

**REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NR: 77979/2018

(1)	REPORTABLE:	YES/NO
(2)	OF INTEREST TO OTHER JUDGES	YES/NO
(3)	REVISED:	NO

DATE: 12 January 2024

SIGNATURE:

In the matter between:

Z[...] G[...]

APPLICANT

And

J[...] G[...] C[...] G[...]

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 12 January 2024

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] This case highlights an unfortunate trend by some of the litigants in matrimonial matters who are legally represented and appear to have access

to financial resources to litigate various aspects of their disputes before their marriages are dissolved by the courts. In this case, there have been various court processes undertaken by the parties since the divorce summons was issued. Some of these court cases appear to have nothing to do with the parties' divorce dispute. However, on careful consideration, it becomes clear that these disputes concern the parties' finances which are central to their divorce action.

[2] This case demonstrates how expensive family-related disputes can be when parties do not negotiate in good faith to reach reasonable and amicable solutions. Particularly when parties actively attempt to understate their incomes, hide their assets, and move money derived from different sources between different bank accounts, some of which may not be opened in their names. Inevitably, this leads to different court actions and applications where parties pursue avoidable litigation against each other at great costs. When parties fail to sensibly resolve their matrimonial disputes, they will be unnecessarily stripped of their much-needed financial resources. Ultimately, legal representatives become the real financial beneficiaries of this litigious behaviour.

[3] Among others, the respondent has already been ordered to pay interim maintenance and to contribute towards the applicant's legal costs. The court is first called upon to determine whether the respondent should be ordered to make a further contribution towards the applicant's legal costs. If so, to determine the actual legal proceedings and the amount for which the applicant is entitled to claim and receive such contribution from the respondent. The second issue that must be determined is whether this court can order the respondent to contribute towards the applicant's legal costs that have already been incurred.

B BACKGROUND

[4] The applicant is a businesswoman who is a sole member of a registered close corporation (hereafter "ACC"), which conducts business as a guest house. She is the exclusive owner of the exotic bird breeding and alpaca farming

activities which she conducts through a company that she registered (hereafter “CL”). The respondent is a businessman, an independent contractor, a director, and the sole shareholder of a private company (hereafter “M Company”). M Company’s business originally included exotic bird breeding and alpaca farming activities. M Company currently trades in agricultural products.

- [5] The parties are married to each other out of community of property subject to the accrual system. However, they are engaged in a highly contested divorce action. On 26 November 2019, the respondent was ordered to contribute an amount of R 30 000.00 towards the applicant’s legal costs. The applicant seeks an order that the respondent pay a further contribution towards her legal costs in the sum of R 2 441 846.91. This is for the legal costs that the applicant allegedly incurred up to and including the first day of the divorce trial. The respondent opposed this application.
- [6] The parties’ trial for divorce was set down from 30 October 2023 to 10 November 2023. This application was argued a week before the commencement of the parties’ divorce trial. While the affidavits are silent on the issue of urgency and the matter was not placed on an urgent court’s roll, there appears to be some dispute in the parties’ practice notes whether this matter should be dealt with on an urgent basis. The issue of urgency was not developed during the oral hearing. In any event, the matter was not placed on an urgent roll and none of the parties is burdened with the onus of proving urgency. There are no children born of the parties’ marriage, which may have dictated the matter being dealt with urgently.¹

C CONTENTIONS OF THE PARTIES

i) Applicant’s version

¹ See *S v S and Another* 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC) para 56, where the Constitutional Court held that ‘... it is incumbent on High Courts to hear on the urgent roll any matter adversely affecting the best interests of the child’.

- [7] According to the applicant, there is a disparity in the financial resources between the parties and the respondent has the means to contribute towards her legal costs. The applicant alleges that the respondent is wealthy and has several sources of income. She claims that the applicant failed to make full and frank disclosure of all his financial circumstances. The applicant contends that her financial position since the respondent was initially ordered to contribute towards her costs has deteriorated.
- [8] The applicant alleges further that she has been forced to borrow money from her friends and family members to cover her legal costs which have increased significantly. Further, she owes her mother an amount of R 1 972 333.48, her friend, Steyn an amount of R 371 982.50, and her other friend, Jansen an amount of R 196 465.42. The applicant alleges further that she entered into loan agreements with all these individuals with fixed-term repayment terms. She alleges further that her mother who had been her major source of financial assistance lost her monthly source of income due to retirement and is not able to render further financial assistance.
- [9] The applicant alleges that from November 2022 to May 2023, the respondent's bank statements demonstrate that he earned a total amount of R 9 889 166.28 which averages out to R 1 648 186.05 per month. The applicant further contends that the respondent failed to disclose an amount of R 220 657.94 that he earned between 1 January 2018 and 19 July 2023 from Maizefield Lime and Logistic CC. Further, due to the respondent's understatement of his income, the applicant caused subpoenas to be issued against relevant witnesses and obtained information from about five companies where the respondent has some financial interest as well as from the respondent's accountant.
- [10] The applicant contends that one of these companies found no evidence of any dealings with the respondent. However, the other company paid the respondent a monthly gross profit share of R 45 000.00 in July 2023. She contends further that in the same company, there is a balance of R 582 509.08 that is held and accrues interest which is available on the

respondent's request. In her founding affidavit, the applicant alleges that the total interest earned by the respondent from the same company is R 186 511.21 whereas in her heads of argument, it is argued that the respondent earned interest in the amount of R 1 861 511.21.

[11] The applicant alleges further that the respondent also earned an amount of R 532 042.00 from a Kynoch Fertilizer Division of Farmisco (Pty) Ltd in gross employment income which the respondent failed to disclose to this court. According to the applicant, the M Company also received money from other different companies and the balance on its bank account is R 780 561.80. M Company also invoiced another company for February, March, and May 2023 for an amount totalling R 46 315.25. The applicant alleges further that all the amounts listed above are a far cry from the amount that the respondent claims he earns per month from his income. The applicant alleges further that between 1 June 2023 and 1 July 2023, the respondent received payment of more than R 4 000 000.00 into his bank account.

[12] It is alleged further that since the commencement of the divorce proceedings, the respondent made several donations to various NPOs and church organisations. Further, in 2023 the respondent donated amounts totalling R 1 663 854.00 to these organisations. Further, the respondent is a wealthy businessman and sales representative of agricultural products which he conducts in his personal capacity and through M Company. He sells seeds and chemicals. According to the applicant, the respondent lives rent-free from property owned by ACC. In 2023, the respondent purchased a luxurious Toyota Hilux bakkie worth approximately R 700 000.00 and Mahindra bakkie worth approximately R 250 000.00

[13] The applicant claims not to have the financial means to litigate at the same level as the respondent. She claims to have spent an amount of R 2 218 924.26 on her current attorneys of record which includes the costs of the eviction application brought by ACC against the respondent. However, it is alleged that this amount does not include legal fees paid to the applicant's

erstwhile attorneys. The applicant alleges further that she is liable to repay loans of approximately R 2 546 921.40 to her family and friends.

