



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 5474/2012

In the matter between:

M. J. M.

Plaintiff

and

L. C. M.

First Defendant

M. J. M. N.O.

Second Defendant

L. C. M. N.O.

Third Defendant

S. P. M. N.O.

Fourth Defendant

S. P. M.

Fifth Defendant

L. J. C.

Sixth Defendant

G. J. M.

Seventh Defendant

D. M. M.

Eighth Defendant

JUDGMENT

Delivered: 25 November 2015

Orders

A: **Rule 43 Application (Case No: 5474/2012: 5 November 2012:Gorven J)**

1. The applicant, L. M., is directed to pay the costs occasioned by such application, including the costs consequent upon the employment of senior counsel.
2. The cost limitations imposed by the provisions of rules 43(7) and 43(8) do not apply.

B: **Rule 43 Application (4417/2013 :Madondo J: 31 May 2013)**

1. The applicant, L. M. , is directed to pay the costs occasioned by such application, including the costs consequent upon the employment of senior counsel.
2. The cost limitations imposed by the provisions of rules 43(7) and 43(8) do not apply.
3. The applicant's attorneys are not entitled to charge and recover any fees from her in respect of this application.

C: **Rule 43 Application (7117/2013 :Nzimande AJ: 1 August 2013)**

1. The respondent M. M. , is directed to pay the applicant L. M. 's costs occasioned by this rule 43 application.

D: **Application under case number 7709/2012 (Interdict Application in respect of the Manhattan Property)**

1. The *rule nisi* issued on 27 July 2012 is discharged.
2. The applicant, M. M. is directed to pay the costs of the first respondent, L. M. .

E: **Divorce Action**

1. A decree of divorce.
2. An order directing the plaintiff to pay to the first defendant in terms of section 7 (2) of the Divorce Act, Act 70 of 1979 the following:
 - 2.1. The sum of R27 700.00 per month, for a period of 5 years, which amount is to escalate annually on the anniversary of the divorce order at a rate equivalent to the Consumer Price Index. The first payment in terms of this order is payable by midday on 7 December 2015;
 - 2.2. The sum of R2 478.00 in respect of a monthly membership contribution to the Discovery medical aid scheme, for a period of 5 years from the date of this order. Such amount is to increase in accordance with any

increase imposed by the Discovery medical aid scheme. The first payment in terms of this order is payable by midday on 7 December 2015;

2.3. The sum of R250 000.00 as a contribution to the purchase of a motor vehicle by the first defendant. Such amount is payable by midday on the 11 December 2015.

- 3 An order directing the plaintiff to pay to the first defendant the proceeds of the sale of the immovable property known as "Manhattan" (together with interest accrued thereon) less the sum of R30 000.00 already advanced to the first defendant.
4. The plaintiff's claims insofar as they are inconsistent with the foregoing orders are dismissed.
5. The first defendant's claims-in-reconvention insofar as they are inconsistent with the foregoing orders are dismissed.
6. The first defendant is directed to pay the costs occasioned by the joinder application as well as the costs of the second, fourth, fifth and sixth defendants in the divorce action, such costs to include the costs of Senior Counsel where so employed and the reserved costs of 8 July 2014.
7. The plaintiff is directed to pay the first defendant's costs occasioned by the rule 43(6) application on 8 October 2014.

8. The first defendant is directed to pay the reserved costs of 26 September 2014 and 1 October 2014 in respect of the rule 35(3) application, such costs to include the costs of senior counsel where so employed.
9. In respect of the costs incurred in the divorce action not covered by the orders in paragraphs A to E above, the plaintiff is directed to pay the first defendant's taxed or agreed costs, on a party/party scale up to and including 8 October 2014. These costs are to exclude:
 - 9.1. the qualifying fees and attendance at court of the first defendant's experts Lance Marais and Neil McHardy which were taken into account in the order made in the rule 43(6) application for a contribution to costs on 8 October 2014;
 - 9.2. the costs occasioned by the adjournment of the trial on 25 June 2014, in which there was no order as to costs.
10. Any remaining costs incurred are to be borne by the plaintiff and the first defendant.

Introduction

1. This is a divorce action in which the first defendant essentially seeks an order for maintenance in terms of section 7(2) of the Divorce Act, Act 7 of 1979 (the "divorce act") until death or remarriage and orders directing the plaintiff to comply with the terms of an ante-nuptial contract and make certain lump sum payments.

Pleadings

2. On 29 May 2012, the plaintiff instituted divorce proceedings against the first defendant. In the action he sought a decree of divorce and an order declaring him to be entitled to the net proceeds of the sale of the Manhattan property in the sum of R 2 100 000.00 alternatively payment of such sum from the first defendant.
3. The basis of the claim for the proceeds of the Manhattan property as pleaded, was that the parties concluded an oral agreement in terms of which the plaintiff would provide the funds for the property to be acquired, the property would be registered in the first defendant's name purely as nominee on behalf of the plaintiff, but the plaintiff would be the actual owner of the property and pay for all the expenses and outgoings in relation to the maintenance and upkeep of the property.
4. When the property was sold on 28 June 2012, the plaintiff as owner of the property was entitled to the net proceeds of the sale¹. The first defendant initially filed a plea disputing the reasons for the breakdown of the marriage and averred that she was the owner of the property and acquired the property from funds donated to her by the plaintiff.
5. The trial of the matter was initially enrolled for hearing in June 2014. By agreement the trial was adjourned to October 2014. Thereafter, the first defendant sought to amend the pleadings and obtained an order on the 8 July

¹ The proceeds of the sale of the Manhattan property is the subject matter of a separate application under case no. 7709/2012. There is an interdict in place preventing the first defendant and the conveyancing attorneys from dealing with the funds in any way.

2014 joining the trustees and beneficiaries of the Moore Family Trust as defendants-in-reconvention² in the divorce action.

6. Her counterclaim was amended to include an allegation that the Moore Family trust was a sham, it was merely the alter ego of the plaintiff he being the true owner of the assets of the trust and in *de facto* control thereof.
7. In the counterclaim the first defendant pleaded that Graeme John Moore and Dean M. M. , born of the marriage although majors, remained financially dependent on the plaintiff and first defendant. In addition the first defendant sought orders directing the plaintiff to comply with the terms of the ante nuptial contract concluded between the parties prior to the marriage and contribute maintenance for herself in the sum of R80 000.00 until her death or remarriage.
8. She in addition sought orders directing the plaintiff to maintain her as a member of a medical aid scheme until death or remarriage and to cover expenses not paid for by the medical aid scheme until death or remarriage. In addition, the plaintiff was required to purchase a new motor vehicle with a value of not less than R700 000.00 within 4 years of the final divorce order and to continue to do so every 4 years and to purchase for the first defendant an immovable residential property of her election with a value of R3 000 000.00 and pay her the sum of R400 000.00 as a once off lump sum payment.

² For ease of reference this will be referred to as the first defendant's counterclaim and the parties will be referred to as in the divorce action.

9. In respect of the Moore Family trust the first defendant alleges that the plaintiff founded the discretionary trust and the second, third and fourth defendants were appointed as trustees of the trust. The trust never held meetings and the trustees, specifically the third and fourth defendants, were never involved in the management of the trust. Even though the fifth, sixth, seventh and eighth defendants are the capital and income beneficiaries of the trust, the trust deed makes provision for the appointment of any other natural person who may be appointed as trustee from time to time.
10. The first defendant avers that the trust has substantial assets and the source of funds to acquire the trust assets emanated from the plaintiff and he in fact exercises full de facto control of the management, acquisition and alienation of assets of the trust and treats the trust as his alter ego. She further alleges that the plaintiff uses the trust for his benefit, it never operated a banking account and all funds received and dispersed by the trust were deposited into and withdrawn from banking accounts held in the name of the plaintiff or his nominee which accounts were under his control.
11. The first, second fourth, fifth and sixth defendants in reconvention filed a plea to the counterclaim, and pleaded that in light of the fact that the first defendant does not seek any relief against them, save for the first defendant in reconvention, any finding the court makes binds them as individuals. They have no duty to support the first defendant consequently, insofar as the fifth and sixth defendants are concerned their joinder to the action is an abuse of process and constitutes an “exercise in terrorem.”

