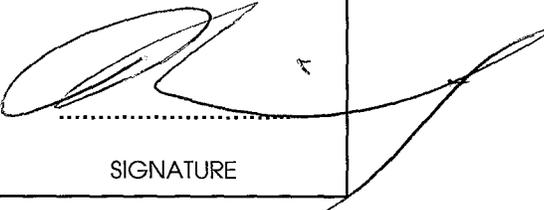




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 28917/2016

<p>(1)</p> <p>(2)</p> <p>(3)</p>	<p>REPORTABLE: NO</p> <p>OF INTEREST TO OTHER JUDGES: YES</p> <p>REVISED:</p>	 <p>.....</p> <p>SIGNATURE</p>
<p>2 March 2018</p>		

In the matter between:

TS, R

Applicant

And

TS, T

Respondent

RULING OF 2 MARCH 2018

CONFIDENTIAL DOCUMENTS AND RELEVANCE

SPILG, J:

INTRODUCTION

1. This is a rule 43 application. The outstanding issues still requiring a decision relate to spousal and a few outstanding items regarding child maintenance. A contribution towards costs order has already been made. On 7 August 2017 I ordered the parties to make disclosure of certain of their financial affairs. The judgment is cited in SAFLII as *Ts v Ts* [2017] ZAGPJHC 244

2. The order reads:

1. *The respondent may deliver an affidavit by no later than 14 August 2017 limited to a response to the allegations contained in the applicant's supplementary affidavit*
2. *By no later than 22 August 2017 the parties shall depose to an affidavit in which they provide full detail in respect of the following accompanied by copies of the source documents as applicable :*
 - a. *In the case of the applicant;*
 - i. *The identity of the originating source of the funds from which the holidays and motor vehicle that were purchased in 2015 through Westrust and in the case of the car the source from which the instalments continue to be paid;*
 - ii. *The basis on which the originating source has provided the funds to the applicant and if pursuant to a contract a copy is require and the material terms are required to be provided;*
 - iii. *Every shareholding of the applicant is required to be identified including the number and of shares, how many shares in total are issued. By shareholding is included every beneficial shareholding in which the applicant has decision making powers or in respect of which he ultimately receives, whether directly or indirectly any dividend or other benefit and if so what is such benefit;*
 - iv. *All sums of money that are owed to the applicant by any business including company, partnership, other joint venture or trust by way of a loan account, partnership capital, undistributed monies , current account or the like;*
 - v. *A list of all directorships held at any time over the past 2 years and if since resigned;*
 - vi. *Copies of the last audited financial statements of each of the companies in which the applicant held a directorship at any time over the past two year.*
 - vii. *Full particulars of any pay-out in respect of any shares in any company in which the applicant held a directorship at any time over the past two years*
 - viii. *Copies of all bank account and investment account statements held by or on behalf of the applicant since 1 January 2017 to date*

ix. *Copies of all credit card and shopping card statements held by applicant or which she is entitled to use since January 2017*

b. *In the case of the respondent;*

i. *A copy of the Masingo Royal Trust Deed and all amendments to it;*

ii. *The identity of the donor, each trustee and beneficiaries of the Masingo Royal Trust with their contact addresses;*

iii. *All letters to the trustees regarding the operation of the trust, including any discretionary powers given to them;*

iv. *How the trustees are to exercise their powers;*

v. *The basis on which the respondent resides on any of the properties of the trust;*

vi. *Whether the respondent has the use, benefit or other right in any other property or asset of the Masingo Royal Trust and when did he commence deriving same;*

vii. *What is the value of each of the benefits derived by the respondent from trust identified separately;*

viii. *Is the respondent a donor, trustees or beneficiary of any other Trust and if so the contents of all the preceding paragraphs are repeated;*

ix. *Every shareholding of the respondent is required to be identified including the number and of shares, how many shares in total are issued. By shareholding is included every beneficial shareholding in which the respondent has decision making powers or in respect of which he ultimately receives, whether directly or indirectly any dividend or other benefit and if so what is such benefit;*

x. *All sums of money that are owed to the respondent by any business including company, partnership, other joint venture or trust by way of a loan account, partnership capital, undistributed monies, current account or the like;*

xi. *A list of all directorships held at any time over the past 2 years and if resigned;*

