Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 9028/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 22 August 2019
Judgment: 26 August 2019

In the matter between:

M E Applicant

and

A E Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant has applied in terms of rule 43 for interim maintenance for herself and the parties' minor child pending the determination of divorce proceedings between the parties. She also claims a contribution towards her costs in the pending divorce action.

[2] The parties were married in 2012. The marriage is out of community of property in terms of an antenuptial contract that excludes the accrual system. Accordingly, if the parties are unable to arrive at a settlement, the only proprietary issue the trial court will have to determine is maintenance. In that regard it is evident from the open tender that the respondent has made in these proceedings that his position currently is that the applicant should be entitled only to rehabilitative maintenance for a finite period of time, and not to ongoing maintenance until her death or remarriage. In her papers the applicant claimed monthly maintenance for herself in the sum of approximately R111 000 and approximately R38 000 in respect of the minor child. She also sought an order directing the respondent to bear responsibility for the child's schooling- and medical-related expenses. These claims were materially moderated by counsel when the matter was argued.

[3] The parties' son, who turns seven next month, currently lives on a shared basis – one week on, one week off – with each of his parents. The arrangements in respect of the care of the child are regulated in terms of an order of court made by Papier J on 7 June 2019 in case no. 9427/2019 by agreement between the parties. That regime is intended to obtain provisionally until a court determines on more permanent arrangements after considering, amongst other matters, evidence from relevant expert witnesses who are currently engaged in their respective investigations on how the interests of the minor would best be served. Ideally, the determination of those more permanent arrangements should occur as part and parcel of the pending divorce proceedings rather than by way of a costly set of discrete proceedings. After all, the interests of any dependent children are a matter that any court seized of an action for divorce is bound to have regard before it may grant an order dissolving the bonds of marriage between the spouses concerned; see s 6 of the Divorce Act 70 of 1979. The parties' legal representatives may be expected to bear that in mind in the further conduct of the litigation. I have certainly done so in assessing the order to be made in respect of the application for a contribution towards the applicant's costs.

[4] Prior to the applicant's departure from the marital home, the parties had resided together at Malmesbury, where, by all accounts, they lived in comfortable circumstances in an exceptionally well-equipped and commodious dwelling house that is owned by the respondent. When she departed the marital home, the applicant went to live with her mother in Kuils River. The terms of the order made by Papier J, as mentioned by agreement between the parties, required the applicant to return to live in Malmesbury if she were to exercise the right to have the child live with her on alternative weeks. If she did not do that, her access to

the child would, by virtue of the terms of the order, perforce be much more restricted. The costs of obtaining alternative accommodation in Malmesbury and setting up an establishment there have been included as a component of the applicant's rule 43 claim. In this regard, in addition to rental and relocation costs, the applicant claimed R695 522,13 to furnish the rented accommodation.

[5] With regard to her claim for a contribution towards her costs in the sum of R550 000, the applicant avers that she has already expended R30 000 in costs and run up legal bills of R110 000. Quotations totalling approximately R178 000 have been received from the experts the applicant says that she needs to engage for the purposes of the litigation, being a counselling psychologist, a forensic accountant and an industrial psychologist. She estimates her legal costs in the pending application concerning the care of the parties minor son to be 'in the region of 185 000' and in the divorce action R140 000 up to and including the first day of trial. It is evident from the engagement by each of the parties of senior counsel assisted by a junior for the rule 43 hearing that both sides are litigating on a luxurious scale. That is also reflected in the unacceptably voluminous founding papers in this application, which, with annexures, run to 172 pages.

[6] As the applicant's counsel acknowledged during argument of the matter, the courts have frequently lamented the non-observance of the requirement of rule 43 that the papers should be succinct and state each party's case on affidavit in a manner closely analogous to that in which it would be set out in a pleading. Rogers J reiterated very recently in *RM v AM* [2019] ZAWCHC 86 (10 July 2019)[1] that it should therefore ordinarily suffice for the deponent party to set forth its case virtually in point form. The all too common practice of padding the papers with emotive marital history regarding the reasons for the breakdown of the marriage and extensive accounts of the parties' idyllic lifestyle in happier times – allegations which almost invariably are then disputed at equal or greater length by the opposing party – do not serve to assist the court in dealing with the matter in hand in the way contemplated by the rule-giver; namely, by providing appropriate interim relief on an expeditious, cost effective and necessarily fairly robust basis.

[7] A succinct statement of the respondent party's income and means will ordinarily suffice to give the court the information it needs to decide the scale on which the applicant's equally succinctly stated needs might reasonably be accommodated *pendente lite*.