12. The plaintiff denies any obligation to pay maintenance or make payment of any lump sum awards as prayed for by the first defendant. In addition the lump sum awards which the first defendant seeks, he alleges are redistribution claims disguised as maintenance claims and therefore the first defendant is not entitled to payment of these as she has no claim in terms of section 7 (3) of the Divorce Act.
13. During the course of the trial, the first defendant sought to further amend her counterclaim dated 16 July 2014. Such application for amendment and the outcome thereof is a matter of record³.
14. At the commencement of the trial, Mr. *Stokes* SC, for the plaintiff, indicated that the plaintiff consented to an order in terms of which the first defendant was entitled to the net proceeds of the sale of the Manhattan property together with interest thereon, without any concession or admission that the first defendant was entitled thereto. In addition an open tender with prejudice of R 2 000 000,00 (two million rand) was made in settlement of the first defendant's claim for maintenance.

Issues for determination

³ Apart from amending the amounts claimed in respect of the orders for maintenance and lump sum payments, the first defendant sought to effect amendments to introduce claims at paragraphs 20 to 31 of the proposed amended claim in reconvention, Annexure ACLR in relation to the Moore Family Trust and the trustees.

15. The issues requiring determination in the trial are the following. Is the first defendant entitled to orders directing the plaintiff to:-
 - 15.1. Pay her maintenance until death or remarriage, the calculation of which includes claims for her major sons?
 - 15.2. Comply with the terms of the ante-nuptial contract?
 - 15.3. Make certain lump sum payments in respect of her maintenance?
16. A further issue for consideration is whether for purposes of deciding the first defendant's maintenance claims, and the ability of the plaintiff to pay them, this court ought to "pierce the veil" of the Moore Family Trust and hold that the assets of the trust are in fact the plaintiff's.
17. It is common cause between the plaintiff and the first defendant that their marriage has broken down irretrievably and they are both intent on divorce.
18. The plaintiff instituted the divorce proceedings in May 2012, and he and the first defendant subsequently permanently separated on 11 July 2012 when the first defendant left the former matrimonial home.
19. The parties were married to each other on 30 January 1988 at Johannesburg, out of community of property by ante-nuptial contract with the exclusion of the accrual system. Two children born of the marriage are majors but are still allegedly financially dependent on the parties⁴.

⁴ The plaintiff disputes that his sons are financially dependent and indicates this is a matter of their choice.

20. In terms of the ante-nuptial contract, upon their marriage, the plaintiff undertook to settle on the first defendant the following:

“3.1.1 all engagement and wedding presents presented to them on the occasion of their intended marriage;

3.1.2 furniture, linen, plate and domestic effects, together with any and all renewals of or additions to the same to the value of R25 000,00 (TWENTY FIVE THOUSAND RAND);

3.1.3 cash to the value of R30 000,00 (THIRTY THOUSAND RAND);

3.1.4 certain life insurance Policy No. 250763 effected with Sage Life (formerly Ned Equity) (“the Policy”) for the sum of R50 000,00 (FIFTY THOUSAND RAND).”⁵

21. The first defendant bore the onus in respect of her counterclaim, testified and led the evidence of several witnesses. I have considered all the evidence presented, even though I may not have specifically referred to it for the purposes of this judgment.

22. I propose to firstly dispose of the issue in respect of the first defendant's claim for maintenance insofar as it includes Graeme and Dean Moore.

Maintenance claimed by first defendant in respect of Graeme and Dean Moore

⁵ The Plaintiff was required to cede the policy to the first defendant.

23. During the evidence of the first defendant, it became apparent that included in the calculation of her claim were amounts in respect of her major but dependant sons Graeme and Dean. This was also apparent from the affidavits and expenses filed in the various rule 43 applications.
24. Insofar as the claim for maintenance of her major sons, is concerned, the first defendant appears to rely on the provisions of section 6 (3) of the Divorce Act which deals with the safeguarding of interests of dependant and minor children and reads as follows:
- "6(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit,(My emphasis)*
25. The first defendant testified that the plaintiff had previously paid for all educational and living expenses of the dependent children using the trust. At the time of their separation in July 2012, the plaintiff indicated via email to their sons Dean and Graeme that he would not contribute to their support and in fact did not do so.
26. The impression created by the first defendant in her evidence was that she together with her family have effectively been maintaining and supporting the dependent children. She conceded, *albeit* reluctantly, that Dean studied and was employed at Sugar Bay earning a minimal income but still required financial support from her. She indicated that Dean had expressed a desire to change his course of study. Graeme, the elder of her children, she also

conceded earns an income but is a full-time medical student at Wits University.

27. She confirmed that despite these being included, certain of the monies reflected specifically items like rent had not in fact been paid. She testified that her brother assisted her in paying certain of the university fees. In addition the expenses were not limited to merely educational expenses. In some of the affidavits, it is also clear that Graeme had been living on his own with his partner and decided to pursue a degree in medicine.
28. If one has regard to the Trust minutes of 24 May 2013, the trustees at such meeting resolved to stand surety for any fees that both Dean and Graeme would incur with a financial institution. In the event of neither one of them being in a position to repay such loans, then the trust would repay the loans and this would be set off as a distribution against their respective loan accounts. This tender was rejected by the first defendant and as testified by her also by Dean and Graeme.
29. It is trite that a major dependent child has a claim for maintenance or financial support against both parents. Both Graeme and Dean have *locus standi* in their personal capacities to lodge a claim for maintenance against the plaintiff and specifically payment of their educational expenses. In my view, the first defendant cannot include in her expenses maintenance and support for Dean and Graeme as she has done previously.
30. The first defendant seeks an open ended maintenance order until her death or remarriage. This would mean that if this court were disposed to granting

such an order and in fact did make such an order, the net effect thereof would be that the plaintiff would have an order in place against him *ad infinitum* until the death or remarriage of the first defendant from which both Graeme and Dean would benefit.

31. In addition should Graeme and Dean decide independently to proceed and institute a claim for maintenance against the plaintiff and were successful in doing so, they would not be bound by such order in the first defendant's favour and the plaintiff would effectively be penalised by having three maintenance orders in place in favour of Graeme and Dean and one in respect of the first defendant.
32. Consequently, the amounts claimed for Graeme and Dean must be excluded from any calculation of the first defendant's maintenance expenses.

First Defendant's claim for maintenance in terms of section 7(2) of the Divorce Act

33. The first defendant relied on the provisions of section 7 (2) of the Divorce Act for her maintenance claims. The section reads as follows:

“(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order terms of subsection (3) and any other

factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur”.

34. There have been number of cases dealing with a section 7(2) claim and I have been referred to a number of these by Counsel who appeared. The principles emanating from the cases relevant to this matter are the following-

34.1 “wants and needs are different things”, and after divorce parties tend to live on a lower scale and a women cannot expect to enjoy the same standard of living as before the divorce;⁶

34.2. rehabilitative maintenance may be awarded to a divorced women and a wide discretion is conferred on the court;⁷

34.3. the section does not create a right to maintenance, and in making an award the court must assess the impact of such award on both parties and award what is “just”;⁸

35. In ACV CV ⁹ the court expressed the view that an ex wife was not entitled to maintenance as a right. The onus was on her to persuade the court to exercise its discretion in her favour and must provide a factual basis for

⁶ *Kroon v Kroon* 1986(4) SA 616 (E)

⁷ *Grasso v Grasso* 1987(1) SA 48 (C)

⁸ *Botha v Botha* 2009(3) SA 89 (W); *Van Wyk v Van Wyk* 1954(4) SA 594 (W)

⁹ 2011(6) SA 189 (KZP); *Kooverjee v Kooverjee* [2006] 4 All SA 369 (C)

doing so and ultimately in determining whether to do so the court must do “justice as between the parties”.¹⁰

36. As regards her ability to earn an income, the first defendant testified that she had been employed periodically during the course of the marriage but this was not to generate an income as she and the plaintiff had agreed that she would stay at home and take care of the house and the children. Any income she earned was not what she considered significant and termed it “pocket money”. She also testified that she did not have any records of this income.
37. This income would be derived from baking and would be expended on the household and estimated it to be in the region of ± R400 .00 – R700.00 per month. She was a consultant for Annique selling beauty products for a period of time but ended this. She re-joined Annique in April 2011 so as to benefit from her personal use of the products. This was for a few months but she could not recall what income she derived from Annique.
38. When she separated from the plaintiff and whilst in Gauteng she continued as a consultant but this income dwindled as she found it difficult to secure new clients and maintain existing ones given the distance. She testified that since her separation from the plaintiff in July 2012, she had no employment and was totally dependent financially on her brother for 14 months until the rule 43 order.

