceedings and are in any event adequately maintained by him.¹

[14] The respondent denies that there is any legal obligation on him to pay maintenance to the applicant until her death or remarriage or at all.²

[15] He asserts that the applicant, upon a division of the joint estate, will be in a position to maintain herself and still live a lavish lifestyle that she was accustomed to during the subsistence of the marriage.³

[16] Insofar as it relates to the Trust, the respondent pleaded a bald denial and asserts that the Divorce Court does not have the requisite jurisdiction to entertain matters pertaining to the Trust as the relief sought is legally incompetent in a Divorce Court.⁴

[17] On the 3rd of May 2022 the applicant served a third party notice calling upon the Trust to dispute her grounds or claim against the Trust.

[18] On the 9th of May 2022 the respondent served a notice in terms of rule 30(2) and called upon the applicant to remove the cause of complaint which renders

¹ Replication: paragraph 6, p 001-47.

² Replication: paragraph 9.1, p 001-48.

³ Replication: paragraph 9.5, p 001-50.

⁴ Replication: paragraph 23, p 001-55.

the applicant's third party notice irregular. However, on the 28th of March 2023, the respondent withdrew his rule 30 notice and amended his plea to the applicant's counterclaim. At paragraph 29 of his amended plea, the respondent denies that the Trust is a sham, and specifically pleads that he has no objection in the event that the court sets aside the Trust.⁵ He repeats this at paragraph 33.1.4 of his amended plea where he explicitly states that he will not oppose an order against the Trust as he has no interest therein.⁶

[19] At paragraph 32 the respondent repeats that he has no objection to the assets of the Trust forming part of the joint estate.⁷

[20] The respondent brought an application for a separation of issues in terms of Rule 33(4). The applicant successfully opposed the application. The respondent was ordered to pay the costs. Judgment was handed down on the 13th of February 2023.

[21] On the 1st of February 2023, a trial date for the 21st of August 2023 was allocated pursuant to an application made by the respondent who is the plaintiff in the pending divorce action. The trial date was applied for in the midst of the pending Rule 43 application brought on 28 November 2022. Peculiarly, and seemingly in his pursuit of ripening the matter for trial, the respondent filed notices to inform the applicant that he does not intend calling any expert witnesses or request further particulars for trial. This was done on the 6th of April 2023.

⁵ Amended plea: paragraph 29, p 001-70.

⁶ Amended plea: p 001-71.

⁷ Amended plea: paragraph 32, p 001-71.

STANDARD OF LIVING

[22] The respondent himself describes the standard of living of the family, and hence the applicant, as follows: -

“7.4 What is evident is that throughout the marriage, the plaintiff conducted a lucrative practice as an Advocate which translated to a luxury (sic) and lavish lifestyle for the defendant and the children who went overseas for holidays every year they wanted to, travelling first class in the plane when travelling overseas, driving expensive cars and expensive holidays, getting monthly allowances which even well educated professionals do not earn for their hard work. In brief, the defendant lived a luxurious lifestyle that many people can only dream of.

7.5 From the sale of the properties and with the half share that the defendant is in law entitled, she will be in a position to maintain herself and still live a lavish lifestyle that she was accustomed to during the subsistence of the marriage...”

13. ... As a result of the successful practice that the plaintiff conducted as an Advocate, the defendant and the children maintained a very high living standard, and a lavish lifestyle with (sic) the defendant never worked in her life but enjoying everything the luxuries of life can provide.”

THE JOINT ESTATE

[23] In his plea to the counterclaim, the respondent admits that the defendant is by law entitled to 50 % of the joint estate, which according to him *“is worth*

*millions of rands*⁸ and consists of the following immovable properties: -

- [23.1] The former matrimonial home valued at approximately R20 million;
 - [23.2] An immovable property situated in a golf estate valued at approximately R5 million;
 - [23.3] A property situated on a coastal resort valued at approximately R12 million;
 - [23.4] Vacant land situated at a golf estate which was purchased for a value of R2 million;
 - [23.5] Vacant land in a country estate valued at R500 000.00;
 - [23.6] Vacant land in the Eastern Cape Province valued at R500 000.00;
 - [23.7] An immovable property situated in an estate valued at R2 million.
- [24] Of all the properties, only the property situate at the coastal resort is bonded with an outstanding balance of R6 million and which is serviced by the respondent with monthly payments of R90 000.00 per month.
- [25] Sworn valuers have been appointed to value 9 immovable properties. The respondent has tendered to pay for the valuations.

