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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
Date:	
Signature: _____	

S[...], D[...] L[...]

Applicant/Plaintiff

And

S[...], J[...]

Respondent/Defendant

Coram: L DE SOUZA-SPAGNOLETTI, AJ

Heard on: 20 June 2024

Delivered: 02 August 2024

JUDGMENT

L DE SOUZA-SPAGNOLETTI, AJ

INTRODUCTION

1. The matter before Court is an opposed Rule 43(6) application as well as a counter application. The applicant seeks a reduction in his maintenance liability while in the counter application, the respondent seeks an increase in maintenance and a contribution towards her legal costs.

2. The applicant is the plaintiff and the respondent is the defendant in protracted, high-conflict and acrimonious divorce proceedings which have endured over an incredible twelve-year period.

3. The papers for reading in this application comprise well over a thousand pages with various supplementary affidavits and hundreds upon hundreds of pages of annexures. These have all been considered due to the expanse of time between service of the application in December 2022 and the hearing date of June 2024. It must be stated that the documentation provided by the applicant is not quite as random and disorganized as the respondent would have liked the Court to believe. However, neither party has endeared him or herself to this Court with the excessive splay of papers which excess flies in the face of all that a Rule 43 application ought to be.

LEGAL PRINCIPLES

4. While every Rule 43 application has to be decided on its own facts, many basic principles have crystalized in our Courts. These include *inter alia*:

4.1 The purpose of Rule 43 applications is to provide quick and inexpensive relief ¹.

4.2 The whole spirit of Rule 43 demands that there should be only a very brief statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent and that the court is then to do its best to arrive expeditiously at a decision as to what order should be made pendente lite ².

4.3 Prolivity in a Rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule ³.

¹ **Taute v Taute** 1974(2) 675 (EC)

² **Colman v Colman** 1967(1) SA 291 (c) at 292A

³ **Smit v Smit** 1978(2) SA720 (W)

4.4 Historically, Rule 43 has been utilized primarily for the benefit of women and children ⁴. This is not to say however, that relief is not available to men who are found to be in need thereof.

4.5 Maintenance ordered under Rule 43 is intended to be interim and temporary in nature and it cannot be determined with the degree of precision and exactitude which is afforded by detailed evidence ⁵.

4.6 Rule 43 relief allows for interim arrangements to be imposed on the parties of a matrimonial dispute, *pendente lite* until a Court can make a properly informed decision after hearing *viva voce* evidence ⁶.

4.7 Rule 43 was not designed to resolve issues between divorce litigants for an extended period but rather as an interim measure until all issues are properly ventilated at trial. The fact that Rule 43 orders may be enforceable for longer periods than initially anticipated, is the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself ⁷.

4.8 There is a tendency for parties in Rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs... *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, there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith and to disclose fully all material information regarding their financial affairs ⁸.

4.9 A fundamental principle of a maintenance award is the ability of the spouse from whom maintenance is sought, to pay ⁹.

⁴ **S v S** 2019 (6) SA 1 (CC) ([2019] ZACC 22

⁵ **J K v E K** (15912/2023) [2023] ZAWCHC 182

⁶ **JG v CG** 2012 (3) SA 103 (GSJ)

⁷ **S v S and Another** (CCT147/18) [2019] ZACC 22

⁸ **Du Preez v Du Preez** (16043/2008) [2008] ZAGPHC 334

⁹ **Reynecke v Reynecke** 1990 (3) SA 927 (E) and **Buttner v Buttner** (382/2004) ZASCA 86

4.10 Maintenance claims must be reasonable and moderate. Extravagant or unjustified claims may undermine the entire application ¹⁰.

4.11 There should be a level playing field in relation to party representation ¹¹.

4.12 The scale upon which the opposing party has and is intending to litigate is relevant to the extent that the parties ought to be placed in approximately equal positions to conduct and present their cases ¹².

4.13 The scale upon which the parties litigate and the trial proceeds must take into account the means of the parties ¹³.

4.14 Rule 43 applications deviate from normal motion proceedings by not allowing for a third set of affidavits. This underscores the importance of including all pertinent information in the founding affidavit ¹⁴.

It is in the context of *inter alia* the aforementioned principles, the immense papers before Court and the arguments presented by the parties that I consider the matter.

For reasons set out in the body of this judgment, I find that there has been a material change in circumstances of the parties.

BACKGROUND

5. The parties were married to each other on 15 January 2004, out of community of property in terms of an antenuptial contract incorporating the provisions of accrual sharing under the Matrimonial Property Act 88 of 1984.

6. There is one minor child born of the marriage, a girl by the name of T[...] S[...], born on 2 June 2007. To emphasize the gravity of the matter, this minor child,

¹⁰ Carstens v Carstens 1985 2 SA 351 (SE)

¹¹ *Nicholson v Nicholson* **1998 (1) SA 48** (W) at 50C-G; *Carey v Carey* **1999 (3) SA 615** (C)

¹² *Dodo v Dodo* 1990(2) SA77 (W); *Carey v Carey* 199(3) SA615 (C)

¹³ *Glazer v Glazer* 1959(3)(SA) 928 (W)

¹⁴ *E v E* and related matters 2019 3 All SA 519

who was 5 when the divorce summons was issued, has just turned 17. She has spent almost her entire childhood within the stress, tension and animosity of high-conflict divorce proceedings. The impact on the minor child is recorded in the Family Advocate's report dated 30 June 2021 ¹⁵. It is also noted, sadly so, that the minor child appears to be spending very little time with the applicant.