[14] The applicant contends that she needs a substantial contribution from the respondent for her to prepare for the divorce trial which has been set down for ten days. This includes the divorce action and loan action which covers substantial documentation. It was submitted on behalf of the applicant that these matters will require substantial preparation by her legal team, which includes two attorneys, one candidate attorney, and a senior counsel. These professionals each have specific charge-out rates based on their level of experience. Further, the applicant is liable to pay R 2 441 846.91 worth of legal fees, which includes the costs of expert witnesses. The applicant alleges that her counsel fees are on a much lower scale than the fees of the respondent's senior counsel.

[15] The applicant alleges further that the parties are engaged in several legal disputes that require financial resources. She contends that as the sole member of ACC, she was forced to bring eviction proceedings against the respondent for his unlawful occupation of the property owned by ACC, where both parties reside. Further, the respondent instituted legal proceedings against ACC which she was also forced to defend at great costs. The applicant also brought an application for the separation of issues that she also had to oppose at a further cost to herself. The applicant further alleges that there had been over fifteen other ancillary legal proceedings between the parties. It was submitted that some of these proceedings were aimed at forcing the respondent to comply with the rules of court because he adopted a strategy that was aimed at litigating the applicant into submission by wearing her down emotionally and financially by ignoring his obligations in terms of the Rules.

[16] Concerning her income, the applicant contends that she does not draw regular income from CL. However, she can derive income depending on the breeding season and the number of chicks that are successfully reared or if she sells mature birds or breeding pairs. She alleges that last season, she

only sold one chick for a period of eight months for approximately R 215 000.00. The applicant alleges that as the 100% shareholder of CL, her business interest in this company amounts to R 1 347 500.00. Further, she rears birds for various breeders from which she receives *ad hoc* income. She alleges that since January 2023, the total income derived from this activity is R 958 900.00 which was used to pay for her legal fees and food for the birds. Some of these birds have an expensive diet that comprises nuts, fresh fruit, oat hay, and vegetables.

- [17] According to the applicant, her guest house derives a monthly income of between R 50 000.00 and R 70 000.00. Most of this income is consumed by the expenses of the guesthouse and she is not able to derive an income therefrom. Further, the income derived from the guesthouse is also utilized to pay for rates and taxes, relevant insurance, internet, and domestic staff. She claims that, unlike the respondent, she does not have a pension interest. The applicant alleges that her monthly expenses amount to approximately R 20 299.00 and she pays between R 10 000 and R 20 000.00 monthly from CL to ACC.
- [18] The applicant contends that she is entitled to prepare and present her case which entitlement is rendered meaningless if she is unable to prosecute or oppose interlocutory applications due to lack of financial resources. She is of the view that the contribution sought from the respondent will enable her to adequately prosecute her claims against him. While this is not a separate prayer in her notice of motion, the applicant in her founding affidavit also sought a contribution towards her maintenance in the form of medical costs for a period of three months and a resettlement allowance in the form of a replacement vehicle.
- [19] According to the applicant, given the fact that the divorce action and loan action have been consolidated, the estimated bill of costs drawn by her tax consultant includes the loan and divorce actions because these disputes and their evidence are intertwined, and overlap. She alleges that the respondent's

claim in the loan action relates to the parties' personal expenses which form part of his maintenance obligations towards her.

- [20] The applicant denies that she has hidden excessive amounts of income in her mother's Investec Call Account. She alleges that she decided against opening a separate account but to utilise her mother's Investec Call Account where she deposited funds from CL. She contends that the money deposited into her mother's Investec Call Account does not belong to her but belongs to CL. The applicant stated in her replying affidavit that everything that was paid into this account originated solely from the exotic bird breeding and alpaca farming activities which were part of the universal partnership between the parties and is excluded.

ii. Respondent's version

- [21] According to the respondent, this application constitutes an abuse of the court process. This is because despite being duly legally represented throughout the divorce proceedings that were instituted in 2018, the applicant decided to lodge this application shortly before the divorce trial commenced. The respondent alleges that the applicant is seeking to obtain an inflated, punitive, unaffordable, and exaggerated further contribution towards her legal costs from him.
- [22] The respondent contends further that there is no indication that the applicant's legal representatives will no longer be representing her if the court does not order that he should contribute towards her legal costs. According to the respondent, should he be ordered to contribute to the applicant's legal costs in this application, that will be the same as being ordered to pay costs for the divorce trial upfront, where a non-matrimonial action that has been consolidated with the divorce issue will also be heard. While these two matters are consolidated, the respondent contends that the disputes and evidence are neither intertwined nor do the two actions overlap. Further, the applicant is only a party to the divorce action and not the loan action while the respondent is a party in both actions.

- [23] The respondent contends that the applicant failed to fully disclose all material information regarding her financial affairs. Further, the applicant failed to completely disclose her financial affairs and income as well as the benefits she obtained from CL. She did not provide full disclosure of the breeding records of the lucrative exotic bird breeding business that she conducted since 2018. Further, she also did not provide particulars regarding the breeding records of the alpaca breeding business in which the applicant has been involved since 2018. The respondent further alleges that the applicant failed to disclose that the income of the guest house has also been used towards paying her legal fees.
- [24] The respondent further alleges that the applicant failed to fully disclose statements of her mother's Investec Call Account. According to the respondent, between February 2020 and May 2021, the gross income of the bird farming enterprise received in the various accounts managed by the applicant was over R 3.5 million. Further, the applicant's First National Bank account received an amount of R 187 316.04. During the same period, CL received a total of R 106 000.00 in its bank account. This means that the bird farming business received a total of R 3 874 074.23.
- [25] The respondent alleges further that there has been a constant unwillingness by the applicant to reveal the annual financial statements, tax returns, VAT returns of CL. Further, the applicant's mother and four other people who were subpoenaed to produce their bank statements and financial documents relating to the monies lent and advanced to the applicant failed to do so.
- [26] The respondent believes that the applicant's mother is equally guilty of hiding assets under her name or possibly other accounts. According to the respondent, if the applicant was acting honestly, she would have opened an account in her name or that of CL where the income derived from the operations of CL would be deposited. She would not have kept quiet about the existence of her mother's account and the fact that the income derived from CL was deposited into that account.

