IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

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

27/02/14
DATE

SIGNATURE

CASE NO: 51064/2013

In the matter between:

26/2/2014

TELANA CLARK — APPLICANT

And

HILTON REED — RESPONDENT

JUDGMENT

KGANYAGO AJ

[1] In this application the court is called upon to determine the question of costs for the urgent application which was heard on the 27th August 2013.

[2] During August 2013 the applicant brought an urgent application against the respondent. The parties reached a settlement and by agreement, the draft order was made an order of court. The issue of costs was reserved to be argued at a later stage.

[3] The applicant and respondent were staying in a relationship. From that relationship four children were born. Their relationship ended during July 2013. During the duration of their relationship the applicant never worked, and was dependant on the respondent for maintenance. The respondent was giving the applicant a monthly budget of R35 000. 00. The respondent was also buying extra groceries when there was a need.

[4] After the relationship was terminated, the respondent made several tenders to the applicant for the payment of maintenance. The applicant did not accept these tenders. However, the respondent kept on paying the R35 000. 00 per month. The indication from the respondent was that he wanted to reduce the R35 000. 00 monthly budget. During August 2013, the applicant was not sure what amount the respondent was going to pay at the end of August 2013. As a result of that, the applicant launched an urgent application in this court.

[5] On the 27th August 2013, the matter was settled on the respondent's initial tenders, except that in addition the respondent tendered the Toyota Fortuner in the place of Toyota Hilux which was initially tendered. According to the applicant, the value of the Toyota Fortuner is more than that of a Toyota Hilux.

[6] Counsel for the applicant contends that the urgent application was necessary and that the applicant was substantially successful at court, and therefore, they are entitled to costs. Counsel for the respondent contends that the applicant was not substantially successful in court and that in fact what was made an order of court was what the respondent has been tendering all along. The respondent is arguing that a costs order should be awarded against the applicant, alternatively each party to pay his/her own costs.

[7] The award of costs is in the discretion of the court, which discretion should be exercised judiciously, having regard to what is fair for both sides.

[8] In the case at Giulana v Diesel Pump Injector Services (Pty) Ltd 1966 (3) SA451 at page 453 B – E the court said the following: *"The language used by Lord Justice BOWEN in the case of Forster v Farquhar, (1893) 1 Q.B.D. 564 at p. 568, appears to me to reflect the law with regard to costs which is appropriate to this case: 'The measure of what is fair as to costs is not to be found in a mere consideration of his conduct toward the opposite side. It may have been reasonable from his point of view to do that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be*

just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success . . . 'I cannot entertain a doubt', says Lord HALSBURY, L.C., 'that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs'. The language of Lord WATSON is to the same effect: 'I shall not attempt,' he says, 'a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense."
(See Scheepers and Nolte v Pate, 1909 T.S. 353 at p. 359, and Kerwin v Jones, 1958 (1) SA 400 (SR))".

[9] In my view, the urgent application was unnecessary. There is no way in the papers where it is alleged that the respondent had stopped paying the R35 000. 00 budget. Despite making tenders, he continued paying that amount. Besides the Toyota Fortuner, the applicant had accepted the tender which the respondent has been tendering all along. Even for the Toyota Fortuner, that cannot be regarded as substantial success as it is merely replacing the Toyota Hilux.

[10] The papers had indicated that the applicant is not working. If I were to make a costs order against her, she will take the very same

money which she is being paid to take care of the children and use it to settle the costs. I am therefore not inclined to make any costs order in favour of any of the parties.

[11] In the result I make the following order:

11.1 That each party to pay his or her own costs.

M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT