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

CASE NO: 17851/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO
.....	.....
Date	**T ENGELBRECHT**

In the matter between:

M[...], S[…] **APPLICANT**
(Identity number 7[…])

And

M[...], M[…] S[…] **RESPONDENT**
(Identity number 6[..])

ENGELBRECHT, AJ

Introduction

[1] This is a Rule 43 application, already issued on 4 May 2023, which was postponed three times previously.

[2] The matter is opposed, and the Respondent requested reasons for the order on 17 May 2024 and confirmed that they require it on the complete order on 22 May 2024 which are hereby provided.

[3] In this matter there are three issues I had to consider:

[3.1] Whether a costs order, *de bonis propriis*, is to be granted against the Respondent's legal representatives for the non-appearance on 26th and 27th March 2024.

[3.2] Whether the Respondent is to be ordered to pay maintenance towards the maintenance of the dependent child and in what amount.

[3.3] Whether the Respondent is to be ordered to contribute to the Applicant's legal costs.

[4] As this is a Rule 43 application it is to be noted that this matter is not appealable in terms of Section 16(3) (a) – (d) of the Superior Act, 2013 (Act 10 of 2013) which read as follows:

(3) Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application –

(a) by one spouse against the other for maintenance pendente lite.

(b) for contribution towards costs of a pending matrimonial action.

(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted or.

(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.

[5] On 25 April 2024 an order was granted in the following terms in favour of the Applicant:

1. The Respondent shall make the following maintenance contributions pendente lite: -

1.1 Payment in the amount of 8 000-00 (Eight Thousand Rand) per month, such payment to be made on/before the 1st day of every month following this order into the nominated bank account of the Applicant.

2. In addition to the aforegoing, the Respondent must contribute to the legal costs of the Applicant in the amount of R20 000,00 (Twenty Thousand Rand), which shall be paid in 5 (five) monthly instalments following this order in the amount of R4 000-00(Four Thousand Rand) per month.

3. The following is ordered in relation to costs: -

3.1 The wasted costs of 26 & 27 March 2024 are to be paid by the Respondent's Legal representatives (Fourie & Associates Practice Number 14118) de bonis propriis, on Scale A of the relevant tariff in terms of uniform rule 69.

3.2 The cost of the application is cost in the divorce action.

WASTED COSTS *DE BONIS PROPRIIS*

[6] A costs order *de bonis propriis* was granted against Fourie & Associates for the non-appearances on 26th and 27th March 2024

[6.1] On 12 March 2024, the Applicant served the notice of set down on the Respondent's legal representatives[1] which was clearly received as the Respondent's legal representative responded in a letter dated 20 March 2024[2] .

[6.2] In this letter the Legal representative of the Respondent indicated that she is pregnant and was informed by her doctor that she is to undergo a caesarean on 25th March 2024 and that her colleagues are unavailable to attend to the matter and her client cannot afford an Advocate. A postponement of the matter was then requested with no tender towards costs.

[6.3] In the letter dated 20 March 2024, the Applicant's legal representative indicated that they do not agree to the postponement.

[6.4] On 22 March 2024, a further letter was sent[3] by the Respondent's Legal representative, in which it was stated that these letters must be provided to the court for such postponement to which the Applicant's legal representative responded that any postponement will be opposed, that there is ample time to make alternate arrangements and that any postponement is to be accompanied by a substantive application[4].

[6.5] On 26 March 2024 the Respondent appeared in person and requested a postponement as he could not represent himself, but the Respondent's legal representatives did not withdraw and therefore were still on record.

[6.6] The matter was then stood down until 27 March 2024 by Acting Judge van Aswegen for the appearance of the Respondent's Legal representatives. A letter

[1] Caselines 020-1
[2] Caselines 020-2
[3] Caselines 020-4.
[4] Caselines 020-5.

was also sent to the Respondent's Legal representatives by the Applicant's Legal representative confirming that the matter stood down until the 27 March 2024 as directed by Acting Judge van Aswegen to enable the Respondent's Legal representatives to appear before Acting Judge van Aswegen[5].