- [27] The respondent suspects that the applicant's mother made payments from her First National Bank credit card for the applicant's legal fees. Then she would be refunded to her discovery account which is an indication that the applicant pays for her legal fees. The respondent alleges that this payment was not always affected by a real debtor. It was a circle payment to create the impression that the expenses were paid to the applicant. The applicant did not pay the purported creditor. Further, the extent of these circle payments can only be confirmed once the applicant's mother's bank account statements and other people who allegedly advanced funds toward the applicant have been disclosed. The respondent suspects that those who allegedly advanced funds for the payment of fees to the applicant were reimbursed a long time ago from the secret Investec Call Account or another account belonging to the applicant's mother.
- [28] According to the respondent, there are two amounts that the applicant disclosed as payments made by her mother to her erstwhile attorneys. However, on a proper assessment, these amounts were paid to her mother's employer. An amount of R 60 000.00 was paid on 12 December 2019 and R 240 000.00 was paid on 25 March 2020. The respondent contends further that these amounts raise questions regarding the veracity of the applicant's version of loans and payments received from friends and family. The respondent alleges further that the applicant's claim regarding the funding of her litigation is false, and she failed to reveal her true financial position. Further, should the applicant make a proper disclosure, it would be clear that she does not need financial assistance from her family members and friends.
- [29] The respondent claims that the applicant has hidden excessive amounts of money derived from the bird-breeding enterprise. Only selected statements were made available. According to the respondent, this raises the question of whether there are accounts in the names of family and friends where the applicant has hidden her income. Further, the applicant neither received financial assistance nor obtained loans from her mother and friends. The respondent denied that the applicant had truly funded her legal costs with personal loans from family and friends.

- [30] The respondent alleges that birds cost between R 10 000.00 and R 220 000.00 each and their sale is done through cash payments. Further, the applicant, and possibly those who purchased these birds, paid cash into the applicant's mother's bank account. The respondent pointed out that a total amount of R 400 000.00 was disclosed by the applicant as an amount advanced to the applicant by her mother in the form of loans. An amount of R 200 000.00 was also disclosed as an amount advanced by one of the applicant's friends as a loan. The other friend was noted as having advanced a loan of R 100 000.00. Further, the legal fees paid by CL was disclosed as a total of R 480 000.00. This makes the total amount paid to the applicant's attorneys to be R 1 180 000.00 and not the requested amount.
- [31] The respondent alleges further that an amount of R 323 181.00 is reflected in the annual financial statement of ACC dated 28 February 2022, as an amount used to pay the applicant's legal fees, but no such entry could be found on ACC bank statements. Further, an amount of R 365 927.00 is reflected as an amount used to pay the applicant's legal fees in the annual financial statement of ACC dated 28 February 2023, but no such entry could be found on ACC bank statements. The respondent alleges that the applicant did not include these amounts in her calculation of the fees that she already incurred. This means that the deficit on the fees is the amount of R 1 038 924.00. The respondent further alleges that the amount of R 243 750.00 that the applicant claims has been used to pay for legal fees, birds, and alpacas is not reflected on the bank statements of CL for March 2023.
- [32] The respondent contends that the applicant is either not telling the truth regarding the amount paid to her attorneys or she is simply not disclosing other hidden income from the bird and alpaca farming business which she used to pay for her legal fees. The respondent challenges the reasonableness of the legal fees that the applicant claims she incurred. In particular, he argues that there is no reason for the applicant to have two attorneys and one candidate attorney working on the matter.

- [33] The respondent contends that he is not liable to pay for the costs of the amendments to the particulars of claim that the applicant brought to date. Further, the applicant is liable for the costs of the amendments, and it is disingenuous to make these costs part of her request for a contribution towards her costs.
- [34] The respondent alleges that he is also struggling to pay his legal costs and thus, cannot be expected to pay those of the applicant. He alleges that he owes his erstwhile attorney an amount of R 331 616.29. The respondent alleges that because the legal fees that the applicant incurred have decreased her estate which reduced her accrual which effectively decreased what he would have been entitled to when the accrual is divided, this means that he has already indirectly contributed to the applicant's legal costs. The respondent contends that if the court were to find that he is liable to contribute towards the applicant's legal costs, then the amount awarded must be deducted from any amount he may be found to be liable to pay to the applicant after the accrual has been calculated.
- [35] The respondent claims that he receives a monthly salary of R 28 000.00 from M Company. Further, despite receiving additional payments based on additional needs, it is M Company that earns the commission. This money is moved from M Company's one bank account to the other. The respondent states that only one of the disclosed M Company's bank accounts is in his name. He insists that he is M Company's employee and income generated by this company does not belong to him. There are no cash transactions in the operations of the M Company. The respondent contends further that there must be a distinction between his income and that of M Company. He denies that he earns R 256 206.23 per month.
- [36] The Respondent denies that he failed to disclose the amount received from Maizefield Lime & Logistic CC and Kynoch Fertilizer Division of Farmisco (Pty) Ltd. He contends that these amounts are reflected on the disclosed bank statements and invoices. Further, the applicant is creating a false impression that an income of R 4 000 000.00 was received in June 2023. The amount of

R 1 165 992.09 received from M Company's FNB account was from inter-account transfers from the respondent's FNB credit card account. According to the respondent, the actual income received was an amount of R 2 935 741.00 which was the annual commission payment from Bayer for services rendered for 2022/2023 season. This is not additional income but an inter-account transaction.

[37] According to the respondent, the bird breeding and alpaca farming enterprise is an extremely lucrative business. Further, the applicant should pay her legal fees using the income that she derives from this business. The respondent alleges that the applicant is litigating on a much more luxurious standard than he is because she has highly skilled legal representatives who are representing her. The respondent alleges further that the applicant stole R 80 000.00 from M Company's First National Bank account and paid into her sister's bank account to ensure that the transaction could not be reversed. The respondent contends further that it is not reasonably required for him to deplete his estate to fund the applicant's malicious, vexatious, and litigious approach.

[38] The respondent admitted that he donated funds to the church and charities but alleges that he has been doing so all his life. He further contends that some of the money was donated to tertiary institutions to pay for underprivileged people.

[39] The respondent further alleges that the costs incurred in some of the court cases between the parties are not incurred in the matrimonial proceedings and ought not to have been included in this application. Furthermore, the vast majority of documentation in the consolidated trial matters relates to the loan action rather than the divorce action.

D APPLICABLE LEGAL PRINCIPLES

i) Further contribution

[40] It is a well-established principle of South African family law that financially weaker spouses, irrespective of the parties' matrimonial property regime, are

entitled to sue their financially stronger spouses for contribution towards their legal costs in matrimonial matters and that such suits are *sui generis*.² This entitlement arises from the Roman-Dutch law duty of support that spouses owe each other.³ It is trite that *'[t]he applicant is entitled, if the respondent has the means and she does not have them, to be placed in the position adequately to present her case ...'*⁴ through the respondent's means.

[41] It has been held that *'[t]he quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge'*.⁵ This is not an unfettered discretion where the presiding judge thump-sack the amount of contribution that should be made. It is a discretion that must be exercised judiciously and with care having regard to among others, the proven facts, evidence led, parties' financial positions, the need for such contribution, the scale the parties are litigating, reasonable litigation needs of both parties, and the ability of the person who is requested to contribute towards legal costs to make such contribution.⁶

[42] Rule 43(6) of the Uniform Rules of Court provides that:

'[t]he court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate'.⁷

[43] In 1988, the Cape Division (as it then was) in *Micklem v Micklem* convincingly opined that:

² See generally *Van Rippin v Van Rippin* 1949 (4) SALR 634 (C) and *Taute v Taute* 1974 (2) SA 675 (E) 676.