THE LAW ON SPOUSAL MAINTENANCE

⁸ Amended plea to counterclaim: paragraph 9.2, p 001-61.

- [26] The principle considerations when awarding spousal maintenance is trite.⁹
- [27] In *Grasso*¹⁰ the court found where money is no object, there is no reason why a wife, on becoming an ex-wife, should not, in appropriate circumstances, continue to enjoy the same standard of living and the same good things in life she did whilst the marriage subsisted. In my view the principle even more so applies *pendente lite* where the Court's main concern is to maintain the *status quo* as far as is practicably and financially possible.
- [28] It is however equally important to remember that a spouse claiming maintenance must establish a need.¹¹ A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one which is obviously, albeit on paper, seeking to evade them.¹²
- [29] The respondent did not attack the reasonableness or need of the monthly expenses scheduled by the applicant in any significant way. He took issue with the maintenance that the applicant pays towards her elderly mother and the school transport for the niece, but could not refute the factual reality that these were expenses that were always incurred and with his blessing. The respondent's argument was rather that he contested the principle that the applicant had a duty to maintain her mother. The basis of a child's duty to support parents is the sense of dutifulness or filial piety. The principle is

⁹ Section 7(4) of the Divorce Act, 70 of 1979.

¹⁰ 1987 (1) SA 48 (C).

¹¹ Taute v Taute 1974 (2) SA 675 (E).

¹² Taute p. 676H.

certainly not a foreign concept in our Courts either. The Supreme Court of Appeal pronounced on the existence of such duty more than a half-century ago.¹³ The respondent's contention is accordingly of no moment.

[30] Notably, the respondent asserts that R 50,000.00 per month is a sufficient amount of maintenance for the applicant, but he was unable to state what exactly her monthly maintenance needs are. He also argued that the applicant's derives a fair amount of income from the rental holiday properties and has access to an amount in her Flexi Fixed Deposit.

[31] In reply, it was argued on behalf of the applicant that the rental income fluctuates drastically from month to month and is largely dependent on demand and the season. The average rental income disclosed by the applicant attests to this fact. The fact remains that the respondent historically never expected the applicant to maintain herself with this rental income and why this position should alter now is incomprehensible and not supported by any evidence.

[32] It was also argued on behalf of the respondent that the medical excess payment claimed by the applicant is exorbitant. The Court debated this issue with the respondent's counsel: If the excesses are as insignificant as the respondent professes, then he would certainly not have any objection to an order that he should pay these expenses. The concession was made.

[33] I took heed of the respondent's objections to some of the items of expenses. Some I have accepted and some I have rejected. Regardless, the Court has a

¹³ Van Vuuren v Sam 1972 2 SA 633 (A) 642.

duty to conduct its own independent analysis of an applicant's list of expenses and satisfy itself that the expenses are reasonable and in the case of spousal maintenance, necessary. Therefore, I have carefully considered the applicant's expenses together with the supporting financial documentation provided and what follows is a schedule of those items which the Court has either reduced or disallowed.