¹⁰ *Buttner v Buttner* 2006(3) SA 23 SCA

39. She was “employed” at an optometrist for 3 days and this is how she was able to “pay” for her contact lenses as the plaintiff had removed her as a beneficiary from the medical aid scheme.
40. She had made attempts to secure employment and had approached friends who offered her employment but this was not in her view offers of formal employment. This was as a cashier at a busy butchery earning approximately R3500,00 per month and as a manageress at a Wimpy restaurant earning between R7000.00 and R8000.00 per month. She testified that she did not have the courage to seek employment in the formal sector and did not seek employment in such sector, as she felt she did not have the necessary expertise and felt “uncomfortable thinking about it”.
41. However, during cross-examination, it became evident that she was being economical with the truth and was not being entirely candid with the court. Her attention was pertinently drawn to the affidavits she filed in the various rule 43 applications and how they differed from what she said during her evidence in chief. For example, if one considers her affidavit of 23 April 2013,¹¹ she indicates that she baked on consignment for Pomander Home Industry and earned a not too significant amount, she was employed by Denise Eysell Estate Agents earning R3000.00 per month.
42. She confirmed having been employed as a sales consultant for Annique and this continued after her separation. She in fact confirmed that in Gauteng during her first three month at Annique as a novice, she was the top sales

¹¹ Rule 43 application under case no 4417/2013

lady. She received prizes for her performance and received an award at an evening ceremony. During cross-examination she testified that after her separation from the plaintiff she earned an income but did not think to mention it in her evidence in chief as “it was hardly worth mentioning” and that “it slipped my mind that I was a consultant”. She in fact indicated that it was not a big deal in her life and she was not earning a substantial income”.

43. It also became evident that she had also not been candid about other places she had been employed at during the marriage and that subsequent to her separation from the plaintiff she had not made any real effort to seek employment and become self -supporting. She testified that despite the offer of employment at the butchery she did not take up the offer as “I have a standard and I don’t believe that is where I belong.”
44. In March 2013, she was still an Annique’s agent yet chose not to disclose this in her evidence in chief. She also she testified that she chose not to renew her contract as she was not certain whether her income would justify the fees that she would pay to renew her subscription as a consultant. However, it became evident that her real motivation was the rule 43 application. She in fact acknowledged that she was applying for maintenance and did not want to jeopardise such application.
45. She admitted she refused to attend the meeting of the Trust on 24 May 2013, when the trustees resolved to pay her the sum of R25 000.00 towards her maintenance. When such tender was communicated to her attorneys, such tender was rejected. She testified she did so as such monies were “trust” monies and did not want to jeopardise her Rule 43 application.

46. When questioned as to what she would like to do she displayed a reluctance to consider anything and when pressed by Mr Stokes that she did not make any effort to find employment not because she lacked skills, confidence or training but rather because she felt she was entitled to be supported by the plaintiff, she in fact said "I don't feel entitled to it I feel I deserve it." She refused the offer of retraining suggested during cross-examination by Mr Stokes based on the recommendations in the report of her expert and said "I will not do so". When asked a direct question as to whether she "point blank refused to undergo retraining" her response was "Yes, I refuse."
47. In addition it became evident that she was selective about her income during her marriage and that she may have derived some income other than what she disclosed in court and in her affidavits more specifically during her separation from the plaintiff.
48. Of relevance to the first defendant's ability to earn an income and the aspect of what is colloquially termed "notional earning capacity", the evidence of an industrial psychologist, Lance Marais was led to give an opinion on her employability and potential future earning capacity until her date of retirement. After assessing, the first defendant on 16 September 2014 he compiled the report dated 22 September 2014, exhibit "K".
49. Mr. Marais was of the opinion that the first defendant had retained some employability and earning potential. He opined that given her age, level of

education, long absence from the formal labour market, the requirement for re-training and marketability and the fact that South Africa was experiencing high unemployment levels, a depressed economic climate in conjunction with the affirmative action policies, it would be extremely difficult to near impossible for her to re-enter the labour market.

50. His findings in his report were based on the interview with her and her personal circumstances as she reported them to him and the tests he performed. He testified that the first defendant obtained an excellent score on the Ravens test which is indicative of her excellent ability. She would not have difficulty when she was required to learn additional and new tasks provided that she had the desire and motivation to succeed.
51. Her score on the Ravens test indicated an ability to learn new concepts and material. Due to her lack of occupational experience he was of the view that she would require re-training for a period of at least 3 (three) years to sharpen her skills, improve her knowledge, and to market her ability and knowledge to compete in the formal labour market.
52. Given the depressed state of the labour market because of her age and lack of experience Marais was of the view that she would obtain employment from someone who knows her rather than in the open labour market. He estimated that depending on the geographical area she is able to obtain employment, she could secure an income of between R5 700.00 (five thousand seven

hundred rand) to R11 200.00 (eleven thousand two hundred rand per month).
The higher figure was based on her re-training.

53. Among the factors emphasized by Marais, was that the first defendant had to be motivated and had to have the desire to succeed. Her scoring on the Raven's test demonstrated her ability as long as she has the motivation and desire to do so.
54. During cross examination he acknowledged that the first defendant had not been totally honest with him about inter alia the fact that she had been employed after 2010, her income derived as an Annique consultant nor her accolades and success arising from such employment, the attempts she made to secure employment and that she in fact did secure offers of employment at a butchery or as a manageress, her "employment" at an optometrist.

The Moore Family Trust being a scam and the alter ego of the Plaintiff

55. The first defendant joined the trustees of the Moore Family Trust, in my view to bolster her claim for maintenance. The effect of this would be that the court would regards the assets of the trust as the plaintiff's in determining the size of his estate.

56. I was referred to a number of authorities dealing with this issue and the instances when the courts looked “behind” the trust and determined that it was the alter ego of the party and trust assets were in fact his.¹²

Terms of the Trust Deed

57. It is not in dispute that the purpose of the trust was to benefit the beneficiaries being the first, fifth, sixth, seventh and eighth defendants,¹³ to meet their maintenance needs¹⁴.
58. The manner in which income and capital payments were to be made were catered for in the trust deed ¹⁵and the powers of the trustees were clearly defined therein.¹⁶
59. The difficulty which arises in this matter is the fact that the first defendant has not been candid with her expert regarding her employment history, nor has she been candid regarding her income. In addition she has also exaggerated her expenses and has also included the expenses of her major sons in the calculation of her monthly expenses.
60. She has also argued that she has become accustomed to a certain lifestyle whilst married to the plaintiff, and is therefore justified in requiring

¹² *Maritz v Maritz* 2005 JDR 0209 (T); *Beira v Beira* 1990(3) SA 802 (W); *Jordaan v Jordaan* 2001(3) SA 288 (C)

¹³ Clause 3.2.1. of the Trust Deed

¹⁴ Clause 3.2.4. of the Trust Deed

¹⁵ Clause 7 of the Trust Deed

¹⁶ Clause 14 of the Trust Deed

him to meet all her monthly expenses without her having to meet any of them herself as he has a huge estate from which he meet such obligation.

