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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NUMBER: 26912/2017

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

	29 April 2024
Signature	Date

In the application between:

W[...]: E[...] M[...] (born D[...] B[...])

APPLICANT

and

W[...]: S[...]

RESPONDENT

JUDGMENT

VAN ASWEGEN AJ

INTRODUCTION:

[1] This is a Rule 43(6) application for the variation of a rule 43 order granted on 12th September 2019 by Levenberg AJ where the Respondent was ordered to make payment *pendente lite* to the Applicant of:

- 1.1 Maintenance in the amount of **R30 000.00** per month;

1.2 a contribution towards the Applicant's legal costs in the amount of **R100 000.00** payable in one lump sum 9 (nine) days of the granting of the rule 43 order ("the rule 43 order")¹

[2] The Applicant now seeks the variation of the aforesaid rule 43 order to seek the following relief *pendente lite*:

"3.1 Paragraph 1 of the rule 43 order granted by the Honourable Acting Justice Levenberg dated 12 September 2019 is hereby and as from the date of the order granted herein ("the order"), replaced with the following order:

3.1.1 the Respondent shall maintain the Applicant, pendente lite, by making payment:

*3.1.1.1 To the Applicant directly into such account nominated by her, without deduction or set off, of an amount of **R68 170.00** per month, payable on or before the first day of each month, the first payment being payable within 5 days of date of the order, and there after on or before the first day of each month following the month in which the order is granted which amount shall escalate at a rate of 8% per year, on the anniversary of the date of this order;*

3.1.1.2 of the premiums and slash all contributions attributable to the membership of the applicant as the main member of a comprehensive medical aid scheme, with benefits comparable to the Executive Plan offered by Discovery Health;

3.1.1.3 of any all medical expenses or portions thereof, incurred in connection with the application that are not discharged or refunded, either wholly or in part,

¹ 016-13;

by any medical aid scheme including, but not limited to, medical, dental, consultative, hospital, surgical, ophthalmic, optometric (incorporating the costs of spectacles and contact lenses), chiropractic, orthodontic, therapeutic (incorporating speech therapy, hearing therapy, occupational therapy, physiotherapy and psychotherapy), psychological, psychiatric, homeopathic, dermatological, and pharmaceutical expenses by virtue of providing the applicant with a credit card designated solely for this purpose in order for the applicant to make payment on request of any upfront payments that may be required in this regard;

*3.1.2 The Respondent shall make payment of a contribution towards the applicant's legal costs in the amount of **R2 700 000.00** in equal instalments of **R270 000.00** per month, the first payment being due within 7 days from date of this Order and thereafter on or before the 1st day of each month following the month in which the Order is granted;*

3.1.3 In the event that the Applicant makes payment of any of the costs referred to above for which the respondent is liable in terms of the Order, the Respondent shall reimburse the Applicant within 7 days of being provided with proof of payment by the Applicant of such expense;

3.2 The remaining paragraphs of the Rule 43 Order not affected hereby remain of full force and effect;

3.3 The Respondent shall make payment of the costs of this application on the scale as between attorney and client;

3.4 The Applicant is granted such further and/or alternative relief as the above Honourable Court may deem fit.”²

² 016-1 to 016-4

CONTEXTUAL INFORMATION:

[4] During or about May of 2013 the parties commenced cohabitation pursuant to an intimate relationship between them.

[5] Subsequently they married each other on 24 October 2015 out of community of property subject to the accrual system. No children were born of the marriage.

[6] During or about 2017 the marriage between the parties broke down irretrievably.

[7] The Applicant commenced divorce proceedings against the Respondent where in the Applicant sought a Decree of Divorce, Rectification of the Ante-nuptial contract, Spousal Maintenance of **R30 000.00** as rehabilitative maintenance for her monthly maintenance requirements, which amount shall increase annually by a percentage equivalent to the [L] [SEP] increase in the Consumer Price Index (as issued by the South African [L] [SEP] Reserve Bank) plus 1% (one percent). ³

[8] Despite only being married one year and nine months, litigation between the parties has been ongoing for a period of more than six years – this equates to more than three times the duration of the marriage. During the six-year time frame the Applicant had launched two rule 43 applications - in 2017 and in 2019 plus the current rule 43(6) application.

[9] The first rule 43 application in 2017 was dismissed as a result of the Applicant's failure to make a proper disclosure of her true financial position.⁴

[10] In the second rule 43 application the Applicant sought maintenance inclusive of medical expenses in an amount of **R47 672.00**. The Court allowed maintenance of

³ 0001-30;

⁴ SW 11 016-233 to 016-238

R30 000.00 and a contribution towards costs of **R100 000.00**. This order has been operational for a period of four (4) years.