[6.7] On 27 March 2024 there was still no appearance by the Respondent's Legal representative and Acting Judge van Aswegen ordered that.

> "*The Respondent's attorney of record should serve and file an affidavit wherein it is indicated why the wasted costs of 26 March 2024 and 27 March 2024 should not be costs de bonis propriis on a punitive scale, such affidavit to be so served and filed on or before 12 April 2022* (which should be 2024)."

[6.8] From the transcript which was also uploaded onto Caselines[6] for 26 March 2024, it is clear that Acting Judge van Aswegen already considered the fact that the Respondent was requesting a postponement, did not accept same and gave a further opportunity for the Respondent's legal representatives to appear the 27th of March 2024.

[6.9] This was not the first time that the matter was postponed as a result of the Respondent not complying with the rules or practise directives of court::

[6.9.1] 20 July 2023 when the Respondent was ordered to provide his Financial Disclosure Form and other financial documents. He only provided only documents with balances. In terms of this court order, he was ordered to pay the wasted costs.

[6.9.2] 28 August 2023 the Respondent was again ordered to provide financial documents and again he was ordered to pay the wasted costs.

[6.9.3] 26 and 27 March 2024 the Respondent requested a further postponement.

[6.9.4] All these postponements were as a result of the Respondent's lack of compliance with court orders or practice directives.

[6.10] Throughout these proceedings the Respondent had the same legal representative except when they withdrew from 13 July 2023 to 17th August 2023[7]. The Respondent's legal representatives are part of a practise which is not

[5] Caselines 020-9
[6] Caselines 029-1 – 029-4.
[7] Caselines 021-1 – 021-4.

a single practitioner, as Ashleigh Kalil-Wilson stated on her affidavit [8]that the two other partners were on holiday.

[6.11] Where a postponement is sought, it is determined at the court's discretion. A party seeking a postponement must demonstrate a full and satisfactory explanation of the circumstances grounding the indulgence.

[6.11.1] The legal principles governing the grant and refusal of postponements are well-established. In **Carephone (Pty) Ltd v Marcus NO and others**,[9] Froneman DJP held:

"In a court of law, the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice."

[6.11.2] In **Take and Save Trading CC v Standard Bank of SA Ltd**,[10] Harms JA said:

"One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right."

[6.11.2.1] In this matter the Respondent's legal representative did not withdraw and despite the knowledge that the Applicant does not agree to such postponement just decided to send the Respondent in person to request such postponement.

[8] Caselines 024-1 – 024-3.
[9] 1999)3) SA 304 par [54].
[10] 200494) SA 1 (SCA)

[6.11.3] This was also confirmed in the Constitutional Court which held in **Lekolwane and another v Minister of Justice and Constitutional Development**[11]**:**

"The postponement of a matter set down for hearing on a particular date cannot be claimed as a right.

[6.11.4] It is also to be noted that the appearance on 26 and 27 March 2024 were the third time and fourth times that the matter was to be heard. Instead of granting such postponement the Respondent was requested to indicate to his legal representatives to appear the next day, which must have shown to the legal representatives that their conduct is frowned upon by the Honourable Court. The Honourable Court gave the legal representatives a further chance to provide an explanation to the Honourable Court for such blatant disregard of the law pertaining to postponements.

[6.11.4.1] The affidavit so provided does not assist in the consideration on whether a wasted costs *de bonis propriis* for the appearances on those two days are to be granted as it restates what was in the letter dated 19 March 2024 and does not even address why the legal representatives did not adhere to the court order so granted by Acting Judge van Aswegen to appear on the 27th March 2024 but try to justify the fact that the first appearance was on 17 July 2023 and therefore there is no prejudice for the Applicant which is not what was requested by Acting Judge Van Aswegen in terms of her order.

[6.11.5] The general rule is that a party who is responsible for such postponement resulting in the matter not being able to proceed on that day, must pay the costs thereof although I do believe the conduct of the Respondent's legal representatives in this matter needs further consideration.