7. It is noted that Honourable Justice Mojapelo back in August 2017, appointed Mudau, J as a judicial case manager in the matter.

8. The trial in the divorce action currently sits part heard, appearingly with no end in sight after 17 days of evidence. With the manner in which this divorce has played out, the probability exists that by the time it is finalized, there will simply be nothing left to fight over.

9. There have been various orders made in the matter including the order of Moosa, J on 16 January 2020¹⁶ in terms of which the applicant was ordered to pay R3 000 000.00 towards the legal costs of the respondent. There is also a judgment handed down by Crutchfield, J on 26 January 2022 in terms of which that order is suspended pending reconsideration of the order by the trial court ¹⁷.

10. The applicant in this current application, seeks variation of the 2012 order of Kathree-Setilloane, J as varied on 31 January 2017 by Vally, J. The applicant sought in his notice of motion, an order as follows:

- a. Monthly maintenance payable to the respondent in an amount of R9 500.00 (prayer 1.1);
- b. Monthly maintenance payable in respect of the minor child in an amount of R5 500.00 (prayer 1.2);
- c. That the respondent be ordered to find alternative accommodation within a period of 2 months for her and the minor child to reside, within a 3km radius of respondent's current residence and in respect of which he contributes an amount of R11 000.00 towards rental (prayer 2);

¹⁵ CL10-385

¹⁶ CL10-660

¹⁷ CL10-354

- d. That the respondent vacate the Houghton Property and that it be disposed of to settle accumulated debts (prayer 3);
- e. That the house situated at 24 Arthur Road be sold within 4 months and the proceeds be utilized to pay outstanding bonds, followed by rates and taxes and other obligations which have accumulated (prayer 4) ;
- f. That the respondent start to pay a portion of Taya's expenses as she is currently employed (prayer 5);
- g. That he continues to pay all the minor child's reasonable medical, medical aid, school and associated expenses (prayer 6 and 7);
- h. That the respondent make use of the Kia motor vehicle (prayer 8);
- i. That the Toyota Prado which he drives be sold to an independent third party and the proceeds be used to pay off the Rule 43 debt (prayer 9);
- j. That T[...] be allowed to continue to operate and employ staff as a going concern and that it be allowed to sell assets (prayer 10);
- k. That the respondent's attorney be made to disclose the nature of his agreement with the respondent as proof that it does not constitute a contingency fee agreement (prayer 11);
- l. That a decree of divorce be issued and that the financial accrual be determined at the end of the trial (prayer 12);
- m. What appears to be a request for an extension of powers of Dr Roux as proposed by the Family Advocate (prayer 13) – this has apparently already been granted by an order by agreement in October 2023;
- n. Costs de *bonis propriis* if his application is opposed (prayer 14).

11. The respondent, on 11 January 2023 raised an exception, firstly on the basis that the relief sought by the applicant for the respondent to find alternative accommodation is not competent relief under Rule 43(1) or 43(6). Secondly, the respondent contended that the applicant's statement had not been properly commissioned. The respondent explains the manner in which the affidavit was commissioned at CL10-535 and provides a confirmatory affidavit from the commissioner of oaths¹⁸. He has also explained various date errors in the affidavit.

¹⁸ CL-10-542

12. The applicant seems quite fixated on his claim that the respondent's legal representative has entered into an unlawful contingency fee agreement with the respondent. Copious debate has been placed before the Court in this regard by both parties, much of it time consuming and irrelevant to these proceedings.

13. It must be noted that the applicant's founding affidavit was uploaded in December 2022 while the respondent's reply thereto was filed in November 2023, almost a year later.

14. In a supplementary affidavit filed in February 2023, the applicant abandoned prayers 4,9,10, 11 and 12 of his notice of motion¹⁹. In this affidavit he first stated that FNB was taking steps to sell the property occupied by the respondent and minor child situate at Unit 7[...], The H[...], corner of 2nd and L[...] E[...] Avenue H[...] E[...] (the H[...] apartment). The applicant then stated that it shall become necessary to find alternative accommodation for the respondent and minor child, claiming that the property has been sold. It is contended by the respondent that the Rule 30 application was withdrawn on the basis that it was no longer relevant due to the sale of the property. The sale of the property would necessitate her and the minor child's move rendering the issues raised in the application moot.

15. It transpires however that the property has in fact, not been sold as the sale had fallen through. A possible sale of the property does seem imminent and while the Court is not competent to order eviction of the respondent and minor child from the property, it is probable that they shall have to find alternative accommodation. The Court takes a dim view of the applicant's duplicity in relation to this "sale". He knew all too well that the sale had fallen through but sought to initially mislead the Court into thinking that the sale was a *fait accompli*.

