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

Reportable

Case no:21722/2024

In the matter between

B[...] C[...] B[...] **Applicant**

and

L[...] L[...] B[...] **Respondent**

Heard: 05 December 2025

Delivered: 23 January 2026

Summary: Rule 43 application-permitting the filing of further affidavit in terms of Rule 43(5)-issues considered for allowing replying affidavit to be filed-material non-disclosure or disclosing false information and consequences thereof-finality of the matter

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ORDER

The following order is made:

(a) The application is dismissed.

(b) The applicant is liable for the costs of both the interlocutory application and the Rule 43 application on a party and party scale.

JUDGMENT

Magona-Dano AJ

INTRODUCTION

1. This is an opposed application in terms of Rule 43 of the Uniform rules,[1] in which the applicant seeks an order directing the respondent to pay monthly spousal maintenance *pendente lite* and to contribute towards her legal costs in respect of the pending divorce action between the parties.

2. In the divorce proceedings, the issues include determining the marriage regime regulating the marriage relationship and whether there was an antenuptial contract that was entered into between the parties or not.

3. The specific relief sought in this Rule 43 application is couched in the notice of motion as follows:

> "1. That pending the finalisation of the divorce proceeding under Case number 21722/2024 above, the respondent is directed to pay maintenance

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[1] Rule 43 provides 1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

(a) Maintenance *pendente lite*;

(b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

(c) Interim care of any child;

(d) Interim contact with any child."

in the sum of R120 000,00(One hundred and twenty thousand rand) per month to the applicant and to the account nominated by the applicant.

2.The respondent is further directed to contribute 50% towards the costs of the matrimonial action, pending or already instituted under the above case number in paragraph 1 supra

3.Respondent is directed to pay the costs of this application, only in the event it is opposing this application.

4.Applicant be and is granted such further and /or alternative relief as the court deem meet."

4. On the day of the hearing of this matter, the applicant filed an application for leave to file a further affidavit, a replying affidavit. This was contrary to the provisions of Rule 43. Filing of further affidavits beyond an answering affidavit is only allowed in exceptional circumstances.

5. Mr Lingani for the applicant formally sought leave to file the replying papers, relying on grounds of Rule 43(5) where a court can allow such further affidavit in its own discretion.

6. After hearing the submissions and considered the papers of that application I granted leave for the filing of the replying affidavit. I had indicated that I will deal with the reasons at a later stage. I now turn to the reasons for the interlocutory application.

<u>Interlocutory application-leave to file replying affidavit</u>

7. After the respondent filed their answering affidavit to the Rule 43 application, they raised a point in limine seeking dismissal of the application. The applicant filed an application seeking an indulgence to file a further affidavit to reply to the allegations that are made in the answering affidavit.

8. The essence of the respondent's allegations included that in her founding papers the applicant had made false statements or material non-disclosures

regarding her financial circumstances and various property ownership. Therefore, she did not come with clean hands before the court.

9. Mr Lingani made submissions that it was crucial that the applicant be granted leave to answer to the allegations made to clear and settle them as they may be fatal to the main application if left unanswered.

10. Mr Lingani further argued that he accepted that Rule 43 is intended to be expeditious and that further affidavits are not permitted as of right. However, the court retains a discretion under Rule 43(5) to permit further evidence/affidavits where necessary to secure a just and expeditious decision.

11. I was then referred to various case law where a court allowed the filing of further affidavits where it would be in the interest of justice to do so, in assisting the court in the determination of the issues in dispute. Perhaps it would be prudent to highlight this passage from the case of *JB et al v JLS*[2] *et al* following the legal principles set before:

> "6] A *point in limine* of this nature, like the one raised in paragraph 5 above was dealt with properly in the following paragraphs of S N v S R[3]:
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> > "*[5] It is well accepted that Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. The premise is expeditious intervention by the courts to alleviate the adverse realities faced by claimants, usually women, who find themselves impoverished when litigating against their spouses who have, historically, always had and still do have stronger financial positions in divorce proceedings.*[4]
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> > *[6] The procedure is straightforward as the applicant seeking interim relief is required, in terms of Rule 43(2)(a), to do so on notice with a "sworn statement*

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[2] *J.B and Another v J.L.S and Another* (22199/2022) [2024] ZAGPPHC 1367 (31 December 2024).

[3] (2023/036122) [2023] ZAGPJHC 1335 (14 November 2023).