ITEM	EXPENDITURE	TOTAL CLAIMED	DISALLOWED/ DEDUCTED	NEW TOTAL
1.	Food, groceries and cleaning materials	15 132.40	5 000.00	10 132.40
2.	Cell phone	1 378.55	1 378.55	0.00
3.	Transport: Fuel Parking and tolls Gautrain & Uber	8 000.00 24.83 300.00	3 000.00	5 000.00 24.83 300.00
4.	Medical expenditure: Doctors and dentists (excess) Other (blood tests)	430.65 443.65	430.65 443.65	0.00
5.	House Maintenance	5 000.00	5 000.00	0.00
6.	Pocket money	13 642.23	4 000.00	9 642.23
7.	Cash withdrawals and miscellaneous <i>ad hoc</i> expenses	3 483.12	1 000.00	2 483.12
	TOTAL	47 835.43	20 252.85	27 582.58

[34] My reasons are as follows. Items 1, 4 and 5 have been disallowed completely

as the respondent has tendered to pay for them. The children are not always with the respondent and are majors with their own allowances received from their father. I have therefore adjusted the claim for groceries and pocket money accordingly. I have simply reduced the fuel and *ad hoc* expense claim to an amount which I deem reasonable under the circumstances.

[35] In the premises, the amount that I intend to award to the applicant for her cash maintenance is an amount of R 75,000.00 per month.

CONTRIBUTION TOWARDS LEGAL COSTS

[36] The more contentious part of the applicant's claim is the amount that she seeks as a first contribution toward her legal costs.

[37] Counsel for the respondent prepared a note identifying those contested items contained in the applicant's *pro forma* account. The applicant's counsel replied with a note containing certain concessions. I am grateful to counsel for this helpful exercise.

[38] The respondent's disallowed items total an amount of R 3,303,310.71, made up as follows:

[i] R 2,397,276.00 (fees).

[ii] R 134,038.41 (drawing fees).

[iii] R 555,609.00 (expert fees).

[39] According to the respondent, the applicant's best case scenario entitles her to an amount of R 172,282.00, which is inclusive of the first day of trial. He therefore contends that his tender of R 200,000.00 is not only on par, but gratuitous.

[40] Having taken into account some of the respondent's objections, the applicant has reduced her claim for a legal costs contribution from R 3,303,310.71 to R 2 926 693.96, which is a difference of R 376 616.75. The concessions made relate to the following:-

[40.1] The rule 30 proceedings (items 1 to 25).

[40.2] The third party proceedings (items 82 to 85).

[40.3] The third party Rule 35(3) proceedings (items 52 to 69).

[40.4] Attendance at trial beyond the first day – attorney and counsel (items 190 and 193).

[40.5] Expert witness attendances (items 191 to 192).

[40.6] The noting of the judgment (items 194 to 196).

[41] The respondent's main objections may be summarised as follows:-

[41.1] The trial date is looming, and the action will finalise soon.

[41.2] Discovery, more particularly further and better discovery, has already occurred.

[41.3] Witness have already been subpoenaed for documents.

[41.4] Five envisaged and unspecified interlocutory applications are unnecessary for trial.

[41.5] Experts are unnecessary for trial. The respondent is not calling any experts.

[41.6] Heads of argument are unnecessary for trial.

[41.7] Judicial pre-trial conferences are unnecessary, and the amount claimed is exorbitant.

[41.8] Indices for trial are unnecessary and the amount claimed is exorbitant.

[41.9] All items relating to the third party trust should be disallowed, because the trust is not defending the action and the parties have agreed to a joint estate.

[42] It is imperative to consider the applicant's claim for a legal costs contribution against the background of the prevailing legal principles as developed in recent authorities. These principles have been succinctly summarised various courts over the past years, and most recently also by this court.¹⁴ No harm will be done by repeating them here.

[43] The guiding principle in exercising the discretion which the court has when

¹⁴ MD v MD 2023 JDR 0804 (GJ)

considering a claim for a contribution towards legal costs, was formulated in *Van Rippen*¹⁵ as follows: -

“... The court should, I think, have the dominant objecting view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the court.”

[44] In *Cary*¹⁶ Donen AJ referred to the constitutional imperatives of the quality before the law. He observed at the outset that he was required to exercise his discretion under rule 43 in the light of the fundamental right to equality and equal protection before the law. He held that there should be “equality of arms” in order for a divorce trial to be fair, and concluded that: -

“... Applicant is entitled to a contribution towards her costs which would ensure the quality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate respondent’s financial affairs through the forensic accountant appointed by her. That is applicant will not enjoy equal protection unless she is equally empowered with ‘the sinews of war’. The question of protecting applicant’s right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him. I therefore regard myself as being constitutionally bound to err on the side of the ‘paramount consideration that she should be enabled adequately to place her case before the court’. The papers before me indicate that the respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he

¹⁵ *Van Rippen v Van Rippen* 1949 (4) SA 634 (C).