61. To justify this she has alleged the Moore family trust and its assets are in essence the plaintiff's assets and form part of his estate and that the trust is a sham and the alter ego of the plaintiff. She has relied on her expert Neil McHardy, a chartered accountant to provide an opinion in this regard. He has done so after considering the trust deed and accessing all documentation in relation to the Moore family trust, annual financial statements and the other business interests of the plaintiff. He concluded that there was a "strong" argument to be made to support the contention that the Moore family trust is a "veneer" and "ultimately the alter ego of Mr M.J. Moore".
62. His reasons for concluding this with the documents at his disposal can be summarised as follows:
 - 62.1 The trust did not maintain a separate bank account which is required in terms of the trust deed and the Trust Property Control Act;
 - 62.2 Decisions were taken without consultation with other trustees and in the absence of resolutions by trustees, specifically in respect of the sale of trust investments and distributions made to beneficiaries;
 - 62.3 The trust deed made provision for two trustees to constitute a quorum. However, instances involving the sale of trust investments and the distribution of the entire trust capital ought

to have involved all trustees at a properly constituted trust meeting where all trustees would have participated in such resolutions;

- 62.4 All trustees would have been expected to participate in important decisions specifically relating to the sale of trust investments and the distribution of the entire trust capital to only two of the five beneficiaries during the financial year end 28 February 2014;
- 62.5 No independent trustees have been appointed which could possibly have averted what appeared to be unilateral decision making;
- 62.6 It is questionable as to whether there is a separation of ownership of the trust assets from those of the founder, Mr M. J. Moore as the trust property control act requires trust property to not form part of the personal estate of a trustee except in circumstances where the trustee is a trust beneficiary and is entitled to trust property there must be a separation of control or ownership of assets from benefits;
- 62.7 The loan made to the founder Mr M.J. Moore does not have any formal terms and conditions save for being interest free, despite a resolution in September 1999. As a consequence thereof it appears as though the founder of the trust M J Moore has benefited from trust property and moreover has control over trust property.

63. The complete details and further instances upon which he relies for the opinion are contained in exhibit "A" which is his report dated 25 September 2014.
64. Having regard to the report it is clear that the monies of the trust emanated solely from Mr M.J. Moore. In light of the fact that the trust did not maintain a bank account the transactions and loans are regularised by means of journal entries. The annual financial statements reveal that all the beneficiaries of the trust benefitted from the Moore family trust. For example in respect of Sean and Graeme their educational expenses and a vehicle were funded and paid for by the trust as too were holidays as well as medical expenses of the first defendant.
65. In addition the properties occupied by the plaintiff and first defendant were purchased and paid for by the trust. The various entities like for example Dataqwp Rentals (Pty) Ltd and Prop-Plus 39 (Pty) Ltd were entities from which monies generated were "paid" to the trust and these funds were used to support the plaintiff, first defendant as well as their children and the plaintiff's children from a previous marriage. The funds were generated solely by the plaintiff and not by the first defendant in any way.
66. He accepted that the trust never received funds. Its assets were shares it held in companies and a shareblock and a loan account through the plaintiff. Its "income" consisted of dividends and donations made by the plaintiff- no actual funds were exchanged or "paid" over to the trust.

67. His conclusion that the trust was required to open a bank account with a banking institution was based on the terms of the trust deed, clause 14.5 and the Trust Property Control Act. During his evidence he conceded that from his examination of the documents no funds were exchanged with the trust and the trust did not receive any monies.
68. That decisions and resolutions were taken without discussion, participation or knowledge of all the trustees was based on the documents he considered and because he was not presented with any evidence in this regard which created an appearance of lack of third party participation.
69. He acknowledged the contents of pages 17 and 18 of exhibit "B", which were resolutions taken in 1999 and 2007 by all the trustees of the Moore Family Trust, significantly all three trustees signed these. Paragraph 2 of the 1999 resolution dispenses with the need for the trust to open a banking account. It also specifically authorized M. M. , the plaintiff to deal with the shares held by the trust in Dataqyip, Quyn Capital and Pro-plus 39 and to negotiate for the purchase and sale of moveable and immoveable assets of the Trust.
70. He further acknowledged that as at 2012, there were no distributions made by the trust, no sale of assets and donations or receipts by the trust were from the plaintiff which were debited to his loan account.
71. The first defendant when she testified attempted to create the impression that in so far as the trust was concerned, no meetings or discussions took

place in which she participated. She in fact indicated that the plaintiff and Sean Moore made decisions without her knowledge, hence this court ought to “pierce the veil” of the trust and find that the assets of the trust were in fact the plaintiff’s. This also formed the basis of the application in the Gauteng High court for the removal of them as trustees and for an amendment to the trust deed.

72. This was not borne out by the evidence of Sean Moore and the documents seem to suggest otherwise. The resolutions in Exhibit B, which are signed by all three trustees including the first defendant, indicate that she in fact participated in the decision making process or at the very least was aware of the resolutions taken certainly in 1999 and 2007. She may not have been an astute business person, but certainly she would be familiar with resolutions and the reasons they were taken, she was present when it was discussed and she was aware what the purpose of the trust was. Sean Moore who testified during the first defendant’s case, testified that at times formal meeting of trustees were held save that in light of the fact that this was a family trust for purposes of all beneficiaries including the first defendant discussions concerning the trust and assets and distributions as well as loans and monies to be expended was often discussed at family gatherings. This was not something disputed by Mrs Moore.

73. Once the litigation had commenced, she received notification of subsequent meetings of the trust and was made aware of items to be discussed and possible resolutions to be taken. She made an informed

decision, no doubt guided by her legal representatives not to attend the meetings.

74. The first defendant as well as the plaintiff held Money Market accounts with banking institutions in respect of funds generated by the companies “owned” by the trust. In my view it is disingenious of her to say she knew nothing of the business affairs of the trust.
75. During cross examination Mr McHardy conceded that having regard to the terms of the Trust Deed decisions taken by the trustees in relation to the transactions of the trust were properly made in terms thereof. Every single transaction of the trust was properly made pursuant to a meeting and notice of such meetings and done within the terms of the trust deed. He confirmed that the 1999 resolution of the trustees, including the first defendant authorises the plaintiff to be shareholder for the trust and also the trust administrator.
76. The trust document makes provision for a separate banking account to be opened if trustees and the trust are to receive monies. Neither the Trust Property Control Act nor the trust deed stipulates that such bank account must be in the name of the trust. It also became apparent that the terms of the trust deed authorises the resolutions take specifically appointing the plaintiff as “administrative trustee”.
77. The trust property control act does not regulate when meetings must be held. The trust deed does so¹⁷. He acknowledged that in practice a minute

¹⁷ Clause 15.8

book of resolutions is kept but given the situation as in the present matter especially when one is dealing with a family trust this is not unusual. There is also nothing in the act or the trust deed which said that resolutions must be recorded.

78. He acknowledged that the resolution taken also indicates that a quorum constitutes two out of three trustees and that there is nothing wrong with this. The consequence is that decisions taken by the two trustees for the net capital distributions to be made to Lorna Moore and Sean Moore are regular and there is nothing untoward.
79. Having regard to the meeting of May 2013¹⁸ this appeared to regularise the position in accordance with the trust deed. Prior to 2013, he acknowledged that the plaintiff took on the whole responsibility for the loan account and all beneficiaries benefited because the trust retains assets. He acknowledged that this in some way was for the benefit of the beneficiaries and in another may have prejudiced the plaintiff. He further acknowledged that the amounts expended on beneficiaries should have been debited as against a beneficiary's loan account.
80. In 2013 the plaintiff owed the trust in excess of R15 000 000.00 for all monies expended including those of all the beneficiaries of the trust as opposed to each individual beneficiary's loan account being debited. He further acknowledged that in terms of the trust deed all the beneficiaries

¹⁸ Page 253 exhibit C 2

were taken care of and all their expenses and needs met by the plaintiff debiting his loan account with the trust.

81. The 2014 annual financial statements are drafts statements and from the information at his disposal the trust owns nothing and earns no income and has no assets. He agreed with Mr Stokes that the only thing inaccurate is the shares being sold whereas the shares were distributed as capital distributions.

The Submissions of the parties

82. Mr Stokes SC argued that a divorce ends the reciprocal duty of support which spouses owe each other. He conceded that section 7 (2) of the Divorce Act confers a discretion on the court to make an order for payment of maintenance if it is satisfied that the claimant spouse discharges the onus to show why an order for maintenance should be made in her favour having regard to the factors set out therein
83. Ms Liebenberg submitted that having regard to the provisions of section 7 (2) of given the fact that the word “just” was used in the section meant that one must be fair and make such award having regard to all the evidence in a reasonable and proper manner. In circumstances where the parties enjoyed a high standard of living and where money was no object there would be no reason why in appropriate circumstances a wife could not continue to enjoy the same standard of living whilst her marriage

subsisted after her divorce, and there would be no reason why a former husband who could easily afford to do so ought not to be ordered to see to it that such state of affairs continues and that he now pays for his ex-wife to enjoy the same standard of living after the divorce.