- xii. *Copies of the last audited financial statements of each of the companies in which the respondent held a directorship at any time over the past two year;*
 - xiii. *Full particulars of Any pay-out in respect of any shares in any company in which the respondent held a directorship at any time over the past two years;*
 - xiv. *Copies of all bank account and investment account statements held by or on behalf of the respondent since 1 January 2017 to date;*
 - xv. *Copies of all credit card and shopping card statements held by the respondent or which he is entitled to use since January 2017;*
3. At the time of the last hearing the applicant had produced all the required documents. The respondent however contended that a number of documents that were ordered to be produced were not relevant to the rule 43 enquiry and are confidential. It is accordingly necessary to consider their status.
4. The respondent adopts a position that because the marriage is out of community of property without the accrual system he is protected from having to disclose his financial status. This is a somewhat belated point that should have been dealt with when the disclosure issue was argued. I will however allow it at this stage but the failure to raise it at the appropriate time does have cost implications.

MARRIAGE UNDER AN ANTE NUPTIAL CONTRACT AND DISCLOSURE OF FINANCES

5. The financial aspects of a rule 43 are directed at providing child maintenance, spousal maintenance or a contribution towards cost. The relative financial obligations of each spouse has nothing to do with the patrimonial consequences of a divorce but everything to do with the

application of s 7(1) of the Divorce Act 70 of 1979¹ and, in respect of a contribution towards costs, by ensuring a level playing field when it comes to litigation between them.²

6. A court would be unable to determine whether there has been a proper disclosure of available income and the parties respective means to provide for maintenance or be able to litigate on a relative par without assessing the available source of funds that historically have been used to support the family prior to the parties' separation and whether that has changed to any marked degree bearing in mind that the households have been split.
7. Where the parties are wage earners employed by a complete outsider who, to adopt a term from company law, is not a related person³, then a court will have confidence in accepting pay slips, IRP5 forms and tax returns. The respondent is not an unrelated party in respect of the companies in which he held directorships or continues to have a not insubstantial shareholding. There are also discretionary trusts in which he is a donor, trustee or beneficiary. The fact that the applicant was removed as a beneficiary confirms his level of control over decisions taken in the structuring of the trusts and the utilisation of its funds.
8. Legal entities and trusts are accepted means whereby income and assets may be distributed in forms other than salary or cash. They also enable income to be deferred via retention in loan accounts or being converted into investments or equity. Another illustration is where one legal entity passes a debit in its books resulting in the transfer of funds to another entity which in turn may either park the proceeds or else immediately distribute them in one form or another for the ultimate benefit of one of the parties to the proceedings.

These various structures may also facilitate the provision of readily available or recurring revenue streams that are habitually used by one or both parties to

¹ See also *W v H* 2017 (1) SA 196 (WCC)

² See *Cary v Cary* 1999 (3) SA 615 (C) at 621D-E and *Ts v Ts* at para 59

³ See s2(1)(a) to (c) of the Companies Act 71 of 2008

the marriage to maintain the family lifestyle. The mere fact that the revenue received is not reflected in a regular payslip or IRP5 return is of no consequence- at best these documents are pieces of evidence. They however can never be conclusive in such circumstances since they are unlikely to account for funds received in the form of loan account repayments or of other benefits having an economic value, such as the *de facto* indefinite occupation of residential property in the name of a trust, the use of a company car or the provision of groceries through a company credit card, the payment of insurance premiums and the like.