16. The respondent, who was unemployed at the time that the last Rule 43 order was granted, commenced employment some time back. This fact is relevant and material to the matter. The Court notes from the papers, the respondent's recalcitrance in confirming her employment to the applicant for many months, this in the face of applicant's repeated approach to her legal representative. The correct

¹⁹ CL10-534

“time and forum” for such disclosure would have been when confirmation was requested. The Court finds this similarly undesirable.

17. Lastly, it is noted that Dr Roux appears to have commenced her investigation in between the service of applicant’s founding affidavit and the respondent’s reply.

FINANCIAL POSITION AND MEANS OF THE PARTIES:

THE APPLICANT:

18. Applicant claims that he is in dire financial straits and that there has been a material change in his circumstances since the Rule 43 order granted in 2012 and amended in 2017 ²⁰.

19. The respondent on the other hand, claims that applicant is a man of extensive means ²¹. She claims that he has immense wealth.

20. The applicant states that he is in no financial position to settle the R3 000 000.00 order of Moosa J, for the contribution towards the Respondent’s past legal costs as he had no liquid assets nor any ability to access such enormous sums of money ²². This is denied by the respondent. Applicant claims that while this cost order was in place, he could not afford to pay the same as a result of which the trial could not proceed to finalization. The respondent denies this too. This Court notes the costs order in question has been stayed on the basis that it shall be reconsidered by the trial Court in the main divorce action.

21. It is common cause that the respondent has attached various assets of the applicant. Applicant states that the attachments include:

- a. 90% of his member’s interest in T[...] Manufacturers CC (T[...]). This enterprise was and continues to be the applicant’s source of income albeit that he is now a mere employee;

²⁰ CL 10-6

²¹ CL 10-642

²² CL 10-9

- b. 90% of his member's interest in United Merchants CC (United) which was the recipient of clothing supplied by T[...]. United was liquidated in February 2022 with the applicant apparently having lost his member's interest and all benefits associated with the CC;
- c. 100% of his member's interest in Lovar Investments CC (Lovar) which owns the former matrimonial home in Norwood. In this regard, the property sits unoccupied, apparently falling into disrepair and with significant bond and utility arrears;
- d. A Toyota Prado motor vehicle which is apparently owned by T[...].

22. Applicant further states that he has had to sell most of his personal assets, including an inheritance of Kruger Rands left to him by his grandmother. He also liquidated a Liberty policy, all apparently to settle his Rule 43 obligations.

23. Applicant states that his financial circumstances deteriorated significantly as a result of the Covid pandemic. He states that he did not earn a salary from April to August 2020 resulting in him being unable to settle his full maintenance obligations during that period. The respondent issued a writ against the respondent on 3 September 2020 for arrear maintenance in an amount of R66 000.00 with the remaining balance in his bank account of R43 881.36 having being debited from his account on 8 September 2020.

24. Applicant attributes his significant financial deterioration to *inter alia* the liquidation of United, higher fabric prices, T[...]'s biggest client having gone into business rescue and subsequent liquidation with T[...]'s apparent inability to recover the monies owed by Edcon, the Covid Pandemic, inspection requirements imposed by SARS and the consequent storage and demurrage costs involved, delivery delays, multiple retrenchments with a reduction in staff from 279 to 111, the looting in Kwazulu Natal in July 2021 and significant COJ and SARS indebtedness apparently to the tune of in excess of R32 million ²³. He states further that contributing factors in relation to his deteriorated position include his decade long maintenance payments as well as over R5 million in legal fees.

²³ CL 10-374

25. This Court recognizes how undesirable and unfortunate a decade-long, Rule 43 obligation is for any party to divorce proceedings.

26. The respondent appears to have debit loans in T[...] to the tune of R1 440 335.08 ²⁴ as well as personal loans owing to one George Sayeg and one Ismail Omar to the tune of R320 000.00 and R2 345 000.00 respectively.

27. As stated afore, the applicant has an order against him for payment of an amount of R3 000 000.00 towards the respondent's legal costs which order has been pending for consideration and argument by the trial court hearing the main divorce action.

T[...]

28. As the applicant's income has and continues to derive from T[...], it is mentioned in further detail below:

28.1 Applicant states that he started T[...] more than 37 years ago and this has been the main source of his income. It is noted that United was placed in liquidation in February 2022, an entity which was reliant on the well-being of T[...];

28.2 He states that the attachment of his member's interest in T[...] has reduced the entity's credit worthiness and they are no longer able to obtain credit, leaving them on a COD arrangement with suppliers;

28.3 One of the historic hurdles in adjudicating upon Rule 43 applications, is the inability of the Court to scrutinize the evidence of the parties in the way a trial Court is able. Nonetheless, the loss of T[...]’s founding member's interest to a third party at a Sheriff's auction cannot but, to the Court's mind, have an impact on the perceived stability of the entity. The applicant after all, sat at the helm of T[...] for thirty seven years;

