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

Case number: 18559/2016

Before: The Hon. Mr Justice Binns-Ward
Hearing: 20 October 2020
Judgment: 21 October 2020

In the matter between:

JvW Plaintiff

and

CvW Defendant

JUDGMENT

BINNS-WARD J:

[1] In this matter the defendant in the divorce action currently before me has applied for the following relief:

1. That condonation be granted for the non-compliance with rule 43(3) and (4) of the Rules of this Court;

2. That Respondent (i.e. the plaintiff) makes a daily contribution to Applicant's costs from 19 October 2020 in the amount of R40 000 a day plus VAT until the divorce trial is finalised.

3. That Respondent pays the costs of this application;

4. Such further and/or alternative relief as the Court may deem appropriate.

[2] The application was served on the plaintiff's attorneys of record on Friday, 16 October, and set down for hearing on Monday 19 October, which was the fourth day of the trial. The plaintiff's legal representatives were not ready for the application to be argued on the Monday, which was an entirely foreseeable eventuality in my view. The plaintiff understandably desired to deliver an opposing affidavit, and his legal representatives, being taken up with the hearing of the principal matter, were in no position to assist him in that regard until after court hours on the Monday. The defendant's representatives, sensibly, did not press for the trial to stand down so that an answering affidavit could be produced during the course of Monday because the delay and the attendant wasted costs involved in that course would have been starkly disproportionate in the context of the issues involved in this matter and the evidence that had already been adduced which has established that the readily accessible means available to achieve a patrimonial settlement consequent upon the dissolution of the parties' marriage are distinctly limited.

[3] The opposing affidavit was delivered yesterday morning, at the commencement of the fifth day of the trial; and at the insistence of the defendant's legal representatives, the application was argued in the afternoon after the plaintiff had been recalled to give additional evidence in respect of the Travel Wallet account that is used in connection with the €85 per diem subsistence allowance that he is paid during the periods that he works for DBM, his employer, as a project engineer in R***.

[4] I was led to understand at the commencement of the trial that the only witnesses to be called in the plaintiff's case would be the plaintiff and an industrial psychologist who would testify as to the feasibility of the defendant, who has been a housewife for most of the duration of the parties' marriage, being able to go back into the labour market post-divorce, and assuming

that she could what her earnings would likely be. I was also led to understand that the defendant's case would consist of the evidence of the defendant and an industrial psychologist engaged by her to traverse the same questions as the expert engaged by the plaintiff.

[5] The plaintiff had previously already substantially completed his evidence in chief and been extensively cross-examined. He was in the witness box from midday on the first day of the trial until the afternoon of the third day.

[6] The plaintiff's expert has testified in chief, but her cross-examination has been stood down because of availability issues that were occasioned in the main by the need for the witness to attend what I was given to understand was a critical medical appointment on the morning of the fourth day of the trial.

[7] In the circumstances it was sensibly agreed by the parties' legal representatives that the defendant's evidence might be interposed. In the result, the defendant's evidence was adduced on the fourth day of the trial, and she too was extensively cross-examined until just before the luncheon adjournment on the fifth day. I understand that her evidence has also been substantially completed, save for the possibility that she might be cross-examined further on issues related to the additional evidence given by the plaintiff and that she is to be re-examined.

[8] It is evident from the summaries filed in respect of the two expert witnesses that there is little difference between them and the nature of those differences between their respective prognostications is well defined.

[9] The trial has therefore already progressed to a stage at which the court already has a quite detailed appreciation of how the battle lines are drawn between the litigants, and of the bases for their respective positions. Ms *de Wet* for the defendant informed me on Monday that there was a

reasonable prospect that the evidence in the trial on both sides might be completed by today, Wednesday, and, with argument, the trial might realistically be expected to be over by Monday next week. I have been requested not to sit tomorrow, Thursday, because of another commitment of the defendant's counsel. So what is being spoken about is that the trial is likely to last two more court days.

