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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE NO: 27058/2012

DATE:24/08/2012

In the matter between:

A C C — Applicant

and

A L C — Respondent

JUDGMENT

MAKGOKA, J:

[1] This is an opposed application in terms of rule 43 of the Uniform Rules of Court. The parties were married out of community of property on 8 April 1989. The children born of the marriage are all major and self-supporting. The applicant claims from the respondent pendente lite: (i) maintenance for herself in the amount of R14 080; (ii) that the respondent continue paying her an amount of R2500 per month in respect of her motor vehicle (iii) that

the respondent maintain her as a dependent on his medical aid (iv) that the respondent pay the rental in respect of her rented property (v) a contribution of R5 000 towards her legal costs. A divorce action is pending in this court.

[2] Both parties are salaried employees. There is a dispute about each party's extra income. For the present purposes, I assume the parties' respective earnings to be what has been disclosed, namely R3 935 (the applicant) and R39 391.03 (the respondent) respectively. The parties no longer live together. The applicant estimates her monthly expenses in the amount of R18 015. The dispute between the parties centres around the following: the principle of interim maintenance for the applicant; payment of the applicant's rental; and contribution to her legal costs.

[3] There is a need in rule 43 applications to set out briefly, the dispute between the parties in the divorce action. That can only be achieved through succinct reference to the pleadings. The necessity therefor is to ensure that such issues have been genuinely raised with a bona fide intention that they be properly ventilated by the trial court. Put differently, this is to ensure that sufficient facts are alleged, which if proven at the trial, would entitle the applicant to the relief claimed. In Carstens v Carstens 1985 (2) SA 351 (SE) Mullins J said:
"Without laying down any rule of practice in this regard, and despite the desirability of keeping the costs of Rule 43 applications as low as possible, I am of the view that the Court should not be required to search for and peruse another file of papers. I am not informed of the case number of the divorce proceedings, nor even whether process was issued out of this Court. Furthermore Rule 43(2) requires the applicant's sworn statement to set out "the relief claimed and the grounds therefor". This suggests that Rule 43 proceedings should be self-contained...."

[4] Experience has shown that in some instances, a party armed with an interim order, frustrates the finalization of the divorce action, with full knowledge that the financial benefits derived in terms of the interim order, are unattainable at the divorce action. It is therefore necessary to interrogate whether the disputes are genuinely raised, regard being had to the purpose of rule 43, which is worth restating. In Nilsson v Nilsson 1984 (2) 294 (C) at 295F, the following was said:

"Primarily Rule 43 was envisaged to provide temporary assistance for women, who had given up careers or potential careers for the sake of matrimony with or without maternity, until such time as at a trial and after hearing evidence maintenance claims and, if children had been born, custody claims could be properly determined. It was not created to give an interim meal-ticket to women who quite clearly at the trial would not be able to establish a right to maintenance. The grey area between the two extremes causes problems."

[5] In the present case, the only aspect in dispute in the main divorce action is the amount of maintenance for the applicant. There is no issue between the parties as to division of the joint estate as the parties are married out of community of property without the accrual system. The only issue therefore is the principle of maintenance for the applicant, post divorce. No basis is set forth in the application why the applicant would be entitled to maintenance from the respondent, post divorce.

[6] It is important to know such basis, since, as a general statement of law, the reciprocal duty of support, which is one of the invariable consequences of marriage, comes to an end when the marriage terminates. However, s7 of the Divorce Act 70 of 1979 (the Act) empowers the Court granting a decree of divorce to make an order of maintenance in favour of one of the

spouses after considering the following jurisdictional facts: the existing or prospective means of the parties; the parties' respective earning capacities; their financial needs and obligations; their ages; the duration of the marriage; the standard of living of the parties prior to the divorce; the parties' conduct insofar as it may be relevant to the breakdown of the marriage; an order for the division of assets and any other factor which, in the court's opinion, should be taken into account.

[7] In each of the cases I have considered where maintenance was granted post divorce, the spouse in whose favour it was granted, was not earning an income as at the date of divorce. See for example Nilsson (supra); Kroon v Kroon 1986 (4) SA 616 (E) Carstens v Carstens (supra); Pillay v Pillay 2004 (4) SA 81 (SE) and Koorvertjee v Koorvetjee 2006 (6) SA 127 (C). In all these cases, what tipped the scales in favour of awarding maintenance seemed to be that there were minor children and the recipient spouses were unemployed.

[8] The general approach of our courts seems inclined to award little or no maintenance at all where one or more of the following factors are present:

(a) the woman is young or reasonably young;

(b) she is well-qualified;

(c) she has no children;

(d) she has worked throughout her married life and/or is working at the time she applies for maintenance;

(e) she is in good health;

(f) the marriage was not of long duration.

(See Nel v Nel 1977 (3) SA 288 (O); Qoza V Qoza 1989 (4) SA 838 (CK) and Pillay v Pillay 2004 (4) SA 81 (SE) at 87A-B. See however, Brink v Brink 1983 (3) SA 217(D)).