²⁴ CL 10-245

28.4 The respondent annexed proof of ownership in her reply, of significant property which she claims has a municipal value of at least R25 million ²⁵. Applicant claims that a property was sold by way of public auction for an amount of R9 000 000.00. This appears to have been confirmed by Standard Bank who held collateral bonds over the property ²⁶. Standard Bank subsequently claimed the full value of such sale and reduced T[...]’s overdraft facility with the proceeds of the sale. Applicant states that the other properties were also placed on auction but Standard Bank refused to proceed with those sales as the covering bonds held by them exceeded the quantum of the offers received;

28.5 The Court notes that applicant’s interest in T[...] was sold for around R650 000.00. It is doubtful for this sale price, that there was any significant equity in the properties owned by T[...]. Of course, all of this would appear immaterial at this stage as applicant’s member’s interest has been sold in execution by the respondent. Respondent confirms this sale in execution ²⁷;

28.6 Applicant states it is a condition of Standard Bank, that he has a credit loan account balance in T[...]’s books in order for the CC to retain its overdraft. He states that his inability to maintain this has resulted in a reduction of that overdraft facility which has caused massive cash flow concerns for T[...]. This would tie up with the view formed by this Court that the perceived stability of the entity could most certainly have been impacted by the sale in execution of applicant’s interest therein;

28.7 On the documents presented, financial statements of T[...] reflected losses for the 2020 ²⁸ and 2021 ²⁹ financial years and, as already stated, the applicant apparently remains with a debit loan in the financials of T[...] in an amount of R1 440 335.06;

²⁵ CL 10-722

²⁶ CL10-348

²⁷ CL 10-628

²⁸ CL 10-301

²⁹ CL10-330

28.8 His bank accounts as listed on his disclosure reflected negative balances ³⁰ and he lists contingent liabilities of R16 086 314.82 which includes an over R10 million overdraft facility of T[...] ³¹. Applicant states that he has signed personal sureties in respect of the Standard Bank overdraft facilities of T[...] and United ³²;

28.9 While the respondent states that T[...] is a separate entity from the applicant, it cannot be disputed that his financial security is tied up in the business of T[...]. Even if the applicant has blurred the lines between himself and T[...] as a separate entity from him, the respondent has caused his interest to be sold so his only interest in the entity now, is the salary he is paid monthly as an employee.

29. Applicant held various Liberty policies which he states he has not been able to pay³³. He also states that the default judgment against The Downey Family Trust, and himself (N.O) from First Rand Bank Limited in an amount of R1 970 667.51 has further affected his credit rating. He states that he has attempted to have the matter resolved so that the respondent and the minor child's utilities are not terminated.

30. The applicant claims that the current Rule 43 order requires him to pay more than the quantum of his net disposable income. This is denied by the respondent and on the papers, the Court does not factually see this either. There is little doubt however that the bulk of his earnings as presented, are being paid under the Rule 43 order leaving applicant to live a humble existence. He also claims to have used up all his savings, cashed in his investments and sold most of his movable assets, including his inheritance from his grandmother which he states was used to pay for the minor child's school fees. He has reduced his life policies from R29 million to R2.9 million ³⁴.

³⁰ CL 10-54

³¹ CL 10-55

³² CL10-65

³³ CL 10-52

³⁴ CL 10-410

31. Applicant claims that he had to instruct cheaper legal representatives and eventually was forced into self-litigation. He states that this is not out of choice while the respondent sits represented by *inter alia* a senior attorney and senior counsel.

32. While the applicant represented himself, and there is no doubt that the respondent had heavier legal artillery at her disposal than he did at the hearing of this matter, the Court does not accept that the applicant is completely without assistance. It did not escape the Court's attention that the applicant returned from a brief lunch adjournment instigated by himself, only to read what appeared to be a hand-written paragraph of legal argument. The court suspects that it might have been dictated to him during the adjournment. Further, his papers, while claiming to be penned by a lay person, are clearly prepared with the assistance of someone who has a legal background.

33. The respondent claims that the applicant has vast amounts of cash and states that he is an extremely wealthy man. She believes that the applicant has an interest in two other businesses, one being Lexshell 365 (Pty) Ltd which she believes owns property in the region of R50 million and the other being Amalgamated Global Trading which she claims was acquired by a payment of R2 000 000.00 cash. She does not state the basis of her belief, nor is there any documentation provided in relation to this. Respondent states that she called for discovery in August 2023 to which applicant has not replied. Her commentary on applicant's obstruction to discovery is noted ³⁵. However, with the aggressive manner in which the respondent appears to have pursued the applicant with all else, it is curious to note that there has been no application to compel in this regard nor seemingly any action taken to compel compliance with the subpoena/s served.

34. The applicant, in response to the aforementioned allegations, states that T[...] is an 85% shareholder of Lexshell and in fact provided proof thereof ³⁶. Again, his interest in T[...] was sold in execution. He is silent on the allegations of an interest in the "Amalgamated" companies but does repeatedly deny that he has any undisclosed assets.

³⁵ CL10-991

³⁶ CL10-991

35. A Court in Rule 43 proceedings does not have the evidentiary benefits of a trial Court and, should it transpire that the applicant does have significant interests which are undisclosed, he would be well warned of the criminal consequences of perjury.