[11] Subsequently, however in this application it came to light that the Applicant had received the following payments which she failed to disclose during the second rule 43 application:

11.1 an amount of **R197 638.92** with payment reference (Mpumalanga show) paid into the Applicant's FNB check account on 24 July 2019 – three months prior to the rule 43 hearing.

11.2 Separate amounts of **R14 712.62** and **R184 600.00** paid into the Applicant's Nedbank cheque account with reference "INTOPTIMUMPLIS 6[...]" and "CAPOPTIMUMPLUS 6[...]" on 7 August 2019 (one month before the Rule 43 application was heard).

11.3 **R541 249.89** an inheritance received on 17 September 2019 – five days after the rule 43 order.

11.4 Negotiated an employment contract with YTV on 1 October 2019 less than three weeks after the hearing of the rule 43 application and three weeks after the set order was granted started earning an amount of approximately **R87 300.00** per month gross from the employment (almost three times the maintenance order which was granted of **R30 000.00**).

11.4.1 This contract was not only deliberately withheld by the Applicant from the Respondent, but the Applicant's erstwhile attorneys also incorrectly advised the Respondent's attorneys that the contract was:

- An oral agreement;
- The Applicant was temporarily contracted;
- There was no fixed basic salary and

- The Applicant was the Acting General Manager.⁵

whereas during January 2023 it came to light that:

- There was a written agreement of employment from 1 October 2019;
- There was a fixed term contract for 3 years as from 1 October 2019;
- There was a fixed salary of \$USD 5,000 which salary escalated by 6% annually plus a housing allowance of BWP5,000 per month and a cellular phone allowance of BWP1,000 per month plus a company car.
- The Applicant was the General Manager.⁶

[12] I am of the firm opinion that the aforesaid non-disclosures were material, substantial and should have been disclosed by the Applicant in the second rule 43 application as it was indicative of her financial situation at the time. The interim maintenance order granted may have been totally different if the true status of the Applicant's true finances were unveiled. The Applicant should indeed have been more diligent in making full and frank disclosure of her income generated through employment or yet to be earned. More so even because the first rule 43 was dismissed with costs for the precise reason that the Applicant sketched a selective picture of her finances and neglected to place her true financial position before the court. Although counsel for the Respondent indicated that the aforesaid has no bearing on this case as the Respondent did not launch a rule 43(6) application, I beg to differ in that the Applicant's litigation stratagem of disclosing selective evidence to the court is highly relevant as the court views such conduct as non-ethical and worthy of censor.

[13] Murphy J in *Du Preez v Du Preez*⁷ concerning remarks on the misstatement of facts or the failure to disclose fully all material information regarding a party's

⁵ SW8.2016-216

⁶ 016-202 to 016-208

financial affairs. He states that such conduct by an applicant is fatal and that such conduct must lead to dismissal in rule 43 applications.

[15] *"However, before concluding, there is another matter that gives me cause for concern deserving of mention and brief consideration. In my experience, and I gather my colleagues on the Bench have found the same, there is a tendency for parties in Rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in Rule 43 applications. To my mind the practice is distasteful, unacceptable and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury, and in certain circumstances may be the crime of defeating the course of justice. Should such conduct occur in Rule 43 proceedings at the instance of the applicant then relief should be denied.*

[16] *Moreover, the power of the court in Rule 43 proceedings, in terms of Rule 43(5), is to "dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision". The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume, there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the*

⁷(16043/2008) [2008] ZAGPHC 334 (24 October 2008)

utmost good faith (uberrime fidei) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with “clean hands” and on that ground alone the court will be justified in refusing relief.”

(my underlining)

[14] In *C.M.A v L.A*⁸ Liebenberg AJ reiterated that there is an obligation on an applicant in rule 43 applications to act with the utmost of good faith and make full and frank disclosure of his/her finances. The penalty of non-disclosure may be as high as the refusal of the application. In paragraph 25 of the judgment the following is said:

“[25] Whilst every application for maintenance pendente lite must be decided on its own facts, certain basic principles have been distilled in the authorities:

[25.1] There is a duty on an applicant who seeks equitable redress to act with the utmost good faith, and to disclose fully all material financial information. Any false disclosure or material non-disclosure may justify refusal of the relief sought;

[25.2] An applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties albeit that a balanced and realistic assessment is required, based on the evidence concerning the prevailing factual situation;

[25.3] The applicant’s actual and reasonable requirements, and the capacity of the respondent to meet such requirements which are generally met from income, although, sometimes, inroads on capital may be justified;

[25.4] A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands, and similarly more weight will be attached to the affidavit of a respondent showing willingness to implement his lawful obligations;

[25.5] An interim maintenance order is not intended as an interim meal ticket for a spouse who, quite clearly, will not establish a right to maintenance at trial;

⁸ [2023] ZAGPJHC 364 (24 April 2023) at [25].