³ *Chamani v Chamani* 1979 (4) SA 804 (W) at 806F–H

⁴ *Nicholson v Nicholson* 1998 (1) 48 (WLD) at 50

⁵ *AF v MF* [2020] 1 All SA 79 (WCC) para 28

⁶ *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) 639

⁷ See *Du Toit v Du Toit* [2019] JOL 45336 (GP) para 31 where it was stated that in terms of '... Rule 43(6) in relation to costs contribution, a party can approach court if the contribution towards costs proves to be inadequate'.

*‘... Rule 43(6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application’.*⁸

[44] It is important to note that there is a test that must be satisfied. The Cape Division of the High Court further correctly held in *Greenspan v Greenspan* that when the court is considering an application in terms of Rule 43(6), *‘... to succeed the applicant must show a material change in circumstances since the date when the last order was made’.*⁹ The Orange Free State Division (as it then was) in *Andrade v Andrade* also convincingly held that *‘Rule 43(6) requires a brief statement indicating the material change that is alleged to have taken place and not a long-winded account as to the circumstances under which the change has come about’.*¹⁰ In *P.E.O.I v W.A.H.*, this court correctly held that:

*‘... to succeed in that endeavour, an applicant must demonstrate, not only that a change or even a significant change in circumstances has occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant’s broader financial circumstances. This would, at the very least, entail a detailed exposition of all available sources of income and would not merely be limited to the income earned from his (now reduced) salary.’*¹¹

Further that

‘[a] considered reading of Rule 43(6) suggests to me that, in order to succeed in demonstrating a material change in circumstances, one must make a full

⁸ [1988] 4 All SA 372 (C) 374.

⁹ [1999] JOL 5300 (C) para 6.

¹⁰ [1982] 4 All SA 639 (O) 639.

¹¹ (97132/16) [2021] ZAGPPHC 60 (3 February 2021) para 16.

and frank disclosure in regard to all of the numerous and varied elements which make up the broad overview of the applicant's financial situation'.¹²

- [45] Without any reference to previously decided cases on this point or any authority to justify its conclusion, the Free State Division in *Du Plessis v Du Plessis*¹³ appears to have taken a different approach from that correctly taken by previous decisions. The court held that:

'[i]t is clear that an application for a further contribution to costs is not dependent on changed circumstances having to be demonstrated. In my view, the same test that applies to an original application for a contribution to costs is also applicable to an application for a further contribution to costs in terms of Court Rule 43(6)'.¹⁴

- [46] The Constitutional Court in *S v S and Another* held that:

'... there is no reason why rule 43 should not be expansively interpreted as some courts have already done. Rule 43(6) provides litigants with an avenue to approach a court for a variation of its decision, on the same procedure, when there is "material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate". As already indicated, it is incumbent on High Courts to hear on the urgent roll any matter adversely affecting the best interests of the child. Accordingly, any other injustices occasioned will relate purely to monetary matters. Past financial injustices can often be righted when the final reckoning is done at the divorce'.¹⁵

- [47] The Constitutional Court further held that:

¹² *P.E.O.I v W.A.H* para 14.

¹³ (3568/2005) [2005] ZAFSHC 105 (16 September 2005).

¹⁴ (3568/2005) [2005] ZAFSHC 105 (16 September 2005) para 7. The judgment is written in Afrikaans and the original text reads: *'Dit is gevolglik duidelik dat 'n aansoek vir 'n verdere bydrae tot koste nie daarvan afhanklik is dat veranderde omstandighede aangetoon moet word nie. Dit volg na my oordeel dat by aansoek om 'n verdere bydrae tot koste ingevolge Hofreël 43(6) in essensie dieselfde toets dan by 'n oorspronklike aansoek van toepassing is'.*

¹⁵ 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC) para 56.

'[t]here may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice'.¹⁶

- [48] I was referred to various authorities in the heads of argument that were submitted on behalf of the respective parties as well as during oral arguments. While all these authorities are certainly relevant concerning contribution to costs generally and litigation parity between the parties, some of them were not of particular assistance in the interpretation of Rule 43(6) of the Uniform Rules of Court under these circumstances.

ii) Interim Relief

- [49] The procedure in Rule 43 of the Uniform Rules of Court is intended to provide interim relief in matrimonial matters. The division of the High Court can be approached in terms of Rule 43 only for an order for interim maintenance, a contribution towards costs of a matrimonial action, pending or about to be instituted, interim care of any child, and interim contact with any child.¹⁷ In *Gunston v Gunston*, the court held that '*... there can be no doubt that the whole sub-section concerns interim orders made in connection with a matrimonial action which is pending or about to be instituted*'.¹⁸

iii) Costs already incurred

- [50] The Natal Provincial Division (as it then was) in *Lourens v Lourens*,¹⁹ refused to order the husband to pay legal costs that had already been incurred by the

¹⁶ *S v S and Another* para 58.

¹⁷ Rule 43(1) of the Uniform Rules of Court.

¹⁸ [1976] 1 All SA 19 (W) 22. See also *Zaphiriou v. Zaphiriou*, 1967 (1) SA 342 (W) 345 where it was held that 'Rule 43 was merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs . . . '.

¹⁹ (1928) 49 NPD 412.

wife. It held that ‘... *such an order should have been applied for in advance, otherwise there would be, or might be, no control over the costs to be incurred*’.²⁰ The court was of the view that it did not have the power to retrospectively award already incurred costs.²¹ Costs that were already incurred were excluded in the order towards the contribution of the applicant’s costs by the Witwatersrand Local Division (as it then was) in *Nicholson v Nicholson*.²² Without any justification or reliance on any authority, the court merely stated that these costs ‘... *cannot be covered by a contribution towards the costs*’.²³

[51] This division in *Petty v Petty*,²⁴ had an opportunity to consider whether already incurred legal costs can be included when the court orders contribution towards the financially weaker spouse’s legal costs. In *Petty*, it was argued on behalf of the respondent that the contribution that was sought was excessive, and that the applicant had been patently dishonest and failed to make full disclosure of all the facts. In particular, it was ‘... *submitted that the past attorney/client costs may not be considered as they do not fall within the purview of Rule 43*’.²⁵ The court agreed with this submission and excluded past attorney/client costs when determining the sum to be awarded to the applicant as a contribution towards her legal costs.

[52] A different approach was adopted in *Cary v Cary*.²⁶ In this case, the Cape of Good Hope Provincial Division (as it then was) looked at the issue of already incurred legal costs from a broader contribution point of view. In this regard, the court held that the applicant was ‘... *entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her*’.²⁷ Without considering whether failure to consider past legal costs would impact

²⁰ Ibid at 413.

²¹ Ibid.

²² [1998] JOL 1325 (W)

²³ Ibid at 8. The court tried to justify its approach by stating that I[i]t is not the practice in Rule 43 applications to give detailed reasons for arriving at the quantum of relief granted to an applicant’. This approach was also followed in *Senior v Senior* [1999] JOL 4779 (W) 23.

