REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT - LOCAL DIVISION)

CASE NO: EL 125/2010

CASE NO. ECD 325/2010

In the matter between:

PRINCESS VUYOKAZI POTELWA

(born MANONA) **APPLICANT**

and

ROY KHWEZI POTELWA **RESPONDENT**

REASONS FOR JUDGMENT

MAGEZA AJ

This is a second Application for relief in terms of Rule 43 of the Uniform Rules of Court. The Applicant seeks an Order that Respondent make a contribution to costs in the sum of R630 812.00 towards the Applicant's

costs of the divorce proceedings between the parties. These are legal costs and costs for asset verification, assessment and valuation.

APPLICANT'S CASE:

[1] Applicant, Defendant in the main action and Respondent were married at Butterworth in June 1984 in terms of the Marriage Act of Transkei No. 21 of 1978 (the Transkei Act). This Act excludes community of property and this is not in dispute. The Act has since been repealed.

[2] In August 2008 the Respondent, as Plaintiff in the main action, instituted an action against Applicant, defendant therein, for a decree of divorce. He tendered maintenance for the 3 (three) minor children as well as reasonable non-private school fees, expenses and provision for medical aid. No tender for maintenance is made in the action in respect of the Applicant and she has consequently filed a counterclaim for maintenance in terms of s 46 of the Transkei Act for an order that Respondent provides her with accommodation, a motor vehicle, personal maintenance and medical expenses. According to Applicant, Respondent disputes her entitlement to these and the issues 'remain hotly contested' (Applicant's averment).

[3] Applicant lives with the children in Vincent, East London whilst Respondent lives in Idutywa where he practices as a medical practitioner

and businessman. She is unemployed, has no income and is dependent on the Respondent. Following their marriage, she stopped teaching and assisted the Respondent in setting up and managing the dry cleaning businesses set up by Respondent.

[4] She first commenced Rule 43 proceedings on 9 November 2008, before Chetty J and on that date an Order that the Respondent, *inter alia,* make a contribution towards costs in the sum of R25 000.00 was made. Following upon the granting of the aforesaid Order, the Respondent failed to comply with the Order necessitating the launch of an Application for the committal of the Respondent to jail for Contempt of Court. The Application for Contempt was commenced in March 2009, Respondent opposes the same and it has since then been postponed on at least 7 (seven) occasions at Respondent's instance and request.

[5] In the interim, the divorce trial was set down for hearing on the 25th of June 2009 and on this day, settlement negotiations were held for the first time and these lasted all of two days. At these settlement negotiations Respondent, as Plaintiff, was represented by senior counsel. Applicant avers, 'a comprehensive deed of settlement was drafted which at the eleventh hour, the Respondent refused to sign, despite indicating agreement in principle throughout the days of negotiation'. At present Applicant believes that all settlement negotiations have been exhausted

and it is, in her view, given the Respondent's attitude, unavoidable that the matter will regrettably proceed to trial.

[6] In order to support her claim for maintenance in the main action, the quantum thereof and Respondent's ability to provide the same, Applicant believes that she requires valuations of the numerous properties owned by the Respondent, as well as valuations of his businesses, shares, investments and other assets. According to her, in the earlier Rule 43 Application heard by Chetty J, the main defence which the Respondent raised to the costs of a Sworn Valuator, or expert Accountant was that Respondent argued the need for such Valuator or Accountant or Forensic Auditor as premature, with Respondent stating in paragraph 58.2 of his previous affidavit resisting the contribution towards costs that "*documentation and valuations will be obtained in the discovery stages of the trial action and there is no need, at present, for unnecessary costs to be incurred as alleged by the Applicant*".

[7] Furthermore, Applicant contends that discovery having now been made in the main action and Respondent having failed to file any of these documents and valuations, it is, self evident from the inadequate discovery affidavit filed by the Respondent, that he has not obtained the valuations of any assets whatsoever. In any event, the discovery stage of the trial has now dawned, and she wishes to pursue the valuations as a matter of urgency.