[25.6] A court must be circumspect in arming an applicant with an interim maintenance order which she is unlikely to achieve at trial, for human nature predicts that she will then seek to delay the finalisation of the action.” (my underlining).

[15] The Court disapproves and takes a dim view of the Applicant’s non-disclosure of her real financial status in the second rule 43. The Applicant had an obligation to act in the utmost good faith, yet decided to portray a skew picture of her financial reality. The fact that the Applicant’s lack of disclosure in litigation has been reoccurring since the first rule 43, is conduct which is shameful and should not be condoned in litigation.

[16] In adjudicating the rule 43(6) application before me I must however consider whether the Applicant has established a material change in her circumstances in respect of the interim maintenance and also an inadequacy in respect of the contribution towards costs. The Applicant’s previous conduct, although heavily criticized by me, will only bear relevance in my assessment of the current application if such conduct reappears.

EVALUATION OF RULE 43(6) APPLICATION:

[17] The Applicant alleges that there has been material changes in her financial and/or circumstances which warrants a reconsideration and or variation of the second rule 43 order.

[18] Rule 43(6) of the Uniform Rules of court provides for a change in circumstances.

“The court may, on the same procedure,⁹ 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.”

⁹ In other words, the procedure in Rule 43(2) and (3).

[19] Rule 43(6) is strictly interpreted.¹⁰ There must be a *material* change in circumstances and it is not permissible to seek a re-hearing or a review of an existing order under the guise of a Rule 43(6) application, or to appeal the existing order.

[20] Although the constitutional court in *S v S and another*¹¹ held that rule 43 should be interpreted expansively, it did not oust the requirement that an applicant in rule 43(6) applications must demonstrate a material change in his/her circumstances.

[21] The Applicant accordingly has to place sufficient evidence of both her and the Respondent's finances (income and expenses) before the court in order for the court to assess whether:

- 21.1 her circumstances call for a substantial increase in maintenance and
- 21.2 whether the contribution towards costs is inadequate.

[22] In order for the court to determine whether there was indeed a change in the applicant's circumstances and what the extent thereof is it is vital for an applicant to make full and frank disclosure of her finances. It requires of an applicant to not only disclose the respondent's income, but more over to provide the court with a full and frank exposition of all her available financial resources or the lack thereof.¹²

[23] The Applicant, who is allegedly requiring additional monies to maintain herself and to pay her legal fees, has to demonstrate her lack of means by fully and frankly disclosing all components that makes up her financial position. In this way the Applicant will ascertain whether the need for financial support exists or not.

[24] The test is accordingly a material change in the Applicant's finances which culminates in a need to support. A greater need must be in existence before the

¹⁰ *Jeanes v Jeanes* 1977 (2) SA 703 (W) 706F; *Grauman v Grauman* 1984 (3) SA 477 (W) 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) 262E–G; *Maas v Maas* 1993 (3) SA 885 (O) 888C; *Greenspan v Greenspan* 2001 (4) SA 330 (C) 335E–F

¹¹ [2019] 6 SA 1 (CC)

¹² P.E.O.I v W.A.H (97132/16) [2021] ZAGPPHC 60

court even has to assess the Respondent's ability to maintain. If no greater need is shown the Respondent's ability does not even need to be considered.

[25] In summary, it is trite that the Applicant has the onus of showing that there was a change in her finances which brought about a material change in her circumstances. In evaluation of a material change it is important to look at the indicators of possible material change.

[26]. The Applicant relies upon material change in circumstances based upon her alleged:

- 26.1 increase in monthly expenses;
- 26.2 the reduction in her income;
- 26.3 the necessity to be placed on a comprehensive medical aid;
- 26.4 the depletion of her assets.

INCREASE IN MONTHLY EXPENSES:

[27] The first factor as alleged by the Applicant is an increase in her monthly expenses.