[6.11.6] Good reason must be present for a costs *de bonis propriis* order where it is found that the conduct of the legal representative is

[11] 2007(3) BCLR 280 CC par [17]

improper or based on a lack of *bona fides* to be granted. In ***Vermaak's Executor v Vermaak Heirs 1909 TS 879*** Innes CJ held that

"*The whole question was very carefully considered by this court in Potgieter's Case 1908 TS 982, and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have <u>been mala fide, negligent or unreasonable</u>.,*

[6.11.7] Although I have sympathy for the Respondent's Legal representative with regard to the late stage of her pregnancy and that she had to have a caesarion, I cannot ignore the conduct that followed the Applicant's indication that he does not agree to such postponement by the Legal representatives of the Respondent. I can also not ignore the affidavit of the Respondent's legal representative that does not address the fact that there was no representation even on 27 March 2024, that there was no effort made to obtain representation despite the order of Acting Judge van Aswegen. She only repeats what was on the letter dated 12 March 2024 which was not accepted and it was indicated that if she proceeds with such proposal a comprehensive application was to be submitted. Then in paragraph 12 thereof, it was stated that they are attempting to brief Counsel at an affordable rate to their client which they then managed to do although same was not done for the March appearances.

[6.11.8] In this matter, I am of the opinion that the Respondent's legal representative:

- did not consider the law pertaining to a postponement as she clearly believed it was to be granted as a right,
- believe it is acceptable to not appear when directed to do so by the Honourable Court and not to explain such non-compliance of the court's order in her affidavit,
- did not show that anything was done to ensure or even try to ensure that someone appears on behalf of herself or the Respondent on 26 March 2024, the first day of the hearing and then also not on the second day after being directed to do so by Acting Judge van Aswegen where it was clear

that the fact that the Respondent appears in person is already frowned upon;

- has shown a blatant disregard of a directive from the court to appear on 27th March 2024 and does not even address that day's non-appearance on the affidavit.

[6.11.9] During argument it was stated by Me. Gumbi that the legal representative was apparently advised by her doctor to rest prior to the caesarean which is not what is stated on the affidavit on Caselines 024-1 – 024-3. I do not believe this would have changed my mind in the granting of the order but it was argued from the bench which conduct is addressed hereunder.

[6.11.10] It is clear that the Respondent did provide the legal representatives on 16 April 2024[12] with an amount of R 10 000,00 for legal representation and an amount of R 8 000,00 on 8 March 2024[13] prior to the appearance of the 26 and 27 March 2024. Payment was made two days prior to the non-appearance and thereafter within a mere three weeks from such appearance.

[6.11.11] There is also no reference made to any effort made by the Respondent's legal representative to approach an Advocate in the division to appear on either 26th or 27th March 2024 in her affidavit except for the comment that they are doing it for a low fee, therefore no one else could have been briefed. At that stage payment of an amount was made and they managed to locate an Advocate where payment was made 6 days prior to the week in which the Respondent was to appear in April. I do not believe for one moment that an Advocate could not have been obtained to argue the matter on 26 March or appear on 27 March 2024 if an effort was made.

[6.11.12] It should then also be noted that at the commencement of this hearing Me. Gumbi indicated that she was not briefed to argue on the order so granted by Judge van Aswegen and the matter had to stand down for her to get instructions wasting the court's time even further.

[12] Caselines 031-25.
[13] Caselines 031-19

[6.11.13] The basic notion behind the granting of such on order for a costs *de bonis propriis* is a material departure from the responsibility of office when an officer acts negligently or unreasonable as stated in **Pieter Bezuidenhout – Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk 1983 (2) SA 233(O)** which I believe is what the Respondent's legal representative have done on 26 and 27 March 2024. The responsibility of an officer of this court is to treat the Honourable Court with utmost respect and to abide by directives or orders so granted by the court at all times.

[6.11.14] Having regard to the above, I exercised my discretion in favour of a costs *de bonis propriis* order for the wasted costs of the two days in court.

