IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No:6664/2019

In the matter between:

A F[....] (BORN M[....]) **Applicant**

and

M I F[....] **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: MONDAY, 19 JULY 2021

NZIWENI AJ

Introduction

[1] There is a divorce action pending between the parties, instituted by the wife on 9 February 2016, under case number 1893/2016. The marriage between the parties was concluded out of community of property and by antenuptial contract, with the inclusion of the accrual system.

[2] In this matter there are essentially two applications. The first one, which is the main one, was launched by the wife, and the second one is a counter-claim lodged

by the husband. For easy reference the parties will be referred to as per the main application.

[3] Davis AJ granted an order ("the rule 43 order") on 28 August 2019, the salient terms of which, as far as they are relevant to this application, are that:

1.1 The respondent was to pay the applicant an amount of R38 500 per month in respect of the applicant's and N[....]'s (their child) expenses (including household and further expenses she incurs when R[....] (their daughter) visits her).

1.2 The respondent would also pay the following expenses in respect of the applicant's residence, and related expenses.

2. The respondent would pay the applicant R6000 per month, with effect from 1 May 2019, without deduction or set off . . . as a contribution towards the costs of annual holidays for the applicant and N[....].

4. The respondent was directed to pay, on or before 30 September 2019, a contribution of R750 000 towards the legal costs incurred by the applicant to date in the divorce action.

[4] Considering the cost order granted already by Davis AJ, it is evident that the legal costs involved in this matter can easily run into millions of rands. There is no doubt that the respondent's net worth is significant. Consequently, this matter concerns a high net worth individual.

[5] Gleaning from the papers it is very apparent that there is a disparity in financial resources between the parties. It is thus palpable that the applicant, compared to the respondent, is not as financially resourced.

[6] Our law is replete with authorities that recognise that, in cases where the financial positions of the spouses in a divorce action are not on an equal footing, the economically disadvantaged spouse should be helped in securing a contribution for legal costs from the spouse who has greater means.

[7] It is so that the existence of heightened or intense hostilities in a divorce action often leads to the escalation of legal costs. It is important that legal costs be contained. I am quite alive to the fact that legal costs vary from case to case.

[8] Equally important is that once the marriage has broken down, parties who have decided to go their separate ways should do so and should be allowed to do so as soon as possible.

[9] The applicant instituted the divorce proceedings on 9 February 2016. Quite clearly, this divorce is taking very long to finalise and it promises to be still a long and complicated journey. The unfortunate corollary of this is that the legal fees are also running up. As already alluded to herein above, the respondent has already been ordered to contribute towards the applicant's legal costs.

[10] The cost of litigation between the parties thus far has been high conflict. In such matters where parties are warring, it is very easy for the entire estate to be consumed by legal costs.

Legal position

[11] Beyond the general issue of maintenance, it is trite that the court, in a proper case, can exercise its discretion and award an interim order for the payment of legal costs as it deems fit. The interim costs act as a vehicle which helps the spouse to protect her or his rights pending the hearing of the divorce action. The order can be varied from time to time, if necessary.

[12] It is settled that the interim legal costs order may be awarded at any juncture before the hearing of the trial, and up to any point of the proceedings. The awarding of an interim order in terms of rule 43, pending a divorce action, is in the discretion of the court. Proper exercise of judicial discretion is important.

[13] Because these proceedings are not appealable, it is thus critical that the virtually unfettered discretion of the court be exercised judicially, and in such a fashion that the order awarded be just and equitable in all spheres. The order

should not induce shock to the community's sense of justice. Court's should also be weary of, and alive to, disguised premature attempts at the distribution of assets.

The applicant's case

[14] In these present proceedings, the applicant staunchly maintains that the rule 43 order did not cater for her future legal costs. Thus the applicant currently seeks a variation of the rule 43 order, in order to obtain a further contribution towards costs.

