IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: 2024 / 013982

In the matter between:

Y[…]: M[…] N[…] (Born H[…])
(Identity Number: 9[…]) Applicant

and

Y[…]: J[…]
(Identity Number: 7[…]) Respondent

(1)	REPORTABLE:YES/NO
(2)	OF INTEREST TO OTHER JUDGES:YES/NO
(3)	REVISED: YES/NO
_____	24 JULY 2024
Signature	Date

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

[1] This is a Rule 43 application wherein the Applicant prays for a contribution towards her spousal maintenance pending finalisation of the divorce action, which contribution takes the form of a cash payment, payment of her medical aid premium and of her accommodation and studies. The Applicant also seeks to regain possession of certain movables and a contribution towards her legal fees.

[2] The parties were married to one another on 1 July 2022 out of community of property with the exclusion of the accrual system.

[3] The Applicant was 25 years old when the parties got married whilst the Respondent was 47 years of age. The Applicant at the time was employed as teacher and received a net salary of about **R19 000.00** per month. The Respondent was and is employed as an account executive at Dell.

[4] The Applicant depicts and sketches in her sworn affidavit a marital life of luxury, whilst the Respondent to the contrary refers to a comfortable and ordinary standard of living in a three bedroom home with normal furniture and appliances.

[5] The parties' marriage was however short-lived and lasted merely one year and four months.

[6] During the marriage, whilst the Applicant was employed as a teacher, the parties agreed that the Applicant would pay from her salary (**R23 000.00** gross and **R19 000.00** net)[1] the respective amounts of **R10 500.00** (as rental, for her medical aid and vehicle payment)[2] and **R3 500.00** per month, the latter amount for groceries[3], to the Respondent as her contribution to her monthly expenses – accordingly an amount totalling **R14 000.00**. The Applicant was then left with a surplus amount of **R5 000.00** a month.

[7] It is clear that the Applicant's contribution of **R14 000.00** to the Respondent correlates with and is confirmation of the parties intention to be married out of community of property. The Applicant therefore contributed 74% of her monthly income to the Respondent to cover for her own monthly expenses.

[8] In the Respondent's affidavit he informs the court that:

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[1] 01-10
[2] Paragraph 46.1.1 and 46.1.2 at 02-22
[3] Paragraph 5.5 at 01-10

8.1 the Applicant in her Plea to her Counterclaim pleaded that during a period of 1 (one) year and 6 (six) months - February 2022 to August 2023, the Applicant paid a total amount of **R156 350.00** towards the joint household's expenses.[4]

8.2 Since July 2022, and from the Applicant's own version in her Plea, a total amount of **R115 550.00** was paid to the Respondent. These amounts were paid by the Applicant as a contribution towards her medical aid and personal insurance which were moved to the Respondent's policies and household expenses.[5] It is accordingly evident that the Respondent was never the sole breadwinner.

[9] I must emphasize that the Summons, Particulars of Claim, Plea and Counterclaim do not form part of the bundle on Case-lines. I would have expected that these pleadings would have been uploaded in order for the court to consider the ambit of the divorce action, the relief claimed by both parties and the Applicant's entitlement to the relief.

[10] Although the Applicant agreed that she paid the Respondent an amount of **R14 000.00** a month and pleaded same in her affidavit, the information as set out in paragraph 8 here in before was not tendered by the Applicant in this rule 43 application.

[11] During March 2023 the Applicant resigned as a teacher and commenced studying accounting at Boston College during May 2023.

[12] The reason for the Applicant's resignation is disputed between the parties.

[13] The Applicant alleges that the Respondent was embarrassed by her employment as a teacher and that he convinced her to pursue online studies as an accountant. Despite the initial allegation by the Applicant of the Respondent's

[4] Paragraph 25 at 02-15
[5] Ad paragraph 25 at 02-15

insistence that the Applicant studies accounting[6] it nevertheless appears from the Applicant's affidavit that she herself elected to study accounting.[7]

[14] The Respondent however denies that he insisted on her resignation and that he wanted her to pursue a high profile career. He alleged that the Applicant was discontent at Bryanston Parallel Medium School [8], did not get along with the principle, was demoted from a primary class teacher to an assistant primary class teacher and that she decided out of her own accord to resign.

[15] The disputes between the parties in this matter are plentiful. The Applicant and Respondent's versions are so far apart that they will have to be trial and tested in the divorce action. It is impossible to deal with the opposing allegations on paper. To extract the truth of the allegations in motion proceedings is impossible.

[16] In assessing this matter I shall first consider the points *in limine* raised by the Respondent.

