

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 9626/2003

And 9326/2001

In the matter between:

J[...] M[...] (born W[...])

Applicant

and

H[...] W[...] -M[...]

Respondent

JUDGMENT DELIVERED ON 29 JANUARY 2004

BUDLENDER AJ:

This is an application in terms of Rule 43 of the Uniform Rules of Court.

The parties were married in 1972. The applicant, the wife, is the plaintiff in the divorce action. In that action she seeks *inter alia* maintenance in the sum of R10 000 per month, and an order directing the defendant to transfer to her 50% of the nett assets acquired by him during the subsistence of the marriage.

The trial is set down for 8 April 2004. In this application, which was launched on 18 November 2003, the applicant seeks maintenance of R10 000 per month, and a contribution to costs of R50 000.

The applicant states that she is unemployed as a result of ill-health. She is

presently living with her son in England. She is dependent on him and on a small income from a testamentary trust in which the capital sum is R115 000. This previously yielded between R800 and R1000 per month. It is now being re-invested in the United Kingdom where it will yield no more than GBP 40 (or about R500) per month.

The Respondent is not able to dispute any of this. It was suggested in argument that the applicant's move to the UK had unnecessarily increased her living costs. While the move has probably increased her living costs, it also reduced the applicant's *de facto* dependence (if not her *de jure* dependence) on the respondent, because her son with whom she now lives is assisting her and sharing her costs. The move was apparently also intended to enable her to obtain social security benefits in England. As Ms Bartman for the applicant pointed out, if this is successful it will actually reduce the respondent's ultimate liability to her for maintenance, assuming that liability is established at the trial. In any event, the applicant could with the same degree of validity assert that the respondent's move to Ireland, where he is now living, has unnecessarily increased his own living expenses.

Ms Maas for the respondent suggested that the proposed re-investment in the UK of the funds in the testamentary trust was not a wise investment, given the reduced income it will apparently generate. Given the continuing fluctuation in interest rates and currency exchange rates, none of us can say, except with the benefit of hindsight, whether this is so. Certainly there is no basis for finding that it is reckless or imprudent.

Even assuming for the respondent that the applicant should have remained in South Africa and kept her money here, then she would have had a total income of a maximum of R1000 per month. It can hardly be suggested that this is adequate for her maintenance. On the facts before me, she plainly needs maintenance. The question is whether the respondent is in a position to provide it, and if so in what amount.

It is here that I encounter some difficulty. While the respondent has answered the

allegations made by the applicant, he has been rather unforthcoming as to his own situation. Affidavits in rule 43 proceedings are required to be brief. His is indeed brief, to the point of being almost cryptic. The section of his affidavit which actually deals with the facts runs to three pages. His allegations as to his own circumstances consist of two paragraphs. The respondent says that he is currently unemployed; that he is being assisted by a friend (whom he does not identify) until he receives the weekly unemployment benefit of approximately GBP 500 per month; and that he obtains approximately 320 Euros (R2500) per week when he is employed on contract work through an agency. He does not say how often he is so employed.

The applicant says that the respondent is living with a German woman with whom he shares living expenses. He does not respond to this except through a general denial of the allegations in the relevant paragraph of the applicant's affidavit. The respondent gives no explanation or account of what his living expenses are, and of how he meets them.

I therefore have great difficulty in determining whether the respondent is able to pay maintenance, and if so, what amount he is able to pay. Fortunately the trial is imminent. The applicant has, with the assistance of her son, coped through the period since December 2002, when she became unemployed for health reasons.

During the first six months after the respondent left the family home during November 2000, he paid her R2000 per month. He does not explain in what manner his circumstances have changed since then, but he does provide some limited information as to what his current circumstances are. The previous amount provides me with some sort of a benchmark. Since those six months passed, the respondent has coped without any maintenance from him - presumably through the assistance of her son. On the basis that this order will in any event be of very limited duration, I will order the respondent to pay the applicant R1500 per month. This will provide rather limited benefit to the applicant, but will similarly do limited harm to the respondent. In April the matter can be properly considered by the trial judge, who will no doubt have much more comprehensive information available. This interim order will, as requested in the notice of motion, be with effect from 1

October 2003, demand having first been made on 12 September 2003.

