



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

CASE NUMBER: 2021/43212

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES.
DATE: 2 February 2023

In the matter between: -

M, D

Applicant

and

M, D

Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 2 February 2023.

SUMMARY:

Rule 43 – Filing of affidavits - The Court found that the time has arrived for an urgent reform of the rule. The right to equality and a fair trial is at the heart of rule 43 matters. Divorcing litigants are confined to the filing of two sets of affidavits only, yet other litigants are not. This found that this position cannot be seen as anything but discriminatory and must be inconsistent with the constitution.

Financial Disclosure – Supporting documents - The provisions of Rule 43 limit the annexures a party may attach to her affidavit. However, the court must be made privy to all relevant supporting documentation in order to arrive at a just and equitable determination of the disputes relating to maintenance and a contribution to legal costs.

Rule 43 – Contribution to legal costs - The court restated the principle that the court must exercise its discretion under rule 43 in the light of the fundamental right to equality and equal protection before the law. An applicant will not enjoy equal protection unless he or she is equally empowered with 'the sinews of war'.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] It is an indisputable fact of history that the only constant is change. The law and the Uniform Rules of Court should be no exception, more

particularly the provisions of rule 43.

- [2] This rule 43 application came before me as a special allocation in terms of a directive issued by the Deputy Judge-President of this Division.
- [3] Essentially, the applicant (the plaintiff in the pending divorce action) claims for an order appointing a psychologist to conduct an investigation into the best interests of the minor boy child, D, who is presently 16 years of age . She also claims for interim spousal maintenance and a contribution towards her legal costs. The applicant instituted a divorce action against the respondent in his personal capacity but also in his *nomine officio* capacity as trustee. There are no less than 15 defendants cited in the divorce action. Both the application and the divorce action are vigorously opposed.
- [4] Due to the sheer volume, I requested a hard copy set of the papers before the hearing, which was promptly delivered to me in five lever arch files. The files contained copies of the pleadings in the pending divorce action, both affidavits filed in the Rule 43 proceedings, the parties' completed Financial Disclosure Forms ("*FDF*") together with the supporting documents. The parties thereafter filed supplementary affidavits accompanied by the required application for leave to do so.

HAS UNIFORM RULE 43 STOOD THE TEST OF CHANGE?

- [5] An all too familiar mantra chanted by courts is that rule 43 papers most often fail to focus attention on material issues and are riddled with emotive, inappropriate and irrelevant vitriol.

- [6] A mere glance at the files in this matter, let alone their content, would more often than not illicit the immediate reaction from the presiding judge that the parties have flagrantly disregarded the provisions of rule 43, which provides for the delivery of a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor and the delivery of a sworn reply in the nature of a plea. This initial reaction may invariably dictate the fate of the application: a postponement or a dismissal.¹ Neither outcome leads to any speedy resolution as envisaged by the rule.
- [7] In *Dodo*² it was held that in special circumstances deviation from this norm may be justified. In *E*³ the full court, however, held that the court does not have a discretion to permit departure from the strict provisions of rule 43(2) and (3) unless it decides to call for further evidence in terms of rule 43(5).
- [8] Although I do not for one moment exclude or ignore the instances where affidavits do contain irrelevant matter and are of no assistance to the court, I am not convinced that the default position of chastising parties for the length of their papers is fair or justified when considering how the world has changed faster than anyone could have imagined, yet the provisions of rule 43 have largely remained untouched since their promulgation on the 12th of January 1965.⁴

¹ *Maree v Maree* 1972 (1) SA 261 (O) at 263H; *Smit v Smit* 1978 (2) SA 720 (W) at 722G; *Nienaber v Nienaber* 1980 (2) SA 803 (O) at 806F; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262C; *Visser v Visser* 1992 (4) SA 530 (SE); *TS v TS* 2018 (3) SA 572 (GJ) at 584D–E and 585A–C; *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D; *Du Preez v Du Preez* 2009 (6) SA 28 (T) at 33B

² *Dodo v Dodo* 1990 (2) SA 77 (W) at 79C–F

³ *E v E* 2019 (5) SA 566 (GJ) at 575B–577A

⁴ Published in what was called the “Extraordinary Government Gazette” No 999; volume 15

- [9] We find ourselves in the 21st century where the world is recognised as a global village, an extended central nervous system connected by telecommunications, the media and the internet as a whole. The world became a global village because a lot of things needed to change. There was a need for development and a need to bridge the gap between people of the world. Yet, parties are expected to cast their case into a mould which was designed more than half a century ago.
- [10] In my view it is simply wrong and causes an injustice to the parties, when the manner in which they present their case is judged against the backdrop of an archaic rule that has unfairly stood the test of time in its current form. This is especially so where divorcing parties who seek interim relief, are confined to the employ of the provisions of rule 43. They are not spoiled for choice as those who litigate in terms of rule 6 and who are not limited in any manner to present their case. This is how it should be as it is in keeping with a legal system infused with constitutional values.
- [11] The right to equality and a fair trial is at the heart of rule 43 matters. Divorcing litigants are confined, yet other litigants are not. This position cannot be seen as anything but discriminatory and must be inconsistent with the constitution.
- [12] Divorce is a frequently messy and invariably stressful business. Parties should not have to experience the additional anxiety of impractical and unjust restrictions imposed by the rule when presenting their case.

- [13] The importance of interim relief granted in rule 43 proceedings cannot be overstated. More often than not, orders granted under the provisions of rule 43 lead to the speedy resolution of the divorce action, or at the very least, to a limiting of the disputed issues. Rule 43 proceedings are in this regard particularly useful where the court hearing the rule 43 application is armed with all the facts and supporting documentary evidence to equip it to arrive at a proper determination of the issues.
- [14] The courts have to a great extent acknowledged the importance of rule 43 applications. *TS*⁵ and *E*, are prime examples. A court has the power to manage and order financial disclosure of financial information and specified financial documents regarding the parties' income, expenses, assets and liabilities. This division has pioneered the establishing of a specialised family court, thereby lending credence to the importance of family law and related matters. How is it then that parties are still limited to depose to affidavits akin to sworn statements and replies with very few annexures, and, to add insult to injury, are limited to two sets of affidavits only ?
- [15] The time has clearly arrived for a dire and urgent reform of the rule. This will achieve a proper ventilation and determination of the issues. It will obviate the time wasted in raising and entertaining technical points such as the length of the affidavits and the hearing of applications for leave to file replying affidavits.

THE FDF DILEMMA

⁵ *TS v TS* 2018 (3) SA 572 (GJ)

[16] I would be remiss if I did not raise the practical difficulties experienced with the application of the directive relating to the filing of FDF's. The form states that when it is delivered to the opposing party, it must be accompanied by all supporting documents mentioned in the body of the form. It then goes on further to state that no supporting documents must be filed in court. This creates an obvious conundrum. The provisions of Rule 43 limit the annexures a party may attach to her affidavit. TS and E reinforced the importance of a full financial disclosure in order to enable the court to arrive at a just determination of the financial disputes. Parties have exchanged the supporting financial documents, but the court is not privy to them. Consequently, the parties cannot refer the court to the supporting documents and the court is in no better position to conduct an analysis of the parties' financial affairs.

[17] This precarious position inevitably leads to a contravention of the provisions of the FDF by legal practitioners who upload the supporting documents onto *caselines /courtonline* with the *bona fide* intention of presenting their clients' case in the best possible way, as they are duty-bound to do. Courts are understandably inconsistent in their approach when allowing or disallowing the uploading of the supporting documents, which instils uncertainty in parties and legal practitioners. This is unnecessary and can and should easily be remedied in my view by way of a further directive and the amendment of the standard FDF form.