[4] *E v E; R v R; M v M* 2019 (5) SA 566 (GJ) para 25.

in the nature of a declaration, setting out the relief claimed and the grounds therefor, …" A respondent wishing to oppose the application is required by Rule 43(3)(a) to deliver "a sworn reply in the nature of a plea." The parties are expected to file concise affidavits and to avoid prolixity.[5]

[7] Instructively, Rule 43 does not provide for the filing of replying affidavits as of right. Moreover, the Court does not have a discretion to permit departure from the strict provisions of Rule 43(2) and (3) unless it decided to call for further evidence in terms of Rule 43(5).[6]

[8] In this case, that applicant, without leave of the court, filed a supplementary affidavit in response to the allegations in the respondent's answering affidavit. This step is impugned by the respondent as irregular. In response, the applicant contends that she is seeking the Court to exercise its discretion in terms of Rule 43(5) and grant her leave to file a supplementary affidavit.

[9] The parties accept that there is no provision to file further affidavits in terms of Rule 43. Whilst that is the case, in E v E; R v R; M v M,[7] *the full bench of this Court, which both parties referred to, observed that: "In terms of Rule 43(5), the court does have a discretion to call for further evidence despite the limitations imposed by Rule 43(2) and (3). The problem with the present Rule 43(2) and (3) is that invariably, in most instances, the Respondent will raise issues that the Applicant is unable to respond to due to the restriction, unless the court allows the Applicant to utilise Rule 43(5). This process will result in conflicting practices as it has already happened in a number of cases and as highlighted by Spilg J in TS. Applicant should have an automatic right to file a replying affidavit, otherwise she has no way of responding to allegations that are set out in the Respondent's answering affidavit." (underlying my emphasis)*

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[5] (16043/2008) [2008] ZAGPHC 334 (24 October 2008).

[6] Rule 43(5) provides: "The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision." See *E v E, R v R, M v M* above n 2 paras 33, 43, 48, and 52.

[7] *E v E; R v R; M v M* id paras 58-9.

12. In casu, I was interested to hear a response to the relevant points presented by the respondent in his answering affidavit which would remain unanswered.

13. Importantly, the respondent filed no affidavit opposing the application for leave to file a further affidavit and placed no evidence before this Court contradicting the applicant's explanation and the need for the additional affidavit. The respondent merely sought to advance submissions from the bar.

14. I considered that Rule 43 restricts the exchange of affidavits. The default position is concise papers to achieve speedy interim relief.

15. Rule 43(5), however, provides that:

> "The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision."[8]

16. The authorities recognise that the court does not have a general discretion to relax the Rule 43 structure, unless it invokes Rule 43(5) to hear such evidence as it considers necessary and to make such order as it deems fit to ensure a just and expeditious decision.

17. In *S.N v S. R*[9], the court confirmed:

a. Rule 43 does not provide an automatic right to file further affidavits;

b. But the court may, under Rule 43(5), allow further affidavits where justice requires it, especially where new matters are raised and the applicant cannot respond under the strict structure.

18. The cases cited above[10] emphasised the practical problem that a respondent may raise issues to which an applicant cannot reply to unless Rule

[8] See *E v E ; R v R; M v M* 2019 (5) SA 566(GJ) paras 33,43,48 and 52.

[9] *S.N v S.R* (2023/036122) [2023] ZAGPJHC 1298 (14 November 2023).

43(5) is utilised, and that fairness may require permitting a replying/supplementary affidavit.

19. Mr Lingani further submitted that it was important for the court to be in favour of granting leave (all aligned with Rule 43's objects and the above authorities) that it would be relevant and necessary that they file a replying affidavit for just adjudication of the Rule 43 application and fairness to properly answer the issues raised. That the allegations made will draw a poor picture of the applicant, as if she came with dirty hands.

20. He emphasised and submitted that this court will note the applicant had not approached the court with the proverbial "dirty hands" as depicted by the respondent, hence an explanation needed to be given in reply.

21. That it would not be to rehash the case stated in their founding papers but to shed light and reply to the serious allegations made so that the court is not left with incomplete facts. He conceded that once leave is granted and the court, on perusal of the replying papers, finds that there was material non-disclosure or misinformation, then the applicant will have to fall by her own sword.

<u>Analysis and Finding – leave to five replying affidavits</u>

22. I have considered and found that the respondent's papers introduced serious allegations that required a response and was of the view that Rule 43's strict structure may otherwise create unfairness. The courts have recognised this as the very mischief addressed by invoking Rule 43(5).

