

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

CASE NO : **2022-048303**

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED

In the matter between:

S[...] **R[...]**

Applicant

and

T[...] **M[...]** **M[...]**

Respondent

JUDGMENT

FRANCK AJ:

[1] In this matter, the Applicant issued summons against the Respondent for a decree of divorce and ancillary relief relating to two children born of their marriage. The Applicant avers that, the parties were married in terms of the Recognition of the Customary Marriages Act 120 of 1998 (“**the Customary Marriages Act**”) on 9 November 2009. As a result, the Applicant avers that the parties are married in community of property. In his plea and counterclaim, the

Respondent places the existence of a customary marriage in dispute.

[2] In September 2024, the Applicant applied in terms of Uniform Rule 43, for relief relating to spousal maintenance, maintenance in respect of the minor children as well as a contribution towards her legal costs. The Rule 43 application is opposed by the Respondent.

[3] In his answering affidavit, the Respondent states *inter alia* :

“12. I must state upfront that I am a man of significant means, and I can afford the maintenance which the applicant’s (sic) claims for herself, the contribution towards her legal expenses and the maintenance for the children. It is on this basis that I am advised that there is no need for me to make a detailed financial disclosure.

13. What I dispute is there being any legal basis for me to maintain the applicant or contribute towards her legal expenses because:

13.1 first, we are not, nor have we ever been married;

13.2 second, the applicant has not made full and frank disclosure to this Court and has not acted with the utmost good faith required of her;

13.3 third, the applicant does not require maintenance and is not in need.”

[4] The Respondent further claims that there is no basis to claim maintenance in respect of the minor children, as he is maintaining them adequately.

[5] The Applicant launched an interlocutory application on 19 November 2024 in which, she seeks the following relief:

1. The Respondent be ordered to comply with the provisions of paragraph 29.4.7 read with footnote 18 of the Revised Consolidated Practice Directive 1 of 2024 dated 12 June 2024 in respect of the pending Rule 43 application under case number 2022-048303 (“the pending Rule

43 application”) by:

- 1.1 completing a financial disclosure form (“**FDF**”) under oath with supporting documentation referred to in the FDF;
- 1.2 indexing, paginating and uploading the FDF and supporting documentation in the court data file,
within 5 days of service of this order by e-mail on the Respondent’s attorneys.
2. In the event of the Respondent failing to comply with the abovementioned paragraph :
 - 2.1 the Respondent’s answering affidavit in the pending Rule 43 application be *ipso facto* struck out;
 - 2.2 the Applicant be authorised to enrol the pending Rule 43 application on the unopposed Family Court roll and seek an order in terms thereof.
3. The Respondent be ordered to pay the costs of this application on the party and party scale including counsel’s costs on Scale A.

[6] The Applicant demanded that the Respondent files an FDF with supporting annexures in correspondence, prior to launching the interlocutory application. The Applicant avers that, she is prejudiced in the preparation for her Rule 43 application by the Respondent’s non-compliance with the practice directive. In the Applicant’s draft order handed up at the conclusion of argument, the Applicant did not persist with prayer 2, and prayed for costs to include the costs of counsel on scale B.

[7] Paragraph 29.4.7 of the Revised Consolidated Practice Directive 1 of 2024 (as amended) (“**the Practice Directive**”) reads as follows:

“29.4. The Family court shall hear the following matters, opposed and unopposed:

29.4.1. to 29.4.6 ...

29.4.7. Enforcement of the Practice Manual and directives bearing on

family law cases, including the exchange of the Financial Disclosure Form (FDF).

29.4.8. and 29.4.9 ...”

[8] Paragraph 29.4.7 contains footnote 18 which reads as follows:

“(1) An FDF, annexed to this Directive as 5.9A, must be completed by each party under oath, together with supporting documentation referred to in the FDF and must be exchanged in every opposed divorce action and in every R 43 matter in which maintenance is in dispute.

(2) the FDF and supporting documentation must be indexed and paginated and thereafter uploaded to the court data file. The FDF must (be) in a separate section to the bundle of supporting documents.

(3) In every opposed divorce action, the FDFs must be exchanged no later than 10 days after the plea is uploaded.

(4) In a Rule 43 matter requiring an FDF the FDFs must be exchanged not later than 5 days after the respondent has uploaded a reply.