[15] According to the applicant, the rule 43 order did not cater for her future legal costs. The applicant currently seeks variation of the rule 43 order, she is seeking a further costs contribution.

[16] The applicant alleges that as of 15 December 2020, she has incurred legal fees to the amount of R781 031,55. She additionally owes Mrs S[....] an amount of R409 217, which she advanced to her for legal costs. According to the applicant, the total amount she currently owes for her legal costs is R1 190 248.

[17] The applicant is also requesting the court to award her such costs as, according to projections, she will incur until the day preceding the first day of trial of the separated hearing. It is further asserted by the applicant that by 27 March 2020, she owed her attorney an amount of R362 057 in respect of fees and disbursements. She further contends that it was anticipated at that particular time, that the legal costs she would incur until the day preceding the first day of trial, would be an amount of R375 0000.

[18] At this juncture the applicant seeks, in total, an amount of R1 450 000 as a further contribution towards her legal costs. This amount, according to the applicant, will be used to settle the amount due to her attorney, to pay her debt to Mrs. S[....], and to attend to the further steps that remain in respect of the trial preparations. She maintains that notwithstanding the amount she is requesting, she will still be left with a deficit and that she will use some of her own funds to defray same.

[19] It is the applicant's contention that, in order to curtail her legal costs, she has had to abandon her junior advocate. According to her the respondent has the wherewithal to make the requested contribution to her costs. The applicant asserts that the respondent has spent R1 235 556, between July 2016 and 15 February 2019, on his own legal fees. She further alleges that, since the Rule 43 application, the respondent has paid a further R1 247173,16 for legal costs.

The respondent's case

[20] On the other hand, the respondent vehemently opposes the application. In addition to his opposition, the respondent has filed a counter-claim for an order *pendente lite* in the following terms:

'1.1 by deleting subparagraph 1.1 and substituting therefore the following:

> "by payment to the applicant of an amount of R28 500 (twenty eight thousand five hundred Rand) per month in respect of the Applicant's expenses (including household and further expenses she incurs when N[....] and R[....] visit her), with effect from 1 March 2021, without deduction or set off on the first day of every month, by way of electronic funds transfer or debit order, into such bank account as the applicant may nominate from time to time;"

1.2 by deleting sub-paragraphs 1.5.1 and 1.5.2 and substituting therefore the following:

> "1.5.1 by payment to the applicant of an amount of R20 000 (twenty thousand Rand) per month towards the monthly rental of the applicant's accommodation, with effect from 1 May 2021;
>
> 1.5.2 in the event of the applicant being required to move to alternative rental accommodation, payment of the rental deposit required in terms of the lease agreement and the costs of moving the household contents and her and the children's personal possessions to the alternative accommodation, including insurance payable in respect thereof;"

2. directing the Applicant to pay the costs of the application, in the event of Applicant opposing same.'

[21] In support of the counter-claim, the respondent avers that three material changes in circumstances have occurred since the Rule 43 order was granted, namely:

(a) His income has substantially decreased;

(b) The applicant's savings have increased;

(c) From March 2021 N[....] has been living in a university residence on campus.

[22] Regarding the applicant's application, the respondent contends that since the separation order was granted on 3 November 2019, the parties have only been required to prepare for trial on the separated issue. The respondent maintains that, given the fact that the separated issue involves only the determination of whether the parties had settled the divorce action, the amount of R1 450 000 claimed by the applicant is excessive and wholly unwarranted.

[23] The respondent further avers that the applicant has already received a sizeable amount towards her legal costs, in the sum of R825 000. He does not believe that the applicant requires a further contribution.

[24] The respondent also asserts that it is premature for this court to grant the relief sought by the applicant. According to the respondent, this is so because the court which is seized with the separated issue, may grant an order to the effect that each party is to pay its own costs. The argument continues that if the court seized with the separated issue makes such an order, he will not be able to reclaim the R1 450 000, should this court be inclined to grant the relief sought by the applicant.