²⁴ [2002] 2 All SA 193 (T).

²⁵ [2002] 2 All SA 193 (T) 196.

²⁶ 1999 (8) BCLR 877 (C).

²⁷ Ibid at 881.

the applicant's ability to litigate at the same scale as the respondent, the court simply stated that:

'[t]he 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"'.²⁸

[53] Without providing some reasoning why already incurred legal costs should be considered when the court awards contribution towards legal costs, the court in *Cary v Cary* rejected the respondent's argument that the costs that had already been incurred in matrimonial disputes '*... fall to be disregarded as an application for a contribution to costs must be made in advance and the court has no power to make a retroactive award*'.²⁹ It is not clear from the judgment why this proposition is wrong and equally so, why already incurred costs should be considered when a court orders one spouse to contribute towards the other's legal costs in terms of Rule 43(1) of the Uniform Rules of Court. With respect and while certainly important, the constitutional approach adopted by the court in this case does not assist in answering this question.

[54] In line with *Cary and* without any analysis and an attempt to illustrate why previous decisions are wrong, in *Du Plessis v Du Plessis*,³⁰ it was held that the view that costs that have already been incurred should not be considered when an application for a contribution to costs is determined is wrong and artificial in principle.³¹ This approach was endorsed by the Western Cape Division in *AF v MF*, where the court held that this approach '*... accords with the injunction in s 39(3) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law*'.³² Without dealing with why the previous decisions wrongly held that already incurred

²⁸ Ibid at 882.

²⁹ Ibid.

³⁰ (3568/2005) [2005] ZAFSHC 105 (16 September 2005).

³¹ Ibid at para 8.

³² 2019 (6) SA 422 (WCC); [2020] 1 All SA 79 (WCC) para 39

legal costs should not be part of the contribution that the wealthier spouse should make to the poorer spouse, the court held that:

'[t]he importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse - usually the wife - will be forced to settle for less than that to which she is legally entitled simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts requires that courts come to the aid of spouses who are without means to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs'.³³

[55] Nonetheless, in *AF v MF*, it was further correctly held that:

'[t]he right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees - in effect to act as her "banker". The primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. ... And where an impecunious spouse has already incurred debts in order to litigate, whether to family or to an attorney, I consider that a court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts (at least to the extent that the court considers the expenditure reasonable)'.³⁴

³³ Ibid at para 41

³⁴ 2019 (6) SA 422 (WCC); [2020] 1 All SA 79 (WCC) para 42.

[56] *AF v MF*'s approach was followed in *HSH v MH*,³⁵ where it was held that

'Davis AJ clearly rejected any arbitrary notion of limiting the extent of the contribution to costs made by one spouse to another. Importantly, he did so on the basis of constitutional imperatives. In practice then, what AF v MF achieved was the conclusion that there is no reason why an applicant may not be entitled to all of his or her costs, because what matters most is that the parties are able to place their case before the court on an equal footing'.³⁶

[57] The view that already incurred legal costs should not be considered when the court determines the amount that the wealthier spouse should contribute toward the poorer spouse's legal costs in terms of Rule 43 was expressed by earlier decisions. The current, and prevailing view, appears to be that the *'... law does not preclude costs already incurred from being taken into account in determining a contribution to costs'.³⁷* While the Western Cape Division recognised that there is a need to consider and apply constitutional ideals when interpreting Rule 43, it correctly cautioned that:

'[i]t 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'.³⁸

D EVALUATION AND ANALYSIS

³⁵ [2023] 1 All SA 413 (GJ) .

³⁶ Ibid at para 96, the court further held that '*AF v MF* noticeably departed from the status quo, and embarked on a more constitutionally compliant path. And it is plain from the passages above that the court in *AF v MF* spelled out the proper approach to the application of rule 43: rule 43 must be interpreted and applied through the prism of the Constitution, which requires the court to interpret the rule in a manner that accords with the fundamental constitutional tenet of equality'.

³⁷ *A.V.R v J.V.R and Others* (4366/2016) [2020] ZAWCHC 134 (23 October 2020) para 2.

³⁸ *A.L.G v L.L.G* (9207/2020) [2020] ZAWCHC 83 (25 August 2020) para 19. See also *KF v MF* [2023] JOL 61240 (WCC) para 45.

[58] Both parties in this matter submitted their main affidavits and supplementary affidavits. The indulgence to serve and upload supplementary affidavits is granted.

i) Changed circumstances

[59] In my view, where the court has already ordered a wealthier spouse to contribute to the poorer spouse's legal costs in pending matrimonial disputes as is the case in this matter, the need for financial support and the ability to provide such support has already been established. Unless a change of circumstances can be established, the position remains the same when further contribution is sought.

[60] Contrary to what was stated in *Du Plessis v Du Plessis*, the court when considering an application in terms of Rule 43(6) should apply a different test than that which was applicable when the original contribution application was considered. First, with the application for further contribution, the court is requested to amend its previously granted order. Secondly, for such an order to be amended, the person seeking such an amendment must satisfy the court that such an amendment of the court order is warranted.

[61] The applicant has the onus of satisfying the court that her current circumstances, which were not prevailing circumstances at the time the initial contribution order was made, necessitates the court ordering the respondent to make a further contribution towards her legal costs. Rule 43(6) refers to 'material change' in circumstances, which appears to be the test that the applicant must satisfy before a court can order the respondent to contribute further to her legal costs.

[62] In my view, the correct approach to be followed when considering whether a wealthier spouse should be ordered to pay more than 'he' was earlier ordered to pay as 'his' contribution towards the poorer spouse's legal costs should be that crafted by this court in *P.E.O.I v W.A.H.* Indeed, the applicant must demonstrate that there is a change in her financial circumstances by placing sufficient facts before the court to empower the court to determine the

materiality of that change in the context of her broader financial circumstance. This necessitates the applicant, not only to zoom in on the respondent's income but also to provide a full and frank exposition of her all-available financial resources or indicate that she lacks such resources.

[63] The applicant, as the financially weaker spouse who is allegedly struggling to pay for her legal fees, must demonstrate her lack of means by fully and frankly disclosing all elements that make up the broad overview of her financial situation. By so doing, the applicant will be demonstrating the need for financial support. While the Constitutional Court in *S v S and another* held that Rule 43 should be interpreted expansively, it did not outlaw the requirement that applicants who approach the court in terms of R 43(6) should demonstrate the change in their circumstances. Perhaps courts are required not to be unnecessarily rigid when determining the materiality of such changed circumstances.