[10] There has already been a series of interlocutory proceedings between the parties in terms of rule 43.

[11] The most recent of these interlocutory applications was heard in the motion court as recently as 8 October, a mere two court days before the commencement of the trial in the divorce action. In that application, under case no.2195/18, the defendant sought the following relief:

1. That Respondent makes a contribution towards Applicant's outstanding legal costs in an amount of R279 815.05;
2. That Respondent makes a further contribution of R170 000 plus VAT to Applicant's costs in the divorce action;
3. That Respondent pays the amount of R45 000 plus VAT in respect of the costs of the first day of the trial;
4. That Respondent makes a daily contribution to Applicant's costs from the second day of the hearing of the divorce action in the amount fo R45 000 plus VAT per day, to be paid directly into Applicant's attorneys' trust account before 09h00 every day;
5. That Respondent shall pay the costs of this application;
6. Such further and/or alternative relief as the Court may deem appropriate.

[12] There is no indication on the court file in case no. 2195/18 of the order that was made in that matter, and counsel were unable to provide me with a copy of the order that should have

been issued by the registrar by this stage. I was informed, however, and this was confirmed by the uncontested evidence of the plaintiff, that the order made directed him to pay a further contribution of R100 000 towards the defendant's costs in the action, as well as her costs of the rule 43 application.

[13] The amount was to be paid in two instalments of R50 000. The first instalment has already been paid and I am given to understand that the second is to be paid at the end of October. For reasons to which I shall come, I have listened to the recording of the hearing before Gibson AJ on 8 October, and have ascertained from that that the order made directed that R50 000 was to be paid by the plaintiff before the commencement of the trial (which duly happened), and the second amount 30 days from the date of the order. Having regard to the provisions of the rules of court, that would be 30 court days from 8 October,[1] although it might be argued, if regard is had to the fact that the learned acting judge first expressed herself with reference to a period of one month, that she may have intended the 30 days to be 30 calendar days. The ambiguity may have to resolved by Gibson AJ if it becomes an issue.

[14] The plaintiff's counsel contended that the current application is an abuse of process because, so she argued, it was nothing more than an attempt to revisit various heads of relief previously sought before and already determined by Gibson AJ. Ms *Pratt* argued that it was evident from what the learned acting judge had said at the hearing on 8 October that the contribution to costs award made then was to cover the foreseen costs of the trial, including those to which the prayer for a daily contribution was directed. Ms *de Wet* for the defendant considered that the judge had not given a reasoned decision.

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[1] See the definition of 'court day' in Rule 1 of the Uniform Rules of Court: '*"**court day**" shall mean any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court*.'

[15] I found it odd that the judge should have directed that part of the award that she made should be paid only in four to six weeks after her order if she had not intended thereby for the order to cover all of the heads of relief sought by the defendant in terms of paragraphs 2-4 of the application before her. I therefore considered it important that I should endeavour to ascertain, as far as it might be possible to do so, whether she had said anything during the hearing that might cast light on her intention in formulating the order in the manner she did. I requested the parties' legal representatives to obtain a copy of the recording of the proceedings for me. This was duly done, for which I am grateful, and I was able to listen to the recording yesterday evening.

[16] It is quite clear on the recording that Gibson AJ rejected the application for relief in terms of paragraph 1 of the notice of motion before her, and in making the order for a further contribution of R100 000 towards the defendant's costs of suit in the action treated of paragraphs 2, 3 and 4 of the notice of motion taking them all together as one.

[17] In my judgment the contention by the plaintiff's counsel that the relief sought in respect of a contribution towards the defendant's costs has already been disposed of in the previous judgment was well made. It would not be proper or appropriate for me to purport to revisit matter already adjudicated by another judge. Appeal is not an available remedy in the context of rule 43, and I am in any event not sitting in an appellate capacity. In the circumstances I consider that the only matter to which the current application can be considered to be directed is at a contribution towards costs from the sixth day of the trial.