[6.12] Therefore an order was granted to pay the wasted costs for 26 and 27t March 2024 *de bonis propriis* by the legal representatives of the Respondent at a Scale A tariff

[7] In terms of ***Taute v Taute 1974(2) SA 676 (E)*** the court held that

"*The applicant is entitled to reasonable maintenance pendente lite dependent upon…. the applicant's actual and reasonable requirements and the capacity of the Respondent to meet such requirements.*

MAINTENANCE FOR THE MAJOR DEPENDENT CHILD

[8] The Applicant seeks an order for an amount of R 10 000,00 plus 50% of the reasonable expenses of the major dependent child's college, stationary, books, clothing and medical expenses not covered by the medical aid. The Respondent requests that the matter be dismissed with costs.

[8.1] The major dependent child was born on 25 February 2005 and is studying at the Academic Institute of Excellence. It is trite that the Respondent is not paying anything towards the maintenance of the major dependent child although it was stated during argument that he makes payments on an ad hoc manner. There is nothing on the papers about those alleged payments and I was not directed to any such alleged payments.

[8.2] During argument it was then acknowledged by Mr. Marnewick for the Applicant, that all expenses of the major dependent child are included into the calculation of the major dependent child's expenses to a total of R 19 037,33 and therefore the Applicant would only proceed seeking an order of R 10 000,00 per month.

[8.3] The parties have been married in terms of Islamic religious ceremony in terms of Sharia law and thereafter on 15 June 2004 in a civil ceremony in community of property.

[9] When the Applicant deposed to the affidavit she was employed as an auditor's clerk at Lutrin & Associates and earned a basic salary of R 75 600,00 and nett income of R 51 545,77 per month . However, the Applicant also included updated documents for the hearing in March 2024, in which she attached three invoices from Hall off Diamonds for consulting fees[14] in the amounts of R 56 000,00 + R 52 000,00 + R 52 000,00 as she is now employed as an independent contractor for October, November and December 2023, to an average income of R 53 333,00 which is a more than what she earned at Lutrin & Associates. The Applicant also provided the corresponding bank statements showing the payment thereof. Mr. Marnewick argued that it must be taken into account that from this amount she still has to pay tax as an independent contractor which I have taken notice of although the amount is not on an affidavit placed before this court and therefore did not influence my decision.

[10] The Respondent states that he is a businessman but that his financial situation has changed dramatically since Covid. The Respondent further states that the only income he receives are from the rental of the factory from which he presently conducts business which he pays into the loan at Standard Bank.[15] It is to be noted that no proof of this alleged loan is attached to the Answering Affidavit or to the FDF and that was not the argument provided on his behalf at the hearing of the matter.

[10.1] In the Answering Affidavit the Respondent does not provide any indication of his income, attacks the Applicant for not alleging what it is and uploaded an unreadable copy of a bank statement.

[14] Caselines 010-69 – 010-71
[15] Caselines 012-3

[10.2] From the further bank statements so provided for the period August 2023 to April 2024 for the business account which he admits he uses for his daily transactions[16] ,it cannot be seen where this R 35 000,00 from the rental of the property stated in his Answering Affidavit and on his FDF under section 2.2[17], is received and what it is used for.

[10.3] The Respondent states in his FDF that this amount is paid towards the Standard Bank Loan, Me. Gumbi alleges in her heads that the amount of R 47 100,00 he allegedly received as a salary over the last four months, also paid towards this unknown loan. On the FDF the Respondent indicates that this alleged loan is for an amount of R 100 000,00 and on his list of expenses the only amount towards personal loans is an amount of R 10 000,00[18] which would therefore leave an amount of R 25 000,00 per month to be used towards maintenance for the major dependent child form the rental alone.

[10.4] In terms of the heads and argument by Me Gumbi the Respondent had an income of R 47 100,00 over a period of four months where she only took cognisance of the amounts so directly paid towards the Respondent. It leaves a question in my mind on how these funds were paid, into which account and why was that account or an explanation not provided to the court?