My reference to the ability of the trial judge more fully to consider the question of maintenance brings me directly to the second leg of the claim, which is the claim for a contribution towards costs.

It is essential that the applicant should be able effectively to present her case. In **Cary v Cary** 1999 (3) SA 615 (C), **Donen AJ** referred in this regard to the constitutional imperative of equality before the law and equal protection of the law.

Section 34 of the Constitution guarantees the right to a 'fair public hearing' before a court or other independent and impartial tribunal or forum. In **Bernstein and others v Bester and others NNO 1996 (2) SA 751 (CC)**, **Ackermann J** pointed out at 805C (without making a finding in this regard) that it could be argued that the formulation of section 22 of the interim Constitution Act No. 200 of 1993 reflected a deliberate election by the framers not to constitutionalise the right to a fair trial. This is because the framers of that Constitution guaranteed the right to have justiciable disputes settled by a court of law or another independent and impartial tribunal, but did not describe the nature of the hearing which was thereby guaranteed.

Now, the converse applies. By contrast with the interim Constitution, our current Constitution guarantees the right to a 'fair public hearing'. The framers thus adopted the formulations of the European Convention on Human Rights and the Namibian Constitution, which **Ackermann J** had contrasted with section 22 of the interim Constitution. I do not think there can now be any doubt that section 34 constitutionalises the right to a fair civil trial. The European Court of Human Rights has held that this entails a right of access to court - **Golder v UK 1 EHRR 524 (1975)** - and the right to be able to present one's case properly and effectively - **Airey v Ireland 2 EHRR 305 (1979)**. The principle of 'equality of arms' is implicit in the right to a fair trial: **Bernstein v Bester (supra) at 805 I (footnote 154)**.

It is not necessary or appropriate for me to attempt to define in this judgment the full ambit and extent of those rights and the obligations they create, which is a complex

matter. However, the existence of the right is relevant to the exercise of my judgment in this matter. The respondent is under a common law duty to make a contribution to the applicant's costs, if it is needed and he is able to do so. This is part of the duty of support which spouses owe each other (**Chamani v Chamani 1979 (4) SA 804 (W) at 806 F-H**). The applicant's right under section 34 of the Constitution is relevant to the exercise of my discretion when a claim is made in this regard, because under sec 8(2) of the Constitution the applicant's right has some 'horizontal' application having regard to the nature of the right and the duty imposed by the right, which in this instance has a common law foundation.

It appears that the respondent will be represented at the trial by an attorney and counsel. The applicant wishes to be similarly represented, which is hardly unreasonable. On the facts before me, she does not have the resources to make this possible. The question then is whether the respondent has such resources.

The applicant says that the respondent owns a share in certain flats in Dresden, Germany, and that she is not aware of any other assets owned by him. The respondent does not either disclose other assets, or say that he does not have any. He does however acknowledge that he is the owner of a one-ninth share of a property in Dresden. The applicant says that she believes it is worth 3.5 million Euros. The respondent says that it is worth not more than 1.5 million Euros. Accepting the latter figure for present purposes, his share in the property is worth about R1,3 million. It seems to me overwhelmingly likely that even if he does not have any other assets, the respondent will be able to borrow a relatively modest amount against his share of that property for a limited period.

The applicant claims a contribution of R50 000 towards costs. Ms Bartman, in analysing the likely costs up to and including the first day of trial (**Service v Service 1968(3) SA 526 (N) at 528G**), suggested that they were likely to be of the order of R30 000.

The applicant is not entitled to payment in full of the costs which she will incur: **Micklem v Micklem 1988 (3) SA 259 (C) at 262 I**. It seems to me that justice will be done if I order the respondent to make a contribution of R20 000 towards the

applicant's costs at this stage.

I accordingly order as follows:

- 1 The respondent is ordered *pendente lite* to pay to pay maintenance of R1500 per month to the applicant, with effect from 1 October 2003.
- 2 The respondent is ordered to make a contribution of R20 000 towards applicant's legal costs.
- 3 The costs of this application will stand over for determination in the divorce action.

G M BUDLENDER