[28] The Applicant stated that the increase in her monthly expenses is due to:

- 28.1 an increase in living expenses,
- 28.2 the decrease in the value of money,
- 28.3 the increase in the costs of many consumables as well as her own medical condition.

[29] In Annexure **W2**¹³ the Applicant draws a comparison between her expenses as declared in the previous two rule 43 applications (November 2017 and May 2019) and the current rule 43(6) application (October 2023). She states that her current reasonable expenses increased in excess of **R20 000.00** per month.¹⁴ The Applicant

¹³ 016-190

¹⁴ Par 25 016-14

rightly refers to the increase as a “*dramatic escalation of her expenses over such period by approximately R20 000.00.*”¹⁵

[30] The Applicant states that her reasonable expenses amount to **R74 670.00** excluding the provision for her medical expenses. It's however fundamental to point out that the Applicant states that, “*I am not necessarily incurring all of the expenses on the said schedule which represents my reasonable and anticipated monthly expenses*”.¹⁶ The amount in respect of the reasonable expenses is accordingly not a real, accurate and fixed amount, but encapsulates future anticipated expenses not yet undertaken. In this regard reference is made to for instance the solar upgrade of **R2 400.00** and a security system of **R1300.00**.

[31] Annexure **SW1**¹⁷ shows an increase in expenses from **R45 286.69** in 2017 to **R52 436.25** in 2019 and **R74 670.00** in 2023. It also depicts expenses which has significantly increased since the second rule 43. In this regard I refer to local and international holidays **R3500.00** in 2019 which has now noticeably increased to local holidays of **R2750.00** and **R7000.00** for international holidays.

[32] The Applicant's bank statements also indicate that the Applicant spends excessively on for instance hair/beauty by paying **R9000.00** for skin treatments on 28 July 2023. She also dines out numerous times a month and has weekend outings.

[33] In summary, the Applicant's expenses have considerably and dramatically increased and do not portrait real fixed monthly expenses but are also inclusive of future anticipated expenses which are yet to be incurred. The Applicant did therefore not place the court in a position to evaluate her current reasonable real expenses. The court is not given an exact breakdown of the Applicant's real fixed expenses, but is rather drawn into a futuristic world with possible expenses yet to be incurred or not. This unfortunately places the court in a predicament when it has to evaluate

¹⁵ Par 25 016-14

¹⁶ Par 70 016-30

¹⁷ 016-193

whether there was an increase in fixed expenses. It should not be necessary for a court to have to decipher and iron out the various expenses (fixed and anticipated) in order to establish the Applicant's case. An applicant's case in all rule 43 and 43(6) applications should be clear and convincing – his or her expenses should be set out in concise and definite terms.

[34] The absence of a definite figure or amount in respect of the Applicant's real and true expenses is indicative of the Applicant's portrayal of a reality of increased expenses which is unreal, as it is inclusive of both future expenses and excessive amounts.

[35] The Respondent states that the Applicant's expenses only amount to **R23 220.00**.

[36] The Applicant has failed to make out a case that she has fixed real monthly expenses of **R74 670.00**. To the contrary the amount of **R74 670.00** is inclusive of future expenses not yet occurred and excessive expenses.

REDUCTION IN APPLICANT'S INCOME:

[37] The second factor in assessing the material change is the Applicant's reduction in income. She states that her income has significantly reduced.

[38] The Applicant states in this application that she is in her mid-sixties, unemployed and only receives a rental income of **R6500.00** per month gross (**R3 800.00** net). She states that this is her only source of income.¹⁸

[39] The Applicant's financial disclosure form (FDF)¹⁹ however indicates that she will receive the following income amounting to **R61 997.60** for the next 12 months:

39.1 Rental 20 Roosevelt Cottage	R43 600.00
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¹⁸ Par 47 016-22

¹⁹ 016D-21

39.2 Interest on NED Investments	12 000.00
39.3. Interest on Current Account	100.00
39.4 Rental Air BnB	6 297.60

[40] Having regard to the bank-statements disclosed in the Applicant's FDF it is clear that the Applicant did indeed receive income from employment positions but that she failed to disclosed same on her FDF.²⁰ The Applicant had received income from employment for the past 12 months amounting to **R193 969.00** in total (calculation of net income under Section H: Solid Impact CC net amount of **R117 810.00** + YTV net amount of **R75 011.00** + Kyknet net amount of **R1 148.00**= **R193 969.00**)²¹

[41] The Applicant in the second rule 43 accordingly obtained an interim maintenance order and a contribution towards cost order, without placing a true account of her financial affairs before that court. She neglected to place information regarding income generated or to be generated from employment before the court. The Applicant's estimated total income as per her FDF (**totals of H to L**) amounts to **R294 835.95** namely **R86 430.70** (income from investments) + **R14 436.25** (annuity) + **R193 969.00** (employment income) and not as alleged only **R100 866.95**.