[25] The respondent is also of the view that it is inappropriate for the applicant to receive further legal assistance, since this will amount to a donation, as she has already received contributions towards her legal costs, and also the fact that she is

about to receive ‘an extremely large capital amount’ in terms of the settlement agreement.

[26] It is further alleged in the respondent’s answering affidavit that the applicant failed to disclose in her founding affidavit that, since the rule 43 order, she managed to save approximately R250 000. According to the respondent, the applicant also did not reveal in her founding affidavit that since their son commenced his studies at university, the applicant’s expenses have decreased, while his have increased.

[27] The respondent does not believe that the facts of this matter require him to make a further contribution until the trial commences. It is further contended that it will be a travesty of justice to award the applicant a contribution towards her costs, in respect of a matter where the trial Court may eventually find that the action was settled.

Issues

[28] The first issue to be determined by this court is whether the applicant is entitled to the relief she seeks and, if so, in what amount. The second issue is whether the relief sought in the counter-claim should be granted.

Evaluation

The main application

Legal costs

[29] A bare perusal of the respondent’s papers reveal averments along the lines that the applicant would be unjustly enriched if the court is inclined to grant the relief she is seeking. Fundamentally, the respondent’s assertions characterise the relief sought by the applicant as being unfair towards him. The respondent also asserts that his net value, as a result of the effects of the Covid 19 pandemic and the national lockdown, has decreased.

[30] It was also vehemently argued that some of the disbursements for which an advance payment is sought, are not necessary and reasonable; for instance, the attendance of experts. It was also asserted on behalf of the respondent that the respondent is already paying substantial amounts towards the maintenance of his family.

[31] It is noticeable in these proceedings that the respondent has two counsels, whereas the applicant has only one counsel and an attorney. This is a stark reflection of the inequality between the parties caused by means, or lack thereof, to finance the litigation.

[32] It is of critical importance to keep in mind that the exercise of the discretion in awarding the interim costs order, has nothing to do with the fact that the applicant may finally lose the impending divorce action, or the separated issue. Instead, it has everything to do with attaining the ends of justice and offering constitutional protection to a spouse who requires it.

[33] Equally, the fact that the applicant is awarded an interim costs order does not necessarily shield her or him from having costs ordered against him or her, when the matter is finally heard.

[34] As it is with all interim orders pending the trial of the divorce action, their objectives, amongst others, are to relieve the economically disadvantaged spouse from economic hardship. More so in litigation involving spouses who don't have the same financial means.

[35] The interim orders are meant, amongst others, to address the inequality in the spouses' financial positions and unevenness in divorce litigation. They are meant to level the playing field, so that both parties are equally able to make well informed decisions regarding settlements or to progress to trial. Therefore, interim proceedings are not supposed to become stuck or burdened with the merits and demerits of the main action. Thus, the contention by the respondent that the applicant stands to receive a sizeable amount when the matter is finalised, is currently irrelevant.

[36] It is vitally important to keep in mind that the applicant seeking an order in terms rule 43, is not entitled to all her costs, but to a contribution towards the costs. Although it is undeniable in this matter that the respondent has much greater financial means, it is nonetheless clear from the founding affidavit that the applicant also has an ability to make some savings and that she manages her finances well.

Mrs S[....]'s refinancing

[37] Insofar as the debt owed to Mrs S[....] is concerned, it has been asserted that the applicant had to incur debt from Mrs S[....] to fund her legal costs. During the hearing of this application, the refinancing of the applicant's debt to Mrs S[....] was a contentious issue. Essentially, it was contended on behalf of the respondent that there is insufficient evidence for the court to make a finding that the monies were indeed given to the applicant to refinance her legal fees.

[38] At the outset I must make it very clear that, although I do not doubt the bona fides of the applicant when it comes to the debt owed to Mrs S[....], it is significant to note that, apart from the applicant alleging that the debt to Mrs S[....] exists, there is no evidence to support this claim, save for an averment that there is a written agreement between them.