THE APPLICANT'S CLAIM

[18] The applicant claims the following relief in terms of her latest draft order

provided to the court on the 26th of January 2023: -

- [18.1] That psychologist, Mr Anthony Townsend, is appointed to conduct an investigation into the best interests of the minor child, D, and to provide the parties and the court with his written report setting out his opinions, findings and recommendations regarding the nature and extent of any interventions, including therapeutic interventions that, in his opinion, are required and appropriate to restore the relationship between the applicant and D as well as the manner in which the parties should exercise their parental responsibilities and rights, including care and contact in respect of D;
- [18.2] That the respondent pays the costs of Townsend directly to Townsend on demand, including any deposit required by Townsend;
- [18.3] That D and both parties shall cooperate with the process of Townsend to the full extent required by him *inter alia* by attending all such interviews, evaluations and assessments required by Townsend, completing all questionnaires and/or other forms and providing Townsend with all information and/or documentation required by Townsend;
- [18.4] That both parties shall complete and sign Townsend's mandate upon receipt thereof from Townsend;
- [18.5] That the respondent shall pay a cash monthly amount of

R95 000.00 in respect of spousal maintenance directly into the applicant's Capitec bank account, the first payment in the amount of R95 000.00 (less the amount of R30 000.00 already paid by the respondent) in respect of maintenance for January 2023 be paid forthwith and thereafter all further payments to be paid on the first day of each and every succeeding month;

[18.6] That the monthly cash contribution be increased annually on the first day of the month succeeding the anniversary date of the order and every twelve months thereafter at a rate of 6 % per annum;

[18.7] That the respondent makes payment directly to the creditor or service provider of the following monthly expenses on due date: -

[18.7.1] The medical aid premiums to retain the applicant on her current medical aid scheme that she is currently a dependent on as well as any medical and dental expenses not covered by the benefits of the medical aid scheme, excluding any elective cosmetic and/or orthodontic costs;

[18.7.2] The levies, rates, taxes and all other imposts, including water and electricity, homeowners and household insurance, security and alarm system costs in respect of the property registered in the applicant's name,

being Erf X, Clifton, Cape Town;

- [18.7.3] The insurance premiums in respect of the BMW X5 and the Mini motor vehicle;
- [18.7.4] The reasonable cost of maintenance and repairs in respect of the aforesaid motor vehicles;
- [18.7.5] The cost of licensing of the aforesaid motor vehicles;
- [18.7.6] The premiums in respect of the applicant's existing life insurance policies, dread disease policies and retirement annuity policies;
- [18.7.7] That the respondent shall reimburse the applicant by payment into the applicant's Capitec account within five calendar days of production by her of an invoice and proof of payment of all reasonable medical and dental expenses incurred in respect of the applicant;
- [18.7.8] That the respondent shall guarantee all of the obligations of the lessee, ABC (Pty) Ltd, in respect of the lease concluded between ABC (Pty) Ltd and DEF (Pty) Ltd in respect of the apartment situated at Unit Y, The Houghton Hotel, Houghton Estate, namely: -

- [18.7.8.1] Payment of the monthly rental in the

sum of R33 000.00, which includes the costs of water, electricity, domestic effluent and meter reading fees;

[18.7.8.2] Any reasonable market-related escalation to the rental at the expiry of the lease, should the applicant elect to remain in occupation of the property, together with the costs of water, electricity, domestic effluent and meter reading fees;

[18.7.9] Payment of the cost of DSTV and Wi-Fi;

[18.7.10] That the respondent shall pay a first contribution towards the applicant's legal costs in the sum of R6 million by making payment into the applicant's attorneys' trust account as follows: -

[18.7.10.1] R1 million within 48 hours of the grant of the order;

[18.7.10.2] R2 million by no later than 28 February 2023;

[18.7.10.3] The balance in equal monthly instalments of R500 000.00, the first such instalment to be paid on

or before 28 March 2023 and thereafter on or before the 28th day of each following month until the full amount has been paid;

[18.7.11] That the respondent shall pay the costs of the application, including the costs of senior counsel.

THE RESPONDENT'S TENDER

[19] The respondent's draft order presented to this court on 16 January 2023 contained the following tender: -

[19.1] The respondent would pay a cash monthly amount of R40 000.00 to the applicant and that this amount shall be increased annually on the first day of the month succeeding the anniversary date of the order and every twelve months thereafter at the Consumer Price Index;

[19.2] The respondent would make payment of the following monthly expenses: -

[19.2.1] The monthly medical aid premiums to retain the applicant as a dependent on the medical aid scheme she is currently a dependent on;

[19.2.2] Insurance premiums in relation to disability, life and dread disease cover, such premiums to be paid

directly to the insurer;

- [19.2.3] The monthly insurance premiums in respect of the BMW X5 and the Mini motor vehicles;
- [19.2.4] The reasonable cost of maintenance and repairs of the motor vehicles, subject to the respondent agreeing in advance to the cost as quoted by any service provider in writing and prior to any work being commenced with on either vehicle and on the basis that both parties are entitled to require competitive quotations for any maintenance work or repairs required for either motor vehicle;
- [19.2.5] The annual cost of licensing the motor vehicles, provided that the applicant furnishes the respondent with any documentation or information necessary and requested by the respondent for the licensing of the vehicles timeously;
- [19.2.6] The respondent shall reimburse the applicant by payment into the applicant's bank account within seven calendar days of production by her of an invoice and proof of payment of all reasonable medical and dental expenses, excluding elective cosmetic and/or aesthetic/beautification and/or orthodontic expenses not covered by the medical

aid, subject to the applicant obtaining the respondent's written consent before incurring a medical expense in excess of an amount of R2 000.00 per event, save in the event of a medical emergency;

[19.2.7] The respondent shall guarantee the obligations of the lessee, ABC (Pty) Ltd, in respect of the lease concluded between ABC (Pty) Ltd and DEF (Pty) Ltd, namely: -

[19.2.7.1] Payment of the monthly rental in the sum of R33 000.00, which amount includes the cost of water, electricity, domestic effluent and meter reading fees as provided for in the signed lease agreement;

[19.2.7.2] The payment of any reasonable market-related escalation to the rental at the expiry of the current lease agreement, should the applicant remain in occupation of the property;

[19.2.8] The monthly cost of the applicant's DSTV and Wi-Fi;

[19.2.9] Each party to pay their own costs of the application.

[20] The respondent made no tender for a contribution towards the applicant's legal costs.

[21] On the second day of the hearing, that is the 26th of January 2023, the respondent presented a new draft order which included an improved tender. The material difference between the two tenders may be summarised as follows: -

[21.1] The respondent increased the monthly cash contribution from R40 000.00 to R60 000.00;

[21.2] The respondent tendered an annual increase of the monthly cash contribution at the rate of 6 % per annum;

[21.3] Regarding the applicant's medical expenses, the respondent requires his written consent before incurring a medical expense in excess of an amount of R6 000.00 per event, save in the event of a medical emergency;

[21.4] The respondent tendered a contribution towards the applicant's legal costs in the amount of R3 123 453.00, which would be paid as follows: -

[21.4.1] R963 453.00 within 48 hours of the grant of the order;

[21.4.2] R650 000.00 by no later than the 28th of February 2023;

[21.4.3] R1 200 000.00 by no later than the 28th of February 2023;

[21.4.4] R310 000.00 by no later than the 28th of February

2023;

[21.5] The costs of the application to be costs in the divorce action.

SUPPLEMENTARY AFFIDAVITS

[22] The applicant filed a supplementary affidavit on the 17th of January 2023. The affidavit included an application for leave to file a further affidavit. According to the applicant, the need for a supplementary affidavit was occasioned by certain information that came to her knowledge pursuant to a subpoena *duces tecum* which was issued against Discovery Insure in respect of claims made by the respondent to support losses incurred during the period 1 January 2021 to 1 November 2022, including documents relating to such claims. The documents under subpoena were provided to the applicant's attorneys of record on the 2nd of December 2022. The documentation revealed that on the 24th of December 2021 Discovery Insure made payment to an entity, TP Investment (Pty) Ltd ("**TP**") of four separate amounts totalling R963 423.00 and on 22 September 2022 under the same claim number paid the respondent an additional amount of R276 860.00.