¹⁶ *Cary v Cary* 1999 (3) SA 615 (C).

be ordered to do so.”

[45] The claim for a contribution towards costs in a matrimonial suit is *sui generis*. It is an incident of the duty of support which spouses owe to each other. It is clear from the authorities quoted above that the purpose of the remedy has consistently been recognised as being to enable the party in a principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place her case before the court.

[46] In *Eke v Parsons*¹⁷ it was stated that under the constitutional dispensation *“the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and to further the administration of justice.”*

[47] As stated in *AF v MF*:¹⁸ -

“The legal rules pertaining to the reciprocal duty of support between spouses are gender neutral so that an indigent husband may claim support from an affluent wife but the reality must be acknowledged that given traditional childcare roles and the wealth disparity between men and women, it has usually been women who have had to approach the court for a contribution towards costs in divorce litigation.”

[48] Implicit in the consideration of a legal costs contribution is the role that gender dynamic play. According to the Constitutional Court: -

“Equality of arms has been explained as an inherent element of the

¹⁷ *Eke v Parsons* 2016 (3) SA 37 (CC).

¹⁸ *AF v MF* 2019 (6) SA 422 (WCC) paragraph [14].

*due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality.”*¹⁹

[49] In *AF Davis AJ* noted that in the unreported decision of *Du Plessis v Du Plessis (an unreported decision)*, Van der Merwe J had followed Cary and accepted “*the relevance of the fundamental right to equality before the law*”.

[50] Like Van der Merwe J, Davis AJ followed suit and concluded thus: -

“I find myself in wholehearted agreement with the approach adopted by Donen AJ and Van der Merwe J, which accords with the injunction in section 39(2) of the Constitution to promote the spirit, purport and objects of the bill of rights when developing the common law.

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 case. 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.

...And where an impecunious spouse has already incurred debts in

order to litigate, whether to family or to an attorney, I consider that the court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts.”

- [51] A misconception that continues to prevail is that an applicant is not entitled to all of her costs claimed up until the first day of trial, as it is merely a contribution that is sought. This cannot be correct. In this regard I align with the sentiments of David AJ in *AF v MF* where the court amplified the purpose of a costs contribution: -

“In my view the obligation to pay a contribution towards the wife’s legal costs does not necessarily postulate an obligation only to pay for part of those costs... The extent of the contribution should logically depend on how much, if anything, the wife herself is able to contribute...”

*To my mind the correct approach to the question of an appropriate contribution towards costs is that adopted in *Zaduck v Zaduck* 1966 (1) SA 78 (SR) at 81A-B by Davies J, who declined to follow the rule that a contribution to costs should not cover all the wife’s costs. The learned judge held that:*

‘[T]he correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved.’

In my view it is arbitrary to apply an inflexible rule if the wife who has no means of funding the balance of her legal costs is nonetheless only entitled to part of the costs which she reasonably requires to fund

her litigation.”

[52] Within the context of the purpose of a legal costs contribution, the meaning of the word “*contribution*” cannot be limited to a principle where a respondent is by default only required to make a part-payment of the costs of an applicant. This approach would completely disregard the applicant’s financial situation and whether or not she has other financial resources, in addition to income, with which to fund her own litigation, which should be the first leg of the enquiry in my view. Once it is established that the applicant has resources and/or income of her own, the second leg of the enquiry relates to the adequacy of the resources and income and whether sufficient to enable the applicant to litigate on a scale commensurate with that of the respondent. If there is a disparity, a contribution must be ordered to bridge the divide.