36. Applicant states that he is struggling to comply with the maintenance and related obligations of the amended order currently in place. He claims that the only assets he has now have been attached by the respondent's legal representative.

37. The Court notes from the advice provided by the respondent's legal representative that there appears to be some unencumbered equity in the sale of the former matrimonial home. The Court notes that this equity can be utilized to buffer the applicant in the event that he falls short on the monthly obligations that shall be imposed upon him.

38. It does appear that the respondent has aggressively pursued the applicant's financial resources to settle the judgments against the applicant who claims that he simply has nothing left.

39. On the evidence before Court and as stated above, considering *inter alia* the applicant's apparent lifestyle along with his humble, R11 000.00 a month rented residence, it is difficult for this Court to find that the applicant is the immensely wealthy man alleged by the respondent. The copious number of annexures to his affidavits do, to a large extent, corroborate what he has said about his financial position, albeit with some errors.

40. The applicant, in December 2022 stated that his gross salary is R172 600.00³⁷. He then stated further on in his affidavit that his last increase was in 2019 and that his gross salary was R176 700.00³⁸. The suggested resignation of the applicant from T[...] is confusing for the Court. This is something for the trial court to scrutinize

³⁷ CL 10-26

³⁸ CL 10-36 and CL 10-869

if necessary. The reality is that he is currently employed by T[...] whereas before he owned a 90% interest in it.

41. His net income as per his September 2022 salary slip was R104 793.40. He states that his net salary as per November 2023 is R104 793.00 ³⁹. It is actually R104 923.78 ⁴⁰. The Court notes various discrepancies in the applicant's account of his earnings which is most certainly a poor show on his part. Nonetheless, the annexures to his papers afford a clearer picture of his earnings and the discrepancies are not significant in quantum.

42. Applicant claims that he previously had the benefit of receiving declared cash payments from T[...], a benefit which he does not have now. He records his estimated annual income from March 2022 to February 2023 to be R1 257 520.08. This is allegedly inclusive of the R720 000.00 annual payment he received by virtue of his member's interest in T[...] which he says he no longer receives ⁴¹. The Court cannot find proof of this on looking at the quantum of his annual declared earnings, nor does the applicant specifically refer to such proof in his opposing affidavit filed in January 2024 ⁴².

43. Since the last Rule 43 order where he was earning around R156 000.00, he has received increases that are not even in line with inflation. It is an inaccurate claim by the respondent that applicant is in a better financial position than he was at the time that the previous Rule 43 order was granted. It does not escape the Court either, that the net salary of the respondent is significantly larger than the aforesaid increase in the applicant's earnings.

44. Applicant also claims that the respondent is leading a more lavish lifestyle than she was when they were married and he simply doesn't have the means to maintain that.

³⁹ CL10-822

⁴⁰ CL10-870

⁴¹ CL 10-64

⁴² CL 10-822

45. While the Court notes that the respondent has spent lavishly on his daughter in relation to her Bat Mitzvah, 16th birthday and a European school tour, it is not uncommon for parents to spend lavishly on their children to ensure they are not prevented from experiencing that which their peers enjoy. A Bat Mitzvah in the Jewish faith is indeed a milestone event in the life of a girl and there is often huge pressure with these types of events, for parents to “*beg, borrow or steal*” to make sure that such events are memorable. It does seem to an extent that the applicant is “*damned if he does and damned if he doesn’t*”.

46. Applicant claims that he is factually insolvent. He states he is unable to settle his personal debt.

47. The applicant claims that he sourced alternative accommodation for the respondent and minor child, similar in standard to that which he himself occupies and that the respondent has refused to vacate her current residence (the Houghton apartment). This Court is simply not empowered in Rule 43 proceedings to order vacation of these premises by the respondent and minor child but hopes that an eviction does not come from the creditors on the property. The applicant has attached examples of rentable accommodation in his papers ⁴³.

48. While again highlighting the difficulties of Courts in Rule 43 proceedings, this Court cannot on the evidence before it which is significant, conclude that the applicant is currently a man of immense wealth.

RESPONDENT

49. The respondent and the minor child are *inter alia* maintained by a Rule 43 order which has previously been varied under Rule 43(6). In terms of this order, the applicant is required to make a monthly, cash contribution to the respondent for her and the minor child in an amount of R31 500.00. The applicant also makes various other payments including that for respondent and the minor child’s medical and educational costs, as well and the costs of her extra mural and cultural activities. The liability for these other costs does not appear to be in dispute although the Rule 43

⁴³ CL-10-431

order in place provides only for the cost of her educational and extra mural activities. It is recognized that while earning less, the respondent does need to contribute to the minor child's maintenance.

50. Since the granting of the previous Rule 43 order, the respondent has become employed and is earning a net salary of R29 500.47 ⁴⁴. She earned no income at all at the time that the last Rule 43 order was granted.

51. The respondent lists her assets in an amount of R310 749.42 and her liabilities in an amount of R8 104 048.39 which amount includes a figure of R8 055 230.75 in legal fees apparently owing to her current attorney.