[39] Ex facie the founding affidavit, what appears regarding this amount is simply an averment that it was used to refinance legal fees. No clarity is provided as to which legal costs were defrayed by the R409 271 refinancing and when. Currently there is no documentation to substantiate the existence of the debt to Mrs. S[....], in order to guide this court. Consequently, this debt is not easily ascertainable.

[40] It is my view that it is simply not enough for the applicant to state that the R409 217 of Mrs S[....] was used to refinance her for legal costs. Though I appreciate that the papers in this application should not be unduly prolix, it is nevertheless important that there should be some paper trail to confirm same and show how, when and where the money was received and spent.

[41] It is important that the court should be satisfied that the debt was incurred, and the money was expended. In instances such as the present one, failure to place such proof before the court may prove to be a fatal flaw. Particularly if the expense is disputed and Mrs S[....] was previously paid by the Respondent.

[42] In the absence of such documentation, I have not been persuaded that this court should make an order that Mrs S[....]'s refinancing should be repaid now.

Anticipated costs preceding first day of the trial on separated issues

[43] A review of the authorities demonstrates that the courts have recognised that issues like an interim contribution towards legal costs, cannot linger on until a final order is made at trial, or when the parties conclude a settlement agreement. They need to be dealt with straightaway.

[44] There is no doubt that this matter is still going to accumulate further legal costs. Davis AJ foresaw that the separation of issues would necessitate another trip to the court for the applicant to bring this application. The applicant requests that this court should award her the costs she is anticipated to incur until the day preceding the first day of the trial on the separated issue, to the amount of R375 000.

[45] Annexure "AF5", a letter written by the applicant's legal representative on 27 March 2020, plainly reflects the claimed anticipated amount.

[46] Though it is difficult to predict the precise costs to the day preceding the first day of trial, in this matter it is common cause that the parties still have to litigate the settlement issue. As matters stand currently, it is not far-fetched to think that these anticipated costs will eventually materialise.

[47] I am thus inclined, in the context of this matter, to grant anticipated costs, as they cannot wait until the separated issue is determined as they are currently justified.

Accrued legal costs

[48] According to the applicant, these are the costs owed as of 15 December 2020. These costs are supposed to be the easiest costs to determine. However, in this matter they prove to be the most difficult to ascertain. AF5 quantified legal costs which were owed by the applicant, as of the end February 2020, to be an amount of R362 057. The applicant claims that she currently owes her attorney R781 031,55 as of 15 December 2020.

[49] The separation of issues order was granted on 3 November 2019. On 27 March 2020, the applicant's attorney had already made an estimation regarding the costs required to litigate the separated issue, and had also specified the amount owed by the applicant in legal costs as at end of February 2020.

[50] Given the fact that the estimated costs and fees owed as at end of February 2020 were established by 27 March 2020, the question which begs to be answered is how was the figure of R781 031,55 arrived at.

[51] As far as the amount of R781 031,55 is concerned, there is a glaring anomaly in that the estimated costs had already been determined, as well as the amount of costs owed up until the end of February 2020. The difficulty is that this court is asked to award costs in the amount of R781 031,55; however, when the amount is viewed against the backdrop of both the estimated amount and the amount owed as at the end of February 2020, the numbers just do not add up.

[52] When one considers the figure of R781 031,55 a person is left wondering when and how did the other costs accrue, within the space of about 10 months. Even on a close reading of annexures "AF7" to "AF9" to the founding affidavit, they do not explain how the costs escalated to R781 031,55 from the end of February 2020 to 15 December 2020. Little wonder the respondent also queries the rapid escalation of this amount.

[53] Before me I do not have sufficient evidence to determine that the amount of R781 031,55 relates to costs which were necessary and reasonable in litigation. Put differently, there is not enough before me to make an informed decision regarding the justification for this claimed amount.