[53] If however, it is established that the applicant is unable to fund any of her own legal costs, the wording of the rule and its reference to “*a contribution*” cannot be a technical basis upon which a respondent can be absolved from what should be considered a legal duty, rather than a gratuitous act:²⁰

“... whether the respondent should be contributing to the applicant’s legal costs is not the respondent’s gift to give: he has a legal obligation to do so. The ambit of the obligation is not for him to determine either; the ambit of the obligation is an objective one, having regard to what the reasonable costs are likely to be in respect of the anticipated trial.”

²⁰ Van Rhyn v Van Rhyn, a judgement in this division under case number 30947/2016 dated 7 June 2019.

[54] Another issue which received quite some attention during argument is whether a Court may allow costs claimed in respect of interlocutory applications brought in the future. The applicant said yes; the respondent disagreed.

[55] In the unreported judgment of *S v S*,²¹ the court:

[55.1] held the view the precedent in this division dictates that a contribution to legal costs is for the costs of the pending divorce action and it excludes the costs of interim or interlocutory applications and other disputes between the parties.²²

[55.2] went further and stated that Rogers J, as he then was, in *AR v JR*²³, relying on *AG v LG*²⁴, adopted the approach that an application for a contribution towards costs does not preclude costs already incurred from being taken into account in determining a contribution to costs, and that costs incurred or to be incurred in respect of applications that are truly interlocutory to the divorce proceedings must be included as per *RM v AM*.²⁵

[55.3] stated that: “*whilst the cases relied upon by Rogers J were all decided in the Cape and do not reflect the prevailing position in this*

²¹ (23967/2012) [2022] ZAGPJHC 483 (26 July 2022).

²² *Winter v Winter* 1945 WLD 16; *Service v Service* 1968 (3) SA 526 (D); *Micklem v Micklem* 1988 (3) SA 259 (C); *Maas v Maas* 1993 (3) SA 885 (O) at 888I.

²³ *AR v JR* (unreported) WCC Case No 4366/2016 dated 23 October 2020.

²⁴ *AG v LG* [2020] ZAWCHC 83 paras [15] – [17] and the cases there cited.

²⁵ *RM v AM* [2019] SAWCHC 86 para [24].

Division, the time may have come for this Division to incorporate the approach reflected in AR v JR²⁶ in respect of costs already incurred being taking into account in determining a contribution towards costs, and that costs in respect of applications that are truly interlocutory to the divorce proceedings be included in addition.

[55.4] ultimately held that it was not appropriate to deal with such an extension of the prevailing practice in this Division, in that particular matter.

[56] I agree that the law requires development on this position, and I align myself with *RM v AM*, where the Western Cape High Court stated as follows:-

“Turning to the merits, a contribution to costs in terms of rule 43 is a contribution to the costs of the divorce action. In Micklem v Micklem²⁷ it was said that the costs of interim applications are excluded. The case cited in support of this proposition, Service v Service²⁸, does not establish it in those wide terms. Miller J in that case excluded the costs of ‘interim applications already made’. At that time past costs, even those directly concerned with the divorce, were thought not to be recoverable by way of a contribution under rule 43.

Interlocutory applications directly related to the divorce proceedings, such as applications to compel discovery and the like, are, in my view, costs of the

²⁶ AR v JR (unreported) WCC Case No 4366/2016 dated 23 October 2020.

²⁷ 1988 (3) SA 259 (C) at para 263B.

²⁸ 1968 (3) SA 526 (D) at para 528F.

'pending matrimonial action' within the meaning of rule 43(1)(b). I accept, though, that the costs of rule 43 applications and of freestanding applications relating to the best interests of children are not covered.²⁹

[57] It is within this context that the court held that:

"As far as I can see, the only incidental applications truly interlocutory to the divorce action have been the following: the husband's application to transfer the divorce action to the high court; the wife's application in the latter part of 2017 to compel discovery (Slings AJ made such an order, costs to be paid by the husband); a follow-up application to dismiss the husband's defence (not adjudicated); and the wife's postponement application (which was effectively overtaken by the husband's counter-application). All the other applications were either rule 43 applications or independent proceedings concerning the best interests of the children."

[58] These principles were cited with approval and applied in *AR v JR*.