52. The respondent notes that there is no provision for escalation under the Rule 43 order currently in place.

53. The respondent and the minor child live in the Houghton apartment which, despite the information provided by the applicant, has not been sold. The Court notes that a sale may be imminent. In the event that the respondent and the minor child need to move, the respondent provides advertisements for what she believes would be appropriate, potential accommodation for herself and the minor child. The properties utilized as examples come at a rental of R30 000.00 per month ⁴⁵, almost three times that of the property which the applicant himself occupies.

54. Applicant states that he has found furnished accommodation available at R11 000.00 per month and that he cannot afford to pay R30 000.00 a month in rental.

55. If made to move, the respondent then claims a lumpsum payment for purchase of various appliances which she states would be required on a move ⁴⁶.

⁴⁴ CL 10-1038

⁴⁵ CL10-670

⁴⁶ CL10-676

56. The Court assumes that on a rental, the stove and oven would be built in and the respondent does not explain how the other, usually movable items are built in. It is also noted that furnished premises appear available.

57. Under the Greenspan decision⁴⁷, the Court declines a request for a lumpsum payment. This Court notes the SCA decision in **Zwiegelaar v Zwiegelaar (607/98) [2000] ZASCA 68; 2001 (1) SA** but of course the payment there applied to final relief granted, not interim relief.

58. In terms of transport, there is a dispute between the parties as to whether the respondent should utilize the BMW X3 or the Kia Motor vehicle which the applicant has suggested. Apparently, the applicant is trying to buy a vehicle from T[...] to provide to the respondent. He points out that he no longer owns T[...] and has no control over its assets. He also states that his ability to obtain vehicle finance is affected by the judgments against him. Applicant states that the respondent has been driving the Kia motor vehicle for a year and that it is damaged as a result of a collision caused by the respondent. The respondent states that this Kia vehicle is not suitable for various reasons and seeks a vehicle comparable in size to the BMW with various added features ⁴⁸.

59. The Court is not convinced that the applicant is at this stage capable of providing a comparable vehicle to the respondent. The respondent claims that the applicant earns 8 times more than she does⁴⁹ but this is patently incorrect as she seeks to compare his gross salary with her net salary.

60. The applicant claims that the respondents' financial position has improved and that respondent refused to disclose her employment at Dis-Chem despite his repeated requests that she disclose same. The court notes the correspondence from respondent's attorney dated 29 November 2022 ⁵⁰. Such response does indeed appear evasive, in particular paragraph 12 thereof. Respondent's employment is most certainly material and relevant and, bearing in mind the fact that she had by

⁴⁷ **Greenspan v Greenspan 2000 (2) SA 283 (C)**

⁴⁸ CL10-608

⁴⁹ CL 10-639

⁵⁰ CL10-868

then been employed for many months, it is unfortunate that such a simple and relevant disclosure appears to have been avoided. The interests of justice most certainly dictated that the respondent disclose such information back when she was initially requested to do so.

61. The Court notes that at the time the previous Rule 43 order was granted, the respondent's earnings were nil. They are now close to R30 000.00 and this most certainly reflects a material change in circumstances.

62. Respondent claims that her expenses have escalated by approximately R25 000.00 since she scheduled them for the last Rule 43(6) application.

63. However, she claims that she currently has a shortfall each month of approximately R44 000.00.

64. The Court notes various luxurious expenses in respondent's monthly schedule including *inter alia* the cost of a personal trainer at R2 900.00, hairdressing at R2 300.00, beautician treatments at R1 100.00, magazines and books at R350.00, perfumes and cosmetic / health and hygiene at R3 000.00, restaurants at R3 600.00 with a further R1 100.00 for entertainment and holidays at R3 870.00 ⁵¹.

65. An amount of R2 000.00 for her overdraft as well as an amount of R8 000.00 per month is noted for legal fees.

66. The court notes a payment from Redefine properties into respondent's Capitec account of R87 500.00 in 2021 ⁵². The applicant claims that she clearly has another source of income which is undisclosed. Respondent claims that it was a once off payment for work performed over a period in 2019. In this regard, the Court does not see other payments of a similar nature and accepts the respondent's explanation for the purposes of this application.

⁵¹ CL10-662

⁵² CL10-662

67. Applicant also claims that respondent has a Discovery provident fund. This does appear to be correct and the respondent has subsequently disclosed it ⁵³. The balance therein is R44 620.00. While the applicant makes quite a show of respondent's neglect to disclose this, and the Court notes her initial non-disclosure, the quantum of the asset is not hugely significant. Bearing in mind however the depletion of the applicant's capital, utilization of these funds may become necessary too.

68. The basis upon which the respondent has been capable of litigating so robustly is not clear but she is strongly and aggressively represented and has been for some years now. The Court expects that this will continue irrespective of a cost contribution which at the end of the day, the Court cannot find means on the part of the applicant to justify.