[42] It is abundantly clear that the Applicant for the past 12 months has been earning and still is earning more than a mere **R6 500.00**. Her allegation that she is solely earning **R6 500.00** is devoid of all truth. The Applicant is receiving besides **R30 000.00** as interim maintenance, also rental in respect of Air BnB **R6 297.60** plus interest on NED investments **R1 000.00** and **R1 000.00** as income from a living annuity.

[43] In *I v H*²² emphasize is place on the fact that an applicant in rule 43(6) applications must make full and frank disclosure in respect of his/her financial circumstances in order to evaluate material change.

²⁰ 016D-23

²¹ 016D-17

²² *I v H* (97132/16) [2021] ZAGPPHC 60 (3 February 2021).

“[14] 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 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.

... in an application under Rule 43(6), the applicant bears the onus of establishing that a material change has occurred in the circumstances of either party or a child, or a previous contribution towards costs proving inadequate. Although that onus is to be considered in the light of the robust and expedient nature of Rule 43 proceedings, it is nonetheless an onus which is to be discharged on a balance of probabilities.

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.”

[44] The Applicant did not make a full, frank and sincere disclosure of her finances in either the rule 43(6) application or her FDF. Since the inception of the first rule 43 application the Applicant had, it seems, elected to selectively place information before the Court. The Applicant also made a deliberate decision not to place her employment income before the Court in the second rule 43. This court takes the Applicant’s financial non-disclosure or selective disclosure in this application in an extremely serious light. A court cannot endorse litigation by a litigant who distorts the reality and who approaches the court with insincerity and dishonesty. Such litigation strategem makes it impossible for a court to evaluate a case fairly and justly. The court can in such circumstances not exercise its discretion based on the factual reality between the parties, as the court has been made aware of the selective financial disclosure which taints the whole matter in its entirety. A decision made based on incomplete and selective financial disclosure will be unjust and will not serve justice.

[45] An applicant seeking equitable redress has to act with the utmost good faith and must make frank financial disclosure. Material non-disclosure may justify refusal of the relief sought.²³

[46] The Applicant in this matter has a habit of selective disclosure and non-disclosure which this court will not sanction, but it will take decisive action against such behaviour and will regard the evidence as being contaminated and inaccurate.

[47] This court cannot and will not assess the Applicant's alleged reduction in income in light of the Applicant's stratagem of placing selective evidence before the court.

[48] It is obvious from the judgment by Molahlehi J that the Applicant has litigated in the initial rule 43 application during 2017 without making frank financial disclosure. Subsequently in the hearing before me it came to light that the Applicant also withheld her employment history and earnings in the second 43 application. What exacerbate matters however is that the Applicant continued on the path of selective disclosure and non-disclosure in the current matter before me making it impossible to adjudicate fairly and justly.

[49] The Applicant did not satisfy this court in showing a reduction in income. This court will not evaluate the Applicant's income having knowledge of the fact that the evidence tendered sketched an imprecise picture of the Respondent's income.

NECESSITY OF COMPREHENSIVE MEDICAL AID:

[50] The third factor to establish material change is the necessity to obtain a better medical health plan due to the Applicant's current health status.

[51] The Applicant further states that she suffers from:

²³ CMA v LA [2023] ZAGPJHC 362 (24 April 2023) at [25]

51.1 a degenerative condition in her back which effects at least five of her vertebrae which results in her administering painkillers and being unable to sit for long;

51.2 osteo-arthritis in most of her joints, which results in cortisone injections every six months and regular physiotherapy and

51.3 high blood pressure.²⁴

[52] She alleges that her health has deteriorated and escalated to the point where she needs to be registered as a member of a more comprehensive medical aid plan such as the executive plan offered by Discovery Health. Reliance is placed on Annexure **W3**.

[53] Currently the second rule 43 order allows for interim maintenance in an amount of **R30 000.00** which includes medical costs in an amount of **R6 826.00**.²⁵

[54] The Respondent argues that there is no justification for the Applicant to be placed on the most comprehensive medical aid scheme offered by Discovery Health in an amount of **R9 122.00** per month.