POINTS IN LIMINE:

[17] The Respondent raised two points *in limine* to the Applicant's application, namely:

17.1 non-compliance with Rule 41A of the Uniform Rules of Court and that

17.2 the Applicant failed to provide material grounds entitling her to the relief which she seeks – the application is defective and there is no cause of action.

FIRST POINT IN LIMINE:

[6] Ad paragraph 5.8 at 01-11
[7] Ad paragraph 5.9 at 01-11
[8] Annexure Y1 at 02-47

[18] As to the non-compliance with Rule 41A, the Respondent alleged that the Applicant did not serve a Rule 41A notice upon serving the rule 43 application and that such a Notice should have been given.[9]

[19] Rule 41A(1) of the Uniform Rules of Court deals with mediation and provides a working definition of mediation it stipulates the following:

> "*a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute." (my underlining)*

[20] The purpose of rule 41A is clear, namely to ensure that parties explore alternative dispute resolution methods at the commencement of their matters in court to avoid protracted litigation. [10]

[21] The four pillars of mediation which are identified by Rule 41A are the following:

21.1 it is a voluntary non-binding non-prescriptive dispute resolution process;

21.2 the terms of the process to be adopted are those agreed upon by the parties;

21.3 the mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them;

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[9] 02-7
[10] MD v RJD (053357/2022) [20241 ZAGPPHC 79 (5 February 2024)

21.4 the process is confidential.

[22] The foundation of the aforesaid principles is that, unlike dispute resolutions by court or arbitration which takes the process and resolution out of the hands of the parties, mediation empowers the parties in that they are in control of the mediation process.

[23] The Plaintiff/Applicant has to in terms of Rule 41A(2) of the Uniform Rules of Court serve on each Defendant or Respondent a notice indicating whether such Plaintiff or Applicant agrees to or opposes referral of the dispute to mediation. The wording of the said rule is the following:

> "*(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.*
> *(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.*

[24] On or about 16 February 2023 the Applicant did together with the Combined Summons in the divorce action serve a Notice of Opposition to Mediation in terms of Rule 41A of the Uniform Rules of Court, dated 8 February 2023, oppose the mediation process. The reason for the Applicant's opposition was worded as follows:[11]
"*The Plaintiff and the Defendant have reached an irretrievable breakdown of their marriage and there is no reasonable prospect of restoration*."

[11] Paragraph 10 at 02-8

[25] The Respondent on or about 20 February 2023, served his Notice of Agreement in terms of Rule 41A, in which he was in favour of the mediation process. He stated *inter alia*:

> "*The Defendant proposed mediation and the appointment of a mediator during January 2024, to which the Plaintiff have not replied to up to date; …*
> *The Plaintiff's reason for opposing mediation in her Rule 41A is unfounded as it is not the purpose of mediation to restore the marriage, but to attempt to reach settlement between the parties;*
> *It is in the best interest of the parties that the parties do not enter into acrimonious litigation."*

[26] The Respondent is accordingly of the opinion that the Applicant should have taken a conciliatory approach or mediation before launching this application.

[27] The aspect of mediation was therefore canvassed by the parties. Although the reasons for the opposition may be non-sensical the Applicant's objection to mediation is indicative of the parties unsuitability to the mediation process. Mediation is a voluntary process and no party can be therefore be ordered to adhere to the process.

[28] I am accordingly of the firm opinion that the Applicant as early as at the summons stage clearly and unequivocally revealed her opposition to the mediation process.

[29] The court in *P v O (21264/2019) [2022] ZAGPJHC 826* at paragraphs 19 - 20 stated as follows:

> "*Rule 41A was introduced as an amendment to the Rules and came into effect on 9 March 2020. Its underlying objective is to make it mandatory for litigating parties <u>to consider mediation</u> at the inception of litigation. (my emphasis) There is no provision in rule 41A to compel any party to submit to mediation. There is also no sanction provided in the rule for non-compliance[...]"*

[30] In *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & (2020/12468) [2021] ZAGPJHC 127 at paragraph 30,* Judge Spilg also posited as follows:

> "*Mediation is entirely voluntary and if the parties, or only two of them, are so minded they are at liberty to agree on such terms of mediation as they wish;*
> *An unwilling party cannot be compelled to mediate. The furthest a court can go is to direct a litigant "to consider" mediation."* (my underlining)

[31] I was also referred by the Applicant's counsel to *FFS Finance South Africa (Pty) Ltd t/a ABSA Vehicle and Asset Finance v Groenewald (2167/22) [2023] ZANCHC 76 (27 October 2023)* more specifically to paragraph 8 thereof which confirms that:

i) mediation is a voluntary process [12] entered into by agreement between the parties and that

ii) a Court does not have the authority to order parties to litigation to refer the dispute between them for possible resolution by way of mediation.[13]

[32] In *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality (1254/2024) [2024] ZAECGHC 40 (26 April 2024)* Zono AJ found that non-compliance with Rule 41A and its provisions are not fatal to the proceedings.