FURTHER VIEWS OF THE COURT

69. It is recognized by this Court that the applicant is not living the life of a king. He provides proof of his current accommodation and the lease on which he is paying R11 000.00 per month. The Court finds it highly unlikely that the applicant has lowered his standard of living so immensely, merely to mislead the respondent and avoid his maintenance obligations. Bearing in mind his current standard of living, it is patently unrealistic for the respondent to move, if necessary, into a rented residence which costs more than 3 times that which the applicant himself occupies.

70. While the respondent claims that her legal representative acts on her instructions and not the other way round, she does no doubt act on his advice. The manner in which this divorce has played out is extremely unfortunate and the conduct of both parties in the matter has, as stated early on in this judgment, probably resulted in there being nothing left to fight over.

71. It is crucial for the well-being of the parties and very importantly that of the minor child, that any legal representative involved in this matter take meaningful steps to steer the proceedings towards finality.

⁵³ CL10-1017

72. The ongoing debate around the sale of the Houghton apartment becomes irrelevant for the purposes of the court's finding. Even on a basic reading of Rule 43, eviction of a party to the action from a property can never be competent relief. Whether urgent vacation of the property becomes necessary as a result of some sort of forced sale is another issue entirely and this Court is not placed to make any rulings in that regard. The Court impels the parties in this regard to, within their respective means, place the interests of the minor child at the forefront with regards to her living arrangements. Much as it would be desirable that she remain in the Houghton apartment, the Court recognizes that this may not be a possibility in the future.

73. In relation to the applicant's alleged failure to discover, while I am mindful of Court rules and protocols, we live in an advanced technological age, even more so post-Covid. To see the parties bicker over the manner in which documents should be provided is reflective of the truly sad state of affairs herein. It is suggested that common sense be allowed to prevail in the giving and accepting of discovery. If the applicant is shown to have been dishonest in his financial disclosure here, he will no doubt suffer the consequences. On the evidence as a whole, this Court cannot find that he has been patently dishonest in relation to his means.

74. The Court notes that despite the respondent's fervent claims the applicant has significant interests in other entities, one of which he has provided disproving share certificates for, no application to compel has been brought by the respondent. This Court agrees with the sentiments expressed in *Louw v Grobler and Another* as quoted in applicant's heads of argument ⁵⁴. The fear of losing important originals in a less than ideal Court filing system is not an uncommon one. We are lucky now to have Caselines in the Gauteng Courts. Why could the documents not have simply been uploaded with an inspection of the originals to prove the veracity thereof? There are countless ways in which the parties could have agreed to give and accept discovery rather than to bicker so bitterly. The Court Rules are there to assist the parties through the litigation process. Strict enforcement of compliance as displayed here has been counter-productive.

⁵⁴ CL18.2-5

75. Financial disclosure is often the enemy of an accurate Rule 43 assessment but this Court cannot find on the evidence before it that the applicant has failed to appropriately disclose his assets.

76. The Court can also not make a finding that the applicant has the financial means suggested by the respondent. The papers simply do not support it. In what appears to be frustration or possibly desperation, the applicant has tendered to the respondent, 100% of any undisclosed assets which she may find. While this may come back to haunt him if he has been dishonest, the Court sees no basis upon which to suspect significant non-disclosure.

77. The requests for mediation of the respondent are noted with an affidavit in favour thereof having been deposed to by respondent's legal representative back in August 2023 ⁵⁵. The applicant could do well to consider mediation before a mutually agreed upon, accredited, independent mediator well versed in family law.

78. The filing of supplementary affidavits was accepted by this Court due to the elapse of time from service of the initial application to final hearing of the matter some 18 months later. While the Court cannot accept that the applicant is completely without legal assistance, he most certainly does not appear to be armed with legal artillery equal to that enjoyed by the respondent. His self-representation, whether by design or necessity, had to be borne in mind by this Court. The latter is suspected.

79. The respondent's sale in execution of T[...] which the applicant founded and owned for more than three decades is found to be significant. This is also in the face of United having been placed into liquidation and various other attachments that respondent has effected including that over the former matrimonial home. Further, the respondent is now earning close to R30 000.00 a month when at the time of the previous Rule 43 order having been made, she was not earning a cent. This too is significant.

⁵⁵ CL11G-3

80. The Court's view aforementioned sits in recognition of the comments made by Crutchfield, AJ as she was at the time in the matter of P.E.O.I v W.A.H (97132/16) [2021] ZAGPPHC 60 (3 February 2021). The respondent in quoting the P.E.O.I case, neglects to point out that in that case, the applicant was not a mere employee but was a significant shareholder in the company which paid his salary. He held a position of significant influence within the company. The applicant in the matter before this court, enjoyed similar control and influence over T[...] at the time of the previous Rule 43 order. It is highly improbable that he enjoys the same control or influence any longer, having been relegated to a mere employee and with his life's work having been sold in execution to a third party. His ability to determine his own earnings is no longer there.

81. It is in the context of *inter alia* the aforementioned material changes in circumstances, that the Court was tasked to consider the viability and appropriateness of the prayers sought by both applicant and respondent.