[1] In para. 2.

Corroborating documentary evidence is often useful, but its employment in rule 43 applications should be sharply focussed and minimalistic.

[8] Opposed rule 43 applications are heard on the daily motion roll by judges already heavily burdened with literally dozens of other cases to be dealt with on the day. The production of unnecessarily voluminous papers in such applications is an abuse of the procedure, an irritant to the judges, and counterproductive to the best interests of the parties.

[9] The adequacy of the pre-constitutional vintage rule 43 procedure, in particular its prescription of brevity, in the context of the Bill of Rights has recently been considered by a specially constituted full court of the Gauteng Division in *E v E and related matters*, [2019] ZAGPJHC 180, [2019] 3 All SA 519 (GJ), to which I was referred to by the applicant's counsel, - I think in an endeavour to soften the criticism they rightly anticipated the length of the papers might evoke. The full court in that Division has recommended certain practice note requirements directed at keeping rule 43 applications within strict bounds without compromising constitutional principle. I could not help noticing, however, when I read the judgment, that the papers in each of the three allegedly too voluminous applications before the Gauteng Division discussed there were significantly shorter than the one before me in the current matter.

[10] I do not find it necessary or appropriate to comment on the proposals made in *E v E* because they are self-evidently directed at obtaining consistency in practice in the conditions that obtain in the Gauteng Division, which, I know, differ materially from those in this Division. In my view, however, whatever the range of evidential material that might be relevant, which in the nature of things will, of course, vary from case to case, voluminous papers are not necessary to enable the court to dispose of rule 43 applications in a manner compliant with its obligations under chapter 2 of the Constitution. The points that need to be made and taken into consideration in such matters can still effectively and adequately be made in affidavits that are drafted succinctly in the way enjoined by the rule.

[11] The parties' material means cannot buy them latitude in compliance with the rule, and the fact that large sums of money might be involved is no justification for extravagant disregard of the rule's purposefully designed restraints. Having regard to the papers not only in the current application, but also in the other opposed rule 43 application on my Thursday roll, it seems that there is a need for practitioners to be cautioned that applications drafted in flagrant non-compliance with the directives in the rule are liable on that account to be struck

from the roll without being heard. If the consequences of that should work hardship, let it not be heard said that they were not foreseeable.

[12] I have had particular regard to the schedule of the applicant's alleged requirements and the respondent's open tender. In my judgment the applicant's needs were initially grossly overstated, and even in the modified form in which they were advanced in argument at the hearing still presumed too much. I consider that the respondent's tender has been formulated more realistically, but it is nevertheless too conservative in certain respects.

[13] I am not persuaded, having regard to the nature of the issues that will require determination in the divorce action, that a forensic accounting investigation costing R100 000 will be necessary. The quotation in that amount obtained from a well-known forensic accountant was vague and non-specific. It seems to me from the undisputed information in the papers that it will not be in serious contention in the trial that the respondent is financially able to pay the applicant maintenance on a relatively generous scale should the trial court decide to make such an order - whether on a rehabilitative basis, or long-term.

[14] It also does not appear to be in issue that the respondent will be able to pay a major portion, if not all, of the expenses related to the maintenance of the parties' minor child, whether the child ends up being placed in his or the applicant's primary care. Whether the respondent's various business interests generate an income materially greater than the net income exceeding R122 000 per month identified in the papers before me is something that should be ascertainable by way of a well-directed discovery exercise. It is not obvious to me that that would require forensic investigation.

[15] The applicant's qualifications and employment history are matters of fact. An informed assessment of her ability to obtain employment and become self-sufficient might well be assisted by the evidence of an expert like an industrial psychologist, but I am not persuaded that the provision of the required opinion would require of the expert witness any industry reasonably justifying anything like R46 000 in fees ahead of the first day of trial in the divorce action.

[16] I accept that the discovered documentation may well be relatively voluminous in the main action in this case, but it should not be necessary for all of it to be perused by both counsel and attorneys. It is the attorneys' responsibility to go through the discovered documentation, perhaps assisted by an advice on evidence from counsel, and to identify what counsel should be briefed with for trial. There should be a sorting of the wheat from the

chaff. Acknowledging the desirability of an equality of arms between the litigants does not mean that an entitlement to a reasonable contribution towards costs contemplated in the rule should equate to a licence to litigate with undue profligacy or inefficiency. It should be remembered that the rule contemplates *a contribution* towards costs, not payment of the opposite party's untaxed attorney and own client costs in total in advance. We have an adversarial system of litigation and the remedy is not designed to provide for risk free litigation for the beneficiary of a rule 43 order or his or her legal representatives. As much as the beneficiary party should not be unduly prejudiced by an inequality of means in the litigation, so also should it not be incentivised by an interim award to delay its expeditious determination or make obtaining it unduly expensive.