[64] From all her affidavits, it does not appear as if the applicant made an effort to demonstrate how her circumstances have changed since she was awarded the initial contribution. This is the test that she must meet, failing which she cannot succeed. This is the information that should empower the court to determine the need for further contribution. While the parties' marriage creates an obligation for the wealthier spouse, as part of the reciprocal duty of support that the parties owe each other in terms of their marriage, the obligation to contribute is dependent on the need of the poorer spouse and the capacity of the richer spouse to provide such support. Before the capacity of the wealthier spouse could be assessed, the poorer spouse must first demonstrate the need for support. In the context of further contribution, the spouse who alleges to be poorer must indicate 'her' financial circumstances to the court. I am not convinced that the applicant in this case has demonstrated her changed circumstances.

ii) Full and frank disclosure

[65] Both parties accuse each other of not fully and frankly disclosing their true financial positions. It appears that the main issue is the parties' financial

interests in their respective businesses. It seems to me that, on the one hand, both parties are of the view that the income earned by their respective businesses belongs to those businesses and they should not be forced to use such income for their legal costs in their matrimonial dispute. On the other hand, each party appears to be of the view that the other's financial interests in their own business should be used for this purpose.

[66] These views seem to be fortified by the fact that each party is a sole member/director and 100% shareholder in their respective businesses. In other words, the parties see each other as extensions of their businesses and do not distinguish their respective financial interests and the income they derived therefrom from such businesses. In terms of part three of the financial disclosure form, parties are required to disclose the annual financial statements for the last two financial years for the businesses in which they have an interest. They are also required to disclose any documentation in their possession that can provide the court with a sense of the value of their interest in the disclosed businesses.³⁹

[67] In these proceedings, the applicant attached a financial disclosure form that was certified on 30 May 2023. In this form, the applicant starts by disclosing the matrimonial property owned by ACC. She states that this property is worth R 5 8 000 000 and that the value of her interest therein is nil. She discloses only two bank accounts held by FNB and indicates that the value of her total interest therein is R -7 680.00. One of these accounts is a credit card. She states that she does not have any investments or policies.

[68] The applicant disclosed further that the value of all her personal belongings amounted to R 110 000.00. She also disclosed that she is owed an amount of R 1 020 280.00 by ACC but the value of her interest in this business is R -232 257.00. Further, the total value of her interest in CL is R 1 330 500.00. She disclosed further that she received personal loans from three people to the combined value of R 2 195 790.96. These creditors comprise her mother

³⁹ See generally *RTS v TTS* [2017] JOL 38763 (GJ) 23.

and two friends. She further disclosed that her monthly expenses amount to R 22 000.00.

- [69] The respondent correctly questioned the applicant's financial disclosure. First, the applicant in her founding affidavit did not indicate that she uses her mother's Investec Call Account to deposit the money generated by CL, a company in which she is the sole director and shareholder. She clearly stated in her replying affidavit after being confronted with this issue in the answering affidavit that everything deposited into this account originated solely from the activities of CL's business. Why did the applicant not disclose this account and provide its bank statements for the court to determine the status of the funds deposited therein? The applicant failed to make full and frank disclosure in this respect.
- [70] Secondly, at this stage, it is not clear who the real 'owner' of the money deposited into the applicant's mother's Investment Call Account is. It is also not clear how much money had been deposited into this account at least for the past two years. The applicant's failure to disclose the information relating to this account in her financial disclosure form and to provide the bank statements for this account gives credence to the respondent's allegation that this account was opened to hide financial resources. This also makes it difficult not to agree with the respondent that if indeed there were loans advanced to the applicant by the persons disclosed in the financial disclosure form, such loans have been paid by the money that was deposited into this account. The applicant failed to provide the bank statements of this account to counter these allegations.
- [71] Thirdly, the respondent alleges that the CL received a total revenue of R 3 874 074.23 and most of the transactions of this business are cash transactions that were probably deposited either by the applicant herself or CL customers into her mother's bank account, which allegation the applicant denies. It was not enough for the applicant to merely deny this allegation. The applicant ought to have disclosed her mother's Investec Call Account's statements from 2020 as annexures to her financial disclosure form referred

to above. Failure to fully disclose these statements creates an impression that the applicant is hiding assets.

[72] Fourth, the respondent requested records of the activities of CL. The applicant should have disclosed the income derived by CL since 2018 from the sale of both the birds and alcapa. In her founding affidavit the applicant stated that during the last season she was only able to sell one chick for approximately R 215 000.00. There is no proof of that transaction that was provided. The actual date and the method of the transaction were also not provided. If this money was paid into a bank account, it is not clear which bank account it was paid into. In this application, no bank statement was provided where this money was recorded. This gives credence to the respondent's speculation that money was regularly deposited into the applicant's mother's bank account.

[73] Equally so and without providing corresponding bank statements to illustrate these entries, the applicant stated that the income received from the business activities of CL was R 101 700.00 in January 2023, R 21 600 in February 2023, R 243 750.00 in March 2023, R 245 000.00 in April 2023, R 38 600.00 May 2023, R 115 000.00 in June 2023, and R 193 250.00 in July 2023. In these proceedings, the applicant did not provide bank statements that indicate these entries. The respondent also made a point that there was no indication in the CL bank statement that an amount of R 243 750.00 was spent in legal fees in March 2023. The applicant claims that these funds were used for operations needs of her business and to also pay her legal fees. There is no breakdown of how much was utilised for the payment of fees. Surely, the respondent cannot be expected to reimburse the applicant through Rule 43(6) for the money that she used from her business to pay her legal fees. This is not part of the debt that the applicant alleges she incurred from family and friends. Since part of this money was used to pay legal fees, that portion ought to have been quantified to deduct it from what the applicant claims she owes her legal representatives.

- [74] The breakdown of the amount that may have been used to pay the legal fees is provided by the respondent in his answering affidavit. The respondent seems to accept that a total of R 480 000.00 was paid to the applicant's attorneys by CL. While accepting that a combined amount of R 700 000.00 was also paid to the applicant's attorneys, he disputes that this amount was due to loans from the applicant's mother and friends, by referring to the sources of this amount as 'purported loans'. Since I could not locate invoices and bank statements which indicate how these monies were paid to the applicant's attorneys, I am also sceptical that there were loans. I note that the applicant's mother deposed to a confirmatory affidavit. In my view this confirmatory affidavit does not assist the applicant in light of the concerns highlighted above regarding the Investec Call Account statements. I think full disclosure of these statements were important in this application. The applicant's friends who are alleged to have advanced loans to the applicant neither deposed to confirmatory affidavits nor provided bank statements recording the money lent to the applicant.
- [75] The respondent also noted that in two financial statements of ACC for 2022 and 2023, it was indicated that amounts of R 323 181.00 and R 365 927 were used to pay the applicant's legal fees even though these entries cannot be found in ACC's bank statements. The applicant does not deal with this contention in her supplementary affidavit. Surely the respondent cannot be expected to reimburse the applicant for these amounts because they were not part of any loan taken from anyone. It is thus, surprising that they were not included in the computation of the amounts paid to the applicant's legal representations. Failure to include these amounts exaggerated the alleged loan amounts that the applicant argues were derived from her mother and friends.
- [76] In her supplementary affidavit, the applicant attached a report compiled by what the applicant referred to as an 'expert'. This report appears to have been procured to counter the respondent's allegation that the applicant failed to make full and frank disclosure of her financial position. This record is intended to deal with the applicant's income. I found it very strange that the applicant

would go to the extent of procuring a report rather than simply providing the required bank account statements of or any acceptable proof from the people that she claims advanced her loans. This report is problematic in many respects. First, it is not clear what qualifies the person who compiled it as an 'expert'. Secondly, it is not clear from the report what is the expertise of this 'expert'.