[23] The respondent filed a supplementary answering affidavit. He objected to the filing of a further founding affidavit by the applicant and described the attempt to do so as an abuse of process. However, the supplementary answering affidavit in my view went far beyond the scope of the supplementary founding affidavit. The respondent glibly dealt with the statement and supporting documentation that Discovery Insure honoured

payment in respect of these claims: -

*"The claims were legitimately and validly submitted and paid with the assistance of my insurance broker."*⁶

[24] Ms Segal, who appeared on behalf of the respondent, did not, wisely in my view, vigorously oppose the application for leave to file a further affidavit.

[25] The issues raised in the supplementary founding affidavit are material in the determination of the rule 43 application. The amount of time that counsel spent on making submissions in relation to the content of these affidavits, is demonstrative of this fact. I accordingly ruled that both supplementary affidavits would be permitted.

THE ADMISSIBILITY OF ANNEXURES "DM7" and "DM9"

[26] The respondent in his answering papers, objected to the admissibility of two documents attached to the founding papers. These documents reflect *inter alia* the respondent's assets and liabilities. The basis of the respondent's objection was that these documents were provided by him on a without prejudice during settlement or mediation discussions. It was not the respondent's case that the information reflected on the documents were incorrect or unauthentic.

[27] The respondent did not bring an application to strike out these annexures. Ms Segal for the respondent, was constrained in her argument to strike

⁶ Respondent's supplementary answering affidavit: paragraph 37, p 004-5-16.

out the annexures in the absence of an application to strike out and left the decision whether to admit the documents in the hands of the court.

[28] The respondent, for reasons dealt with later, has not been forthcoming with his financial disclosure. In addition, he does not dispute the correctness of these documents. The parties' financial positions lie at the root of this application. The annexures are therefore admitted into evidence.

THE FACTS

[29] The applicant is a 54-year old woman. She describes herself as a housewife. This is denied by the respondent who states that the applicant is a football club owner and manager.

[30] The respondent is a businessman and a qualified chartered accountant. This is common cause.

[31] The parties married on 13 March 1994 out of community of property in terms of an antenuptial contract which incorporated the provisions of the accrual system as provided for in chapter 1 of the Matrimonial Property Act, 88 of 1984. In terms of the antenuptial contract: -

[31.1] the respondent excluded from the accrual all life endowment insurance policies and retirement policies taken out by him on his life and declared that the net value of his estate, excluding insurance policies at the commencement of the marriage, was R2.3 million;

[31.2] The applicant declared that the net value of her estate at the commencement of the marriage was R50 000.00.

[32] Three children were born of the marriage. The eldest daughter, S, is a major and an accountant previously employed in such capacity. S resides with the respondent and D in an apartment in the northern suburbs of Johannesburg. S has been joined in the main divorce action as the fifth defendant by virtue of her direct and substantial interest in the action.

[33] L, the parties' second born child, is a major and unemployed. She obtained a B.Com degree from the University of Witwatersrand and presently resides separately from the respondent with her boyfriend in the same complex. L is cited in the main action as the sixth defendant in that she may have a direct and substantial interest in the judgment of the trial court in respect of certain of the relief claimed by the applicant in the divorce action.

[34] D, the only and youngest son, is a grade-10 learner at a private school in Johannesburg. He resided with the applicant at the former matrimonial home until approximately 10 October 2021 when he, without prior discussion with the applicant, went to live with the respondent at The Houghton.

[35] It is common cause that the marriage relationship between the parties has irretrievably broken down.

[36] It is further common cause that the parties attempted mediation prior to the institution of the divorce action. The mediation was unsuccessful.

THE DIVORCE ACTION

[37] During September 2021 the applicant instituted a divorce action against the respondent in his personal capacity, cited as the first defendant, and in his representative capacity, cited as the second defendant and thirteen others in which action the applicant claims various forms of relief as more fully set out in the particulars of claim. The applicant claims against the respondent in his personal capacity *inter alia* a decree of divorce, lifelong maintenance and an amount equal to one half of the difference between the net accruals of the parties' respective estates.

[38] The applicant cited the respondent as the second defendant in his representative capacity as: -

[38.1] a trustee of The H Trust, a South African Trust which has registered in its name two luxury apartments situate in a development known as The Houghton, both of which are rented to tenants;

[38.2] protector of The S Trust which holds *inter alia* the shares in BPH Ltd BVI, the shares in BB Ltd BVI and SI Ltd BVI;

[38.3] settlor and protector of the B Trust;

[38.4] settlor and protector of the C Trust.

[39] Save for The H Trust, all the other mentioned Trusts are situated in the British Virgin Islands and hold substantial assets worth several hundreds

of millions of Rands.

[40] The applicant states that there are at least two additional trusts, namely the SM Trust, which is a Trust situated in the BVI and the OS Trust. The SM Trust, according to the respondent's pleadings, owns the shareholding in two private USA companies, which companies are the registered owners of two valuable apartments in New York City, namely: -

[40.1] X Place, which the respondent attributed a value of R80 million;
and

[40.2] Y Street, which the respondent attributed a value of R27 million.

[41] The PS Trust reflects the respondent as the settlor and the trustee as one Peter Rosenberg who resides in Pennsylvania, USA.

[42] The applicant cited the third defendant as the registered owner of a luxury property in Clifton. She alleges that the third defendant holds this property as nominee for the respondent. The respondent alleges that the third defendant is not the beneficial owner and claims that it is in fact the BPH Ltd BVI, whose shares are held in the S Trust.

[43] The third defendant raised an exception to the applicant's particulars of claim, which exception is yet to be determined.

[44] The trustees of the BVI Trusts, WH Ltd BVI and Intelligent SI Ltd BVI have not entered an appearance to defend.

[45] The S, B and FM Trusts have within their structures properties to the

value of approximately R166 million, on the respondent's version.

- [46] The eighth defendant is a trustee of a Mauritian Trust, however, no further information has been provided in regard to this Trust. The Trust representative, Peter Todd, declined to provide any further information unless requested by a Mauritian court process.

LIFESTYLE OF THE PARTIES AND THE FAMILY

- [47] It can hardly be persuasively argued by the respondent that the family has not lived a life of extravagance and luxury. The description by D, the parties' youngest son says it all: "*We've lived like the richest people in the world..*"⁷

- [48] The former matrimonial home has been described by the respondent as a palatial home in the northern suburbs of Johannesburg, which property is registered in the name of TP, a non-trading company. On the respondent's own version the former matrimonial home was beautifully renovated with expensive furnishings, mostly paid by the companies owned by the Trusts. The trustees were prepared to pay for the renovations and the majority of the invoices were sent to the trustees and paid by them.⁸

- [49] To mention but a few of the luxurious furnishings, a diamond bathtub imported from the United Arab Emirates and valued at \$19 797.00 was installed in the applicant's ensuite bathroom, and a crystal chandelier of five metres long and five metres in diameter to the value of \$54 772.60

⁷ Founding affidavit: annexure "DM 16"; p. 4-1-144: WhatsApp message dated 26 October 2021.

⁸ Answering affidavit: paragraph 1, p 004-1-215.

was erected above the staircase.⁹ Clearly no expense was spared.

[50] The family holidayed locally at luxury homes in Clifton and were able to enjoy holidays abroad during the course of which they purchased luxury items under designer labels, including Dolce & Gabbana, Gucci and Louis Vuitton. The respondent purchased designer handbags and sunglasses as gifts for the applicant.

[51] At some stage the parties intended to emigrate as a family to the USA and the respondent stated that he is hopeful that he would be able to afford the fees of L to study abroad and be accepted into an American College.¹⁰

[52] Even after the irretrievable breakdown of the marriage and separation of the applicant and the respondent, the respondent and the children continue to live a lavish lifestyle which includes: -

[52.1] Holidaying in Zanzibar and in the USA in mid-2021. The respondent admits that he purchased goods abroad and claims that this holiday was funded from the proceeds that he received from the sale of study material in January 2020 in the amount of \$100 000.00;¹¹

[52.2] Rented two apartments in October 2021, one for himself, S and D at R60 000.00 per month and one for L and her boyfriend at the rate of R33 000.00 per month;¹²

⁹ Answering affidavit: annexure "OA14", p 004-1-379.