84. Even if the court were to find that the first defendant had an ability to earn an income this ought not to disentitle her to an order directing the plaintiff to pay maintenance to her. She submitted that given the circumstances of this matter despite the fact that the children born of the marriage were majors sufficient evidence had been adduced to show that both children were full time students and remain financially dependent on the parties for all their financial needs.
85. She submitted that in certain instances the assets of the trust maybe taken into account by a court to determine the extent of a spouse's estate¹⁹. Given the circumstances of this matter, this must be extended to claims in terms of section 7 (2) of the Divorce Act as the court was justified in piercing the corporate veil of the trust to determine whether or not the Moore family trust was in fact the alter ego of the plaintiff. There was sufficient evidence on record having regard to the evidence of Mr Wehmeyer, Sean Moore and Neil McHardy to conclude as such.
86. The plaintiff created the trust as a vehicle to provide for him and his family in what she termed a "tax effective" and financially beneficial manner. The trust had no independent trustees and despite submissions to the contrary

¹⁹ *MM and Others v J M* 2014 (4) SA 384 (KZP); *BC v CC* 2012 (5) SA 562 (ECP)

the plaintiff was and remained in de facto control of the trust. All the resources of the trust emanated from the plaintiff and it never operated a separate banking account. The source of income from the trust was dividends generated from companies of which the plaintiff was the director at all relevant times. All income was deposited into accounts held in the plaintiff's name or under his control and in light of the fact that the trust never maintained a separate banking account a loan account in the books of the trust enabled the plaintiff to use the income of the trust for both he and his family's benefit.

Evaluation of the Evidence

87. The first defendant did not impress me as a witness. I accept that she was married to the plaintiff for a considerable period of time and had grown accustomed to a certain standard of living. However, her evidence and the manner in which she testified, in my view, left me with a lasting impression of the words often quoted "*hell hath no fury like a woman scorned*". When she testified she painted a picture of the plaintiff as being the controlling, dominant individual who adopted a dictatorial role in their marriage, who preferred her to adopt a subservient, docile role, accepting what he said and being in no way involved in the decision making during their marriage. She also wanted to create the impression as a consequence of this that he may have been largely responsible for the breakdown of the marriage.

However, during cross examination a different picture emerged. The first defendant struck me as being anything but docile and subservient.

88. The plaintiff certainly appears to have the means to satisfy any maintenance claim which the court may make in favour of the first defendant. The first defendant has as already placed on record, not been candid with the court regarding her earnings during the course of the marriage and more particularly since her separation from the plaintiff. It appears that she is able to generate an income albeit on her version an immodest one.
89. The parties were married for a period in excess of 20 years and at present she is 51 years old, it being common cause that the plaintiff is much older than her. The parties appear to have enjoyed a high standard of living prior to the divorce. Having regard to the reasons for the breakdown of the marriage, it appears that there may have been problems in the marriage for a period of time and 2012 was the catalyst for the final separation of the parties. Having regard to the first defendant's evidence it is clear that both parties are equally to blame for the breakdown of the marriage and that this should not be a factor which should weigh heavily with the court.
90. The first defendant from her evidence appears to be intent on holding the plaintiff responsible for her maintenance needs and "making him pay". She was of the view that despite the fact that she was able to secure employment and generate some income for herself she was not prepared to do so as she considered the plaintiff responsible for maintaining her for

the remainder of her life. As I have already said included in her monthly expenses are those expenses of her major sons.

91. It is trite the first defendant bears the onus to meet the requirements of section 7 (2) and to also establish what her monetary needs are in respect of the quantum of such maintenance. I find myself in respectful agreement with the authorities that maintenance ought not to be a “bread ticket” for life. This would be consistent with the clean break principle and also given the fact that the first defendant is able to generate an income for herself and on the evidence of her own expert certainly has the acumen and intelligence to do so.
92. The fact that she expresses no desire to do so is something which weighs heavily with the court and certainly is a factor which I have considered in determining the period of time for which I intend making an order for rehabilitative maintenance specifically for her to retrain herself and better equip her in the formal labour market. I am not in agreement that I should exercise my discretion in favour of the first defendant and hold the plaintiff completely liable for her maintenance for the rest of her life or until she remarries.
94. Given the nature of the evidence of the first defendant and the fact that she has been able to generate an income *albeit* a limited income from her employment as an Annique consultant; and given the fact that she only made enquiries insofar as two job offers were concerned with friends, in my view she has the potential given re-training to market herself and earn an income to eventually maintain herself.

95. Given the pattern of non-disclosure in these proceedings, least of all to Mr Marais, I cannot exclude the possibility that she has not been candid with the court about her income. During the evidence reference was made to bank accounts and income earned and I cannot exclude the possibility that this was not the only income she earned.²⁰ Reference was only made to one bank account and not an access account which she controlled and into which a number of transfers were made.
96. Her responses to questions during cross-examination reveal a refusal to be retrained or to seek employment at all as she believes that she “deserves” to be maintained by the plaintiff for the remainder of her life. The impression she left the court with, was that to be employed as a manageress or a cashier was “beneath” her and she expressed an unwillingness to be retrained at all and to do anything for herself.
97. In addition the first defendant did not assist the court in advancing her cause for maintenance. She was not frank with the court, at times very vague and I often gained the impression was not very forthcoming. Her lack of candour regarding her employment history and income derived therefrom especially with her expert, Lance Marais did not assist in any way for the court to assess her true maintenance requirements and her earning potential. I also accept that in matters involving maintenance there is a tendency especially in rule 43 applications to exaggerate ones expenses. In this matter I do not view these as mere exaggerations or an over inflation of expenses- in my view there was an element of dishonesty.

²⁰ It was suggested to her that she shared in commission with an estate agent to show houses.

98. Her failure to take Mr Marais into her confidence resulted in him being hampered in providing a report which would be of assistance to the court. In fact she failed to disclose to him that during her marriage to the plaintiff, save for a short period of time she was a successful Annique consultant and derived an income from this, that she was recognised as such at a particular function and received prizes in recognition of her success as a sales person.
99. Even after her separation from the plaintiff she derived an income from this. She also failed to disclose that she had been offered employment as a cashier at a butchery and as a manageress at a Wimpy by friends but failed to take up any of these offers and her reasons for doing so. This would have given him some indication of her earning potential, income earned and the real efforts made by her to obtain employment. Her lack of candour with him in this regard must certainly affect the conclusions he comes to based on the incorrect factual premises.
100. Of significance is that even though she secured an interim maintenance order before Nzimande AJ, she conceded that she in actual fact only needed an amount of R27 000.00 per month to meet her expenses. She had managed to save some of this money to pay legal fees. This amount in my view is as accurate a figure one can come to in determining her needs given her lack of candour.
101. When questioned by Mr Stokes as to whether she would be willing to be retrained in order to capacitate her to supplement her income, and to enable her to market herself and compete in the labour market to be

gainfully employed so as to support herself, she was unwilling to even consider this and flatly refused the offer. In response to questions put to her during cross-examination, her answers often were “*I deserve it*”, “*I am not prepared to do so*”, “*Michael must pay*”.

102. As sympathetic as I may be to the plight of married women who devote their time and effort to their marriages, and who also become accustomed to a certain lifestyle, maintenance is not a “*bread ticket*” and in line with the “clean break principle” women cannot expect to be supported for the remainder of their lifetime. A classic example of this is the first defendant.
- 103 Given the evidence of Marais, I am of the view that to award rehabilitative maintenance to the first defendant for a period of 5 years would be sufficient. She needs 3 years to retrain and a further two to find her feet and enter the labour market. In the interim she has the ability to supplement her income as an Annique consultant should she need to do so.
104. I am also satisfied that a contribution to her medical expenses in the form of the plaintiff paying to her a sum equivalent to the instalment she will be required to pay to Discovery is warranted. Such amount can increase in line with the annual premium increases imposed by Discovery.

Compliance with the ante-nuptial contract and orders for lump sum payments

105. Having regard to the evidence presented and the documents filed, when the first defendant vacated the matrimonial home in July 2012, she took

her personal items, the 2006 and 2012 Pajero motor vehicles, other items of crockery and cutlery and kitchen appliances and bed linen. She also removed cash and had access to monies in her bank account and used the Diner's club card.