23. I could find no prejudice (or prejudice cured), and any potential prejudice was neutralised because:

   a. the respondent had the opportunity to oppose the application for leave by affidavit and did not do so;

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[10] *S.N v S.R* which relied on the Full Bench decision in *E v E; R v R; M v M* ibid.

b. the respondent could have sought leave to answer if he was genuinely prejudiced;

24. Ms Riley for the respondent simply made submissions from the bar, such did not constitute evidence and could not displace sworn factual averments properly made on affidavit.

25. Where a party elects not to place evidence before court, that party is not entitled to create factual disputes through argument alone.

26. I found that granting leave in the matter promoted a just interim order and reduced the risk of an unfair outcome that may later intensify disputes and costs.

27. It was clear to me that the averments made in the answering affidavit and the information provided were pertinent to the determination of the issues before me, hence I felt the need to hear what the answer to the allegations would be for a just consideration and decision in the matter.

28. It is based on the above that in the exercise of the court's discretion in terms of Rule 43(5) and in the interests of justice I granted leave for the applicant to file a replying affidavit to the Rule 43 application for a full and proper ventilation of the issues both expeditiously and justly.[11]

29. These are the reasons the court granted leave for the filing of the replying affidavit by the applicant.

30. I turn now to deal with the main application having a full picture of the issues.

The Rule 43 Application

Relevant Background facts

31. The parties were married to each other on 07 October 2023 at Joostenberg Vlakte and the marriage still subsists. As indicated, there is a dispute regarding the matrimonial property regime applicable to the marriage.

[11] See *Du Preez v De Preez* 2009 (6) SA 28 TPD regarding the relevancy of all information.

On the one hand, the applicant contends that their marriage was in community of property whilst the respondent alleges that they are married out of community of property by virtue of an ante-nuptial contract which expressly excluded the accrual system.

32. It is common cause that there were various legal proceedings instituted by the applicant against the respondent in which she was never successful and incurred legal costs against her.

33. On 09 October 2024, the respondent instituted divorce proceedings which forms the subject of the main action that is presently pending before this court.

Applicant's Case

34. In her founding papers the applicant avers that she is in need of maintenance, respondents bear a legal duty to support her and are financially able to contribute towards her legal costs. Her sole source of income is a monthly payment that she receives from a disability policy with Discovery and rental income to the sum of R102,438 as listed on Annexure A1 of the founding papers.

35. During her marriage, she was accustomed to a lavish lifestyle where she never had to worry about money. As a result of the breakdown of the marriage, her financial position deteriorated substantially.

36. She has incurred legal expenses of more than R700,000 arising from ongoing litigation between the respondent and her. These included fees for the attorneys, two counsel, and various expert witnesses. Listed on Annexure A2 is copies of the various invoices.

37. On top of her monthly living expenses, which amount to R202,275, the income she receives from the annuity is insufficient to meet both her monthly living expenses and the costs of litigation. Consequently, she has been

dependent on her overdraft facility and credit card to fund her basic needs and legal expenses.

38. Therefore, she remains unable to maintain herself and requires the financial support of the respondent for both her monthly maintenance as well as contribution towards legal costs.

39. The applicant avers that the respondent is a wealthy businessman with diverse commercial interests and considerable financial means. He can afford to support her as requested. She then attached annexures containing details of the company owned by the respondent, a list of the company assets which includes a collection of classic cars, a schedule of various properties he owns as well as a copy of the respondent's bank statement.

Respondent's Answer

40. As a point *in limine* the respondent avers that the applicant has made numerous false statements and material non-disclosures showing on that basis alone the application ought to be dismissed.

41. In support of this, Ms. Riley made submissions that the legal costs claimed by the applicant do not fall under a maintenance claim, further that the total figure listed does not amount to R700,000 but R559,457.69. Whilst Respondent did not dispute that applicant may have incurred substantial costs in relation to litigation which she instituted against him and in respect of which cost orders were made against her in his favor. The applicant is the one who is liable to him in respect of such costs.

42. In any event, those costs are not costs incurred in connection with or incidental to the divorce action.

43. Apart from the Rule 43 application, there is no ongoing litigation between the applicant and the respondent. Therefore, the legal costs and other expenses which the applicant may have incurred in respect of the various litigations she

had instituted against the respondent cannot be considered by the court when determining the Rule 43 application.