[55] If one looks at Annexure **W3** Doctor CS van Heerden merely indicates that the Applicant will require anti-inflammatories. The Respondent rightly so stated that the medicines can be obtained over the counter and are inexpensive. There is further no supporting evidence which indicates that the Applicant requires cortisone injections every six months nor did the reports indicate that the Applicant requires physiotherapy. The Respondent also indicates that high blood pressure can also be controlled with a diet and further guidance from her general practitioner.

[56] The Applicant's Discovery Essential Core Plan includes, according to the Respondent, full cover for in hospital treatment and specialists, unlimited private

²⁴ 016-16 Par 35.1 to 35.3

²⁵ 016-142 Par 40.

hospital cover at any hospital, unlimited private hospital cover at a network hospital come out full cover for chronic illnesses and medication, cover for emergencies when travelling and cancer cover up to **R250 000.00**²⁶

[57] The Respondent's own medical aid contribution also only amount to **R5 802.00**.²⁷

[58] I do not consider the Applicant's current medical status as a basis underlying and confirming a material change in circumstances as the evidence points to the fact that the Applicant's current medical plan will allow for her current needs.

APPLICANT'S DEPLETION OF HER ASSETS:

[59] The Applicant has attached Annexures **W4**²⁸ and **W5**²⁹ depicting respectively her assets and liabilities as at the date of the second rule 43 application and currently.

[60] The depletion of the Applicant's assets was, the Applicant alleges due to the payment of her legal costs and by supplementing the shortfall between her reasonable monthly expenses and the maintenance amount paid by the Respondent. However, she does not allege or substantiate to whom the monies were paid and when they were paid.

[61] During 2015 to 2016 the Applicant stated that she had disposed of two immovable properties which she owned and that she received an amount of **R1 400 000.00**. She alleges that said amount became depleted by mid 2019 due to living expenses and legal costs. Despite this allegation there is no indication that this amount was utilized as suggested. If the monies were used to pay legal costs one would have expected a full disclosure.

²⁶ Par 35 016-140

²⁷ Par 40 016-141 to 016-142

²⁸ 016-70 to 016-71

²⁹ 016-72 to 016-73

[62] The Applicant also alleges that during 2022 she was forced to repatriate and deplete an amount previously held to her credit in an offshore account with FNB of more or less 5500£. There is also no proof of this allegation, which is denied by the Respondent.

[63] The Applicant's asset values further do not correlate with one another. In her Section 7 reply it is reflected as **R4 598 378.00**, in her Particulars of Claim it is said to be **R4 219 776.00** and in the Ante-nuptial Contract she declared the asset value as **R9 700 000.00**.³⁰ Currently, the Applicant now claims a much lower asset value of **R3 600 000.00** (excluding the Sheffield Property of **R4 000 000.00**) with investments and savings of **R717 000.00**. However, the reduction of **R6 000 000.00** in the Applicant's assets, remain without any explanation or clarification.³¹ The Applicant yet again elects not to disclose the exact facts.

[64] Despite the alleged depletion of the Applicant's assets she further remains silent as to how she funded the following:

- 64.1 the Mustang motor vehicle in an amount of **R350 615.00**; ³²
- 64.2 the kitchen renovations in an amount of **R62 220.00**; ³³
- 64.3 a loan to daughter in an amount of **R120 000.00** ³⁴
- 64.4 an additional motor vehicle in an amount of **R111 500.00**.³⁵

[65] The Respondent furthermore in Annexure **SW3**³⁶ draws a comparison between the Applicant's assets and liabilities since 2017 up to now. It is apparent that the Applicant's assets have increased with **R4 000 000.00** being the value of 40% of the Sheffield immovable property.

³⁰ 003-33

³¹ Par 405 016-142

³² Par 46.1 016-143

³³ Par 46.2 016-143

³⁴ Par 46.3 016-143

³⁵ Par 46.4 016-143

³⁶ 016-196

[66] The Applicant's income and asset value and the alleged decrease thereof remain open to speculation and without substantiation. It raises more questions than answers. The Applicant did not take the court into her confidence. She made inconsistent and selective disclosures about her income and expenditure, assets, and liabilities. She does not approach the court with "clean hands".

[67] The court cannot assess whether there is a material change in circumstances without having a detailed and precise account of the Applicant's assets and liabilities. If an Applicant chooses of her own volition to be vague and selective in placing evidence before the court without validation of the evidence such an Applicant must face the risk of dismissal of his/her application. The Applicant's litigation strategy of non and selective disclosure has been re-occurring since the first rule 43 in 2017.