106. When the sale in respect of the Manhattan property was concluded, certain items of furniture and other movables were sold by her and she was paid the sum of R100 000.00 by the purchasers of the property which payment was made into her bank account and which monies she utilised. She also testified that when she and the plaintiff experienced problems in their marriage they concluded a "reconciliation" agreement.
107. She acknowledged that in terms of this agreement she received the Manhattan property as a consequence and that the furniture in the Manhattan property which was paid for by the plaintiff was sold by her and she received the proceeds thereof. She also received the occupational interest from the Manhattan property until the transfer was registered. The plaintiff, she acknowledged, over the years purchased the items referred to in the ante-nuptial contract many times over and that the insurance policy is no longer in force.²¹
108. In my view the plaintiff has more than complied with the terms of the ante-nuptial contract and the first defendant is not entitled to any orders in relation thereto. The fact that she considered the reconciliation agreement as something in addition to what she was entitled to in terms of the ante-

²¹ The plaintiff in an opposing affidavit filed in the matter indicated that the proceeds of the insurance policy were paid out and the funds used for their benefit.

nuptial contract is of no consequence. In any event, this court has a discretion to make a just award in terms of section 7(2).

109. As she has had access to furniture, which she sold and has in the interim purchased further items I am not inclined to make such an order as requested. She also has the proceeds of the Manhattan property. Even though she has two vehicles at her disposal I am inclined to make an order for some contribution by the plaintiff to enable her to acquire a new vehicle, although not in the amount requested as she testified that she can trade in the one towards the purchase price.
110. I now turn to the issue of the trust. Whilst I accept that there may be instances in which the courts are inclined to “pierce” the corporate veil and go behind the trust and to determine whether or not the assets are in fact those of a plaintiff I am of the view, that on the facts of this matter this is not one instance where that should be done. In any event the first defendant in my view has not established in any way that should she be successful in her claim for maintenance the plaintiff is not in a possession to pay any maintenance due to the first defendant.
111. In declining to do so, I am not satisfied that the first defendant has discharged the onus that the trust was the alter ego of the plaintiff or that it was merely a sham. The evidence seems to suggest that the Moore family trust was setup for the benefit of the beneficiaries including the Plaintiff, the first defendant, their children and the plaintiff’s children of his former marriage. I am of the view that the purposes behind adopting the stance

and alleging this was to justify the first defendant's claim that the plaintiff ought to meet all her maintenance needs and obligations for the remainder of her life. There is simply no bases for doing so.

112. On the evidence presented I must accept that the trust drew up a separate set of financial statements every year this separately recorded the trusts activities, its income and expenses and its assets and liabilities. The first defendant as trustee signed off on the financial records and did not in her evidence or that of Neil McHardy attempted to suggest that the financial statements were inaccurate or were fraudulent. Separate records were kept of the trust assets, and that of the plaintiff. The trust and the plaintiff separately paid their own tax in accordance with their income and expenses.
113. In addition the first defendant attempted to show that she knew nothing of the trusts activities, resolutions, financial statements or the operations of the trust. However it is clear that she was present when family meetings occurred discussing the business of the trust. She refused to attend any meetings of the trust specifically when she and the plaintiff had separated. What is more apparent is the fact that she was aware that the purpose of the trust was for the benefit of not only her and the plaintiff but also their children and the plaintiff's children of his former marriage.
114. The trust was the vehicle through which they survived and through which they enjoyed a high standard of living. In addition the plaintiff appears to have been an astute business man and utilised his monies generated for purposes of the trust, to meet all their maintenance and living expenses.

115. I agree with the submission of Mr Stokes that this case is on all fours with that of *Maritz*.
116. During the course of the trial I issued orders and indicated that my reasons for such order would follow in the judgment. I propose to do so briefly.
117. In respect of the rule 43(6) application of 8 October 2014, the orders I issued were the following:-
- 117.1. The respondent, M. M. is directed to make a contribution to the applicant L. M. 's costs in the sum of R150 000.00 (one hundred and fifty thousand rand). Such amount is payable by close of business on Thursday, 9 October 2014.
- 117.2. The cost limitations imposed by the provisions of rules 43(7) and 43(8) will not apply.
- 117.3. The costs of the application in terms of rule 43(6) are reserved for determination by the court hearing the divorce action.
118. In such application the first defendant had included a pro forma of what her estimated legal fees were. She acknowledged that she had received a contribution to costs in a previous rule 43 order in the sum of R 80 000.00. Ms Liebenberg argued that the bill was in respect of the first defendant's anticipated costs and that she was not seeking a contribution to all her costs but only those relating to the trial, despite this being a trial essentially about a maintenance claim. She submitted that a contribution

of R 800 000.00 was reasonable to enable the first defendant to pursue her claim against the plaintiff.

119. The basis for an order for the contribution to costs is the duty of support spouses owe each other.²² An applicant for a contribution to costs must show that he or she is defending the action in good faith and that he/she has insufficient means of his/her own.²³
120. An order in respect of contribution to costs is toward the costs of the action and costs of interim applications are excluded. In *Service v Service*²⁴ the argument advanced by the applicant was that she should be able to litigate on the same scale as her husband and was entitled to the payment of the whole amount of her estimated costs. The court was of the view that the applicant was not entitled to be paid in advance the full estimated amount of her future legal costs and in considering the bill of costs took the view that as the bill included costs of interim applications the amounts claimed were on a generous scale and some of them were included on the assumption that certain expenses would have to be incurred.
121. In *Nicholson vs Nicholson*²⁵, the court opined that an applicant was entitled to a contribution to costs. The court was of the view that it is well recognised that such contribution would not cover all an applicant's costs

²² *Carey v Carey* 1999 (3) SA 615 (C), *Lalla v Lalla* 1973 (2) SA 561 (D)

²³ *Engelbrecht vs Engelbrecht* 1944 NPD 186; *Van Broenbsen* 1948 (1) SA 1194 (O)

²⁴ 1968(3) SA 526 (D) @ 528 F

²⁵ 1998 (1) SA 48 (W)

nor would it cover her attorney and client costs and all that an applicant in an application for contribution to costs was entitled to is to have those estimated costs covered or substantially (my emphasis) covered. The court was of the view that costs already incurred are not covered by a contribution to costs and also scaled down the costs claimed²⁶.

122. In *Micklem vs Micklem*²⁷ the court also reaffirmed the principle that an applicant was not entitled to payment of her full costs or costs incurred to date. The court indicated that an applicant was entitled to costs which would adequately place her before the court and among the issues to be considered in deciding this was the question of essential disbursements.
123. The amount awarded to an applicant in such application depends on the court's view of that amount necessary for an applicant to adequately put her case or present her case to the court. An applicant is not entitled to all her anticipated costs even though a respondent may be able to afford them but its only entitled to a substantial contribution towards them.
124. It has also become practice for the court to adopt the view that an attorney must bear some risks with regard to fees and this is a factor which is considered when deciding an application for a contribution to costs.
125. Given that the trial of the matter was at an advanced stage and that the costs awarded previously were to enable the first defendant to litigate to the first day of trial, I was of the view that some contribution was

²⁶ Nicholson supra @ 52 I

²⁷ 1988 (3) SA 259 (C) @ 262 I

warranted to enable the first defendant to at least proceed with her claim for maintenance rather than delay matters further. It was for these reasons that the order for such contribution was issued.

126. The next application was the rule 35(3) application in which I issued the following orders:

126.1. The application is dismissed.

126.2. The applicant, L. C. M., is directed to pay the costs occasioned by the application, including the costs consequent upon the employment of senior counsel.

127. Prior to the trial commencing the First Defendant sought an order compelling the Plaintiff to “reply further and more comprehensively to the applicant’s Rule 35 (3) notice within five (5) days from date of this court order being granted.”

128. The additional documents in respect of which the First Defendant sought to compel discovery are set out as items 1 to 34 of the Rule 35 (3) notice annexed to the founding affidavit to the application as “FA1”

129. The plaintiff filed an affidavit dated 29 July 2014 in response to the Rule 35(3) request. On receipt thereof, by way of a letter dated 1 September 2014, addressed to the plaintiff’s attorneys, the first defendant’s attorneys raised complaints in relation to the response filed.

130. Rule 35 (3) reads as follows:

“If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with sub-rule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him”.