44. Applicant incorrectly formulated a claim for a contribution of 50% towards the costs of the matrimonial action without giving a specified amount with explanation on how she quantified it. Further the interim maintenance sought (R120, 000) has doubled to that claimed in her counter claim to the divorce action (R60 000).

45. The respondent does not deny being wealthy and owning various businesses and estates. He further acknowledges the banking statements attached to the founding papers, whilst it shocked him how she got hold of such personal information.

46. Ms. Riley submitted that the respondent’s wealth and business success over the years cannot be used against him for an application of this nature where the applicant is also a businessperson and a person of means.

47. That the applicant also failed to disclose material information about her financial standing as is detailed below.

Currently owned immovable properties

48. The applicant did not properly and completely disclose to the court in her application that she presently owns at least four real estate properties as follows:

a. One being erf 1[...], Everdale in Durbanville her home;

b. The others are (two) Units 1 and 2 and Garage G1 in sectional title schemes in the Strand area.

c. The other is erf 4[...] Sandbaai.

49. The applicant only mentioned the aforementioned properties in passing under what appears to be a spreadsheet's income column and a few items in the expense column pertaining to levies of/on municipal accounts and the like for each of the four properties, without detailed information.

Previously owned immovable properties

50. Further, the CSI report reflects that the applicant also owned properties which were previously sold. These were the following:

   a. Units 6 and 96 in the Sectional Title Scheme situated in Strandsig purchased in 2017.

   b. Erf 8[...] Vermont a property that was purchased in 1991.

51. There are no details about when these properties were sold, their values and how the proceeds were specifically spent, especially the Strand units purchased in 2017 which must have been sold most recently.

52. The applicant did not list, describe, or provide values of any of the properties. In an application of this nature, it fell on the applicant to provide these details.

Vehicles owned

53. Further, the applicant has also failed to inform the court that she owns an array of motor vehicles herself, namely a Pajero SUV, a VW transporter van, a Mercedes-Benz Vito van, a Mercedes-Benz motor car, a Maserati motor car, and three smart mini cars.

Business interests

54. She also failed to disclose her various business interests as a businessperson, which are as follows:

   a. She has operated a gardening and landscaping business for a considerable amount of time with outstanding success. She worked on several contracts pertaining to the landscaping components of large real estate developments.

   b. Additionally, the CSI person's report states that the applicant is now a director of one entity and has held directorship in at least seven entities in the past. This information plus the fact that the corporation she is a director of sold about three real estate properties after it was registered have not been disclosed by her.

c. The applicant is also actively involved in the business of buying and selling quality collectible items of furniture and she uses the VW transporter and Mercedes-Benz Vito vans for transporting sizable items. Some of the items of her furniture stock are currently stored at the respondent's premises.

d. She is well known across the country. She has a Facebook profile which markets her business successfully and online presence extending as far as Kibler Park, Alveda, Mayfield, and Boksburg. She also advertises on Gumtree, TikTok, and Instagram in addition to her multiple profiles on Facebook.

Policy Payout

55. Respondent avers that the applicant did not disclose that she previously received a policy payout from of R5million rands from Discovery pursuant to a motor vehicle accident in which she was involved and suffered damages from. There is no mention of this sum in the applicant's founding affidavit.

56. Additionally, the applicant cites rental income and a disability policy or annuity as her only sources of income. The applicant did not provide an explanation for the sudden 100% rise in her monthly income from the disability policy.

57. She submitted a schedule of income and expenses that did not include any legal fees or new, unusual costs. She was expected to provide this information to explain to the court why she can no longer rely on the income she previously earned from her assets, businesses, and other resources, but she failed to do so.

58. The applicant has not explained why she is withdrawing more than twice her previous monthly income from Discovery, as this will undoubtedly deplete the policy before 2027—prior to her turning 65. She previously informed the

respondent that the Discovery disability payments would end around 2027 or when she turns 65, whichever comes first.

59. Ms Riley submitted that applicant is therefore attempting, through this application, to have the respondent assume her Discovery payout under the pretence of an interim order while the divorce proceedings continue. Given her monthly surplus of R13,647.90, she does not require any maintenance from the respondent unless it is because her Discovery payments are ending. However, she has not disclosed any information regarding this matter.

60. That after their marriage, the applicant did not move in with the respondent but instead visited occasionally, staying briefly before returning to her Durbanville home where most of her belongings remained. Although she brought some furniture to the respondent's residence, she continued living independently. The respondent also visited her property from time to time. As a result, they never lived together as spouses or shared a home despite being married.