9. The nature of the financial disclosure requirements in the Form E used in matrimonial proceedings in England indicates that its jurisdiction is fully alive to the various means by which financial benefits have actually been received and have been used to maintain the family during the marriage.
10. In the present case there are a number of trusts that have been established and it is evident that much thought has gone into efficient tax planning.
11. I might consider going further in those cases where either there has been an unequal contribution by one spouse based on their relative earning capacity and accumulated wealth or in cases where the one spouse may have contributed financially or provided other material assistance such as skills or labour to the business in the expectation that the marriage would last.
12. The one party may also exercise exclusive control over the use and distribution of funds derived from the business despite the other party having made a significant financial contribution. At best a party will claim the existence of a universal partnership and its application is with respect well illustrated in the as yet unreported decision of Brooks J in *Zincume NO v Dukada and others* delivered on 14 November 2017 (case no 534/2016 Eastern Cape Local Division, Mthatha) is with respect a good illustration.

However in a case I have just dealt with under rule 43, well over half of a considerable retirement pay out was used to finance the husband controlled business and to fully pay up bonds that might otherwise have been serviced

out of business profits. Issues such as *de facto* gender inequality over financial affairs within a marriage where the wife has contributed capital to the husband's business or allowed it to retain earnings for growth, without being given a stake in the belief that the marriage would last, do not appear to have yet engaged the courts.

13. The fact that the English courts have on occasion ignored the limitations of our ante nuptial contract regime suggests that there are other considerations of fairness that might militate against its mute acceptance in suitable cases that may be worthy of consideration within a constitutional framework.

RELEVANCE AND CONFIDENTIALITY

14. Properly categorised the position adopted by the respondent is that certain of the documents are not relevant to the outstanding issues because the applicant has no legal right to maintenance. There is also an argument raised that the disclosure of some of the documents would reveal the respondent's financial investments.

15. *Adv Fhedzisani* for the respondent argued that the present case is different since the applicant had expressly waived her right to claim maintenance.

Firstly the ante nuptial contract provides that there would be no system of accrual and that there would be no community of property or community of profit and loss.

Secondly clause 25 of the various trusts in which the applicant was originally a beneficiary deals with the ring fencing of disbursements made to a beneficiary so as to ensure that it does not fall into a joint estate.

16. As mentioned earlier the issue is one of both spousal and child maintenance *pendente lite*, while the claim for a contribution towards legal costs has already been determined. These issues do not concern the distribution of

property but the provision of maintenance out of the resources of one or other of the parties, while tight to a contribution for costs would have been fundamentally concerned with a constitutional right of access to justice, not with the distribution of assets.

17. The court requires full financial disclosure because the nature of the structuring of the respondent's finances is such that a court would be failing in its obligations to make a proper determination under rule 43 (as read with the Children's Act insofar as the outstanding issues of maintenance impact on the children) if it was not put in a position to consider them.

18. There is another reason why full financial disclosure is necessary. The applicant, who is the defendant in the divorce action, has counterclaimed that in consideration for signing an ante nuptial contract the parties agreed verbally that if the marriage terminated there would be certain proprietary settlements the respondent would make and he would also pay rehabilitative maintenance. It is also alleged that subsequent to the marriage and in 2005 the parties agreed to jointly register West Side Trading in which the applicant would be the sole shareholder and that the profits of the business, which it was agreed required the active involvement of one of the respondent's companies, would provide ongoing financial support for the applicant's personal wellbeing.

Accordingly the issue of ongoing financial support through structures over which the respondent has control or a meaningful say, if correct, translates inter alia to the provision of ongoing maintenance. Accordingly one of the *lis* before the court at the main trial is the question of maintenance. The argument that the documents are not relevant because there is no maintenance issue before the court must therefore fail.

19. The respondent however adds another leg to his argument. If the documents are to be considered then the applicant cannot have regard to their contents for any purpose other than maintenance. *Adv Mokotedi* argues that the applicant's hands cannot be tied in this manner.