[18] I very recently expressed, in *A G v L G* [2020] ZAWCHC 83 (25 August 2020) at para 17-19, what I consider to be the applicable principles in respect of applications for contributions to costs in matrimonial cases:

[17] The purpose of the remedy has consistently been recognised as being to enable the party in the principal litigation who is comparatively financially disadvantaged in relation to the other side to 'adequately place [his or her] case before the Court'. Devising the measures necessary to achieve that object have long since been recognised as 'the paramount consideration' in such matters. Describing the rationale for the remedy in terms of 'constitutional imperative' does not, in my view, really add anything of substance to its historical character in the Roman Dutch common law; cf. the references to Merula, *Manier van Procedeeren*, Wassenaar, *Practyk Judiciëel* and Leyser, *Meditationes ad Pandectas* in *Van Gorkum and Noonan* [*v Davies* 1914 TPD 572, at p. 575], and in *Boezaart & Potgieter v Wenke* 1931 TPD 70 at 84-85. [Here I was referring to certain dicta in judgments such as *AF v MF* 2019 (6) SA 422 (WCC); [2020] 1 All SA 79 (WCC) and *Cary v Cary* 1999 (3) SA 615 (C) that have held that the right of a spouse in matrimonial litigation to obtain a contribution to costs is now sourced in, or buttressed by, s 9(1) of the Constitution.] There is indeed much in the Bill of Rights that is essentially a codification and entrenchment of the common law and the rules of natural justice. The significance of their constitutional entrenchment is to preclude any law or conduct inconsistent with them and to impose an obligation on the state (including, of course, the courts) to respect, protect, promote and fulfil the rights conferred thereby, including by interpreting any legislation mindful of those obligations,[8] and to constrain Parliament's powers of amendment.

[18] The proper approach to the determination of such applications is well established. Ogilvie Thompson J described it in the following terms in *Van Rippen* [1949 4 SA 634 (C)] at p. 639: '... the quantum which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court. In the exercise of that discretion the Court should, I think, have the dominant object in 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 [or husband, as the case might be] must be enabled to present her [or his] case adequately before the Court.' The essence of the approach encapsulated in those words has been reiterated in countless other reported cases.

[19] It is an approach that recognises that a contribution towards costs is not the same as a warrant to litigate at any scale of the applicant's choosing if that is disproportionate to the apparent reasonable requirements of the case or the means of the parties and the scale upon which the respondent is litigating. An entitlement to a contribution towards costs should also not be seen as equating to a licence to risk-free litigation. To quote once again from *Van Rippen*: 'By ordering a contribution the Court does provide the sinews of war; but, so far as I am aware, the Court has never under the contribution procedure provided the applicant's attorney with complete advance cover for all his fees.' That the provision of an equality of arms be balanced with maintaining an equitable exposure of both of the adversaries to the risks of the chilly consequences of the ill-considered incurrence of costs is a factor to be borne in mind in the exercise of the court's discretion. It will encourage a realistic approach by both parties to the litigation and incentivise them

> to focus on reaching early and mutually beneficial settlements where that is reasonably possible.
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> (Footnotes omitted.)

[19] The extent of the so-called 'sinews of war' to be provided in terms of the contribution towards costs remedy obviously depends in the first instance on the availability of the means of the parties. As noted in *Van Rippen*, referred to earlier, in the exercise of its discretion in these matters a court has regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation. All of these matters are considered with a view to assessing the adequacy with which the applicant party needs to be, or has been, enabled to place his or her case before the court.