[9] In Kroon (above) the court stated three broad principles: First, no maintenance would be awarded to a woman who can support herself. Second, in considering whether maintenance should be ordered post divorce, the court's aim should be to ensure a 'clean break' between the parties. Third, the court may, however, award 'rehabilitative' maintenance to middle-aged women who have for years devoted themselves full-time to the management of the household and the care of the children of the marriage. Such maintenance is awarded for a period sufficient to tide them over while being trained or retrained for a job or a profession.

[10] The applicant is clearly excluded from the category of spouses for whom maintenance, post divorce, was meant for: (i) she has not been a housewife; (ii) there are no minor children; (iii) she is 51 years old); and (iv) she is employed. In any event, and principally, the applicant has not alleged any of the jurisdictional facts upon which maintenance, post divorce, could be granted in her favour. I put it to counsel that the issue of maintenance is unlikely to proceed to trial, to which counsel readily conceded. I see no reason why the divorce action should not be settled immediately. The parties' estate is too small to incur any further unnecessary costs in litigation. There shall therefore be no interim maintenance for the applicant to the extent she has not made out a case for such to be a triable issue.

[11] Next I consider the applicant's rental amount. The lease agreement is in the name of one Mr. Van der Riet, and the rental amount is debited against his account. The applicant's explanation, in a supplementary affidavit, is that Mr. Van der Riet is her friend, who signed the lease agreement on her behalf because she was not credit-worthy. Mr. Schoeman, for the respondent, rejected this explanation and urged me to find that the applicant and Mr. Riet have an intimate relationship. I tend to agree with that supposition. I take a dim view that the

applicant was not upfront with the Court on this issue. Her explanation only came up after the respondent raised it in his opposing affidavit. She should have disclosed it herself, if the relationship was that innocent. The only reasonable deduction I can make on all the facts, is that the applicant and Mr. Van der Riet are romantically involved and the latter is paying the rental amount on behalf of the applicant. It is therefore not her expense.

[12] With regard to contribution towards costs, similarly no basis has been laid for a proper consideration. Apart from mentioning this in her prayers, it is not motivated at all, save for an en passant reference in the body of the affidavit. The applicant has therefore not informed the Court the basis of the R5 000 she claims, e.g. how it is are arrived at; what unpaid costs have already been incurred, the projected amount up to and including the first day of trial, etc. There can be no better manner of placing such information before court than a draft bill of costs, or at the very least, a summary of fees schedule. This is how the Courts considering applications for contribution towards costs have, over the years, approached the matter (See for example Van Rippen v Van Rippen 1949 (4) SA 634 (C); Service v Service 1968 (3) SA 526 (D); Micklem v Micklem 1988 (3) SA 259 (C); Nicholson v Nicholson 1998 (1) SA 48 (W); Cary v Cary 1999 (3) SA 615 (C); Greenspan v Greenspan 2001 (4) SA 330 (C).

[13] In Van Zyl v Van Zyl 1947 (1) SA 251 (T) it was held that to succeed in an application for contribution towards costs, the applicant must set out sufficient facts which if established by her at the trial on the hearing of the evidence would justify the court in granting an order for restitution of conjugal rights1. In the present case, I have already found that the applicant has not set out any facts which would justify the court in granting her rehabilitative maintenance.

[14] In the recent past a trend has developed in this Division, in terms of which excessive and unmotivated amounts for contribution towards costs are claimed in rule 43 applications. The idea clearly is underpinned by the hope that the court would simply order an amount midway the high and the low. It is even common for counsel to submit that "the practice in this Division is to allow an Rx amount for contribution towards costs." I am not aware of such 'practice'. If it indeed exists, it is manifestly wrong. A blanket, proximate, 'one size fits all' approach, encroaches on the Court's discretion to consider each case on its own facts.

[15] To sum up: the applications for interim maintenance, the applicant's rental and contribution towards costs should all be refused. No case has been made out in respect therefor. I intend to make an order in respect of the issues which the parties are agreed on.

[16] In the result, the following order is made pendente lite:

1. The respondent is ordered to maintain the applicant as a dependent on a medical aid scheme to which he is a member, at his cost, and to pay all excesses which are not covered by the medical aid scheme;
2. The respondent is ordered to pay to the applicant an amount of R2500 per month in respect of the applicant's motor-vehicle;
3. The costs of this application are costs in the divorce action.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 20 AUGUST 2012

JUDGMENT DELIVERED : 24 AUGUST 2012

FOR THE APPLICANT : ADV AR VENTER

INSTRUCTED BY : HENNING ATTORNEYS, LYNNWOOD

FOR THE RESPONDENT : ADV Z SCHOEMAN

INSTRUCTED BY : KRAUEVICH & JANSE VAN VUUREN INC., CENTURION