61. The respondent has never provided financial support to the applicant, who previously stated she was self-sufficient and did not require his money. He is therefore surprised by her request for maintenance pendente lite and legal fees, considering it insincere and a misuse of the court process.

62. Any legal costs which the applicant has incurred pursuing unsuccessful claims against the respondent are for her own account and are liable to the respondent for such cost orders that have been awarded in his favor.

63. Ms Riley further submitted that the applicant has failed to set out any particulars whatsoever of costs and expenses she has incurred or is likely to incur in connection with the divorce action as is expected of an applicant seeking a cost contribution in Rule 43 applications. That would be the only cost that she could look to the respondent to contribute towards if she had grounds for pursuing such a claim against the respondent.

64. Further, the applicant's monthly surplus was incorrectly calculated because it amounts to R17,477.51 and not R13,647.90. Therefore, she has no need for maintenance from the respondent, and she is well able to afford the personal costs.

65. That therefore based from all the above the application falls to be dismissed.

Applicant’s Reply

66. In her replying papers, the applicant denied that she had made any material non-disclosures or made false statements in her founding affidavit.

67. Firstly, with regards to annexure 2 of the founding affidavit, there was mere oversight in that a missing invoice that ought to have been attached was now attached to the replying affidavit. This invoice contains expenses for legal fees dated 20 July 2024 to 3 February 2025.

68. The applicant conceded that annexure A3 of the founding affidavit contained calculation errors and that they have now attached the corrected version to the replying affidavit with the correctly substituted calculation.

69. The Discovery income amount in annexure A3a has been amended to match annexure A1. This correction does not prejudice the respondent, as the correct figure was provided in a separate annexure; the previous discrepancy was a mistake that overstated expenses as R132,471.60 instead of R90,285.73. No new facts or values are introduced—just an accurate calculation as shown in the updated annexure A3a.

70. She clarified that she does not seek relief for past legal fees or costs previously awarded against her. Instead, she requests a contribution toward anticipated legal fees in the ongoing divorce action. Annexure A2 was included

solely to demonstrate her financial depletion from prior litigation, showing she cannot afford legal representation without the respondent's contribution.

71. The applicant requests to be afforded equal standing when presenting her case in the divorce court, particularly as the respondent has secured the services of both junior and senior counsel, along with an attorney for the proceedings. She further clarifies that, given the complexity and scope of the matters at issue in the divorce action, a reasonable contribution—quantified as 50% is approximately R350,000—is necessary, considering the value of the estate. The relevant cost breakdown is provided in Annexure A2a.

72. She confirmed ownership of four immovable properties: two generate rental income, one is her current residence, and both are bonded with repayment included in her expenses. The fourth property is uninhabitable and not income-generating due to needed renovations; she attached photos and noted that the respondent was aware of their renovation plans before the divorce.

73. That the further properties that the respondent searched and found under the CSI report Units [...] and 9[...] situated in Strandsig and erf 8[...] Vermont were sold before their marriage, and the proceeds were either used to settle existing bonds of one of the four properties mentioned or to purchase the Sandbaai property erf 4[...].

74. That she only has access to rental income from the two strand units, and both are bonded and the figures are disclosed in Annex A3 of the founding affidavit.

75. Further, with regards to the listed vehicles she confirmed owning these but were not contributing to any current income that she has. She gives further information about the vehicles as follows:

a. The Mercedes-Benz vehicle is used for personal transport.

b. The smart cars in their possession are non-operational due to mechanical issues.

c. The Mercedes-Benz Vito van, Maserati and one smart car are in the respondent's possession as he often hires these to the museum's customers to generate income. She has had no access to this income that the respondent is possibly deriving from them.

d. The VW transporter was purchased for a coffee shop and antique furniture shop venture that they had planned on opening on the museum premises, but that business could not proceed due to the respondent denying her access to the property.

e. The Pajero SUV is quite old and has some mechanical faults.

76. The applicant further averred in her replying papers that she has disclosed in Annex A3 of the founding affidavit the contribution towards insurance premiums to demonstrate that she did not attempt to conceal their existence, but they do not alleviate her financial distress nor produce income.

77. Regarding claims that she is a company director, the applicant confirmed she holds that title for a company established to manage three properties sold before her marriage to the respondent. The company remains registered mainly for area tax payments, has no assets or activities, and she considers it irrelevant to this application. A copy of the company's IRP6 was attached.