¹⁰ Answering affidavit: paragraph 174, p 004-1-232.

¹¹ Answering affidavit: paragraphs 240.1 and 240.2, p 004-1-246.

¹² Answering affidavit: paragraph 271, p 004-1-254.

- [52.3] Arranged an overseas holiday for himself and D to the UK in November/December 2021;
- [52.4] Frequently travelled to Cape Town on his own or with the children for holiday breaks;
- [52.5] Holidayed in Israel and London in April 2022 with D, S and L;
- [52.6] Holidayed twice with S in late June/early July 2022 in New York and Turkey;
- [52.7] Paid for a holiday for S to Israel by herself;
- [52.8] Paid for an overseas school trip for D to holiday in Israel in July 2022;
- [52.9] Visited Spain with D in August 2022;
- [52.10] Bought expensive designed items and other goods and purchased expensive gifts for third parties.

THE RESPONDENT'S INCOME

- [53] In his answering affidavit, the respondent tells the court that he has always been involved in the field of education. His main source of income prior to 2017 was derived from the rendering of services to various local education companies. These companies tendered for contracts with the Department of Education for the supply of hardware which incorporated a software package. The respondent alleges that this source of work is no

longer available to him due to an adverse and false media release in 2016 which alleged that one of the companies he was employed by was complicit in tender rigging. The adverse media release also led to a SARS enquiry related to the company which tendered for the work and in regard to the respondent personally as he was a director of the company in question. As a consequence, the respondent alleges that he has been battling to secure work and now provides educational consulting services in order to earn an income.

[54] As far as his current educational consulting services are concerned, the respondent alleged that he currently provides educational consulting services on a contract basis and that he would provide copies of the invoices that he has rendered for the period January 2020 to date. He stated that he nets approximately R180 000.00 per month or R2.16 million per annum from this endeavour.¹³

[55] The respondent states that:

*"If the status quo relation to the family's expenses is preserved, [his] income should be sufficient to provide for the expenses, and if not, [he] will be required to loan a small amount to provide for the family's reasonable requirements."*¹⁴

[56] The respondent admits that he generates a rental income from three properties registered in his personal name, however, he alleges that the rental from these properties had been utilised for many years to reduce the mortgage bonds and to pay for unexpected maintenance and repairs

¹³ Answering affidavit: paragraph 82, p 004-1-200.

¹⁴ Answering affidavit: paragraph 82, p 004-1-200.

that are required from time to time.¹⁵

[57] The respondent left it to his counsel to analyse the invoices rendered by him, to calculate the tax liability and to arrive at a net monthly income. These are facts one would reasonably expect to be stated by the respondent under oath in his answering papers.

[58] The calculation exercise embarked upon by the respondent's counsel revealed an average net monthly income of R189 107.00 over a period of 26 months. This calculation does not take into account the once-off payment of \$100 000.00 that the respondent received in February 2020. Divided over a period of 26 months, this amount equates to an additional R60 000.00 per month. Consequently the argument was therefore made on behalf of the respondent that his net monthly income equates to R257 730.00. This is a far cry from the net monthly amount of R180 000.00 disclosed by the respondent under oath.¹⁶

[59] If accepted that the amount of R257 730.00 is a true reflection of the respondent's monthly income, it was submitted that when subtracting the respondent's monthly expenses of R294 100.00 per month, the respondent experienced a monthly shortfall of R44 000.00, which would be covered by loans.

[60] The fact of the matter is that the respondent's numbers and versions simply do not add up. I say so for, *inter alia*, the following reasons: -

¹⁵ Answering affidavit: paragraphs 85 and 87, p 004-1-201 and 004-1-202.

¹⁶ Answering affidavit: paragraph 82, p 004-1-200.

- [60.1] The respondent attached to his financial disclosure form (FDF) a 2020 tax assessment in which his gross income for the year of assessment was reflected as R39 163.00 and his taxable income as R28 093.04;
- [60.2] In his FDF, the respondent estimated his net income from self-employment for the next 12 months as unknown;
- [60.3] His total monthly expenses of R294 100.00 do not include the applicant's spend on the TP credit cards or her other expenses that are and have been paid by the respondent;
- [60.4] The respondent has not disclosed all his bank accounts or accounts in which he has an interest, nor did he provide the required six months of bank statements in respect thereof. Amongst others, the respondent has not provided copies of the bank statements for the Standard Bank CB FC Standard Bank account, foreign bank accounts in the USA and the UK, including bank statements for the following Barclays accounts: -
- [60.4.1] Savings Reserve Account;
- [60.4.2] Foreign Currency Premier World Account;
- [60.4.3] Foreign Currency Reserve Account;
- [60.4.4] A second Foreign Currency Reserve Account;
- [60.5] The respondent failed to disclose any of the bank accounts in the

name of TP and he has furthermore not disclosed the earned rental income from three apartments that he owns in London;

[60.6] His tax returns submitted to His Majesty's Revenue Service in the United Kingdom are particularly telling. The respondent marked all the requested information in the 2019 tax return as not applicable;

[60.7] On the 18th of February 2019 the respondent received correspondence from Her Majesty's Revenue and Customs informing him that the 2018 to 2019 tax return could not be accepted as it was missing the residence remittance basis supplementary pages. The respondent was charged penalties for the late filing of his tax returns;

[60.8] On the 8th of April 2019 the respondent seemingly replies to the enquiry in manuscript. The letter is not addressed to anyone in particular and no proof of transmission is attached. Copies of 2019 and 2020 tax returns follow, but are in most instances scantily completed and indication that the returns have been submitted or assessed. Yet, the respondent insists on corresponding with Her Majesty's Revenue Services in manuscript and again without submitting any proof of transmission or receipt;¹⁷

[60.9] The respondent failed to disclose copies of bank statements for

¹⁷

Answering affidavit: annexure "OA10", p 004-1-335 to 004-1-369.

the Barclay account number XXXXX, which is an account into which regular transfers of approximately £10 000.00 monthly are paid;

[60.10] The respondent failed to disclose bank statements relating to the Discovery credit card or the two Visa credit cards in the name of PH LLC or MR LLC;

[60.11] The respondent also skirted the issue regarding the settling of the mortgage bonds over the three London apartments and how this was extinguished. In his FDF he alleges debt owing to BPH BVI in the sum of £869 852.00 in respect of loans owing for these properties;¹⁸

[60.12] The consulting invoices rendered by the respondent also requires closer scrutiny. He tendered invoices for the period January 2020 to July 2022. The applicant complains that despite a number of requests, the respondent has not provided invoices for the period January 2020 to December 2020. The invoices that have been provided are addressed to ABC (Pty) Ltd. The respondent's daughter, A, is the director of ABC (Pty) Ltd. The invoices bear no VAT number and no address, and they do not provide any detail of the services rendered either;

[60.13] The respondent alleges that he obtained loans from time to time from entities owned by the Trusts in order to supplement his

¹⁸

Founding affidavit: paragraph 35.8, p 4-52; annexure "DM9".

income and to provide for the family's expenses. In fact, according to the respondent as at December 2020 his loans totalled approximately R25 million. These loans have since increased to R31 902 100.00 without any explanation for the increase or why the directors of the companies who have loaned money to him permit such loans or how the loans are going to be repaid or what the terms of the loans are, including interest;¹⁹

[60.14] Moreover, it seemed particularly difficult for the respondent to explain away the letter of wishes he addressed to the S Trust on the 9th of January 2019 where he stated as follows: -

*"During my lifetime I would like you to take note of my wishes I may have from time to time make known to you in connection with the administration of the Settlement and the distribution of capital and income. In particular I would like you to pay me such part or parts of the capital and income as I may from time to time request."*²⁰

[60.15] The aforesaid statement is unequivocal and unambiguous and demonstrates that the respondent has access to additional financial resources, which include the assets and funds of the BVI Trusts, the H Trust and the various entities whose bank accounts are under his direct or indirect control.