[10.4.1] Me. Gumbi also refers to this loan in her heads in an argument on what the funds she calculated were used for, although she could not find it on the papers as it does not appear on the Answering Affidavit and no Supplementary Affidavit was filed.

[10.4.2] On the Capitec account I can find two payments of R 10 000,00 but on the FNB account I could not find one.

[10.5] I do not accept for one moment that the amounts so indicated on these accounts specifically allocated to "*Mickey*" for salary are the only income of the Respondent. Certain expenses are paid from this account such as groceries, petrol, water and electricity, clothes, costs to bicycles, cash withdrawals are made, and legal costs. As the Respondent stated that he uses this account for his daily expenses such expenses paid by the business should be allocated to him as part of his income.

[16] Caselines 012-4.
[17] Caselines 022-5.
[18] Caselines 022-20

[10.5.1] As I had to warn Me. Gumbi more than once not to argue facts which does not appear on the papers before me, I wish to state that an argument is not evidence under oath as it is merely an effort for a persuasive comment made by the Legal representative of the parties. Therefore, such argument cannot replace evidence.

[10.5.2] Arguments cannot replace a parties' affidavit in any manner whatsoever.

[10.6] From the Capitec Bank account in the Respondent's personal name payments have been received to a total of R 51 579,03 since December 2023 to end of March 2024 to an average of **R 12 894,75** per month. It was admitted that despite that, no payments were made to the major child, but it was alleged that funds were immediately paid to the Standard Bank loan of which two such payments could be found.

[10.7] From the FNB bank statements which were provided from August 2023 to April 2024 it shows that the business is operating and received income for the last four months in 2024 in the amount of R 357 100,75 providing an average income over the last four month of **R 89 275,18** plus the **R 12 894,75** from the Capitec account = **R 102 169,934** plus the R 35 000,00 from rental of the factory to Wall Trading = **R 137 169.93.** Despite such income no payments are made towards the major dependent child's expenses.

[10.8] Taking all of this into consideration, it is my view that the Respondent is not playing open cards with regard to his income, does not provide copies of all his personal bank statements, does not show where the rental payments are paid to and that he had and still has access to funds for his daily expenses and legal costs from the business account although he alleges he only owns 20% thereof while electing not to contribute to the maintenance of the major dependent child.

[10.10] I am therefore of the view that the Respondent can afford the order so granted.

[11] The Applicant provides a list of expenses without the allocations to the major dependent child and therefore it was done in court to a total of **R 19 037.33** although in her affidavit she alleges that it is R 19 000,00.

[11.1] The Applicant states that she paid an amount of R 33 105,00 towards the major dependent child's educational costs which was paid in January 2023 but on

her list of expenses she still allocates an amount of R 5035,00 as school fees. The Respondent states that she did not indicate whether that amount is per semester or per year.

[11.2] Mr. Marnewick then indicated that the amount is actually towards the tertiary education of the major dependent child which is the same per month as shown on the list of expenses. The Applicant provided a year's statement from the institution[19] in her updated documents attached to the FDF. From all charges on the invoice from the Academic Institute of Excellence it comes to a total of R 56 187,50 which is **R 4 683,29** over 12 months and therefore the amount is to be adjusted on the list of expenses..

[11.3.] The Applicant indicates that the major dependent child is on her medical aid and stipulates a total amount on her list of expenses but in calculating the pro rata expenses of the major child there is no indication on what amount is to be allocated to such expenses and it is therefore not included into the total expenses of the major child.

[11.4] There are two vehicles, a Haval, and a Renault on the list of expenses which the Respondent alleges should be sold as same are too expensive. I am of the view that those assets are to be dealt with in the division of the joint estate and not in these proceedings. In terms of her list of expenses she indicates that she has a shortfall of R 777.18.

[11.5] It is clear from the papers that the Applicant does not base her application on a shortfall but on the fact that the parties have a reciprocal duty to maintain their major dependent child which he has not done since separation. The Applicant's elderly mother also stays with her and therefore there are three adults residing together which is noted with regard to the pro rata allocation of household expenses to the major dependent child specifically with regard to household expenses.

