

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 017721/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

DATE **03/01/25**

SIGNATURE

In the matter between:

X[...], H[...]

Applicant

and

X[...], G[...]

Respondent

JUDGMENT

Joyini J

INTRODUCTION

[1] The applicant approached this court in terms of Rule 43 of the Uniform Rules of Court (“Rule 43”). She seeks maintenance for herself and their two major dependent children plus a contribution towards her legal costs, pending the finalisation of her action for divorce from the respondent.

- [2] The purpose of Uniform Rule 43 applications is to ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage when pursuing their cases in the main divorce action. Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them.¹

BACKGROUND FACTS

- [3] By way of summary, the applicant and the respondent ("the parties") got married to each other on 9 October 1997. The marriage is in community of property. The marriage relationship still subsists. Two children were born from this marriage between the parties. Both of them are major dependent children. One of them is residing with the applicant.
- [4] The applicant seeks a monthly maintenance of R15 000.00 for herself and R26 000.00 and R40 000.00 respectively for two dependent major children plus a R250 000.00 contribution towards her legal costs.

ISSUES FOR DETERMINATION AND RELIEF SOUGHT

- [5] The applicant sought an order under Rule 43 of the Uniform Rules of Court, aiming to secure maintenance *pendente lite* for herself and her two major dependent children plus a contribution towards her legal costs.
- [6] In assessing this matter, I shall first consider the points *in limine* raised by the applicant.

POINTS IN LIMINE: DISCRETION TO ALLOW FURTHER AFFIDAVITS AND LATE FILING OF THE FINANCIAL DISCLOSURE FORM

- [7] The applicant has raised points *in limine*, taking issue with the filing of the respondent's supplementary affidavit and late filing of the respondent's financial disclosure form. This became an issue when the respondent was seeking the court to exercise its discretion in terms of Rule 43(5) and grant him leave to file his supplementary affidavit and his financial disclosure form.

¹ M G M v M J M [2023] ZAGPJHC 405 para 9.

[8] A point *in limine* like the one raised in paragraph 7 above was dealt with properly in the following paragraphs of S N v S R²:

*“[5] It is well accepted that Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. The premise is expeditious intervention by the courts to alleviate the adverse realities faced by claimants, usually women, who find themselves impoverished when litigating against their spouses who have, historically, always had and still do have stronger financial positions in divorce proceedings.”*³

*[6] The procedure is straightforward as the applicant seeking interim relief is required, in terms of Rule 43(2)(a), to do so on notice with a “sworn statement in the nature of a declaration, setting out the relief claimed and the grounds thereof, ...” A respondent wishing to oppose the application is required by Rule 43(3)(a) to deliver “a sworn reply in the nature of a plea.” The parties are expected to file concise affidavits and to avoid prolixity.*⁴

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

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

² (2023/036122) [2023] ZAGPJHC 1335 (14 November 2023).

³ *E v E; R v R; M v M* 2019 (5) SA 566 (GJ) at para 25.

⁴ *Maree v Maree* [1972 \(1\) SA 261](#) (O) at 263H; *Zoutendijk v Zoutendijk* [1975 \(3\) SA 490](#) (T) at 492C; *Visser v Visser* [1992 \(4\) SA 530](#) (SE) at 531D; *Du Preez v Du Preez* [2009 \(6\) SA 28](#) (T) at 33B; *TS v TS* [2018 \(3\) SA 572](#) (GJ) at 585A.

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

[9] The parties accept that there is no provision to file further affidavits in terms of Rule 43. Whilst that is the case, in E v E; R v R; M v M,⁶ the full bench of this Court, which both parties referred to, observed that: "In terms of Rule 43(5), the court does have a discretion to call for further evidence despite the limitations imposed by Rule 43(2) and (3). The problem with the present Rule 43(2) and (3) is that invariably, in most instances, the Respondent will raise issues that the Applicant is unable to respond to due to the restriction, unless the court allows the Applicant to utilise Rule 43(5). This process will result in conflicting practices as it has already happened in a number of cases and as highlighted by Spilg J in TS. Applicant should have an automatic right to file a replying affidavit, otherwise she has no way of responding to allegations that are set out in the Respondent's answering affidavit."

- [9] Accordingly, it is in the interest of justice and in the best interest of children to allow the parties to file substantive but relevant affidavits setting out the basis upon which their relief is sought. It is clear that the averments in the affidavits and information provided are pertinent to the determination of issues in dispute. I therefore exercise my discretion in terms of Rule 43(5) to allow the filing of further affidavits and the respondent's financial disclosure form.