[33] The Applicant has as previously indicated, opposed mediation. As mediation is voluntary the court will not force parties to mediate.

[34] Mediation was accordingly considered and although the Respondent was in favour of mediation the applicant was opposed to it. The *point in limine* in respect of non-compliance with Rule 41A can accordingly not stand and is dismissed.[14]

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[12] *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & Others* [2021] ZAGPJHC 127
[13] *Nedbank Ltd v D & Ano* [2022] ZAFSHC 331
[14] MD v RJD (053357/2022) [20241 ZAGPPHC 79 (5 February 2024)

[35] The second *point in limine* relates to the Applicant's application being defective and her failure to set out a complete cause of action (facts and grounds) in her sworn affidavit.[15]

[36] The Respondent in his answer to the rule 43 application details the lack of information, facts and grounds pleaded by the Applicant in her sworn affidavit pertaining to:

36.1 the interim maintenance claim,

36.2 the amounts allegedly paid monthly from the Applicant to the Respondent for the Applicant's monthly expenses;

36.3 a breakdown of her monthly expenses and the reasonableness thereof and

36.4 a total picture of how she managed to financially survive for a period of four months after vacating the matrimonial home.

[37] The Respondent also pleads that the Applicant relies upon her entitlement to interim maintenance and legal costs based on the mere averment and presumption that he earns more than the Applicant and can afford same.[16]

[38] The Applicant claims **R25 000.00** per month in respect of interim maintenance yet she elects not to set out and explain the method of calculating the said amount.[17]

[39] The Applicant furthermore merely made a single averment that her monthly expenses shall be clear from her Financial Disclosure Form ("FDF").[18] The Applicant does not canvass her expenses or the reasonableness of the expenses in her affidavit. The Respondent also rightly points out and emphasizes that there is no right of reply to the Applicant's FDF.[19]

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[15] 02-10
[16] Paragraph 16.1 at 02-11
[17] Paragraph 6.1 at
[18] Ad paragraph 6.1 at 01-18
[19] 02-11 and 02-12

[40] The assessment of this *point in limine* places the magnifying glass squarely upon the requirements of Rule 43 in respect of an Applicant's affidavit and the contents thereof.

[41] Rule 43(2)(a) of the Uniform Rules requires that :

> "*An applicant applying for any relief referred to in sub-rule (1) shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, together with a notice to the respondent corresponding with Form 17 of the First Schedule.*" (my underlining)

[42] The procedure embodied in rule 43(2)(a) is hybrid, being largely in the nature of an application, but it also resembles an action since the affidavits have to be in the nature of a declaration or a plea.[20] The object of the rule is to confine the affidavits to a reasonably succinct statement of the parties' cases.[21]

[43] The Applicant's sworn statement must contain factual allegations upon which the court can assess and evaluate whether to grant the relief sought. It is not sufficient to make a bald statement such as that '[t]he applicant requires R*x* for maintenance' or that '[t]he applicant is the party best fitted to have interim custody of the children'.[22] In this matter the Applicant made the bald allegation that she seeks **R25 000.00** and refers to her expenses in her FDF. However, there is no correlation between the amount claimed and her monthly expenses.

[44] In *Eksteen v Eksteen 1969(1) SA 23 (O)* it is also emphasized that rule 43(2) embraces factual allegations and not merely the inference which an applicant makes and alleges from facts which he has not set out.

[45] Upon analysing the Applicant's affidavit it is clear that the vast majority of her sworn affidavit is dedicated to setting the scene and portraying a picture of the

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[20] *KT v AT and Others* [2019] JOL 46116 (WCC), 2020 (2) SA 516 (WCC).

[21] *Taute v Taute* 1974 (2) SA 675 (E)

[22] *Boulle v Boulle* 1966(1) SA 446D and *Eksteen v Eksteen 1969 (1) SA 23*

Respondent being a wealthy man with a lifestyle to suit this. Only in the latter part of her affidavit – the last 3 pages thereof - does the Applicant then deal with her maintenance claim and the contribution towards costs.