[8] **The Respondent's Assets.**

These are:

(i) a well established medical practice in Idutywa;

(ii) 3 (three) dry cleaning businesses in Mthatha and Idutywa;

(iii) shares in Idutywa Hotel;

(iv) 2 (two) motor vehicle spare parts businesses in Mthatha and Idutywa;

(v) shares in a Total garage;

(vi) share portfolio held in JSE listed companies;

(vii) unit trust and investment policies held in Liberty, Old Mutual and Sanlam valued conservatively at R10 000 000.00 (ten million Rand).

In addition, the properties (residential and commercial) owned by Respondent include the following:

Erf No.	**Description**	**Estimated Value**
76, 257, 324	Dutywa vacant plots	R 340 000.00
126, 413	Dutywa dilapidated structures	R 315 000.00
322, 323, etc.	Dutywa & Butt., & Mthatha	

	Res. Dwellings	R12 430 000.00
503	Port St Johns Guest Lodge	R 2 800 000.00
27058	Vincent Gardens East London	R 3 500 000.00
10283	Vacant site at Bonnie Doon, E L	R 1 500 000.00
1939	Upmarket property in an estate Fourways Ext 34 Johannesburg	R 4 500 000.00
15366	Office Building Central East London	R10 000 000.00
	TOTAL	**R35 385 000.00**

[9] Applicant is of the view that taking into account the immovable properties held by the Respondent, his movables and other assets, his estate is conservatively estimated at R50 000 000.00.

Arising from all the investments, businesses, rentals and practice, Respondent's conservative monthly income is estimated at R400 000.00 (four hundred thousand Rand).

[10] Applicant has attached indicative costs of valuation work that can be done by a reputable accounting/auditing (KPMG) firm and this is in the sum of R455 000.00 and a further sum of R50 000.00 in respect of the services of a forensic investigator.

Applicant has further filed a detailed legal costs breakdown for trial preparation, consultation with the use of commensurate counsel including her attorneys up to and including the first day of hearing for a total of R98 724.00.

RESPONDENTS CASE.

[11] The gravamen of Respondent's reply to Applicant's claim can be summed up as follows:

11.1 He concedes that on the 25 June 2009 the parties entered into settlement negotiations. These, according to him, 'were scuppered by Applicant's excessively extravagant, unjustified and extortionate demands' paragraph 15 of answering affidavit.

11.2 He states that the present Application is unnecessary in that the award of Chetty J in November 2008 provides Applicant sufficient cover to proceed to trial. The argument from the bar on Respondent's behalf is that if she did utilise such funds for the 25 June 2009 trial, then she should have no need for more contribution to costs. In any event the Respondent, out of his own goodwill, tenders an amount of R20 000.00.

11.3 In so far as the valuations pertaining to his estate, he states at paragraph 37, 'The homework referred to by the Applicant herein is totally unnecessary and uncalled for since the contents of the estate have absolutely nothing to do with her, our marriage being out of community of property and each of us having a distinct and separate estate'.

[12] Now the starting point in these matters can be summarized as follows:

This relief (contribution to costs) is available to a spouse *pendente lite* and is founded on the duty of support. – See Chamani v Chamani 1979(4) SA 804 (W).

These are costs that are necessary and as would be adequate for Applicant to prepare for and conduct pending litigation. – See Senior v Senior 1999(4) SA 955 (W).

In determining the quantum of the contribution, the Court will have regard to the circumstances of the case, the financial ability of the parties, difficulty of issues pertinent thereto and the levels at which the manner of litigating is pitched. In this evaluation, the court does so bearing in mind that it has a discretion that it has to exercise judiciously and for sound reasons.

In Nicholson v Nicholson 1998(1) SA 48 (W), Wunsh J at page 51-I observed, “Whatever the position may be where spouses are married in community of property and the Applicant is claiming access to funds in the joint estate, the starting point in a case like this should be the Applicant’s party and party costs which are subject to adjustment according to the factors mentioned in the cases, such as the means of the husband, the scale upon which he is litigating and the complexity of the case”.