[59] The appropriate test in my view therefore is whether the interlocutory application is truly interlocutory to the divorce proceedings, because in such an instance the interlocutory will necessarily be required to efficiently finalise the proceedings. This by its very nature would include interlocutory application premises on frivolous grounds. Ultimately, the inclusion should be just, equitable and fair in the context of the pending litigation.

²⁹ Winter v Winter 1945 WLD 16 at para 18; Maas v Maas 1993 (3) SA 885 (O) at para 888I-889B.

[60] There is another important differentiation to make, namely the costs in bringing the interlocutory application and the costs order that it ultimately granted by the court hearing the interlocutory application. A development in the legal principles relating to a contribution to legal costs, more specifically whether allowance should be made for interlocutory applications, is by no means intended to usurp the discretion of the interlocutory court when ultimately determining which party, if any, should be liable for the costs of the application. In addition, such development is not intended to interfere with the powers of the taxing master when scrutinising a bills-of-costs on taxation either. All the development seeks to achieve is to financially empower an applicant to do whatever he or she needs to do to advance his or her case fairly and justly.

[61] Turning to the facts of this matter and considering the history of the litigation thus far, I would do an injustice to the applicant if I did not make some allowance for the bringing of interlocutory applications in her costs contribution. I agree with the applicant's submission that the need to request further documents may very well flow from an analysis of the documents that have already been provided by financial institutions and the like. To illustrate this point counsel on behalf of the applicant submitted that no management accounts have been provided for the game lodge, nor have any asset registers or share certificates been provided in circumstances where the shareholding remains in dispute. Loan accounts also seem to be a highly contentious issue. In addition, as a separate *sui generis* entity the trustees would have to be subpoenaed to provide documents and not the respondent in his personal capacity. The process of discovery therefore seems far from

over.

[62] It is all fair and well for the respondent to argue that the discovery process is not necessary, because he agrees that the trust assets should be included in the division of the joint estate. This argument loses sight of the interplay between the value of the estate and the principle of spousal maintenance and how the enquiry into these two issues is inextricably linked. The need for spousal maintenance³⁰ can only be reasonably determined once the Court is apprised of the net asset value of the estate and hence, the value of the applicant's 50% share. Moreover, a claim for spousal maintenance, more particularly the principle, must be determined upon the granting of a decree of divorce and not thereafter. A division of the joint estate is a legal consequence of a decree of divorce, but a need for spousal maintenance is not.

[63] It accordingly stands to reason that not only does the value of the estate have to be accurately determined before a divorce is granted, but a failure to do so would compromise the applicant's claim for spousal maintenance.

[64] In my view I need not dwell any further on the importance of appointing a forensic accountant in light of what I have stated regarding the issue of discovery and the importance of accurately calculating the net asset value of the joint estate. I am not persuaded by the argument that the mandate of the expert who the applicant intends to call is necessarily limited to the issues state in his quotation.

[65] As indicated, the respondent is clearly disputing the applicant's need for

³⁰ Section 7(2) of the Divorce Act, 70 of 1979.

maintenance. He holds the view that her 50% share of the joint estate would be more than adequate to sustain herself. Of course, this argument does not take into consideration the interim period where the applicant will require maintenance pending the division of the joint estate, and the realisation and/or transfer of certain assets. Furthermore, the respondent's speculation that the applicant's share will be sufficient to sustain herself, is not only cold comfort to the court, but also to the applicant. If the applicant's 50% share is not adequate, her employability comes into play, and it is then when the evidence of an industrial psychologist becomes relevant. Due to the prevailing variables in this matter, the need for such an expert cannot be disregarded at this stage. I accordingly find that his expert, on the papers as they currently stand is necessary.

- [66] Within the context of this matter, it deserves reminding that experts are not there for the parties, but for the court. Kotzé J put it as follows in *S v Gouws*:³¹

"The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field."

- [67] Davis J summarised the role of experts and their reports aptly in *Schreiner NO & Others v AA & Another*³² as follows:

"In short, an expert comes to court to give the court the benefit of his or her expertise."