[46] The question for determination is accordingly whether the Applicant has set out sufficient facts and grounds in her sworn affidavit in order to make out a case for *interim* maintenance and a contribution towards costs in the amounts claimed.

[47] It is trite law that in motion proceedings the affidavits serve not only to:

i) place evidence before the Court but also to

ii) define the issues between the parties.

In so doing the issues between the parties are distinctly identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.

[48] An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.

[49] The facts set out in the founding affidavit (and equally in the answering affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter. [23]

[50] Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)* detailed that:

> "*Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request*

[23] *Reynolds NO v Mecklenberg (Pty) Ltd1996 (1) SA 75 (W) at 78I*.

the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See Lipschitz and Schwarz NNO v Markowitz 1976 (3) SA 772 (W) at 775H and Port Nolloth Municipality v Xahalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 111B--C."

[51] In applying the aforesaid principles relating to affidavits I now deal with the Applicant's sworn affidavit.

[52] Although the Applicant makes reference in her affidavit to both her and the Respondent's earning capacities she as stated here in before elects to not deal with the calculation of the claim for interim maintenance **R25 000.00** in her sworn affidavit.[24]

[53] The Applicant however in her affidavit refers to her FDF in respect of her monthly expenses.[25] The FDF does not clarify how the **R25 000.00** is calculated and there is no correlation. Despite making reference to the FDF, the Applicant, contrary to what was expressed in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)* does not address in detail her monthly expenses or identify the reasonableness of these monthly expenses in her sworn affidavit linking the FDF to the interim maintenance claim.

[54] The Applicant accordingly seeks the court to have reference to her annexed FDF and to assess her monthly expenses without expressly dealing with these expenses or the reasonableness thereof in her affidavit. She also disallows the Respondent an opportunity to respond thereto. This is not only unsatisfactory, but also in non-compliance with what should be contained in an applicant's sworn affidavit in terms of rule 43(2)(a).The facts and grounds upon which the Applicant

[24] Paragraph 6.1 at 01-18.
[25] 01-73

base her cause of action must be self-contained in such a sworn affidavit. The reason being that the Applicant has to not only sustain her cause of action, but the Respondent has to fully answer thereto.

[55] In evaluating the Applicant's FDF it is evident that her monthly expenses total an amount of **R55 729.73.**[26] These expenses however remain unexplained, uncanvassed and their reasonableness not evaluated. The Respondent were also not afforded an opportunity to dispute, if he so wanted, these expenses. The correctness of the aforesaid amount was not tested.

[56] If one has regard to the Applicant's monthly income as an article clerk of **R10 300.00** and of the Applicant's expenses amount of **R55 729.73** the Applicant is left with a shortfall of **R45 429.73**.

[57] The Applicant is notwithstanding the aforesaid shortfall of **R45 429.73** claiming **R25 000.00.** An amount of **R20 429.73** (R45 429.73 minus R25 000.00**)** accordingly remains unaccounted for and unexplained.

[58] It is abundantly clear that the Applicant's need for interim maintenance cannot be assessed and ascertained if her expenses and the amount claimed as maintenance are merely depicted in her affidavit and FDF, but not discussed and analysed.

[59] The Applicant's maintenance claim in an amount of **R25 000.00** is an amount pleaded without any link or reference to her expenses. The said amount also remained unexplained and not addressed during argument.

[60] I am of the firm persuasion that the Applicant's maintenance claim indeed lacks particularity and is unexplained and unsubstantiated. The Applicant has failed to adhere to rule 43(2)(a) of the Uniform Rules of court.

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[26] 01-74

[61] The Applicant has indeed spelled out that the Respondent earns significantly more than her. Nevertheless that in itself does not entitle the Applicant to maintenance *pendente lite*. The Applicant has to establish a need to interim maintenance.

[62] The Applicant had to deal with her need for maintenance by making full and frank disclosure of all relevant facts in sufficient particularity. Even more so in light of the fact that the claim relates to spousal maintenance *pendente lite.*[27] It is clear that if an Applicant is not entitle to maintenance at the divorce stage that maintenance *pendente lite* must also not be awarded. The Applicant in this matter accordingly had an obligation to address her maintenance claim with more precision and detail in order to satisfy the court of her right to maintenance. I am of the opinion that the Applicant has not done so in her sworn affidavit and will discuss this here in below.

[63] In evaluating the Applicant's need the court has to look at whether there was full and frank disclosure by the Applicant of all material facts.