[20] As also noted, the issues in this case have already been quite extensively ventilated and we have reached the closing phase of the trial. I have had cause before now to caution the parties that, objectively speaking, the common assets of the parties do not justify the scale on which they have litigated. I did so in the forlorn hope that they might be prevailed upon to settle. They each own a home, in the defendant's case lightly bonded and in the plaintiff's case quite heavily so. The defendant is entirely dependent on the plaintiff for her subsistence expenses and for those of the parties' two children, who live with her. Any expenditure on costs, which the applicant's case suggests is of the order of R80 000 per day, is bound to impact on the plaintiff's ability to provide for the maintenance of the defendant and the children in the short to medium term. This is so because the evidence that I have heard in the trial indicates that although the plaintiff has pension savings of the order of approximately 8 million, and for the next few months until the end of February next year might be expected to earn a net salary of between R100 000 and R110 000 per month by virtue of his special assignment work abroad, his net monthly net income thereafter will revert to the ordinary amount of about R73 000. Having regard to the

scale on which the parties live, which is relatively modest, that amount does not go far when spread over two households.

[21] The only place that the defendant's counsel was able to point to from which the plaintiff might readily liquidate funds to make a contribution is his access bond; and in that regard there will be an accessible amount of only approximately R100 000 after the plaintiff has fully complied with the order made by Gibson AJ. He also has own his costs to fund.

[22] Ms *de Wet*, if I understood her correctly, argued that Gibson AJ's order had been made on the understanding that the plaintiff had fully exhausted all available funds including those accessible via his bond account. Having read the papers in the application before Gibson AJ and listened to the recording of the hearing before the learned acting judge, that does not appear to be correct. It is evident from what the judge said during the hearing that she was cognisant of the R1,3 access bond facility and of the approximate amount available through it at the time.

[23] Ms *de Wet,* appreciating the limited funds readily available to the plaintiff, argued that he would be able to borrow more to provide the contribution that has been applied for. It was not demonstrated how this might be done. The plaintiff's pension savings cannot be put up as security for a loan by reason of the legislation applicable to pension savings.[2] Nor are such savings exigible in satisfaction of any judgment in money that might be granted against him. I also regard it as unlikely that the plaintiff would in the time between now and the anticipated end of the trial be able to raise an extended loan against the security of his immovable property. His summary of income and expenses, even if one takes a sceptical view of some of his expenses - most notably the amount in respect of the maintenance of his major son - does not give a picture that a lending institution would be inclined to look on favourably in the context of an application

[2] Section 37A of the Pension Funds Act 24 of 1956.

for a further mortgage loan. It is well known by now that lenders are required by law in terms of the National Credit Act to undertake affordability checks before granting loans.[3]

[24] The additional income in the region of R30 000 to R40 000 a month that the plaintiff will earn for three to four months when he returns to Romania next month is not available now to pay a contribution towards costs before the conclusion of the trial. By the time that income is paid, the trial should be over and judgment, including a determinative order as to costs, should have been given.

[25] In all the circumstances I have not been persuaded that it would be feasible or appropriate to order a further contribution towards costs at this stage. That is not to say that the legal representatives on either side are in danger of not being able to recover their outstanding fees and disbursements when the trial is over. On the contrary it is evident that the fixed assets of whomsoever should be ordered to pay the costs of the action will be sufficient to cover those debts, even if it means that one or the other of them might lose ownership of their homes. That is unfortunately the reality when litigation is pursued at such length on the basis of relatively meagre resources. As I have said, *both* of the parties are at risk in this regard.

[26] The application for a further contribution towards the defendant's costs will therefore be refused. The application was dealt with *en passant* on the afternoon of the fifth day of the trial. The costs will have been to a large extent absorbed in the day fees for that day. In the circumstances I do not propose to make any order as to the costs of the application, which effectively means that each party will bear their own costs in respect of any additional expenses occasioned thereby.

[27] The following order will issue:

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[3] See Part D of Chap. 4 of the National Credit Act 34 of 2005.

1. Save that condonation is granted in terms of para 1 thereof, the application by the defendant in terms of rule 43 under the notice of motion in case no. 18559/2016, dated 16 October 2020, is refused.

2. There shall be no order as to costs in respect of the said application.

A.G. BINNS-WARD
Judge of the High Court