

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 399/2021

In the matter between:

M. A. D[...] S[...] M[...]

Applicant

And

G. J. M[...]

Respondent

JUDGMENT

Rugunanan J

[1] The applicant resorts to the rule 43 application procedure for which she seeks a costs contribution of R40 000 from the respondent in respect of a pending divorce action which is set down for trial on 14 August 2023. Her counsel in argument submitted that the quantum of the contribution has been pruned to R20 000, in the light of discussions which culminated in a considerable narrowing of issues for adjudication at trial. These discussions are external to the papers before me and their content need not be mentioned herein.

[2] The application was launched on 6 July 2023.

[3] The applicant asserts in her founding affidavit that the contribution is required for covering her legal costs including counsel and *'the experts I will now need to appoint to value the respondent's estate'*.

[4] The primary assertions in the founding affidavit are disputed.

[5] In opposition to these proceedings the respondent seeks a dismissal of the application with costs.

[6] I must do the best I can in the circumstances to arrive at a rough and ready solution to the problem. I do so by applying trite principles applicable to founding affidavits in application proceedings.

[7] Having read the papers filed of record and having heard and considered the submissions for both parties, I have concluded as follows:

[8] The founding affidavit is deficient, notwithstanding the reduction of the contribution being claimed.

[9] In application proceedings it is trite that a litigant must make out its case in its founding papers.

[10] It is to the founding affidavit that a court will turn to determine what the complaint is (see *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H). The founding affidavit must in itself contain sufficient facts upon which a court may find in the applicant's favour (see *Elegant Line Trading 257 CC v MEC for Transport, Eastern Cape* [2022] ZAECHC 45 para 2). In motion proceedings it is trite that the affidavits constitute both the pleadings and the evidence- hence the issues and averments in support of the parties' cases should appear clearly therefrom (see *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D).

[11] The applicant asserts that the contribution claimed is fair and reasonable.

[12] Her opinion is subjective.

[13] She does not set out her claim in a manner as will enable the respondent or this Court to discern how it is constituted and quantified. There appears to be a substantial quantum leap between the amount of R40 000 claimed in the notice of motion and the amount of R20 000 demanded by her attorneys.

[14] The demand was made in a letter dated 13 June 2023 dispatched to the respondent's attorneys. Nothing is mentioned about the engagement of experts, though in argument applicant's counsel indicated that experts have been engaged with appropriate notification having been given in accordance with the rules of court.

[15] It is significant that the applicant's founding affidavit proffers no indication of the experts engaged and what the approximate cost of their services would be. For present purposes the founding affidavit must therefore be construed on the basis of the applicant's assertion quoted earlier in this judgment.

[16] The applicant further asserts that she is unemployed and requests this court to have regard to a full set of application papers in a previous rule 43 application heard by this Court on 10 August 2021.

[17] In keeping with the principle that a litigant must make out its case in its founding affidavit, it is not the practice for a court to be required to go behind a founding affidavit and have regard to extraneous or separate material. A court cannot be expected to trawl through such material and then draw inferences or speculate on its relevance to the issues at hand.

[18] Rule 43 applications by their nature are designed to provide a cost-effective and expeditious remedy for a party in need of interim relief. That need and the exigencies that gave rise to the proceedings must, in the first instance, be demonstrated in the founding papers.

[19] The applicant's bid for the Court to have recourse to material contained in her previous set of papers – which in my view has already been adjudicated upon – constitutes an abuse of process.

[20] The previous affidavit is voluminous and I was not referred to specific portions thereof.

[21] To expect a court a court to do so without any indication of the relevance of what portions are to be relied on is an invitation I decline to accept.

[22] The respondent squarely takes issue with a number of the applicant's averments, *inter alia* by asserting that she is self-employed and by attaching her bank statements to his opposing affidavit.

[23] He conveniently sets out material information in his opposing affidavit.

[24] Tellingly, the information indicates that not insubstantial sums have been periodically deposited into the applicant's Capitec bank account albeit during 2021.

[25] As for the respondent's financial resources, his bank statements indicate a balance of R624. 80 as at 14 July 2023.

[26] Despite placing affordability in issue, the respondent has made a tender the for payment of a contribution of R10 000.00 split over two instalments of R5 000.00, the first of which commences on 8 August 2023 and the second to be effected no later than 31 August 2023.

[27] I was informed from the bar that the respondent's tender was rejected and that the applicant persisted with her claim for R20 000.00.

[28] I am of the view that the applicant has not made out a case in her founding papers and where the respondent has placed affordability in issue, the applicant's repudiation of the tender is disingenuous.

[29] The parties have filed supplementary affidavits.

[30] Though concise, I am not persuaded that they are of any assistance in arriving at the conclusion which I have.

[31] For reasons aforementioned, the application is deficient.

[32] It is vexatious and ill-conceived.

[33] Being of the view that there are no *bona fide* grounds for affording the applicant the relief which she seeks, the fate of the matter must be determined in accordance with the respondent's prayer in his opposing affidavit.

[34] In the circumstances the following order issues:

[35] The application is dismissed with costs.

**M S RUGUNANAN
JUDGE OF THE HIGH COURT**

APPEARANCES:

For the Applicant: G. Brown
Instructed by
Wheeldon Rushmere & Cole Attorneys
High Street
Makhanda

For the Respondent: S. Sephton
Instructed by
Neville Borman & Botha Attorneys
Hill Street
Makhanda

Date heard: 1 August 2023

Date delivered: 3 August 2023