[61] I simply cannot ignore WhatsApp correspondence that the respondent addressed to the applicant on the 7th of September 2020 when he left the

¹⁹ Answering affidavit: paragraph 79, p 4-1-199.
²⁰ Particulars of claim: annexure "G", p 2-136.

matrimonial home: -

*"I don't want to fight with you or anyone – it must just be amicable – we can carry on as is – money no issue – just need to share everything."*²¹(emphasis added)

[62] More than a year later, the applicant received a WhatsApp message purportedly drafted by D. The following was said: -

"We have no problem being fair and everyone living well but we won't allow your approach to succeed."

[63] That the respondent is financially savvy and an innovative strategist when it comes to business and the structuring of his financial affairs is unquestionable. One such example is his actions in 2020 when he approached a mutual friend of the parties who lives in Canada with the following proposal: -

"I have to think of the worst scenarios and so anything that I own or even that is not owned by me but linked to my sister or family I need to brake (sic) the chain – the only way we do that is to sell Move the proceeds somewhere safe – because this is our house and where we live we can't contemplate actually selling it and moving out – hence the solution to sell it but also be able to live in it etc..."

[64] This proposal was made at a time when the respondent was concerned that the matrimonial home may be at risk because of a SARS investigation into one of the companies earlier referred to.²²

²¹ Founding affidavit: annexure "DM1".

²² Founding affidavit: paragraph 50, p 004-1-62.

[65] The respondent does not deny the fact that he made such a proposal.²³

[66] The respondent's knack for business is exemplary on his own version: -

*"I can make money over and over again in my sleep and I will do so after this divorce."*²⁴

[67] On 8 January 2021 the respondent sent the applicant a WhatsApp message and said that: -

*"If I haven't taken on this BLT²⁵ obligation I would have officially retired and wanted to spend the rest of my life enjoying what I have slaved for 26 years – so unfortunately I will see it through and after that when it has ended I intend to retire and live and enjoy and just be there for the kids."*²⁶

[68] Again the respondent does not deny these statements he made. He attempts to explain them away by stating that they were made in anger and disappointment at the manner in which the applicant was seeking to obtain benefits to which she was not entitled.²⁷ What those benefits are, is not stated.

[69] The respondent receives rental income from two Clifton properties, one registered in the name of the applicant and one registered in the name of the respondent's nominee. The applicant complains that she asked the respondent to provide details of the rental income, which he has failed to do.²⁸

²³ Answering affidavit: paragraphs 283 and 284, p 004-1-257.

²⁴ Founding affidavit: paragraph 70, p 004-1-72.

²⁵ The BLT referred to by the respondent is Blue Label Telecoms.

²⁶ Founding affidavit: paragraph 70, p 004-1-72.

²⁷ Answering affidavit: paragraph 313, p 004-1-264.

[70] A search on an Airbnb website reveals that the respondent is the host of the property held by his nominee. The daily rental for early December 2022 was R14 000.00. The property was shown as being unavailable for rental from the 9th of December 2022 to the 28th of January 2023, therefore a total of 51 days @ R14 000.00 per day. The rental income earned would be approximately R714 000.00.

[71] On the 8th of January 2021 the respondent, following the applicant's request that he accounts to her for the rental income in respect of the two Clifton properties, stated as follows: -

"... There are about 14 properties as you know – if you want an update on Clifton then please handle all 14 – please think carefully what you ask you..."

I'm quite happy to have much less responsibility now as I want to start enjoying the lost years where all I've done is literally worked – I'm happy to let you run it...

*Either I continue to be the person who runs these things and ensures the family has income and capital to live on forever and I'm trusted to do this otherwise I want nothing to do with any of it – I'm not updating you on every rental and every rental enquiry."*²⁹

[72] The respondent's answer leaves much to be desired: -

"The quotation in this paragraph does not demonstrate that I receive income from the properties personally but simply that I manage the properties and have done so for years. I reiterate that I

²⁸ Founding affidavit: paragraph 74, p 004-1-73.

²⁹ Founding affidavit: paragraph 75, p 004-1-74.

do not receive any personal income from the properties. This income is used to service bonds, maintain the properties and pay the expenses and holding costs of the properties."³⁰

[73] I was not impressed by the respondent's lack of disclosure, his fobbing off of critical issues and his campaign of secrecy. The respondent approached this court with a disclosure of his financial affairs in the same way as he has done with the applicant throughout their marriage – on a need-to-know-basis. A constant theme throughout the applicant's papers is the various attempts she had to make and the legal costs she had to incur in order to procure documentation regarding the respondent's financial affairs, his business, and his assets, whether directly or indirectly controlled by him. This is not the conduct one would expect of a litigant who is eager to resolve the disputes.

THE APPLICANT'S INCOME

[74] The applicant is a housewife and a director of CB FC, a non-profit organisation which carries on the business of coaching football to children and sponsors a number of children whose parents are unable to pay. Although the respondent describes the applicant as a football club owner and manager and surmises that she is baking goods which she sells,³¹ the income that the applicant withdrew from CB FC is common cause.³²

[75] The respondent does not deny the fact that the applicant has been financially maintained by him and that she is financially dependent on

³⁰ Answering affidavit: paragraph 318, p 004-1-265.

³¹ Answering affidavit: paragraph 4, p 4-1-174.

³² Answering affidavit: paragraphs 254 to 265, pp 4-1-251 to 4-1-253.

him.³³

[76] The respondent also does not deny the fact that during February 2020 he gave the applicant a corporate credit card in the name of TP to replace her existing credit card. Her expenses on the card were paid by TP and/or the respondent. At the time he provided the applicant with the TP credit card, he did the same for S and L. The applicant tells the court that she used the TP credit card to pay for certain of her own personal expenses and some of the household expenses.³⁴ None of the statements are denied by the respondent.³⁵

[77] In December 2021, the respondent told the applicant that he would reduce the limit on the TP credit card that the applicant used from R100 000.00 monthly to R50 000.00 monthly. He alleged that this was a necessary cost-cutting measure to save the family from financial ruin and because the applicant was spending more than she previously spent. With effect from 27 December 2021 the limit on the TP credit card was reduced to R50 000.00 monthly and thereafter the respondent refused to pay for other expenses that he had previously paid for. Clearly his conduct was punitive and was designed to pressurise the applicant as alleged by the applicant in her founding papers.³⁶

[78] In the premises and on a consideration of the allegations contained in the founding and answering papers in response, the respondent can hardly

³³ Founding affidavit: paragraph 42, p 004-1-56; answering affidavit: paragraphs 266 to 268, pp 004-1-253 to 004-1-254.

³⁴ Founding affidavit: paragraph 42, p 004-1-56.

³⁵ Answering affidavit: paragraphs 266 to 268, pp 004-1-253 to 004-1-254.

³⁶ Founding affidavit: paragraph 45, p 004-1-58.

deny the fact that the applicant is financially dependent on him. To be fair to the respondent, he has to a certain extent acknowledged this fact by virtue of the maintenance tenders that he has made in the two draft orders provided to the court prior to and during the argument of this application. It is accordingly more a question of how much the applicant requires as opposed to her entitlement to maintenance.

THE PARTIES' EXPENSES

[79] In addition to the use of the TP credit card, the applicant in her founding papers listed numerous additional expenses paid by various entities or by the Trusts for her benefit.³⁷ These included the salaries of two domestic workers, a gardener, rates, taxes, imposts, water, electricity in respect of the former matrimonial home, the cost of holidays, air tickets, luxury accommodation, motor vehicles, educational costs of children, entertainment, gifts, the applicant's cellphone, DSTV and security alarm systems.

[80] The respondent embarked on what he refers to as a simple matter in order to determine the *status quo* in relation to each family member's monthly expenses. This exercise entails the examination of each family member's personal credit card statements.³⁸

[81] The respondent prepared what he alleges to be an analysis of the applicant's monthly expenses from time to time and extracted in part from the TP credit card statements. However, it very quickly becomes clear that

³⁷ Founding affidavit: paragraph 47, pp 004-1-59 to 004-1-61.