[54] The invariable consequence of this is that, having regard to what was placed before me, I am currently only able to award the following costs: anticipated costs until the day preceding the first day of trial to the amount of R300 000 and costs incurred as at the end of February 2020, to the amount of R362 057.

[55] As the order can be varied from time to time, the applicant can still claim those accrued costs as from the beginning of March 2020, when she has the necessary proof thereof. This brings me to the respondent's counter-claim.

Counter-Claim

[56] This court has to consider both the applicant's needs and the respondent's ability to pay.

[57] As already alluded to, merely by gleaning from the papers it is evident that there is a disparity in financial resources between the parties. It is evident that the applicant, as compared to the respondent, is not as financially resourced.

[58] It is common knowledge that the applicant has some money in the form of savings. The applicant was able to save some funds, amongst others, by saving some of the amounts paid to her by the respondent for holiday trips. Clearly, the amounts are meant to be used for a specific purpose. The applicant also said she will use the funds also to defray some of her legal costs.

[59] The parties are accustomed to a certain lifestyle, which involves holidaying. It appears that the respondent seeks to reduce the applicant's standard of living.

[60] Just because a child lives at a university residence, does not necessarily mean he will never be going home again. After all, children need the stability of home. Undeniably, the house where the applicant is currently staying is also in keeping with the status of the parties, and the capacity of the respondent to pay.

[61] It is an essential fact that the respondent never asserted that, due to the reduction in his net income, he is unable to satisfy the rule 43 order. Even if this court was disposed to accept that there has been a reduction in the respondent's net

income, that does not necessarily mean there is a material change in circumstances. A reduction in net income does not imply undue hardship to the respondent and inability to satisfy the order.

[62] It is so that a court can, in the exercise of its discretion, vary an order for interim maintenance if there is such a change in the circumstances of the parties as to justify a variation. In consideration of all the circumstances mentioned by the respondent, I am compelled to find that there are no material changes that warrant a variation of the order.

Conclusion

[63] The award of the relief sought by the applicant will not prevent the respondent from continuing with this matter. It will not deplete his funds; such was not argued. The respondent has significantly greater financial muscle than the applicant, notwithstanding the fact that the applicant managed to save some monies, or the fact that the respondent's income has decreased.

[64] In this matter it is common cause that the parties are not in an equal financial position. Clearly, in this matter a great injustice will occur if some of the amount sought by the applicant is not granted to her.

[65] Importantly, the applicant, as the respondent's wife, is still entitled to the assets and earning capacity of her husband. For that matter, as already alluded to, the issue in this matter is not about affordability.

[66] Certainly, it cannot be said that the applicant's approved legal costs are outrageous. The applicant's affidavit and her annexures, in my view, do justify the granting of the costs which this court is about to award to the applicant.

[67] I am alive to the fact that applications that seek to vary an interim order should not be granted lightly. However, in this matter, even the relief sought currently by the applicant cannot wait for the hearing of the divorce action, or the hearing of the separated issue.

[68] The applicant in this matter has succeeded in showing that her financial position, compared to that of the respondent, is sufficiently meritorious to warrant the grant of this particular an order. When it come to the costs currently under consideration, the circumstances of this matter do justify the variation of the rule 43 order.

Costs

[70] Basically, these costs are costs incurred and to be incurred in the preparation mainly for the hearing of the separated issue. In my mind, ordering that these costs, together with the costs occasioned by the hearing on 21 May 2021, be costs in the hearing of the separated issue, seems to be the most sensible thing to do.

[71] **In the result, I make the following order:**

(a) The respondent is directed to pay the applicant, on or before 30 July 2021, a contribution of R662 100 (rounded) towards her legal costs.

(b) Respondent's counter claim is dismissed.

(c) Costs to be costs in the hearing of the separated issue.

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CN NZIWENI

Acting Judge of the High Court

Appearances

Counsel for the Applicant:	Adv L Buikman SC
Counsel for the Respondent:	Adv B Pincus SC
	Adv C Small