APPLICANT'S EVIDENCE AND ARGUMENT

- [10] By way of summary, counsel for the applicant argued that the respondent is not honest and open about his income, as seen from his bank statements. In his financial disclosure form, he only included his ABSA account. The applicant revealed that, *"Certain bank accounts, which I am aware of, are not included and have not been provided, such as the Nedbank Credit Card, Nedbank Cheque Account, ABSA Credit Card, Taida Account, G[...] Trading Account, and American Express Account."*⁷

- [11] Counsel for the applicant argued that the respondent accuses the applicant of not playing open cards, but he (respondent) himself does not present all the

⁶ E v E; R v R; M v M id at paras 58-9.

⁷ Caselines 12.1-218, para 7.3.

facts and provide all bank statements regarding his financial position to this court.

RESPONDENT'S EVIDENCE AND ARGUMENT

[12] The respondent opposes this application on *inter alia* the following basis: That the respondent maintains the two major dependent children and contributes towards their expenses; that the applicant's maintenance claim is not commensurate with the historical standard of living of the parties and is exorbitant, *mala fide* and unreasonable; that the applicant has failed to approach this court on a *bona fide* basis and failed to make full and frank financial disclosure; and that the respondent cannot afford to make any contribution towards the applicant's exorbitant legal costs because such an order would prejudice the respondent's ability to fund his defence to the divorce litigation.⁸

[13] In the applicant's financial disclosure form,⁹ the applicant discloses her annual net income derived from employment as R450 000.00 per annum, equating to R37 500.00 net income per month.

[14] In section 2.3¹⁰ of the applicant's financial disclosure form, the applicant has not disclosed that she has any offshore/international banking accounts. She has only disclosed her South African banking accounts.

[15] The applicant later conceded that she has an offshore account with China Merchant Bank.¹¹ The question is why she did not disclose this crucial information in her FDF?

EVALUATION AND ANALYSIS

[16] The applicant has to deal with her need for maintenance by making full and frank disclosure of all relevant facts in sufficient particularity. In evaluating the

⁸ Caselines 19-19 to 19-20.

⁹ Applicant's FDF: 12.1 A-16 to 12.1 A-17.

¹⁰ Applicant's FDF: 12.1 A-10.

¹¹ Caselines 12.1-223, para 12.

applicant's need, the court has to look at whether there was full and frank disclosure by the applicant of all material facts.

[17] In *C.M.A v L. A*¹² Liebenberg AJ reiterated that there is an obligation on an applicant in rule 43 applications to act with the utmost of good faith and make full and frank disclosure of his/her finances. The penalty of non-disclosure may be as high as the refusal of the application. In paragraph 25 of the judgment, it was held: “[25] *Whilst every application for maintenance pendente lite must be decided on its own facts, certain basic principles have been distilled in the authorities: [25.1] There is a duty on an applicant who seeks equitable redress to act with the utmost good faith, and to disclose fully all material financial information. Any false disclosure or material non-disclosure may justify refusal of the relief sought.*”

[18] In the same vein, the respondent referred this court to *Du Preez v Du Preez*¹³ where it was held: “[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. Consequently, I would assume, there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith (uberrime fidei) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with “clean hands” and on that ground alone the court will be justified in refusing relief.*”

[19] The fact that the applicant later conceded that she has an offshore account with China Merchant Bank¹⁴ only after the respondent has revealed this crucial information means that the applicant is not before this court with clean hands.

CONCLUSION

¹² [2023] ZAGPJHC 364 (24 April 2023) at [25].

¹³ (16043/2008) [2008] ZAGPHC 334 (24 October 2008).

¹⁴ Caselines 12.1-223, para 12.

[20] Having considered the evidence before this court and the caselaw cited above, I am of the view that the applicant has to be reminded of this important duty (referred to in *Du Preez* above) on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith and to disclose fully all material information regarding their financial affairs. In conclusion, I am also persuaded by the respondent's argument that the applicant's material non-disclosure means that he is not before this Court with clean hands. Therefore, on that ground alone, I conclude that this court is justified in refusing the relief sought by the applicant. My conclusion therefore is that this application must be dismissed.

COSTS

[21] I have considered both parties' argument relating to the costs of this application. I am accordingly not inclined to grant costs in either party's favour. Therefore, I leave this to the trial court to decide. The costs of this application will therefore be costs in the cause, meaning that they would be determined as part of the overall case.

ORDER

[22] **In the circumstances, I make the following order:**

[22.1] Leave is granted for the filing of the respondent's supplementary affidavit and the respondent's financial disclosure form.

[22.2] The applicant's application is dismissed.

[22.3] The costs of this application will be costs in the cause.

T E JOYINI
JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 21 November 2024

Date of Judgment: 3 January 2025

Delivery or handing down of the Judgment

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 3 January 2025 at 10h00.