- [77] It is not clear whether it was brought to the attention of this expert that the respondent was interested in establishing the applicant's income from 2018. It does not appear that this expert was informed further that the respondent was particularly interested in the breeding records of the exotic birds and alpaca business. The respondent sought to be provided the record of the sale transactions that occurred since 2018 with relevant dates. One would have expected that this report would have included how payment was made and details of where the money that was received ended.
- [78] Instead, in compiling this report, the 'expert' relied on limited documentation, information, and explanations obtained from the applicant. Most importantly, the 'expert' states in the report that he relied on these '*... without independent verification and without performing audit procedures that would enable me to express an opinion on the information included therein albeit that I determine such to be reasonable in the circumstances in which such was received*'. The 'expert' further stated that '*... [r]eliance is placed on fair representations made by parties involved, and in most cases accepted without procedures to verify such representation*'.
- [79] Surely, the court cannot be expected to rely on such a report where the so-called expert admits upfront that what is contained in his report is not verified. It is concerning that while the 'expert' indicates that he was provided the applicant's mother's Investec Call Account, he did not indicate when this account was opened. It is not clear from the report whether the expert requested and was furnished with the bank statements of this account to verify some of the transactions performed therein. In my view, this report does

not indicate the applicant's income. It strengthens the view that the applicant did not make a full and frank disclosure.

[80] Finally, since the applicant claims that she has spent an amount of R 2 218 924.26 on her attorneys and she is liable to repay loans of about R 2 546 921.40, does this mean that the applicant paid her attorneys exclusively from loans received from her friends and mother? This appears to be contrary to the claim that part of the proceeds of CL in 2023 were used to pay for her legal fees. Most worryingly, there are no records of the sale activities and income earned by CL from 2018. Notwithstanding the Covid-19 challenges that none of the parties raised, it is highly unlikely that a business that was able to derive R 958 900.00 income in 2023, was not able to make any money in the previous years, from which the applicant could comfortably pay her legal fees. I am inclined to agree with the respondent that no evidence demonstrates that the applicant genuinely borrowed money from her mother and friends.

[81] In my view, the evidence before the court points to the fact that the applicant was and can pay for her legal fees from her business operations. In fairness, it is also adequate to assess whether the respondent made a full and frank disclosure. In these proceedings, the applicant attached a financial disclosure form that was certified on 8 May 2023. In this form, the respondent started by indicating that he is an employee at M Company, where he is the sole director and shareholder. He stated that he has three personal bank accounts with a collective balance of R 1 517 522.00.

[82] The respondent also disclosed that he has an investment with Stanlib Unit Trust worth R 1 694 210.00 and personal belongings worth R 17 500.00. He valued his liabilities to R 331 616.29 and her shareholding in M Company to R 1 155 019.00. The respondent also noted on his financial disclosure form that the applicant unlawfully took R 80 000.00 from him. In this form, the respondent further stated that he earns a net salary of R 324 970 and indicated that it will increase to R 371 964,00 in the next twelve months. Further, his personal monthly expenses amount to R 38 142.00. He further

indicated that his financial interest in the immovable property owned by ACC is R 6 760 342.00.

[83] While the respondent questioned the way the applicant paid her legal fees, he did not provide information relating to how he is financing his legal fees on the alleged annual net salary of R 324 970.00. It is not clear whether he is paying for these fees himself or through M Company. The applicant stated that this amount is not representative of the respondent's total income. In support of this allegation, the applicant provided a spreadsheet that indicates that the respondent received a total of R 9 889 116.00 in both his personal bank accounts that that held by M Company.

[84] While this amount may be exaggerated because the respondent moves money between different accounts, it cannot be denied that substantial income was derived by M Company. In my view, it is not accurate to conclude that the respondent's annual income is R 324 970.00. The respondent is a sole director and shareholder of M Company. He decides how the money made by this company is spent. It is unlikely that from all the income made by this company, the respondent only derives a salary since he alleges that it is this company that also earns a commission. In this respect, the respondent also did not fully and frankly disclose his financial position.

[85] Nonetheless, some of the amounts that the applicant claimed were not disclosed are reflected on some of the bank statements that the respondent provided. It is unnecessary to itemise these amounts. It suffices to mention that the evidence before the court makes it clear that the respondent's M Company is in a much better financial position than the applicant's CL. However, this does not mean that the respondent is obliged to pay for the applicant's past legal fees that have clearly been settled through the Investec Call Account which contained funds from CL.

iii) Pending matrimonial disputes

[86] Rule 43 is titled 'interim relief in matrimonial matters'. In my view, there can be no confusion as to what types of matters warrant the court's attention based

on Rule 43. This title clearly indicates that there should be a main matrimonial action or application and any party to such proceedings may approach the court to be granted interim relief pending the finalisation of the main matrimonial application. It follows therefore that the interim matter must also be of a matrimonial nature. In other words, this should be a matrimonial issue that cannot await the finalisation of the main action and the court is empowered to provide a provisional order. In simple terms, this must be an interlocutory application to the main matrimonial action or application.

[87] As was stated in *Gunston v Gunston*,⁴⁰ I agree that Rule 43 in its entirety relates to provisional orders that are made in connection with pending matrimonial matters. It follows therefore that the costs envisaged in Rule 43(1)(b) and Rule 43(6) relate only to matrimonial actions or applications. Rule 43 (1)(b) clearly requires the court to order contributions to costs for matrimonial actions that are either pending or about to be instituted. This in my view includes all the interlocutory applications that are matrimonial in nature that arise from the main action or application.

[88] Interlocutory applications are usually about to be instituted or pending. In my view, the court cannot order contribution or further contribution in terms of Rule 43(1)(b) and Rule 43(6) for any other form of action or application that does not fall within the description provided for in Rules 43(1)(b). The costs relating to the applicant's application for further contribution can be granted under Rule 43. However, I doubt that the position is the same concerning the loan action and eviction action that was instituted by ACC against the respondent. The latter two cases are not matrimonial by their very nature.

[89] The loan action may be pending but it is not matrimonial by its nature. This is a dispute between a juristic person and the respondent. Similarly, the eviction matter may not be pending but it was also a dispute between a juristic person

⁴⁰ [1976] 1 All SA 19 (W) 22. See also *Zaphiriou v. Zaphiriou*, 1967 (1) SA 342 (W) 345 where it was held that 'Rule 43 was merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs . . . '.

and the respondent. The respondent cannot be held liable to pay the legal costs associated with these applications because, in terms of Rule 43, these matters are not matrimonial matters. The legal costs that ACC incurred concerning the eviction matter and will incur in respect of the loan action cannot be included in the costs that should form the basis of the required further contribution. These matters are simply brought against the respondent by ACC as a juristic person and not the applicant.