[12] The Respondent does not address his expenses in his Answering Affidavit and then includes a list of expenses on the FDF to a total of **R 81 300,00** but does not explain how he is or was paying same. The Respondent alleges he has no income or on the version of Me Gumbi only has an income of R 47 100,00 over a period of four

[19] Caselines 010-72

months but then alleges that he has expenses of R 81 300,00 which makes absolutely no sense. Mr. Marnewick argued that in the absence of proof of these expenses he cannot argue on whether same is reasonable or unreasonable. It was also argued that I should take it into consideration that when this FDF was compiled the Respondent was allegedly already in financial constraints and could not pay maintenance towards the major dependent child and should have provided his real expenses.

[12.1] On this list there are for example provision made for a gardener of R 6 000,00 and home maintenance of R 10 000,00 but he cannot pay anything towards the major child.

[12.2] Me Gumbi then argued that maybe the gardener and membership fee are not reasonable, but she does not address any of the other unreasonable expenses.

[13] Regarding and considering an order in a Rule 43 matter it is of utmost importance that parties take the Honourable Court into their confidence and provide sufficient and applicable financial information for such determination. Murphy J in **Du Preez v Du Preez**[20] stated as follows concerning remarks on the misstatement of facts or the failure to disclose fully all material information regarding a party's financial affairs.

> [15] *However, before concluding, there is another matter that gives me cause for concern, deserving of mention and brief consideration. In my experience and I gather colleagues on the bench have found the same, there is a tendency for parties in Rule 43 applications acting expeditiously or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the information. Counsel habitually, acting no doubt on instructions, unabashedly seek to rectify the false information as if the original misstatement was one of those things' courts are expected to live with in Rule 43 applications. To my mind, the practise is distasteful, unacceptable and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties*

[20])16043/2008) [2008] ZAGPHC 334 (24 October 2008)

should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and in certain circumstances may be the crime of defeating the course of justice.

[16] .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. .Any false disclosures or material non-disclosure would mean that he or she is not before the court with "clean hands" and on that ground alone will be justified in refusing relief."

[13.1] In **C.M.A v L. A**[21] judge Liebenberg AJ stated as follows in paragraph [25]

[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 to disclose fully all material financial information. Any false disclosure or material non-disclosure may justify refusal of the relief sought.

I believe that this also applies to the Respondent when he wants to argue that he cannot afford to pay maintenance or requires a reduced amount to pay towards such maintenance than that claimed by the Applicant.

[25.2] An applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties albeit that a balanced and realistic assessment is required, based on evidence concerning the prevailing factual situation.

[13.2] A Rule 43 application was designed to provide interim relief, but it is a known fact as stated in ***TS v TS 2018(3) SA 572 (GJ)*** by Judge Spilg that it is like playing Russian Roulette and prone to an unfair result for one if not both parties especially if parties do not play open cards and provide all applicable information pertaining to their financial circumstances before the Honourable Court.

[21] [2023] ZAGPJHC 364 (24 April 2023) at [25]

[13.2.1] At paragraph 6, Judge Spilg also stated that *the consequences of the Rule 43 order may also be difficult to undo.*

[13.3] In the matter of ***SK v JK case number 3198/23, 13 March 2023*** at paragraph 15 Judge Thulare J referred to Rule 43(5) which indicates that the order made in Rule 43 application should be *just and expeditious.*

[13.3.1] In paragraph [15] thereof it is stated that because of that specification in Rule 43(5) in the Honourable Judge's view it "*placed a duty on the courts but also on applicants to base their applications and their conduct to the application to what is morally right and fair. It requires a dispassionate approach to the application which is guided by truth and reason A Rule 43 application remain a process of balancing the scales for a just divorce process and provides temporary assistance for the support of the spouse and the children and to enable a party in an unfair position to present its case adequately before the court."*