[17] The applicant's claim for a very substantial payment from the respondent in respect of the furnishing of her rented accommodation makes it necessary for me to point out that the rule 43 procedure is also not intended to provide a mechanism to extract what would in effect be capital settlements from the other spouse in advance of judgment in the divorce proceedings. In the current case, the applicant has no entitlement under the parties' matrimonial regime to a capital settlement even in the principal case. In my view, the sum of nearly R700 000 that she claims in this regard would for practical purposes equate, were it to be awarded, to a capital settlement.

[18] The object of the remedy procedurally regulated by rule 43 is to enable provision to be made for the applicant party to maintain an acceptable standard of living pending the determination of the divorce and to mitigate the unfairness in the litigation that might otherwise attend an inequality of means between the parties to the divorce litigation. What might be judged to be an acceptable standard of living will depend on the circumstances, but it will often entail some compromise of the standard enjoyed while the parties lived together under a common roof. Whether the compromise is to be temporary or permanent will depend on the outcome of the divorce action. The figure upon which I have determined in respect of the furnishing of the accommodation rented by the applicant will allow her to purchase the essentials, including a washing machine and dishwasher. The accommodation is required only to provide for the reasonable living requirements of herself and her young son. I am satisfied, having regard to the interim award in its totality, that the applicant and Leo will be able to live comfortably enough pending the determination of the divorce.

[19] On the basis of my assessment of the evidence in the light of the aforementioned considerations the following order is made:

A. The respondent is ordered to provide personal maintenance for the applicant *pendente lite* as follows:

1. By payment to the applicant on or before the first day of every month, commencing on 1 September 2019, by way of debit order or electronic transfer into such account as the applicant may nominate of the sum of R20 500; the said amount to be increased by five per cent annually on the anniversary of the date of this order.

2. By maintaining or providing, and paying the subscriptions for, comprehensive cover for the applicant on his current medical aid scheme or on a scheme with substantially equivalent benefits and by meeting any co-payments that might be required in respect of any medical or dental treatment reasonably required by the applicant, including the provision of prescribed pharmaceuticals, spectacles and the like.

3. By paying the sum of R15 500 per month to the applicant, alternatively directly to the lessor, in respect of the rental of residential accommodation for the applicant and Leo.

4. By payment within 10 days to the applicant of a single sum in the amount of R15 000 in respect of a contribution towards the cost of the delivery of furniture to the rented accommodation procured by the applicant.

5. By payment within 10 days of the sum of R46 500 to the estate agent of the rented property occupied by the applicant to be held by the said estate agent in trust as a deposit as security in respect of the applicant's obligations in terms of the lease of the residential property rented by the applicant; such deposit to be repayable to the respondent, subject to the terms of the lease, when the applicant vacates the property upon the expiry or cancellation of the lease.

6. By payment within 10 days of the sum of R50 000 to the applicant by way of a once off contribution towards the cost of furnishing and equipping the rented accommodation.

B. The respondent is ordered to provide personal maintenance for the parties' minor son, Leo, *pendente lite* as follows:

1. By payment to the applicant on the first day of each and every month by way of debit order or electronic transfer into such account as the applicant may nominate of the sum of R7 500; the said amount to increase annually by five per cent on the anniversary of the date of this order.
2. By maintaining or providing, and paying the subscriptions for, comprehensive cover for Leo on his current medical aid scheme or on a scheme with substantially equivalent benefits and by meeting any co-payments that might be required in respect of any medical or dental treatment reasonably required by Leo, including the provision of prescribed pharmaceuticals, spectacles and the like.
3. By payment of all of the expenses related to and reasonably incurred in respect of Leo's education, including his school fees and his sporting and extramural activities, such payments to be made directly to the schools and goods and services providers concerned.

C. By payment to the applicant of a contribution towards her costs of suit up to and including the first day of trial in the pending divorce action, such costs to include the costs incurred or to be incurred by the applicant in the pending litigation in case no. 9427/2019, in the sum of R180 000, payable as follows:

   i. Within 10 days, R30 000;

   ii. On or before 1 October 2019, R50 000;

   iii. On or before 1 November 2019, R50 000;

   iv. On or before 1 December 2019, R50 000.

D. The costs of the rule 43 application shall stand over for determination in the divorce action.

A.G. BINNS-WARD

Judge of the High Court