(5) Where a summons in an opposed divorce action and a rule 43 application are initiated simultaneously, the exchange must occur in accordance with (4) above.

(6) Whenever an FDF is overdue and a compelling order is sought in the Family Court, such application for a compelling order shall be preceded by a demand to comply within 5 days of the delivery of the demand.”

[9] In his answering affidavit, in the interlocutory proceedings, the Respondent relies on the fact that he is a “*man of financial means*” as a defence to filing an FDF. He states that, he has the means to satisfy the relief claimed by the Applicant in the Rule 43 application. The Respondent repeats the averments (in the Rule 43), that he has no duty to support the Applicant, as he has placed the existence of a marriage in dispute. He avers that, the Rule 43 application was not necessary as he is already maintaining the minor children adequately, and places the quantum of maintenance claimed by the Applicant in dispute. The

Respondent further denies that he has a duty to contribute to the Applicant's legal costs, as the existence of the marriage has been placed in dispute.

[10] The Applicant points out in her replying affidavit, that the Respondent did not take the court into his confidence and did not disclose how much money he has spent on his own legal fees despite having been invited to do so by the Applicant and without which, the court will not be in a position to consider if the parties are litigating on equal playing fields.

[11] The Applicant also records in her replying affidavit, that the Rule 43 application was launched as the Respondent:

[11.1] unilaterally reduced the maintenance that he used to pay to the Applicant;

[11.2] failed to contribute adequately toward spousal maintenance as well as maintenance of the minor children;

[11.3] failed to pay fees for the educational psychologist administering therapy to one of the minor children;

[11.4] failed to pay the children's school fees;

[11.5] refused to pay any maintenance in September 2024.

[12] In the Respondent's supplementary heads of argument, and at the hearing of the matter, the Respondent relied on what is already set out hereinabove and submitted that the facts upon which he relies are novel and distinguishable from other Rule 43 matters. The Respondent argued that, compelling him to make a detailed financial disclosure would infringe on his right to privacy of confidential information.

[13] It was further argued by the Respondent that he should not be ordered to make a full and frank financial disclosure as the issue whether or not a customary marriage existed between the Applicant and the Respondent have been separated in terms of Uniform Rule 33(4) with the remaining issues in the

pleadings having been postponed *sine die*. The separation order was granted by the Honourable Mr Justice Wepener on 24 January 2024. The Respondent thus alleged, that the quantum of his estate is not currently an issue in dispute.

[14] The Respondent relied on the matter of **De Villiers v De Villiers**¹ in which, Froneman J, as he then was, refused to grant an order in respect of documentation which he viewed as being irrelevant for the purposes of trial. Such an order was, however, granted within the realm of a Rule 35(3) application, in circumstances where the Respondent in that matter had already made financial disclosure and provided the Applicant with proof of his assets and annual income and in circumstances where the Respondent, in that matter, had admitted the Applicant's claim for maintenance. The De Villiers judgment, is accordingly not relevant to the current issue in dispute.

[15] In light of the Respondent's opposition to the Rule 43 application and, especially since he has placed the expenses of the Applicant and the minor children in dispute, it is necessary for the court to have regard to how the Respondent spends his income, the standard of living he enjoys, the quantum of the expenses he previously paid for, what he spends on luxuries and holidays as well as legal expenses.

[16] The standard of living enjoyed by the parties prior to their separation is a factor that is taken into account, at the Rule 43 stage. Full financial disclosure is required by both parties and, the Respondent must satisfy the court that he indeed has the financial reserves that he alleges he does.

[17] Full financial disclosure is in the best interests of the minor children, whose interests are of paramount importance and does not trump the Respondent's right to privacy. The Respondent cannot claim a right to privacy, relating to his financial affairs in divorce proceedings which pertain *inter alia* to the quantum of maintenance as it relates to minor children, especially in

circumstances where the quantum of such maintenance and payment of expenses have been placed in dispute. Financial disclosure is further relevant insofar as it relates to the Applicant's claim for spousal maintenance *pendente lite*. The relief relating to Rule 43 is available to the Applicant, even in circumstances where the Respondent has placed the existence of the marriage in dispute.