Further at page 52-B, “I can see no logical or rational basis for excluding the Applicant’s attorney’s fees from the costs to which a contribution must be made”.

In cases where the Respondent is litigating through the utilization of the best Counsel the court will have regard to equality of arms and means.

[13] In Cary v Cary 1999(3) 615 (C), Donen AJ, after considering the right to equality enshrined in s 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996, commented at p 621 – D, “By similar reasoning in this matter, Applicant is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her husband. The Applicant would not be able to present her case fairly unless she is empowered to investigate Respondent’s financial affairs through the forensic accountant appointed by her. That is, Applicant will not enjoy

equal protection unless she is equally empowered with 'the sinews of war'".

[14] In an unreported Rule 43 judgment of this Division (Olivier v Olivier – case 1298/04) delivered by Leach J, (some 6 years ago) dealing with a contribution to Applicant's costs in the proceedings, the Court awarded Applicant the sum of a R150 000. It is to be noted that this sum related only to legal costs. At page 5 para 2 the Court observed, "Turning to the contribution towards costs, both parties have employed senior counsel, which is understandable if one bears in mind the considerable amount of money in the matrimonial cake about which they are fighting. Litigation is an expensive business. It is impossible to know what the actual expenses of the parties will be. When one hears that both sides are hell bent on taking preliminary issues to the Constitutional Court, it is clear that lengthy and protracted litigation lies ahead. Recently, in an opposed divorce which was not unduly complicated and which came before me on a review of taxation, the taxed bill of one side up to and including the first day of trial (when the matter settled) exceeded R90 000.00. Consequently, a substantial contribution would have to be made, albeit bearing in mind that a contribution is merely to provide the "sinews of war" and not payment of all the anticipated expenses of the other party. In these circumstances, I was of the view that, at this stage, a contribution of R150 000.00 was called for".

Further at page 6 the learned Judge went on to say, “While it is so that a contribution towards costs is often calculated on the basis that it includes costs up to and including the first day of trial, where-after an application can be brought for each succeeding day, I did not attempt to determine the contribution *in casu* in that way. Instead, taking into account the fact that the matter would probably run well beyond the first day, I ordered a contribution in a large sum towards what is undoubtedly going to be a substantial fee liability”.

[15] Some 10 (ten) years ago in Greenspan v Greenspan 2000(2) SA 283 (C), a case much analogous on the facts with the present, Hlophe DJP (as he then was) in summing up at p 290 B – F commented, “The Applicant seeks an Order that the Respondent should pay a contribution of R250 000 towards the Applicant’s costs in the divorce action. It is common cause between the parties that the Respondent has already paid about R56 000 as contribution towards the Applicant’s costs in the divorce action. The Applicant contends that that is just not good enough, regard being had, *inter alia,* to complex factual issues that will arise with regard to the fixed property in Houghton, coupled with the fact that the Respondent himself is conducting litigation on a luxurious scale. It is a fact that the Respondent’s legal team, save Mr Rogers, comes from Johannesburg. This includes senior counsel and a Johannesburg Attorney. It is also a fact that the Respondent’s attitude throughout has been that his financial circumstances are irrelevant for purposes of the

divorce action. That is obviously not true, as the Respondent will soon find out. The Respondent was described by Lategan J as 'an enormously wealth man in any terms … [who] is worth in the vicinity of R100 million'. This is not to say the Respondent should be punished for his wealth. The Applicant is entitled to litigate on a scale commensurate with the means of her husband. She is certainly not expected to litigate upon the basis that she has to watch every penny that is spent in litigation. Her husband is clearly conducting litigation on a luxurious basis. The Applicant likewise is entitled to conduct litigation on a similar basis (see *Glazer v Glazer* 1959 (3) SA 928 (W) at 932; *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 52; *Cary v Cary* [1999] 2 B All SA 71 (C) at 76 – 7.