³⁸ Answering affidavit: p 004-1-183.

the approach employed by the respondent is flawed. His analysis include items not incurred by the applicant on her credit card and he estimates other categories of other expenses. The respondent does not set out the basis for his estimates either. He discloses a schedule prepared by him of the family's total expenses over a period of time, but fails to disclose the source of these expenses.

[82] During argument it was the respondent's incantation that the applicant has unjustifiably increased her expenses since July 2021. However, what the respondent fails to consider is the applicant's allegation that she had access to other funds, namely cash and the respondent's own Standard Bank account. The respondent also takes into account that the period of his analysis included a time when Covid lockdown regulations were imposed and which by its very nature would have impacted on the amounts spent by the applicant.

[83] During argument, Ms Woodward for the applicant made certain deductions from the applicant's list of expenditure. These expenses relate to a time when the applicant resided in the former matrimonial home. The applicant's initial claim as formulated in her notice of motion of the amount of R100 000.00 was therefore reduced to an amount of R95 000.00 per month.

[84] On the respondent's own version the applicant's monthly expenses amount to R85 465.00 per month. This amount includes the direct costs paid by the respondent.³⁹ I take into account that the rental amount

³⁹

Answering affidavit: annexure "OA4", pp 004-1-292 to 004-1-302.

estimated at the time was R20 000.00 and not the rental amount currently incurred. Having said that, I must also take into account that this is not a direct expense paid by the respondent personally, as is the case with some of the other expenses which the respondent has undertaken to pay directly.

[85] According to the respondent's FDF, his personal monthly expenses, excluding those expenses of the children, amount to R119 350.00.⁴⁰

[86] Although the respondent's figures for day-to-day expenses seem substantially lower than those of the applicant, I cannot ignore the fact that the respondent's regular trips abroad, the travelling costs associated with such trips and the international spending that have not been disclosed. and accordingly I must find that his monthly expenses as reflected in the FDF are not commensurate with his lifestyle.

[87] I have thoroughly considered the amount claimed by the applicant and compared it with the standard of living of the parties and the continued lifestyle of the respondent and the children. Although the respondent continues to live the life of Riley, I am of the view that some of the applicant's expenses are exorbitant and have been justifiably criticised by the respondent. The amounts claimed for food, groceries, cleaning materials, lunches and dinners, clothing and shoes, haircare and beautification, entertainment and recreation, and allocations for local and international holidays come to mind. I have taken this into account in arriving at a reasonable and necessary maintenance figure.

⁴⁰

Financial Disclosure Form: p 016-33.

CONTRIBUTION TOWARDS LEGAL COSTS

[88] The applicant claims a significant contribution towards costs. It is also her first application for a contribution towards her legal costs.

[89] The issues on the pleadings as they presently stand are *inter alia* as follows: -

[89.1] The reasons for the breakdown of the marriage insofar as it is relevant to the applicant's claim for spousal maintenance;

[89.2] The manner in which the parties should exercise parental rights and responsibilities in respect of D;

[89.3] The applicant's entitlement to spousal maintenance, the period for which such spousal maintenance should be paid and the amount of maintenance;

[89.4] The identity of the assets which comprise each of the parties' respective estates, the value of each asset and the extent of their liabilities;

[89.5] Whether the immovable property registered in the name of the third defendant is beneficially owned by the respondent;

[89.6] Whether section 4(1)(a) of the Matrimonial Property Act should be interpreted in accordance with section 39(2) of the Constitution to provide that "*the net value of the estate of a spouse includes the financial value of assets held by a trust de*

facto or de jure controlled by the spouse that would have acquired and owned the assets in his own name but for the trust”;

[89.7] Whether The H Trust is a sham and whether the assets purportedly held by the Trust are the assets of the respondent and fall to be calculated in the accrual of his estate;

[89.8] Whether the BVI Trusts are sham Trusts and whether the assets purportedly held by each Trust are the assets of the respondent and fall to be calculated in the accrual of the estate;

[89.9] Whether the respondent is the beneficial owner of the shareholding of SI (Pty) Ltd and whether Intelligent Solutions Investment Ltd BVI is the nominee for and on behalf of the respondent and whether the thirteenth defendant should be ordered to deliver the shares in SI (Pty) Ltd to the respondent;

[89.10] Whether the respondent is the beneficial owner of the shareholding of TP and whether TP Ltd, a BVI company which holds the shares in TP, does so as nominee for the respondent and should be ordered to deliver the shares in TP to the respondent;

[89.11] Whether the respondent is the beneficial owner of the entire shareholding of SME (Pty) Ltd and an order that Catherine Saleleni Malapila holds the shares as nominee for and on behalf of the respondent and should be ordered to deliver the shares in

the fourteenth defendant to the respondent;

[89.12] Which party/ies should bear the costs of the action.

[90] The pending divorce action is clearly not a fight that will settle any time soon. The issues are complex and the potential funds involved, significant.

[91] There are also other assets held in a Trust in Mauritius, as appears from correspondence dealt with in the papers and additional companies the respondent may or may not beneficially own, including L7 (Pty) Ltd.

[92] The respondent in his answering affidavit simply refers to his plea filed in the divorce action. He appears not to deny the applicant's assertion that she has no liquid assets with which to place her attorneys in funds to cover legal fees and disbursements.⁴¹

[93] The applicant states that she has to date paid her attorneys the total sum of R966 900.00. This amount she paid by way of loans and the sale of jewellery.⁴²

[94] The respondent is not far behind. He states that he has to date incurred an amount of R838 800.00 in regard to his personal legal costs. In addition, he paid R354 000.00 towards a firm of attorneys appointed to represent the Trusts. Curiously the respondent states that he paid the aforesaid amount on behalf of the Trusts and via a loan.⁴³

[95] The respondent states that he has managed to fund his personal legal

⁴¹ Founding affidavit: paragraph 90, p 004-1-87.

⁴² Founding affidavit: paragraphs 98 and 99, pp 004-1-89 to 004-1-90.

⁴³ Answering affidavit: paragraph 364, p 004-1-276.

costs from his own income.⁴⁴ This is a luxury not afforded to the applicant. The respondent suggests that both he and the applicant would have to approach the trustees for loans and/or a distribution in order to fund their legal costs in the divorce.⁴⁵

[96] Both parties have appointed senior counsel to represent them in the divorce action. In addition, the applicant has acquired the services of a chartered accountant, Mr DP Sabbagh, in order to provide a report in his capacity as a forensic accountant which sets out his opinion and the reasons for his opinion as to the identity of the assets and the value of the assets that comprise the respective estates of the parties. The respondent has retained the services of Prof Harvey Wainer, a forensic accountant, to advise and assist him. This demonstrates that the respondent acknowledges the need for the appointment and involvement of expert witnesses.

[97] The respondent acquired the services of one Miko Louw ("*Louw*") to scrutinise the draft bill of costs provided by the applicant in support of her claim for a contribution. The applicant submits that Louw's opinion is of little assistance to the respondent as there is no evidence that Louw has any knowledge of the issues between the parties, the complexity, the standard to which the parties are litigating and what work would be required to get the matter trialready.

[98] Louw opines that the applicant's claim for two attorneys to do the same work is unjustified. I have been informed by Ms Woodward that Ms Steyn,

⁴⁴ Answering affidavit: paragraph 365, p 004-1-276.

⁴⁵ Answering affidavit: paragraph 365, p 004-1-276.

the junior attorney who acted for the applicant, is no longer in the employ of Billy Gundelfinger Attorneys. Ms Woodward therefore, albeit for a different reason, deducted the allowance for Ms Steyn, but correctly indicated that the workload would now be solely carried by Prof Gundelfinger, the senior attorney and proprietor of the firm. Accordingly these additional expenses insofar as it relates to an increase in the hourly rate would have to be taken into consideration.