20. Frisky there is an impracticability about implementing a condition of this nature. I know of no Chinese wall that would allow the applicant and her legal representatives to disabuse their minds of the contents of the documents. Nor should they.
21. I start off on the premise that this is an *a fortiori* case of careful financial planning. Accordingly company payslips or documents showing the resignation of directorships are inconclusive. What they are relevant in demonstrating, due to the respondent's ability to have a say in the control of the companies and trusts involved, is that the monthly income now disclosed is incapable of supporting the family lifestyle which the parties have enjoyed. As a result the court must treat them as inadequate and must undertake a lifestyle assessment based on proper financial disclosures.
22. Financial disclosure was ordered precisely for the purpose of enabling each party to more properly assess their respective positions, to present argument based on a more informed position, to have an available remedy for misrepresentation or material non-disclosure and to enable the court to make an order based on an informed decision which available data indicates is likely to be of final effect for the reasons set out in *Ts v Ts* at paras 5 and 11.
23. Secondly I do not consider the case which the applicant makes out in her counterclaim to be evidently vexatious or frivolous. The papers reveal the establishment of West Side Trading 334 (Pty) Ltd and the applicant has been consistent in contending that the respondent has frustrated her ability to derive income out of the company. The respondent's allegations in reply support, a least *prima facie*, an arrangement whereby she would derive income out of the tenders that would be obtained by the company and which necessitated the involvement of the respondent and a company effectively controlled by him.

24. Since full financial disclosure is essential having regard to the financial structures each party has had established or in which they find themselves there is no scope for limiting the use to which information can be used in the main action, even if one could find a practical way of doing so. In any event it would have to be discovered.

25. I fully understand that such information may be of a private nature and should not be placed in the public domain without a substantive application which is duly considered by a court after hearing the respondent. I accordingly will provide such protection in the order I make.

COMPLIANCE WITH THE DISCLOSURE ORDER

26. The respondent has provided a substantial number of documents pursuant to the earlier order requiring financial disclosure. Only the applicant would be able to indicate whether they are complete. I will therefore leave it to the applicant, once she has considered the documents produced, to indicate whether they are sufficient for purposes of dealing with the outstanding issues in the rule 43 application.

COSTS

27. The respondent should have raised the present argument at the previous hearing. This was not done and since the argument is unsuccessful, it is appropriate that the respondent should bear the wasted costs of the hearing on the opposed scale.

ORDER

28. I accordingly order that:

1. *The respondent is to deliver to the applicant by no later than 9 March 2018 the full set of documents that were filed in court pursuant to the financial disclosure order granted on 7 August 2017 (“the disclosure documents”). The documents consist of;*
 - a. *Two lever arch files with dividers titled:*
 - i. *Ante nuptial contract*
 - ii. *Group Financials*
 - iii. *Trusts*
 - iv. *Banks*
 - v. *Investments*
 - vi. *Directorships*
 - vii. *Financials of Trusts*
 - viii. *SARS*
 - b. *A bundle of various further documents dealing inter alia with one of the Trusts, a property acquired by the trust, maintenance calculations , payment history and certain emails*
 - c. *A bundle of documents described as;*
 - i. *Credit facility;*
 - ii. *Facility tiers*
 - iii. *Facility approval*
 - iv. *VAT*
2. *The disclosure documents may not be published and may only be utilised in relation to any litigation between the applicant and the respondent or the children born of the marriage. This is without prejudice to the rights any person may have to apply to this court that such document or part thereof that might be used in the court proceedings be published.*

3. *The court will hear argument on the outstanding rule 43 issues on a date to be agreed or determined by the court*
4. *The respondent is to pay the wasted costs of the hearing of 13 February 2018 on the opposed scale*



SPILG J

DATES OF HEARING: 13 February 2018

DATE OF JUDGMENT: 2 March 2018

FOR APPLICANT: Adv K Mokotedi

Lingenfelder & Baloyi Inc

FOR RESPONDENT: Adv M Fhedzisani

Thantsha Attorneys