[16] I have for good reason set out the aforegoing to highlight not only the right of Applicant to the relief sought but to provide a comparative analysis of decisions apposite the case before me. The Respondent has both in his replying papers under oath and in argument before me, not sought to deny the extent of the estate at his disposal. He steadfastly seeks to repel Applicant's claim fundamentally on the ground that Applicant, being married out of community, has no right to interrogate his estate. In his view, it would appear, her claim for maintenance has no bearing on his assets. This cannot be so in light of the fact that the trial court would, if the right to maintenance is proved, have to make an assessment of the Respondent/Plaintiff's ability and means to provide the maintenance. From a perusal of the papers I am of the view that

Applicant, as Defendant, could succeed in its counterclaim thereby rendering imperative the assessment of his estate.

[17] The Respondent has been less than truthful in the manner in which he has conducted litigation to date. He could have easily obviated the need to have forensic investigations and valuations by making good on the undertaking he made to this Court in the first Rule 43 hearing of the 9th November 2008 by discovering same as undertaken. Not only does he not do that, he boldly misrepresents how that Court came to the award of R25 000.00.

[18] The inexplicable refusal to put to bed a settlement agreement in June 2009 when the matter had been set down for trial is starkly indicative of the probability that Respondent is prepared to wear out the Applicant utilising the vast resources at his disposal. The costs of the two days with senior counsel in attendance were needless, to say, a tragic dissipation of resources.

[19] On the papers before me, the Applicant has shown a *prima facie* case and, being unemployed and without assets, lacks the means to conduct legal proceedings. In light of the manner in which this matter has progressed since the award of R25 000, it is certain that the same would have been used up as at the settlement negotiation stage. Furthermore, I am quite satisfied that given the scale and luxury with which Respondent

is litigating and the use of the best legal teams including senior advocates, Applicant is entitled to commensurate ‘sinews of war’. This does not mean that she is entitled to all the costs set out in her papers. I am in agreement with the aforegoing authorities on the expensive nature of litigation and in my view an amount in the order of R90 000.00 up to the first day and including all necessary preparation is eminently reasonable in light of the facts.

[19] The sinews of war are not limited to the legal costs. Where parties in a matrimonial dispute are able to minimise issues by exercising rationality and reason, they avoid the unwarranted escalation of costs. Where however, as in the present instance, one party in whose favour resources are weighted does not co-operate by providing information relating to assets where the evaluation of these are relevant to the determination in the main action, our Courts will come to the assistance of an Applicant. In so far as the complexities of assessing and valuing the vast multifaceted estate at Respondent’s disposal including the valuation thereof, such work would require the services of auditors and expert valuators. Indicative fee structures have been submitted by Applicant. Having been a commercial legal practitioner for years I am cognisant of how expensive these services are and whilst it is so that these services are expensive in light of the globalised nature of reputable auditing firms, I would think that a sum in the order of R190 000.00 would be a useful

contribution towards these costs. In this I include the costs anticipated for the forensic investigators.

In the result, I make the following order:

1. That the Respondent is to make an interim contribution to costs of preparation to Applicant in the sum of R280 000.00 inclusive of experts and associated legal costs.

2. That the Respondent pay the amount as follows:

    2.1 R100 000.00 on or before the 31st March 2010

    2.2 R100 000.00 on or before the 31st May 2010

    2.3 R80 000.00 on or before the 30th June 2010

3. That the costs be costs in the main action.

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P.T. MAGEZA

ACTING JUDGE OF THE HIGH COURT

MATTER HEARD ON : 11 MARCH 2010

REASONS DELIVERED ON	**:**	**15 MARCH 2010**
COUNSEL FOR THE APPLICANT:		**MR COLE**
ATTORNEYS FOR APPLICANT	**:**	**MAVONYA MOSHESH & ASSOC** **21 KING STREET, SOUTHERNWOOD** **EAST LONDON**
COUNSEL FOR RESPONDENT	**:**	**MR ZILWA**
ATTORNEYS FOR RESPONDENT	**:**	**SMITH TABATA INC** **57 WESTERN AVENUE, VINCENT** **EAST LONDON**