³¹ 1967 (4) SA 527 (EC) at 528D.

³² 2010 (5) SA 203 (WCC) at 211J-212B.

[68] Finally, a word on the argument relating to the drawing fees of the *pro forma* invoice as claimed by the applicant. It is not a requirement that a *pro forma* invoice must be prepared by a costs consultant or an independent attorneys, although the accuracy and detail does provide assistance to the court. However, the respondent's objection to certain of the items included in the invoice was wholly justifiable and demonstrated a complete disregard by the drawer of the invoice of the principles relating to a claim for a contribution towards legal costs in terms of Rule 43. On both scores I am not persuaded that the drawing fee was justified and will therefore not allow it.

COSTS

[69] I have considered both parties' argument relating to the costs of this application. The facts in this regard were not extraordinary in this context and I am not persuaded that the respondent's opposition was frivolous or in bad faith. I am accordingly not inclined to grant costs in either party's favour and leave this to the trial court to decide.

ORDER

In the circumstances I make the following order: -

1. *"The respondent shall, pendente lite, pay maintenance for the applicant and the major dependent children as follows:*

- 1.1. *Cash maintenance for the applicant in the sum of R 75,000.00 (seventy-five thousand) per month, payable directly to the applicant, without set off or deduction, into a bank account nominated by the applicant from time to time, on or before the first day of every month, to commence within 5 (five) days of date of this order and to operate retrospectively for that month, and thereafter on the first day of each month;*
- 1.2. *By payment of all costs associated with the former matrimonial home situated at [...], Gauteng, including but not limited to:*
 - 1.2.1. *the monthly rates and taxes, electricity and water, refuse, and home maintenance;*
 - 1.2.2. *the monthly household contents and home insurance and DSTV;*
- 1.3. *By payment of the costs of the applicant's current cell phone contract;*
- 1.4. *By payment of all costs associated with the applicant's Range Rover Vogue V8 motor vehicle (registration number:[...]), which she will continue to have unfettered use of, including but not limited to payment of the monthly instalments, comprehensive insurance, maintenance, repairs, tyres, and the annual license;*
- 1.5. *By payment of all costs relating to the children's education at their tertiary education institutions. These costs shall include, but not be*

limited to university tuition fees, special levies and debentures, application fees, deposits, enrolment costs, costs of travelling to and from the tertiary education institutions, accommodation to enable them to attend the tertiary education institutions, extra lessons, extra mural activities, including sport and cultural activities, equipment reasonably required for such extra mural activities, books and stationery, sporting clothes and equipment, functions, tours and outings and camps, sport academies, transport and the requisite computer equipment, including printer cartridges and software;

1.6. *By payment of the monthly premium for the applicant and the children to remain as dependents on the respondent's comprehensive medical aid scheme;*

1.7. *By payment of all excess medical expenses incurred in respect of the applicant and/or the children that are not covered by the medical aid scheme, including but not limited to dental, orthodontic, ophthalmological, psychotherapy, physiotherapy, homoeopathic, occupational therapy, pharmaceutical and other medical or related costs incurred in respect of the applicant and/or children;*

2. *The respondent shall make full and timeous payment of any and all maintenance obligations stipulated, without deduction or set off. Any expenses incurred and paid for by the applicant which, in terms of this court order, are to*

be paid by the respondent, shall be reimbursed by him to the applicant within 5 (five) days of receipt of invoice;

3. *The respondent shall make payment of a contribution toward the legal costs of the applicant in the amount of R2,800,000.00 (two million eight hundred thousand rand and ninety six cents), by way of four equal monthly payments of R 700,000.00 (seven hundred thousand rand), the first payment to be made on or before the 15th of May 2023, and thereafter to be made on the first day of each month to directly to the applicant's attorneys, without deduction or set off, into a bank account nominated by the applicant's attorneys from time to time;*
4. *Costs of the application are costs in the divorce action.*

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 18 April 2023

DATE OF JUDGMENT: 28 April 2023

APPEARANCES:

On behalf of applicant:

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