78. The assertion that the applicant owns collectible furniture and a furniture store is refuted. The furniture she possesses is her personal possessions that she brought to the respondent's (marital) residence; some of these items are now kept on the property in accordance with an agreement. They intended to build an antique store and coffee shop on the museum grounds, but their ongoing legal feud had put everything on hold.

79. The applicant adamantly disputes that she is the individual selling furniture on Facebook or other media. That was just a profile of someone who lives in Boksburg and has a similar name. She is unaware of the person's cell phone number. She claims that a simple Facebook search for her name gets 49

profile matches, indicating the name's popularity. The applicant then included an image of the Facebook search results for "B[...] B[...]."

80. The respondent stated that the R5 million-rand insurance payout was received in 2012, during her marriage to her late husband, and used for his medical expenses, her children's education, and to purchase properties (erf 1[...] Strand and two sectional schemes in Jacomshof and Strandsig), which were sold before their marriage.

81. Additionally, she was mistaken to refer to her Discovery disability as an annuity as it was a benefit that Discovery, which has discretion over both continuation and quantum, reviews on an annual basis. Discovery made the decision to pay 100% of the previously confirmed earnings instead of the 40% chosen. An excerpt from the applicant's contract with Discovery was then provided, demonstrating that this was the case.

82. This in essence was the case that was presented before this Court relating to the Rule 43.

ISSUES TO BE DETERMINED

83. Point in Limine -Whether the applicant has complied with her duty of full and frank disclosure.

84. Whether she has committed false disclosure or material non-disclosure of her financial affairs; if so

85. Whether the Court is entitled to dismiss the application on such grounds; or

86. Whether the applicant has satisfied this Court for the relief sought; and

87. Whether the respondent has the means to provide the relief sought; and

88. Whether the relief claimed is reasonable and proportionate in the context of Rule 43.

LEGAL PRINCIPLES

89. A party who approaches court for relief must place all material facts before the court fully and frankly.

90. In *Schutte v Schutte* 1986 (1) SA 872 (A), the court confirmed that:

"Non-disclosure or incomplete disclosure of material financial information may justify an adverse inference against the defaulting party."

91. In *C.M.A v L. A* (2022/20502) [2023] ZAGPJHC 364 (24 April 2023) 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, it was held:

"*[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 <u>to disclose fully all material financial information. Any false disclosure or material non-disclosure may justify refusal of the relief sought</u>."

92. *In Taute v Taute* 1974 (2) SA 675 (E), it was stressed that:

"The applicant must make a full and honest disclosure of assets and income. Failure to do so undermines the credibility of the application."

93. More recently, courts have increasingly taken a firm stance against "strategic vagueness" in financial affidavits. Cryptic disclosures are often viewed as an attempt to:

a. Conceal true financial capacity.

b. Create an artificial picture of need.

<u>DISCUSSION AND ANALYSIS</u>

94. This application requires parties to come with clean hands. This includes, among other things, an applicant must give total disclosure of their own assets, just as they are disclosing those owned by the other party whom they claim should be ordered to make payments.

95. Rule 43 proceedings require full and frank financial disclosure. An applicant's failure to do so undermines the credibility of their alleged financial need and justifies the drawing of an adverse inference.

96. I will address the preliminary point raised whilst considering the relevant facts and submissions presented.

97. <u>The Strand and Sandbaai immovable properties</u>

a. The applicant did not clearly disclose her immovable properties in the founding affidavit, nor provide a list comparable to the one she gave for the respondent's assets.

b. She did not clearly specify that certain properties generate rental income, and the inclusion of some details in an annexure lacked sufficient clarity.

c. I found her response in the replying affidavit unconvincing, as referencing annexure A3—which lists expenses related to "Strand prop 1" and "Strand prop 2"—does not constitute full disclosure that these are immovable properties. The response still lacked specific details regarding ownership, property descriptions, valuations, and information on rental amounts.

d. This includes the so called "uninhabitable property" in Sandbaai which we now know from the replying affidavit that it is an immovable property, belonging to her, but there are further details such as its value, when she acquired it and so forth that should have been disclosed in the first place, but none was given even in the replying affidavit.

98. This in my view were material non-disclosures a conduct that is never acceptable in court proceedings of this nature. Without the Respondent's

investigation and disclosure of the Deeds/CSI reports, the court would have been left in the dark about these details.