[68] Having regard to the four factors mentioned here in above on which the Applicant rely to satisfy her onus of showing a material change in her circumstances, it is apparent that the Applicant misstated the true nature of her financial affairs. Murphy J in *Du Preez v Du Preez*³⁷ commented on the trend in rule 43 applications for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to rectify same. He also stated that the practice is distasteful, unacceptable and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. The sanction for such conduct in Rule 43 proceedings at the instance of the applicant should be a dismissal of the relief sought.

[69] I am of the firm persuasion that the Applicant in the first and second rule 43 applications and the current rule 43(6) application clearly had a litigation strategy of placing only selective evidence before the court in pursuance of the relief which she sought. The judgment granted by Mohlahlehi J drew the Applicant's attention to the fact that full and frank financial disclosure should be made in all rule 43 applications and that the penalty for non- disclosure was a dismissal of the application. Yet,

³⁷ *Du Preez v Du Preez* (16043/2008) [2008] ZAGPHC 334 (24 October 2008)

despite the dismissal of the first rule 43 application, the Applicant in the second rule 43 also elected not to make a full disclosure. This only came to light in the hearing before me along with other material non- disclosures in the current rule 43(6) application.

[70] The Applicant's conduct as aforesaid has only one result namely placing the court in a position where it cannot evaluate the material change in circumstances. The court's awareness of the Applicant's material non-disclosures and her habit of selectively placing evidence before the court, leaves the court with no other option as to penalize the Applicant.

[71] The Applicant had to satisfy the court that she has a greater need in respect of maintenance *pendente lite* based upon a material change in her circumstances. The Applicant however failed to establish a greater need for an increase in maintenance, because of the non-disclosure of her true finances. The court is therefore unable to adjudicate the maintenance claim in a just and fair manner. The Respondent's ability to pay does not have to be assessed if the Applicant fails to establish a greater need.

[72] The Applicant's relief in respect of a greater amount of maintenance *pendente lite* is accordingly dismissed.

[73] I now wish to discuss the impact of the Respondent's non-disclosure of her true income, assets and liabilities and finances on the contribution towards costs.

INADEQUACY OF CONTRIBUTION TOWARDS COSTS

[74] The Applicant alleges that the contribution towards the legal costs in an amount of **R100 000.00** is insufficient and that she had already incurred costs in the region of approximately **R2 000 000.00**.³⁸ As at date of the second rule 43 order the Applicant had outstanding legal fees of **R215 725.00**. The **R100 000.00** was paid the Applicant alleges to her erstwhile attorneys.

³⁸ Par 41 016-18

[75] Neither the Applicant's FDF nor the rule 43(6) application validate the aforesaid allegation of payment. There are no invoices or statements of account which indicate when, to whom and in respect of what work these expenses were incurred.

[76] The Applicant must have known that she had to disclose and substantiate payments made to any of her attorneys to prove an inadequacy to pay her legal costs.

[77] These parties have, as alluded to here in before, been litigating for more than six years on a mere one year and nine months' marriage out of community of property inclusive of the accrual with no children.

[78] The Respondent did put forward a *with prejudice* offer which the Applicant rejected.³⁹

[79] The Applicant alleges that the Respondent has spent **R4 923 339.00** on legal costs. The Respondent did not deny it, but also did not mention an amount.

[80] The Applicant suggests a contribution towards costs of **R2 700 000.00**⁴⁰ which is more than double her litigation costs over a six-year time frame. This amount is ludicrous having regard to the fact that the Applicant alleges that she has spent **R2 000 000.00** on litigation over more than 6 years.

[81] The Applicant alleges that she has proven that the contribution towards costs is inadequate because of the following:

- 81.1 the divorce action has been ongoing for approximately six years;
- 81.2 pleadings have been exchanged;
- 81.3 there has been extensive discovery in the divorce action;
- 81.4 there have been numerous interlocutory applications.

³⁹ SW4 016-199

⁴⁰ W9.1 016-81

[82] The Applicant's proposed future bill of costs by Mr. Ray Vaughn Gertzen reflects **R2 700 000.00** as a contribution towards costs. However, it is not confirmed by him under oath.⁴¹

[83] The Respondent has also obtained an assessment of the Applicant's proposed bill of costs from a cost consultant – Mr. Hennie Rosslee - who alleges that the legitimate costs should be no more than **R428 055.35**.⁴² There is also no confirmation by Mr. Rosslee.

[84] It is an established principle that both parties are entitled to litigate on the same scale commensurate with the means of the parties during the subsistence of the marriage.⁴³

[85] In an application for a contribution towards costs in terms of rule 43(6) the Applicant should therefore make out a case that she has to incur various expenses in preparation for trial and does not have the necessary funds to incur those expenses.