82. It seems that the respondent seeks to live a lifestyle of a time long passed - a time when the applicant had not been dispossessed of his biggest assets and the parties had not spent twelve years litigating and well over R10 million rand in legal fees - this all over a marriage which comparatively speaking, did not last that long.

83. In relation to the *de bonis propriis* costs sought by the applicant against respondent's legal representative, there is simply no basis therefor. The actions of the respondent under the guidance of her legal representative appear to be aggressive and somewhat ruthless but they do fall within the parameters of the law. Merchak's dogged, pursuance and enforcement of respondent's rights, while at the same time contributing to the material change in circumstances in the matter, lays no basis for the contention that he has acted scandalously. The applicant's attempt to make comparisons to Merchak's previous cases was shut down by the Court at the hearing, the same being found to be neither relevant nor appropriate.

84. Rule 43 orders are interim and are meant to be temporary in nature. Sadly, and as the applicant correctly states, the orders in place have long outlived the

lifespan of the marriage which is utterly undesirable and most certainly not what was ever envisaged under the operation of Rule 43.

85. The Court accepts that the parties may have enjoyed at worst, a comfortable lifestyle during the course of the marriage. However, the separation of the parties occurred well over a decade ago and circumstances appear decidedly different to those which are said to have existed pre-2012. The applicant, by all accounts appears to be living a comparatively sparse and humble existence. The respondent and minor child are at this stage, going to have to tighten their belts too.

86. The slight lowering by this Court of the monthly cash figure payable by the applicant is tempered by the almost R30 000.00 which the respondent is now earning.

87. The request by the respondent for a further contribution towards legal costs is simply not viable on the papers. It seems that any unencumbered equity available to applicant, will have to be utilized as a safety buffer for times when he is unable to satisfy his maintenance obligations from his salary. Further, the artillery of legal arms currently favours the respondent.

In the circumstances, the Court makes the following order:

ORDER

1. Paragraphs 5 and 6 of the Rule 43 Order granted by the Honourable Justice Kathree-Setiloane dated 30 August 2012 (“the Rule 43 Order”) and paragraphs 1, 2, 3 and 4 of the Rule 43(6) Order granted by the Honourable Justice Vally dated 31 January 2017 (“the Rule 43(6) Order”) are hereby deleted, no longer of any force and effect, and replaced with the following:

1.1. The applicant shall maintain the minor child and the respondent, *pendente lite*, by making payment of:

1.1.1 R28 000.00 per month to the respondent directly into such account nominated by her, the first payment being due on or before the 1st day of each month following the month in which this order is granted;

1.1.2 An annual escalation of 5% per year on the cash payment in paragraph 1.1.1 above which escalation shall commence on the anniversary of the date on which the first R28 000.00 payment under this order is made;

1.1.3 In addition to the aforesaid, the applicant shall continue to make payment of the following reasonable expenses, directly to the service providers concerned:

1.1.3.1 All reasonable expenses relating to the minor child's school or tertiary education, including but not limited to school or tertiary level fees, books and required reading material, uniforms, stationery, outings and school tours, levies, extra lessons and school photographs;

1.1.3.2 The reasonable costs incurred in connection with the minor child's sporting, extra mural, cultural and holiday school activities undertaken by the minor child including subscription fees, the cost of outfitting and equipment relating thereto;

1.1.3.3 The premiums and/or contributions attributable to the membership of the minor child to the medical aid scheme under which she is currently covered, as well as the reasonable and necessary expenses incurred in connection with the health of the minor child that are not covered by such scheme;

1.2 The KIA motor vehicle driven by the respondent shall be repaired for the respondent by and at the applicant's cost and the applicant shall:

1.2.1 at his cost, acquire an AA roadworthy certificate in respect of the vehicle;

1.2.2 pay the monthly insurance on the vehicle including excess;

1.2.3 pay an appropriate Tracker/Netstar/Matrix subscription on the vehicle;

1.2.4 pay the cost of maintenance, repairs, services and license fees of the vehicle.

2. In the event that the respondent and minor child are compelled through force of law to vacate the Houghton Apartment and/or elect voluntarily to vacate it, then and in such event paragraphs 7, 8 and 9 of the 30 August 2012, Rule 43 Order are deleted and replaced with the following:

2.1 The applicant shall make payment either in full for a rental accommodation, alternatively if such rental figure exceeds R18 000.00, then a contribution thereto in an amount of R18 000.00 per month with an annual 5% escalation on such figure, payable on the anniversary of respondent's move to such rental accommodation;

2.2 The applicant shall pay the cost of water and electricity, household insurance and security of such rental accommodation of the minor child and the respondent, to the extent provided for in the aforesaid lease;

2.3 The applicant shall pay a total amount of R15 000.00 towards the moving costs of the respondent and the minor child which amount shall become payable within 14 days of proof of signature by the respondent and lessor of the relevant lease.

3. The remaining, applicable paragraphs of the Rule 43 and the Rule 43(6) Order are not affected hereby and remain of full force and effect.

4. Each party shall pay its own costs.

BY ORDER OF THE COURT

FOR APPLICANT:

D S[...] - Self Represented

FOR RESPONDENT:

Amandalee a de Wet SC