131. The provisions of the rule are intended to provide a procedure for a party dissatisfied with the discovery of another party or in circumstances where he alleges discovery is inadequate. In determining whether or not to grant such an order, the court would have regard to the relevance of the documents requested. Relevancy must be determined from the pleadings and the party can only obtain inspection of the documents relevant to the issues on the pleadings.²⁸

132. The test for relevance was referred to in *Rellams (Pty) Ltd vs James Brown and Hamer Ltd*²⁹. In such decision the court referred to Brett LJ in *Compagnie Financiere et Commerciale du Pacifique vs Peruvian Guano co (1882) 11 QBD 55* when the court held as follows:

“It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the

²⁸ *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 @ 310 - 311

²⁹ 1983 (1) SA 566 (NPD) @ 564

case of his adversary. I have put in the words either directly or indirectly because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document, which may fairly lead him to a train of inquiry which may have either of these two consequences.”

133. A document must be described with sufficient accuracy to enable it to be identified. In doing so, a document can be described within a “genus” enabling it to be identified if it cannot be specifically identified³⁰. In responding to a request in terms of Rule 35 (3), a litigant must state on oath that the documents are either irrelevant to the issues in the action or that they are privileged from disclosure or state where they are if not in his possession.
135. In dealing with the application and the case which the plaintiff was required to meet, the rule makes it clear- a party is entitled to an order if the documents are relevant to the issues in the proceedings and they are in the possession of the person they are being sought from.
136. The plaintiff has indicated the following. He has indicated that the documents are not in his possession and what has happened to them like for example the bank statements and a schedule has been put up. ³¹ Where the documents are not in his possession he has stated in whose

³⁰ Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 @ 317 C-E

³¹ The first defendant has issued subpoenas for such records.

possession they are and has consented to the third party making them available.

137. All documents evincing the *causa* for payment are couched too wide these are not described nor are they of a “genus”.³² Ms Liebenberg submitted that the applicant does not know what these documents were and was not in a position to describe them. I was not satisfied that the first defendant had sufficiently described these documents or that they fell within a “genus”.

138. In addition, the authorities are clear the rule in *Plascon Evans* applies and the application must be adjudicated with that in mind. Once a respondent has indicated that the documents are not in his possession and has stated in whose whereabouts they are if known to him he has complied with the rule.³³

139. The next issue is that of costs.

Costs

140. The divorce act contains a provision dealing with the aspect of costs in a divorce action. Section 10 reads as follows:

“In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs for proceedings be apportioned between the parties.”

³² *Swissborough Diamond Mines (Pty) Limited and Others v Government of the Republic of South Africa and Others* 1999(2) SA 279 (T) at 321

³³ *Richardson's Wool Washeries Limited v Minister of Agriculture* 1971 (4) SA 62 E

141. It is trite that the court has discretion in awarding costs and such discretion is to be exercised judicially upon a consideration of the facts in each case and the decision is a matter of fairness to both sides. The general rule is that a successful party is entitled to his costs.
142. In determining who is the successful party, the court looks at the substance of the judgment and not merely to its form. The court can deprive a plaintiff of its costs where the whole trial turned on issues in regard to which the ultimately successful party has been unsuccessful.
143. In *Galion (Pty) Ltd v Burger*³⁴ the court ordered the defendant to pay the plaintiff's costs up to and including the first day of trial and thereafter the Plaintiff to pay the defendant's costs. De Villiers JP in ***Van Vuuren v Jonker***³⁵ said, "it is in the magistrate's discretion whether or not he shall award costs, he must exercise that discretion in a judicial manner." In other words, when awarding costs, the principles of justice and equity should be taken into account by the presiding officer.
144. On the first day of trial, the plaintiff consented to an order that the first defendant was entitled to the proceeds of the Manhattan property without any admission of liability and tendered the sum of R 2 million rand towards the claim for maintenance. This obviously has an impact on the costs to be awarded as a consequence of the litigation.

³⁴ 1972 (4) CPD 652 @ 654 A

³⁵ 1910 TS 686

145. Such tenders were not accepted by the first defendant. In addition the plaintiff had all along denied the first defendant's claims for maintenance and such tender in respect thereof was made on the first day of trial. Where there is a gross disproportion between the amount claimed and the amount awarded, the plaintiff should not necessarily be deprived of his or her costs. In ***Cohen v Engelbrecht***³⁶, De Villiers CJ said, "Because a plaintiff asks more than he is entitled to recover, that is no ground for refusing him his costs. ... A gross disproportion between the amount claimed and the amount recovered might possibly affect costs..."

146. The circumstances of each case should be taken into account. This factor reaffirms the wide discretion a court has. In ***Kennedy v Dalasile***³⁷, Hutton said, "the question of costs is entirely in the discretion of the Court... The Court on the question of costs will be influenced by (a) the gross impropriety or otherwise of the plaintiff's conduct; or (b) by the seriousness or otherwise of the charges which the defendant fails to justify; or (c) by both these considerations."

147 There are a number of applications in respect of which the issue of costs needs to be determined, least of all being the various rule 43 applications as well as the costs of the divorce action.

³⁶ 1898 15 SC 40

³⁷ 1919 EDL 1

148. In respect of the rule 43(6) of the 8 October 2014, as the first defendant was successful in her application for a contribution to costs, there is no reason for costs not to follow the result, and the plaintiff must bear the costs associated with the application.
149. In respect of the costs the first defendant submitted that she was entitled to the costs of the interim interdict application granted on 27 July 2012 as the plaintiff has consented to an order entitling her to the proceeds of the Manhattan property. In addition she submitted that the first defendant was entitled to the costs of the divorce action specifically in respect of her claim as against the trust, and also that the plaintiff be directed to pay the costs of the divorce action including the costs of senior counsel and the qualifying expenses of the expert witness Neil McHardy and Lance Marais.
150. I agree that given the tender in respect of the Manhattan property even though it was made without any admission or concession that she was entitled thereto, the plaintiff must bear the costs associated with such application. In addition, in light of the order it must follow that the *rule nisi* must be discharged.

Adjournment of the trial 25 June 2014.

151. The parties representatives made submissions regarding who should pay the costs of this adjournment. At first glance it would appear that the trial was adjourned at the instance of the first defendant as she instituted an application to join the trustees and such application was brought at the

eleventh hour even though she had sufficient information at her disposal to have brought such application earlier. However, the court file is endorsed with an order "no order as to costs". It would thus appear that an order relating to the adjournment has already been made.

Rule 43 Application (Case Number 5474/2012 : Gorven J: 5 November 2012)

152. This application served before Gorven J and the costs thereof reserved. It is apparent from a transcript of the proceedings that he expressed a view that the applicant, L. M. , had not made full disclosure of her income from Annique nor had she disclosed amounts paid to her and which had been in her bank account and consequently had not approached the court with clean hands. A party approaching the court in rule 43 applications must do so with the utmost good faith and disclose all material information relating to their financial affairs.³⁸

153. In addition she sought the respondent, M. M. , to contribute to the maintenance of their major sons who were not residing with her. A further difficulty which is evident from the papers is the lengthy affidavit filed in the application. Rule 43 proceedings are intended to be "quick and inexpensive". Our courts have also cautioned against parties filing lengthy and prolix affidavits. It is also intended that two affidavits are filed.³⁹

154. Having regard to the application papers filed in this application and the nature of the non-disclosures, in my view the applicant, L. M. ought to be

³⁸ *Du Preez v Du Preez* 2009 (6) SA 28 (T) at paragraph 16

³⁹ *Colman v Colman* 1967 (1) SA 291 (C) at 292 A; *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T)

directed to pay the costs occasioned thereby and the limitations imposed by rule 43(7) and (8) be dispensed with.

Rule 43(6) : 28 October 2014

155. In respect of the rule 43(6) application of 28 October 2014, I was not satisfied that the first defendant had made out a case for a further payment in respect of a contribution to costs. Ms Liebenberg made submissions from the Bar on behalf of the applicant. I may add that to facilitate the trial proceeding on the reconvened dates, the plaintiff advanced the sum of R 30 000.00 from the proceeds of the sale of the Manhattan which had been tendered at the commencement of the trial.
156. In her previous rule 43(6) on 8 October 2014, she had indicated what her legal costs had been to date and this referred to all the litigation between the parties and was not restricted to the litigation in the divorce action. In addition, the applicant had not set out fully how she had expended the monies paid in respect of contributions to legal costs advanced to her on prior occasions.