[99] Other than making a bald statement that the applicant is not entitled to a contribution to costs for interlocutory applications, Louw does not explain why she says so. I therefore do not follow the argument that this amount falls to be deducted. The same applies for the deduction of applications to compel.

[100] Louw criticises the disparity in the hourly rates between Prof Gundelfinger and Ms Lowndes. Louw motivates this critique on the basis that litigants are entitled to equal representation. This certainly in my view does not imply that litigants are expected to employ attorneys whose chargeout rates are exactly the same.

[101] I also do not see how Louw can express the view that the employment of two counsel is unnecessary in circumstances where the respondent has only employed the services of one counsel. Whether the applicant is entitled to employ two senior counsel, even where they deal with different aspects of the divorce action, is probably the more prudent question to ask.

[102] Louw's criticism raised against the hours spent on preparing requests for further particulars, notices in terms of rule 35(3) and preparation for the first day on trial, bolsters the applicant's argument that Louw was not privy to the issues on the pleadings at the time she was called upon to consider the draft bill of costs. In my view, if Louw was provided with a copy of the pleadings, the financial disclosure and the affidavits filed in the rule 43 application, she would have been hard-pressed to criticise the amount of hours that would go into preparing for a matter of this magnitude.

[103] It deserves mentioning that it would seem that the respondent is himself not too convinced that Louw's criticism of the draft bill of costs can be accepted as gospel. Although Louw reduced the applicant's bill of costs to R2 646 592.75, the respondent tendered an amount of R3 123 453.00, which is R476 860.25 more than Louw's estimation.

[104] I accept Ms Woodward's argument that she excluded fees relating to the rule 43 application on the basis that the applicant seeks the costs of the application. However, in my view even in an instance where a court should find that costs of the application should be costs in the divorce action, fees and disbursements occasioned by the rule 43 application ought not to find its way in the estimate for a contribution of the legal costs in preparation for the first day on trial. I have already indicated that I hold that the employment of two senior counsel is unjustified in the circumstances and I will take this into consideration in my award for a contribution.

[105] I must express grave concern regarding one of the sources the respondent wishes to utilise in order to make payment of the respondent's contribution towards her legal costs, and that is the Discovery Insure insurance claim money. According to the respondent this claim is under investigation for fraud. On the applicant's version she is entitled to a portion of the amount as a reimbursement of the losses that she suffered during a robbery. The dispute is ongoing. Initially when this issue was raised during argument, the respondent tendered to place these funds in trust with an attorney pending the finalisation of the dispute. On the 26th of January 2023 when the respondent tendered a contribution towards the applicant's legal costs, he instructed his counsel to inform the court that the first payment would be made by using the insurance money. This surely cannot be done in light of the circumstances and will no doubt cause further and unnecessary litigation. I have therefore provided for this eventuality in my order.

APPLICABLE LEGAL PRINCIPLES

[106] An applicant in an application for spousal maintenance must demonstrate that the respondent owes her a duty of support, that she has a need to be maintained, and that the respondent has adequate resources to discharge this duty. Having considered the evidence, whether contested or uncontested, I find that the applicant has discharged this duty. The only issue therefore remaining is the quantum of such maintenance contribution.

[107] The guiding principle in exercising the discretion which the court has when

considering a claim for a contribution towards legal costs, was formulated in *Van Rippen*⁴⁶ as follows: -

"... The court should, I think, have the dominant objecting view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the court."

[108] In *Cary*⁴⁷ Donen AJ referred to the constitutional imperatives of the quality before the law. He observed at the outset that he was required to exercise his discretion under rule 43 in the light of the fundamental right to equality and equal protection before the law. He held that there should be "equality of arms" in order for a divorce trial to be fair, and came to the conclusion that: -

"... Applicant is entitled to a contribution towards her costs which would ensure the quality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate respondent's financial affairs through the forensic accountant appointed by her. That is applicant will not enjoy equal protection unless she is equally empowered with 'the sinews of war'. The question of protecting applicant's right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him. I therefore regard myself as being constitutionally bound to err on the side of the 'paramount consideration that she should be enabled adequately to place her case before the court'. The papers before me indicate that the respondent can afford to pay the amount claimed and that he will

⁴⁶ *Van Rippen v Van Rippen* 1949 (4) SA 634 (C).

⁴⁷ *Cary v Cary* 1999 (3) SA 615 (C).

not be prejudiced in the conduct of his own case should he be ordered to do so."

[109] The claim for a contribution towards costs in a matrimonial suit is *sui generis*. It is an incident of the duty of support which spouses owe to each other. It is clear from the authorities quoted above that the purpose of the remedy has consistently been recognised as being to enable the party in a principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place her case before the court.

[110] In *Eke v Parsons*⁴⁸ it was stated that under the constitutional dispensation *"the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and to further the administration of justice."*

[111] As stated in *AF v MF*:⁴⁹ -

"The legal rules pertaining to the reciprocal duty of support between spouses are gender neutral so that an indigent husband may claim support from an affluent wife but the reality must be acknowledged that given traditional childcare roles and the wealth disparity between men and women, it has usually been women who have had to approach the court for a contribution towards costs in divorce litigation."

[112] Accordingly it would be unwise to ignore the gender dynamic of rule 43 applications and it is against this background that the courts should exercise their discretion when interpreting and applying rule 43.

⁴⁸ *Eke v Parsons* 2016 (3) SA 37 (CC).

⁴⁹ *AF v MF* 2019 (6) SA 422 (WCC) paragraph [14].

[113] According to the Constitutional Court: -

*"Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality."*⁵⁰

[114] In *AF Davis* AJ noted that in the unreported decision of *Du Plessis v Du Plessis* (an unreported decision), Van der Merwe J had followed Cary and accepted *"the relevance of the fundamental right to equality before the law"*.

[115] Like Van der Merwe J, Davis AJ followed suit and concluded thus: -

"I find myself in wholehearted agreement with the approach adopted by Donen AJ and Van der Merwe J, which accords with the injunction in section 39(2) of the Constitution to promote the spirit, purport and objects of the bill of rights when developing the common law.

The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse – usually the wife – will be forced to settle for less than that to which she is legally entitled, simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his case. That situation strikes me as inherently unfair. In my view the obligation on courts to

promote the constitutional rights to equal protection and benefit of the law, and access to courts, requires that courts come to the aid of spouses who are without means, to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.

...And where an impecunious spouse has already incurred debts in order to litigate, whether to family or to an attorney, I consider that the court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts."

[116] It was argued before me on behalf of the respondent that the applicant is not entitled to all of her costs claimed up until the first day of trial. David AJ in *AF v MF* strongly disagreed: -

"In my view the obligation to pay a contribution towards the wife's legal costs does not necessarily postulate an obligation only to pay for part of those costs... The extent of the contribution should logically depend on how much, if anything, the wife herself is able to contribute...

*To my mind the correct approach to the question of an appropriate contribution towards costs is that adopted in *Zaduck v Zaduck* 1966 (1) SA 78 (SR) at 81A-B by Davies J, who declined to follow the rule that a contribution to costs should not cover all the wife's costs. The learned judge held that:*

'[T]he correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved.'

In my view it is arbitrary to apply an inflexible rule if the wife who has no means of funding the balance of her legal costs is nonetheless only entitled to part of the costs which she reasonably requires to fund her litigation."

THE MINOR CHILD

[117] *"Mom, I think we need to speak about the divorce and all the fighting that has been happening... I'm not happy and have been feeling upset about everything. I've watched and been in the middle of all this fighting for the last year now and because of the fighting our family has been separated and all I want is to be with my sisters and be part of a family."*⁵¹ - the words of D.

[118] D, is a highly intelligent and talented 16-year old boy, who is caught up in a very acrimonious dispute between his parents. He must be absolutely torn apart that his loyalties are pulled one way and then the other by the very people who should be ensuring that he has a secure, loving and stable environment. I have no doubt that the emotional pressure on D can be nothing short of enormous and only by his parents achieving a full, lasting resolution, can this boy hope to enjoy a normal, happy childhood, or the precious little of it that remains.