[86] The claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in Roman Dutch procedure and has been sanctioned through many decades.⁴⁴

[87] The basis of the claim is the duty of support the spouses owe each other.⁴⁵

[88] The manner of assessment of quantum of the contribution towards cost dealt with in the case of *Van Rippin (supra)* at page 639 is the following:

"The quantum which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court. In

⁴¹ 016- 96 to 016- 97.

⁴² SW10 016-222

⁴³ Dodo v Dodo 1990(2) SA 77 W

⁴⁴ *Van Rippin v Van Rippin* 1949 (4) SALR 634 (C)

⁴⁵ *Chamani v Chamani* 1979 (4) SA 804 (W) at 806F–H).

the exercise of that discretion the Court should, I think, have the dominant object in view that having regard to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation the wife must be enabled to present her case adequately before the Court. In any such assessment the question of essential disbursements must necessarily be a very material factor." (my underlining)

[89] In this application the Applicant should at least have set out the following allegations:

- 89.1 the nature and extent of the Applicant's assets and liabilities;
- 89.2 where the Applicant is possessed of assets explain why such assets cannot be utilized to fund the litigation;
- 89.3 if the Respondent has made a previous contribution towards costs the Applicant should explain how such funds were utilized.

[90] In this matter the Applicant has failed to set out her assets and liabilities in a clear and precise manner. The Applicant also failed to explain to whom the **R100 000.00** contribution was paid. Not only is her income questionable and not all disclosed, but so also the value of her assets. The Applicant neglected to explain the deterioration in asset value and the different asset values mentioned in the Section 7 notice, the Ante-nuptial contract, and the Rule 43 and 43(6) applications.

[91] The non-disclosure of the Applicant's finances also infiltrates the evaluation of the inadequacy of the contribution towards costs.

[92] The sanction for not disclosing exact and real figures and placing selective evidence before court can only result in dismissal of the relief sought. The reason being that the court cannot exercise its discretion in a just and fair manner when all relevant information is not before it.

[93] I accordingly find that the Applicant has failed to establish a greater need and an inadequacy due to non-disclosure of her total and real financial circumstances. The application is dismissed.

[94] The litigation in this matter seems to span endlessly and spiraled over more than 6 years. Various applications have been brought namely two rule 43 applications, a rule 43(6) application and other interlocutory relief which are all costly. The only fraternity gaining from this litigation seems to be the legal fraternity.

COSTS:

[95] In not making full and frank disclosure of the Applicant's finances, the Applicant has affected the adjudication of this matter.

[96] It is critical for an applicant in a rule 43(6) application to act with the utmost good faith.

[97] The Applicant in this matter had the onus of satisfying the court that her current circumstances, which were not prevailing at the time of the initial contribution order or maintenance order, necessitated the court to order a greater maintenance and contribution to costs order.

[98] Accordingly, the Applicant had to do place sufficient facts before the court to empower the court to determine the materiality of the change in the context of the Applicant's financial circumstances.

[99] In order to establish the Applicant's need she had to make full and frank disclosure of both the Respondent's and her finances. She therefore had to give the court a look into all her financial resources.

[100] It is apparent that the Applicant employed a litigation stratagem of non-disclosure or selective disclosure of her true financial position since the first 43 application which trailed through to the second rule 43 and now the current application.

[101] Despite Molahlehi J 's judgment in the first rule 43 dismissing the rule 43 with costs and referring to the non-disclosure of facts the Applicant elected to persist with her non-disclosure of her financial circumstances in the second rule 43. Although this

only came to light in the current application and the Applicant's counsel argued that it did not play a role when the court evaluates the current application, I am of the firm view that the Applicant's lack of, or selective disclosure of her true financial circumstances does have a significant bearing on the evaluation of this application. More so even when the Applicant in the current application also continues to place selective evidence before the court.

[102] This Applicant clearly is inclined to misstate the true nature of her financial affairs to pursue the relief sought. The litigation stratagem of selective financial disclosure is visible throughout the rule 43 history in this matter.

[103] This court will not sanction and endorse the Applicant's selective disclosure of evidence throughout, but will penalise the Applicant for her recurrent behaviour.

[104] I accordingly find that the application is dismissed with costs of two Counsel.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 29 April 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be h00 on 29 April 2024

S van Aswegen

Acting Judge of the High Court,

Johannesburg

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