Rule 43 Application (4417/2013 :Madondo J: 31 May 2013)

157. These proceedings were set aside by Madondo J on 31 May 2013 as an irregular step. After the applicant had instituted the proceedings, the respondent's attorneys filed a notice in terms of Rule 30(1). No response was received to such notice and the applicant's attorneys enrolled the rule 43 application for hearing. The respondent's attorneys despatched a letter to the

applicant's attorneys that there had been no response and that the rule 43 application ought to be removed from the roll.

158. The response was that the rule 43 application would not be removed from the roll and the respondent was invited to launch the rule 30 proceedings to be argued on the same day as the rule 43 application.

159. The grounds relied on by the respondent were that the application constituted an abuse of process as the papers were unduly prolix and contained matters not relevant to the claims for interim maintenance.

160. For reasons already dealt with above rule 43 are intended to be "quick and inexpensive" proceedings in which parties are to succinctly deal with the issues. There is authority for the proposition that "prolixity" in such proceedings constitutes an abuse of process.⁴⁰

161. There is thus no reason why the applicant ought not to be directed to pay the costs occasioned by such application.

162. A further matter which warrants some attention in this application in particular relates to the conduct of the applicant's attorneys of record. I have already in the exercise of my discretion when it comes to costs ordered the applicant to pay the respondents costs. In an effort to ameliorate the position for the applicant, I am inclined to disallow her legal representatives to recover any fees from her in respect of this application in line with the reasoning in the *Du Preez* decision and the line of cases referred to therein. It seems to be that such order is warranted as

⁴⁰ *Du Preez* supra at paragraph 5

correspondence was exchanged prior to the hearing of the application and the rule 30 application being brought and formally enrolled for hearing.

Rule 43 Application (7117/2013 :Nzimande AJ: 1 August 2013)

163. The applicant was successful in such application. There ought to be no reason why I should depart from the normal rule relating to costs that she be awarded such costs. Even though it was submitted that the applicant was not honest, I cannot sit as a court of appeal and adjudicate the merits of such application. Consequently, the respondent M. M. , is directed to pay the applicant L. M. 's costs occasioned by the rule 43 application.
164. On 28 October 2014, I also issued the following orders in the rule 43 (6) application:
- 164.1 The application is dismissed.
- 164.2 The applicant, L. M. , is directed to pay the costs occasioned by such application, including the costs consequent upon the employment of senior counsel.
- 164.3 The cost limitations imposed by the provisions of rules 43(7) and 43(8) do not apply.
165. The applicant had renewed her application for a contribution on the basis that she needed to bring the rule 28 application and also as she needed to continue with the trial. What she failed to do was to explain what she had done with the monies advanced to her in respect of the contribution to costs and why she needed a further contribution. Ms Liebenberg made

submissions from the bar and did not in my view provide an explanation for how the monies advanced were utilised. It was for these reasons the orders were issued.

166. In so far as the costs of the action are concerned, I am of the view that the plaintiff is liable for the costs thereof until 8 October, the first day of trial when the tenders were made. In addition these cannot include all the costs in relation to the experts as these formed the basis on which the application in terms of rule 43(6) was granted on 8 October 2014. Included in the draft bill of costs were these amounts and consequently the first defendant would not be allowed to claim for those twice.
167. In addition the court must also indicate its displeasure with the first defendant in so far as she conducted her case. It is for these reasons that I intend only awarding costs up to 8 October and also directing her to pay the costs of the joinder application and the costs of the defendants in reconvention in relation to her counterclaim especially in respect of the Trust.
168. She was not candid with the court and in my view dragged the trustees into the fray for no good reason. As she was unsuccessful against them and also as she was only partially successful in her claim for maintenance, she cannot succeed in recovering all her costs.

Conclusion

169. One final matter which requires mentioning is the rule 28 application for the amendment of the first defendant's claim in reconvention, which was

opposed by the plaintiff and argued when the trial resumed on 28 October 2014. A substantive application was brought by the first defendant which forms part of the record. The orders made in regard thereto are a matter of record.

170. The parties are aware of the difficulties experienced due to the fact that I do not have a registrar appointed to assist me and that for the October session, 2014 the court files were not endorsed in consequence thereof. I had attempted to obtain the recordings of the trial to confirm any other orders I made for its duration but have not been able to secure these and have had to rely on my notes in my bench book.

171. Should it become necessary a full transcript will have to be obtained and I may need to supplement the judgment in respect thereof.

172. In the premises, the orders I issue are as follows:

A: **Rule 43 Application (Case No: 5474/2012: 5 November 2012:Gorven J)**

1. The applicant, L. M., is directed to pay the costs occasioned by such application, including the costs consequent upon the employment of senior counsel.
2. The cost limitations imposed by the provisions of rules 43(7) and 43(8) do not apply.

B: **Rule 43 Application (4417/2013 :Madondo J: 31 May 2013)**

1. The applicant, L. M. , is directed to pay the costs occasioned by such application, including the costs consequent upon the employment of senior counsel.
2. The cost limitations imposed by the provisions of rules 43(7) and 43(8) do not apply.
3. The applicant's attorneys are not entitled to charge and recover any fees from her in respect of this application.

C: **Rule 43 Application (7117/2013 :Nzimande AJ: 1 August 2013)**

1. The respondent M. M. , is directed to pay the applicant L. M. 's costs occasioned by this rule 43 application.

D: **Application under case number 7709/2012 (Interdict Application in respect of the Manhattan Property)**

2. The *rule nisi* issued on 27 July 2012 is discharged.
3. The applicant, M. M. is directed to pay the costs of the first respondent, L. M. .

E: **Divorce Action**

1. A decree of divorce.
2. An order directing the plaintiff to pay to the first defendant in terms of section 7 (2) of the Divorce Act, Act 70 of 1979 the following:
 - 2.1. The sum of R27 700.00 per month, for a period of 5 years, which amount is to escalate annually on the anniversary of the divorce order at a rate equivalent to the Consumer Price Index. The first payment in terms of this order is payable by midday on 7 December 2015;
 - 2.2. The sum of R2 478.00 in respect of a monthly membership contribution to the Discovery medical aid scheme, for a period of 5 years from the date of this order. Such amount is to increase in accordance with any increase imposed by the Discovery medical aid scheme. The first payment in terms of this order is payable by midday on 7 December 2015;
 - 2.3. The sum of R250 000.00 as a contribution to the purchase of a motor vehicle by the first defendant. Such amount is payable by midday on the 11December 2015.
- 3 An order directing the plaintiff to pay to the first defendant the proceeds of the sale of the immovable property known as "Manhattan" (together with interest accrued thereon) less the sum of R30 000.00 already advanced to the first defendant.
4. The plaintiff's claims insofar as they are inconsistent with the foregoing orders are dismissed.

5. The first defendant's claims-in-reconvention insofar as they are inconsistent with the foregoing orders are dismissed.
6. The first defendant is directed to pay the costs occasioned by the joinder application as well as the costs of the second, fourth, fifth and sixth defendants in the divorce action, such costs to include the costs of Senior Counsel where so employed and the reserved costs of 8 July 2014.
7. The plaintiff is directed to pay the first defendant's costs occasioned by the rule 43(6) application on 8 October 2014.
8. The first defendant is directed to pay the reserved costs of 26 September 2014 and 1 October 2014 in respect of the rule 35(3) application, such costs to include the costs of senior counsel where so employed.
9. In respect of the costs incurred in the divorce action not covered by the orders in paragraphs A to E above, the plaintiff is directed to pay the first defendant's taxed or agreed costs, on a party/party scale up to and including 8 October 2014. These costs are to exclude:
 - 9.1. the qualifying fees and attendance at court of the first defendant's experts Lance Marais and Neil McHardy which were taken into account in the order made in the rule 43(6) application for a contribution to costs on 8 October 2014;
 - 9.2. the costs occasioned by the adjournment of the trial on 25 June 2014, in which there was no order as to costs.

10. Any remaining costs incurred are to be borne by the plaintiff and the first defendant.

HENRIQUES J

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Dates of Hearing: 8, 9, 10, 28 to 31 October 2014

Plaintiff's Counsel: Advocate A. Stokes, SC

(Second, Fourth, Fifth and Sixth Defendants Counsel)

First Defendant's Counsel: Advocate S. Liebenberg

(Third, Seventh and Eighth Defendants Counsel)