99. These instances clearly involved material non-disclosure; however, there were additional aspects that warrant further consideration which I deal with further below.

Further assets

100. The three sold properties-The applicant ought to have provided comprehensive information regarding the properties she previously owned, especially seeing that they were being challenged in the answering affidavit, details such as including the dates of sale and their respective values to demonstrate to this Court she no longer has the proceeds from their sale and or they are truly irrelevant to this application. There is no such information provided, and in her replying papers, she still does not fully explain or give these details.

101. The vehicles-regardless of their current value or whether they generate income for her, are considered her assets. She should have clearly provided a list of these vehicles similar to the one she attached regarding the respondent's vehicles. Insurance premiums are not a clear description of ownership of the vehicles, make , model and worth to her, her giving this information in a replying affidavit was unimpressive and still fell short of full and frank disclosure.

102. Miscalculations—while it is understandable that errors may occur when calculating expenses or explaining attached legal fees, these particular mistakes were significant and should have been avoided. Depending on the respondent for calculations or reminders about required attachments remains unsatisfactory. Notably, the errors included overstated expenses and understated income.

103. Further, the information regarding the so-called Garage G1 of the Strand Units remains unclear to this Court, whether it separately generates income also or forms part of one of the units.

104. The Discovery Contract- the full document was not attached and providing only an extract risks misinterpretation; the applicant was responsible for supplying sufficient details for the court to understand the issue of the 100% payout by Discovery, which may quickly deplete these funds.

105. Directorship position- there are no specifics about her directorship position or properties sold by the company, she still failed to be clear in the replying papers about this.

106. In my view, the above reflect that the applicant failed to take the court fully into her confidence in relation to her circumstances and financial affairs.

107. Although there is not much to say about their living or sleeping arrangements, the fact that they are still married to this day is undeniable. However, the material non-disclosure of her financial affairs and other material aspects is glaring leaving her application deficient, incomplete, and leaves much to be desired.

108. The importance of making a full and proper disclosure of financial affairs in a Rule 43 application cannot be overstated.[12] In *Du Preez v Du Preez*,[13] the court bemoaned the conduct of the litigants who misstated the nature of their financial affairs. Dismissing the claim by the applicant, the court held that:

> "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 utmost good faith (*uberrimea 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

[12] *TS v TS* 2018 (3) SA 572 (GJ) para 22.
[13] 2009 (6) SA 28 (T) paras 4-7.

with 'clean hands' and, on that ground alone, the court will be justified in refusing relief."

109. The applicant's cryptic disclosure of her immovable properties constitutes material non-disclosure. Her failure to provide values, encumbrances, or income potential is incompatible with the duty of full and frank disclosure applicable to Rule 43 proceedings. The explanation tendered for this omission is unimpressive and undermines the credibility of her alleged financial distress. The court is accordingly invited to draw an adverse inference.

110. It is based on all the above reasons that I am of the view that the applicant has failed to take this court fully in her confidence, her conduct fell short of the standard of utmost good faith (from material non-disclosure) and should be denied the relief sought based on that score.

111. Since the above has been established, there is no need to address any further issues. The applicant's case has failed on its own merits.

COSTS

112. The respondent has been successful in this application, and I see no reason why this court should not also exercise its discretion to award costs in his favour, especially since he incurred additional unnecessary expenses in the interlocutory application due to actions taken by the applicant, as described above.

113. I previously endorsed the initial (interlocutory) order, with the only outstanding matter being the determination of costs, which was reserved for later consideration. At this stage, it is appropriate to now address that issue.

114. Taking into account the considerations outlined above, I therefore find that the applicant must be held liable for all the costs incurred including those toward the interlocutory application brought in terms of Rule 43(5) and this main application.

115. According to Ms. Riley, the costs should be on a punitive scale. This argument did not persuade me. Hopefully, the applicant will have learnt by now to consider her options carefully before filing a lawsuit even if returning for a properly constructed application. She already has a number of costs orders against her and faces a potentially costly major battle in the divorce action.

CONCLUSION

116. In that regard the following order stands to follow:

a. The application is dismissed.

b. The applicant is liable for the costs of both the interlocutory application and this application on a party and party scale.

P MAGONA-DANO
Acting Judge of the

Western Cape High Court

Appearances:

For the Applicant:	Adv Claire Reilly De Klerk & Van Gend Attorneys
For the Respondent:	Mr. Lingani Lingani & Partners Attorneys