[18] The operation of Rule 43 and the relief that it offers litigants, is not suspended pending finalisation of the separated issue, at trial. The Applicant is entitled to spousal maintenance *pendente lite* and she is entitled to an order relating to maintenance in respect of the minor children as well as a contribution towards her legal costs, pending finalisation of the trial.

[19] The Practice Manual indicates that the FDFs must be filed after the Respondent's plea. If regard is had to the pleadings filed in this matter, the issue of maintenance is alive on the pleadings and, the financial disclosure form is thus relevant not only to the Rule 43 proceedings but also to the issues in dispute, to be dealt with at trial. Regardless of the separated issue, and even if such issue is decided in favour of the Respondent, the question relating to quantum in respect of the minor children will remain.

[20] Furthermore, the Respondent cannot gate-keep information whilst disputing the Applicant's expenses are fair and reasonable. The Applicant is entitled to level playing fields and an equality of arms in matrimonial litigation.² The concept of equal playing fields, does not only relate to a contribution towards costs, but also to the duty of disclosure in matrimonial litigation.³

[21] When assessing a spouse's reasonable litigation needs, a court will have regard to what is involved in the case, the scale on which the parties are litigating or intend to litigate and the parties' respective means.⁴

[22] Providing for both parties to make discovery, is reconcilable with the fundamental right to equality before the law. Until such time as the separated issue has been determined, i.e. whether or not the parties are married in terms of customary law, there is a matrimonial dispute between the parties that serves as the jurisdictional factor for the Rule 43 application.⁵

[23] From the wording used in the Practice Directive, the duty to make a financial disclosure is couched in peremptory terms.⁶

[24] Furthermore, the fact that full, frank and detailed financial disclosures are indispensable in matrimonial matters, have been confirmed on many occasions, with reference to Rule 43 proceedings.⁷

[25] I accordingly find in the Applicant's favour. There is further no reason why, the costs in this application should not follow the result. In this regard, the Applicant prayed for party and party costs on scale A in its notice of motion and I was not convinced that costs on a higher scale should be granted.

An order is accordingly made in the following terms:

[1] The Respondent is ordered to, within ten (10) days of the service of this court order via e-mail on the Respondent's attorneys of record, to make financial disclosure in terms of paragraph 29.4.7 read with footnote 18 of the Revised Consolidated Practice Directive 1 of 2004 dated 12 June 2024 by:

[1.1] completing under oath, a financial disclosure form and by providing the supporting documents referred to in the financial disclosure form;

[1.2] indexing, paginating and uploading the financial disclosure form and the supporting documents to the court data file.

[2] The Respondent is ordered to pay the costs of the application including the costs of counsel on Scale A.

FRANCK, A J

Date of hearing : 4 June 2025

Date of judgment : 15 July 2025

Legal representation :

For Applicant :

Counsel : Advocate N Nemukula

Attorneys : Houghton Harper Inc

For Respondent :

Counsel : Advocate Ramabulana

Attorneys : Victor Nkhwashu Attorneys Inc

¹ [2005] JOL 15845 (E)

² **Glazer v Glazer** 1959 (3) SA 932 G-H at page 932 A-E; **Cary v Cary** 1999 (3) SA 614 (C) at 621 D-G

³ **B v B** (700/2013) [2014] ZASCA 137 (25 September 2024)

⁴ **AF v MF** 2019 (6) SA 422 (WCC) at 29 and **Nicholson v Nicholson** 1998 (1) SA 48 (W) at 50 B

⁵ **SJ v SE** 2021 (1) SA 563 (GJ); **AM v RM** 2010 (2) SA 223 (ECP) and **Women's Legal Centre Trust v President of the Republic of South Africa and Others** 2018 (6) SA 598 (WCC)

⁶ **MS v RS** (21620/2019) [2023] ZAGPJHC 1257 (26 October 2023)

⁷ **CA v HA** (5578/2022) [2024] ZAWCHC 25; **E v E**; **R v R**; **M v M** (12583/2017, 20739/2018, 5954/2018) [2018] ZAGPJHC; **TS v TS** (28917/2016) [2018] ZAGPJHC 29 (2 March 2018) and **MD v MD** (2021/43212) [2023] ZAGPJHC 910; [2023] 2 All SA 736 (GJ)