- [90] The applicant did not separate the amounts that have been incurred or will be incurred in these two matters by ACC from the costs that she personally has or will incur in respect of the legal costs relating to the pending and or to be instituted matrimonial matters. The respondent does not have a duty to reimburse the applicant for any money that she may have spent in pursuing ACC's claims against him.

iv) Amendments Costs

- [91] In terms of Rule 28(1) of the Uniform Rules of Court, any party can amend their pleadings by notifying their opponent of their intention to amend. If there is no objection to the amendment from the opponent within ten days, the amendment will be effected.⁴¹ Rule 28(9) of the Uniform Rules of Court clearly states that *'[a] party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party'*. Generally, the party seeking to amend the pleadings will be ordered to pay the costs of the amendment unless the other party objects and such objection is unmeritorious, frivolous, or vexatious.⁴² In my view, this rule applies the same in matrimonial matters as it would in all other matters.
- [92] Once lawyers have consulted with their clients, it can be assumed that they understand their clients' cases to such an extent that they will adequately draft the relevant documents that will assist their clients in getting their desired

⁴¹ Rule 28(2) of the Uniform Rules of Court.

⁴² See *Dimension Data Middle East and Africa (PTY) Limited and Others v Ngcaba: In re: Ngcaba v Dimension Data Middle East and Africa (PTY) Limited and Others* (2016/22545) [2022] ZAGPJHC 993 (6 December 2022) para 41.

outcomes. Should such lawyers realize potholes in their clients' cases along the way, surely their clients' opponents cannot be expected to foot the bill for any amendments that are brought, unless of course such opponents unreasonably oppose the contemplated amendments. In my view, there is no justification to burden the respondent with the costs of amendments in this matter.

v) Litigating at the same level

[93] It cannot be denied that in a society such as South Africa with established income disparities and discrimination between men and women within marriages, the requirement to demonstrate a material change in circumstances is gendered by its very nature and courts should protect financially vulnerable women when so required.⁴³ The gender realities must be confronted through constitutional ideals as was the case in both *Cary v Cary* and *AF v MF*. It cannot be doubted that financially weaker spouses are usually women who are confronted by financially stronger spouses, usually men, who use their financial muscle to financially disadvantage them in matrimonial litigation.⁴⁴ It is equally true that historically the ability of women to generate their own income is generally reduced by their commitment and service to their marriage where they bear more responsibility for housework and caring labour.⁴⁵

⁴³ See generally *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* (CCT 364/21; CCT 158/22) [2023] ZACC 32 (10 October 2023) para 121 accepted that '... there is a large body of scholarship showing that apartheid not only institutionalised racial discrimination but also hinged on and entrenched gender inequality. A 2016 study reported that South African women are significantly more likely to be "multidimensionally poor" (that is, lacking adequate access to nutrition, health, education and basic services) than men, with this burden of poverty falling more heavily on black women than white women. Women in South Africa are typically less securely employed than men, and employed women are concentrated in sectors which are typically less advantageous when it comes to remuneration and terms of employment – retail, catering and accommodation. South Africa has among the highest mean and median gender income gaps, and the disparity increases with age'.

⁴⁴ See *H v H* [2023] 1 All SA 413 (GJ); 2023 (6) SA 279 (GJ) para 73, where it is correctly stated that '[m]ost often, these applications are brought by economically disadvantaged spouses who are unable to meet the costs of litigation or who are forced to enter debt to pay hefty legal fees'.

⁴⁵ *G v Minister of Home Affairs and Others* [2022] 3 All SA 58 (GP); 2022 (5) SA 478 (GP) para 13. This decision was subsequently confirmed by the Constitutional Court.

- [94] However, in recent times and with the advancement of women in various workplaces and sectors, there are exceptions to the general rule that necessitate courts reflecting on the actual woman before the court to assess whether her financial circumstances fit into the general position. The facts of this case appear to be totally different from those in cases like *Cary v Cary*, and *AF v AF*. The applicant in this case does not seem to be as economically disadvantaged as the women in these cases, which in my view, is an important factor that must be taken into account. Failure to do so will lead to the general disadvantage that women experience being used to benefit women who are not as economically disadvantaged. In my view, this is something that ought to be avoided.
- [95] In *Cary v Cary*, the parties agreed during the marriage that the wife should devote herself to the full-time care of their children. The wife was unemployed with no income.⁴⁶ In *AF v MF*, the husband was the joint chief executive officer of a family business, earning a salary of R 7 000 000.00 per annum. In addition to this salary, he received *ad hoc* payments and substantial distributions from a family trust of which he was a beneficiary. His net asset was R 20 000 000. While the wife had a degree, she stopped working when she gave birth to the parties' first child. She later obtained a part-time job when she separated from her husband where she earned a monthly salary of R 17 677.00.⁴⁷
- [96] These and other similarly situated women must be protected by ensuring that they not only receive what is due to them from their marriages on divorce but are also empowered to litigate against their wealthy husbands at the same level through adequate contribution or where the need arises further contribution to their legal costs.
- [97] While there is a tendency, and for good reason, to generalise the vulnerability experienced by women during divorce proceedings, there are exceptions to

⁴⁶ [1999] JOL 4575 (C) 2

⁴⁷ 2019 (6) SA 422 (WCC); [2020] 1 All SA 79 (WCC) para 8 & 9.

this norm which courts are also constitutionally obliged not to turn a blind eye. In my view, the applicant in this case fits into that exception and ought not to be considered in terms of the general vulnerability described above. The applicant is a businesswoman who is a sole member of a trading close corporation and a sole director of a trading company. Both these businesses generate money from which the applicant derives income that can be used to pay for her legal fees. The applicant failed to fully and frankly disclose her income to the court to demonstrate her need for further contribution.

E CONCLUSION

[98] Both parties are represented by reputable firms of attorneys with competent lawyers as well as senior counsel on both sides with exceptional family law experience and expertise. Both teams of lawyers are ready to represent the parties in all these proceedings including the divorce trial. There is no indication that any of these lawyers would withdraw their services in this case.

[99] The applicant's failure to provide a detailed breakdown of the activities of CL and how monies received from these activities are handled gives an impression that there was an effort on her part to conceal the actual income made by this company. The income that the applicant disclosed for 2023, clearly illustrates that this is a profitable company, the proceeds of which can be used to assist her with the payment of her legal costs.

[100] Concerning the costs of this application, the parties have been litigating extensively against each other. I am of the view that there is no need to order the applicant to pay the costs of this application and that each party should pay his or her own costs.

ORDER

[101] In the results, I make the following order:

1. The applicant's application is dismissed.
2. Each party to pay his or her own costs.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the applicant: Adv LC Haupt SC

Instructed by: Clarks Attorneys

Counsel for the respondent: Adv ML Haskins SC

Instructed by: Couzyn Hertzog & Horak Incorporated

Date of the hearing: 26 October 2023

Date of judgment: 12 January 2024