[119] I conducted a chamber interview with D in the presence of my Registrar. I needed to understand D's resistance to go for an assessment and therapy.

[120] In the matter of D v P⁵² the learned Judge said *"The courts as upper*

⁵¹ Founding affidavit: annexure "DM15".

⁵² D v P (82527/2016) [2016] ZAGPPHC 1078 (15 December 2016)

guardians of minors have the daunting task in deciding the destiny of minors when their parents, either due to their own actions or due to particular circumstances forced upon them, cannot agree on what would be in the best interests of the minor children. More than often, the parents tend to see the best interests of their children through their own self cantered interests, and then pose those interests as being that of the minor child. Rightly or wrongly, that is life. It does, however, impose a greater duty upon the court to determine what the best interests of the minor child are."

[121] This matter is no exception.

[122] Delay is inimical to the welfare of children particularly those embroiled in such contentious proceedings, who continued to be harmed both by the psychological manipulation of the parent or others with whom they reside and the continued denial of a relationship with their other parent. In recent years there has been an increased appreciation of the seriousness of a child being denied a relationship with a parent within the realm of family law.

[123] No matter the reason for not wanting to see their other parent, custodial parents are responsible for making sure that their child sees their other parent. Family law courts want to see co-parents working together to encourage their child to spend time with each parent. If the opposite is happening—even if it is what the child wants, courts may not look as favourably upon the parent who appears to be preventing visitations.

[124] Even though D is on the brink of adulthood, he is still a child and a troubled one at that in my observation. The respondent must keep this in mind. Of course, this is a particularly emotional situation, and feelings of guilt could be influencing his decisions. But that does not reduce his responsibility as a parent and a co-holder of parental responsibilities and rights.

[125] Section 6(5) of the Children's Act, 38 2005 does provide for the child's views to be taken into consideration. Therefore it is incumbent upon the court and parents to thoughtfully consider D's opinions, but the court and parents remain in charge, so to speak. And accordingly, the window of opportunity that is left before D enters adulthood must be used in the best way possible and this includes active encouragement on the part of the applicant and the respondent for D to spend time with both of them and for the parents to be mindful of their own behaviour or those around them that could influence D not wanting to have a relationship with his mother.

[126] Afterall, the overriding and paramount consideration in matters like this, is always what is in the best interest of a child. This is what is required by both section 28(2) of the Constitution and section 9 of the Children's Act. I truly hope that the order which I intend to make will uphold and preserve D's best interests now and in years to come.

COSTS OF THE APPLICATION

[127] It is trite that the awarding of costs is discretionary. There are usually no winners and no losers in matters of this kind. However, I cannot simply turn a blind eye to the conduct of the respondent which has necessitated the applicant to come to court at great expense. The respondent initially made no tender for a contribution towards the applicant's legal costs until the very last day of argument.

[128] The fact remains that the applicant has been substantially successful in the relief that she sought and will be out of pocket if the costs occasioned by the application is allowed to disappear in the mix of the divorce action proceedings.

[129] I am not ignoring some of the applicant's exorbitant claims either and that is why I am limiting the costs order that I intend to grant to the first day of the hearing only.

ORDER

In the circumstances I make the following order: -

PENDENTE LITE:

1. Psychologist, Mr Anthony Townsend, is appointed to conduct an investigation to the best interests of the parties' minor boy child, D, and to provide the parties and the court with his written report setting out his opinions, findings and recommendations regarding the nature and extent of any interventions, including therapeutic interventions that, in his opinion, are required and appropriate to restore the

relationship between the applicant and D as well as the manner in which the parties should exercise their parental responsibilities and rights, including care and contact in respect of D.

2. The respondent shall pay the costs of Townsend directly to Townsend on demand, including any deposit required by Townsend.
3. Both parties shall cooperate and shall ensure that D cooperates with the process of Townsend to the full extent required by him *inter alia* by attending all such interviews, evaluations and assessments required by Townsend, completing all questionnaires and/or other forms and providing Townsend with all information and/or documentation required by Townsend.
4. Both parties shall complete and sign Townsend's mandate upon receipt thereof from Townsend.
5. The respondent shall pay a cash monthly amount of R80 000.00 (Eighty Thousand Rand) in respect of spousal maintenance directly into the applicant's Capitec bank account number XXXX, the first payment in the amount of R80 000.00 (less the amount of R30 000.00 already paid by the respondent) in respect of maintenance for January 2023 be paid forthwith and thereafter all further payments to be paid on the first day of each and every succeeding month.
6. The monthly cash contribution of R 80 000.00 shall be increased annually on the first day of the month succeeding the anniversary date of the order and every twelve months thereafter at a rate of 6 % per

annum.

7. The respondent shall make payment directly to the creditor or service provider of the following monthly expenses on due date: -

- 7.1 The medical aid premiums to retain the applicant on her current medical aid scheme that she is currently a dependent on as well as any medical and dental expenses not covered by the benefits of the medical aid scheme, excluding any elective cosmetic and/or orthodontic costs.
- 7.2 The levies, rates, taxes and all other imposts, including water and electricity, homeowners and household insurance, security and alarm system costs in respect of the property registered in the applicant's name, being Erf X, Clifton, Cape Town.
- 7.3 The insurance premiums in respect of the BMW X5 , registration number and letters XXXX GP and the Mini motor vehicle, registration number and letters XXXX GP ("*the vehicles*").
- 7.4 The reasonable and economically viable cost of maintenance and repairs in respect of the vehicles.
- 7.5 The cost of licensing of the vehicles and shall on demand take all steps necessary to ensure that the vehicles are licensed and shall be responsible for payment of any fines incurred as a result of his failure to license either of the vehicles timeously or at all.

- 7.6 The premiums in respect of the applicant's existing life insurance policies, dread disease policies and retirement annuity policies.
- 7.7 The respondent shall reimburse the applicant by payment into the applicant's Capitec account within five calendar days of production by her of an invoice and proof of payment of all reasonable medical and dental expenses incurred in respect of the applicant. The respondent shall not be liable to make payment of any elective cosmetic and/or orthodontic costs.
- 7.8 The respondent shall guarantee all of the obligations of the lessee, ABC (Pty) Ltd, in respect of the lease concluded between ABC (Pty) Ltd and DEF (Pty) Ltd in respect of the apartment situated at Unit Y, Houghton Estate, namely: -
- 7.8.1 Payment of the monthly rental in the sum of R33 000.00, which includes the costs of water, electricity, domestic effluent and meter reading fees;
- 7.8.2 Any reasonable market-related escalation to the rental at the expiry of the lease, should the applicant elect to remain in occupation of the property, together with the costs of water, electricity, domestic effluent and meter reading fees;
- 7.8.3 Payment of the cost of DSTV and Wi-Fi;
8. The respondent shall pay a first contribution towards the applicant's

legal costs in the sum of R4.5 million (Four Million And Five Hundred Thousand) by making payment into the applicant's attorneys' trust account as follows: -

- 8.1 R1 million within 48 hours of the grant of the order.
 - 8.2 R2 million by no later than 28 February 2023;
 - 8.3 The balance in equal monthly instalments of R500 000.00, the first such instalment to be paid on or before 28 March 2023 and thereafter on or before the 28th day of each following month until the full amount has been paid.
9. The respondent shall not be entitled to utilise any portion of the amount of R 963 000.00 paid by Discovery Insure in respect of the insurance claim which forms the subject-matter of an ongoing dispute, to pay for the applicant's costs contribution, without the prior written consent of the applicant.
 10. The respondent shall pay the costs of the application, including the costs of senior counsel, which costs shall not include the costs occasioned by the hearing of the application on the 26th of January 2023.
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F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 20 January 2023 and 26 January 2023

DATE OF JUDGMENT: 2 February 2023

APPEARANCES:

On behalf of applicant: Adv J A Woodward SC

Instructed by: Billy Gundelfinger Attorneys
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On behalf of respondent: Adv L Segal SC

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