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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 232225/25

In the matter between

N[...] L[...]

APPLICANT

AND

R[...] N[...] V[...] L[...]

RESPONDENT

Date of Hearing : 30 January 2026

Date of Delivering : 02 February 2026

JUDGMENT

THULARE J

ORDER

- (a) The application is postponed to 20 February 2026.
- (b) The applicant is granted leave to file a third set of affidavits in reply, such affidavits to be filed by Friday 6 February 2026 and
- (c) The issue of condonation sought by the respondent and the wasted costs occasioned by the postponement are reserved for determination by the court seized with the application on 20 February 2026.

[1] In the Rule 43 application the applicant sought payment of maintenance *pendente lite* for herself and the parties' minor children, contribution to her legal costs and costs of the application. Rule 43 was served on 28 November 2023 together with a Rule 41A(2) notice wherein the applicant agreed to the matter being referred for mediation. On 11 December 2025 the respondents attorneys prepared a joint minute which recorded the parties election for mediation and sent it to applicant's attorneys. The following day the respondent's legal representatives proposed a mediator and asked for the signed minute to be returned so that they can arrange for the mediator. The legal representatives also indicated that their offices were closing that day, 12 December 2025 for the holiday period. On the same day, the applicant's legal representatives wrote a letter to the respondent's legal representatives indicating that the applicant no longer agreed to mediation. No condition had been given earlier, but the applicant alleged that her agreement to mediation was conditional upon *inter alia* the respondent's full financial disclosure. The applicant simultaneously filed an amended Rule 41A notice refusing mediation. The respondent's case is that the applicant's actions, against

the background of timeframes, was calculated to engineer that he would be unable to file a sworn reply timeously to gain an unfair advantage in this matter.

[2] On 15 December the respondent filed a discovery affidavit containing financial disclosures. On 18 December the applicant's attorneys were advised that the respondent could only be able to file his sworn answer by 20 January 2026. The respondent's attorney and counsel only returned from holiday on 12 January 2026. The respondent met with his legal representatives on 15 January 2026 to furnish instructions for the preparation of the answering affidavit. The applicant made extensive allegations concerning the position of the respondent's business, Diesel Bros, which made it necessary to obtain assistance of the respondent's accountant to properly assess the accuracy and validity of the claims made. Furthermore, the respondent had through subpoenas only received documents during December and January with the last tranche on or about 16 January 2026, from financial institutions with which the applicant had accounts. These documents required time for the legal and accounting professionals engaged by the respondent to consider them. The applicant herself had not yet provided the respondent with the documents she discovered. The respondent alleged that the applicant did not suffer any prejudice as he continued to provide ongoing financial support to her and the children. The applicant did not file any affidavit in answer to the condonation and simply did not agree to it and submitted that the reasons advanced by the respondent for the delay had no merit and that the respondent was barred from filing his answering affidavit. The applicant sought the hearing of the condonation application and its dismissal, alternatively if the hearing of the condonation application is postponed, the respondent be ordered to pay the costs on scale C including costs of senior counsel.

[3] The respondent took the view that in terms of Rule 41A, the date for the filing of his answering affidavit was suspended. That view was wrong. Rule 41A(4)(a) to (c) reads as follows:

41A Mediation as a dispute resolution mechanism

“(4) Where a dispute is referred to mediation —

(a) the parties shall deliver a joint signed minute recording their election to refer the dispute to mediation;

(b) the parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate;

(c) the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the minute referred to in paragraph (a) to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits; and”

On the facts, the applicant reneged on mediation before the joint minute was signed as envisaged in Rule 41A(4)(a). The signature of the joint minute by both parties, not one of the parties, suspends the filing of affidavits and notices. Absent the signed joint minute, the suspension is not triggered. On the facts of this case, the filing of affidavits and notices was never suspended in terms of Rule 41A(4).

[4] The approach to condonation was set out as follows in *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at para 7:

“[7] Condonation of the non-observance of Court orders and rules is not a mere formality. A party seeking condonation must satisfy the Court that there is sufficient cause for excusing the non-compliance. D Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case (see *Torwood Properties (Pty) Ltd v South African Reserve Bank* [1996 \(1\) SA 215 \(W\)](#) at 228B - F). The following factors identified by Holmes JA in *United Plant Hire (Pty) Ltd v E Hills and Others* [1976 \(1\) SA 717 \(A\)](#) at 720E - G are in the context of an appeal to be taken into account in the exercise of such a discretion: (a) the degree of non-compliance; (b) the adequacy of the explanation for such failure; (c) the prospects of success; (d) the importance of the case; (e) the respondent's interest in the finality of the G judgment; (f) the convenience of the Court; and (g) the avoidance of delays in the administration of justice. The list is not exhaustive. Those factors are not individually decisive but are interrelated and the one is weighted against the other so that the strength of one or more may compensate for the weakness of one or more of the others. The fact that a party chooses not to oppose H the granting of condonation is a relevant but by no means overriding consideration (see *Saloojee and Another NNO v Minister of Community Development* [1965 \(2\) SA 135 \(A\)](#) at 138E).”

I appreciate fully that the core purpose of Rule 43 is to provide a quick, inexpensive, and temporary solution to urgent issues pending the final divorce decree [*S N v S R* (2023/036122) [2023] ZAGPJHC 1335 (14 November 2023); *H.X v G.X* (017721/2023) [2025] ZAGPPHC 11 (3 January 2025) at para 7]. The applicant in her practice note intimated a wish to consider her position and even to file a further set of affidavits, if the condonation remained live. On the other hand, the issue of mediation on which the applicant reneged, was tied up with the condonation issue, and the condonation issue was tied up to the prospects of success question. The question whether the reneging from mediation was a calculated strategy to gain an unfair advantage can best be determined by the court having the full particulars, including the financial disclosure. At this point before me the applicant has not yet replied to the allegations made by the respondent. The court best suited to determine some of the considerations as set out in *Gumede*,

including the prospects of success, is the court hearing the Rule 43 application, having the benefit of all the facts in the full set of papers from both parties. The prospects of success cannot properly be evaluated in isolation from the merits of the case. The issue of costs, on the facts, is inextricably linked to the path of travel of the parties in the Rule 43 application and the merits and demerits of their cases. Whether any party failed to make a full and frank financial disclosure as alleged by each party against the other and whether the applicants reneging was well founded are but some of the relevant considerations regarding the costs occasioned by the condonation application and the postponements. These questions can only be considered after all the facts are placed before the court, which is not yet the case. For these reasons I am making the order.

DM THULARE
JUDGE OF THE HIGH COURT