[13.4] In this matter. the Respondent failed to properly complete his FDF and to attach the required and necessary supporting documentation to such FDF. The parties are obliged to complete the FDF although the Respondent had to be ordered to do so, then still did not complete it properly or provide the applicable documentation which resulted in a further court order to force him to comply. The FDF and the proper completion thereof is a mandatory form in terms of the Practise Manual of this court. As stated in ***HJE v BA Case Number 2016/10540 on 12 September 2022*** in paragraph [30]

"*The purpose of Rules of Court and this Court's Practise Manual is to facilitate the expeditious and fair hearing of cases in an orderly manner."*

[13.5] I am of the firm belief that the Respondent did not provide the necessary and required financial information with the sole purpose to ensure that this court would not be placed in a position to determine his exact income. As a result thereof, the Respondent did not provide all bank accounts, does not explain his own income or expenses and how it is paid or even was paid, does not explain what is paid by the business on his behalf such as petrol, groceries, meat and legal costs, or place before this court sufficient information pertaining to the rental

income of R 35 000,00. This then left same to the court to do which conduct should be frowned upon. This is a clear example of a catch me if you can attitude as stated in ***DEB v MGB*** [22] where Gorven AJA remarked that "

> "*The attitude of many divorce parties, particularly in relation to money claims where they control the money, can be characterised as "catch me if you can." These parties set themselves up as immovable objects in the hope that they will wear the other party down. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and delay and obfuscate in the hope that they will not be "caught" and have to disgorge."*

[13.6] In the unreported case ***EVS v JHV and another Case Number 135/2020 (Eastern cape) 28 February 2023*** Judge Laing stated in paragraph {37] that.

> *"Trial proceedings, especially matrimonial matters should not be akin to tooth extraction. If the rules permit the fair and necessary disclosure of particulars to streamline and expedite the dissolution of a marriage, inevitably a distressing experience for the spouses and families involved, then effect ought to be given thereto.*

[14]. In taking all the information before me into consideration, I then recalculated the list of expenses including the amended amount for and towards the educational institution and ordered that the Respondent is to pay an amount of R 8 000,00 per month towards maintenance which amount the Respondent can afford.

LEGAL COSTS

[15.] The Applicant claims an amount of R 40 000,00 as a contribution towards her legal costs.

[15.1] The Applicant states that she cannot understand how the Respondent can afford the legal costs although it can be seen that an amount of R 18 000,00 was paid towards legal fees in the last two months and a total of R 64 626.23 was

[22] [2014] Jol 32339 (SCA)

paid from the business accounts so provided from August to April 2024. This confirms that the Respondent has access to funds for litigation where the Applicant does not have such luxury.

[15.2] It is an established principle that both parties are to litigate on the same scale commensurate with the means of the parties during the subsistence of the marriage.[23]

[15.3] The claim for a contribution towards legal costs in matrimonial action is *sui generis* and has its origin in Roman Dutch procedure sanctioned over many decades.[24] The basis of the claim is the duty to support the spouses owe each other. [25]

[15.4] In the case of *Van Rippen* Supra it is also stated at page 39 in the assessment of the quantum of the contribution that:

> "*The quantum which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of court*."

[15.5] It is clear from the papers before me so filed by the Respondent that he has access to the business account from which he pays his legal costs, has no problem with the postponement of these proceedings despite the fact that same leads to further costs orders against him where the Applicant has paid the major child's expenses with no support from the Respondent, that she has no access to such account and that she has made an effort to place all relevant and applicable financial information before this court.

[15.6] Therefore, to ensure that the parties are allowed to litigate on the same scale and as a result of the fact that this is the first request for a contribution towards legal costs, I ordered the payment of a reduced contribution of R 20 000,00 in four equal payments.

ENGELBRECHT T

[23] Dodo v Dodo 1990(2) SA 77 (W)
[24] Van Rippin v Van Rippin 1949*4) SALR 634 (C)
[25] Chaimani v Chaimani 1979*4) SA 804 (W_) at 806F – H.

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 7 May 2024.

Appearances:

For the Applicant:	Advocate Marnewick
For the Respondent:	Advocate Gumbi
Date of Hearing:	25 April 2024
Date of Reasons for order:	7 June 2024