[64] The Applicant in her affidavit did indicate that whilst teaching she paid an amount of **R14 000.00** of **R19 000.00** to the Respondent as per an arrangement, but she did not deal with:

i) the contents of the arrangement or

ii) how much she paid to the Respondent over a period of one year and four months to cover for her expenses.

The expenses paid by the Respondent for the Applicant's expenses over the course of marriage were only revealed to the court by the Respondent in his affidavit.

[65] As alluded to here in before the Applicant's expenses and their reasonableness were neither addressed nor explained in her affidavit. The Respondent could therefore not answer to these expenses and it leaves the court out in the cold as to their reasonableness.

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[27] Nilsson v Nilsson 1984 2 SA 294 C

[66] The Applicant also did not disclose her part time employment at Trinity House during or about August 2023 or what she earned from the said employment.[28] The Respondent also pleaded that the Applicant received a pension, as is evident from the IRP5 and the codes uploaded on Case-lines as Annexure *MN*.[29] The Applicant's pension is not disclosed in the Applicant's affidavit.

[67] Save for stating that the Applicant sold her Mini-Cooper and purchased a Suzuki Swift 1.2 after she vacated the former common home, the Applicant also failed to disclose the fact, as pleaded in her reply and plea to the Respondent's counterclaim that she sold the Mini-Cooper for **R430 000.00** and purchased a Suzuki Swift 1.2 for **R230 750.00**. She also omits to disclose the amount that she received after selling the Mini Cooper and purchasing the Suzuki Swift namely **R199 250.00** which she received on 21 November 2023. How this amount was utilized by the Applicant also remains unknown save for the allegation that it has been depleted.

[68] This court is in agreement with the Respondent that the Applicant should have disclosed in detail all relevant, material facts and grounds as to how she financially survived for four months after vacating the common household.

[69] Although the Applicant also pointed out that her mother assisted her with her monthly expenses and provided housing to her, she omitted to state which of her expenses her mother paid and the amounts. The court would have expected the Applicant to discuss this in great detail and precision as it specifically relates to the Applicant's needs.

[70] The Applicant furthermore does not deal with:

i) the fact that she studies at Boston College online,

ii) that, if she wanted to she can return to her preferred profession of teaching and

iii) that her earning capacity will increase significantly if she goes back to teaching as a profession.

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[28] Ad paragraph 49.7 at 02-25
[29] 01-128

The Court would have expected the Applicant to deal herewith in specific detail as it affects and has a bearing on the Applicant's claim for maintenance. The Applicant also being married out of community with the exclusion of the accrual refrained from dealing with her prospects of being successful in claiming maintenance in the divorce action.

[71] The Applicant's lack in pleading essential and material facts, as alluded to here in before, leads to a failure to establish whether a true need exists to be maintained. In addition thereto 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.[30] As a result there is a duty on all applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrimei fidei*) and to disclose fully all material information regarding their financial affairs.

[72] In *C.M.A v L.A*[31] 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 the following is said:

"[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;

[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 the evidence concerning the prevailing factual situation;

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[30] Murphy J in *Du Preez v Du Preez* (16043/2008) [2008] ZAGPHC 334 (24 October 2008)
[31] [2023] ZAGPJHC 364 (24 April 2023) at [25].

[25.3] The applicant's actual and reasonable requirements, and the capacity of the respondent to meet such requirements which are generally met from income, although, sometimes, inroads on capital may be justified;

[25.4] A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands, and similarly more weight will be attached to the affidavit of a respondent showing willingness to implement his lawful obligations;

[25.5] An interim maintenance order is not intended as an interim meal ticket for a spouse who, quite clearly, will not establish a right to maintenance at trial;

[25.6] A court must be circumspect in arming an applicant with an interim maintenance order which she is unlikely to achieve at trial, for human nature predicts that she will then seek to delay the finalisation of the action." (my underlining).

[73] All applicants in rule 43 applications accordingly have to succinctly, but with full particularity and honesty establish and disclose in their sworn affidavits the facts and grounds which would entitle them to the relief sought. The Applicant only has one opportunity in the founding affidavit to set out all the material facts and grounds relied upon as there is no right of automatic reply.

[74] The Applicant in this matter has deposed to a 16 page affidavit. Only 3 of these 16 pages deal with the claim for i*nterim* maintenance and a contribution towards costs. The remainder of the affidavit deals with the background facts and the Applicant's earning capacity.

[75] I am of the firm opinion that the Applicant has indeed failed to disclose all the material and essential facts and grounds as to establish her need to *interim* maintenance and a contribution towards costs. The Applicant had to strictly observe the provisions of rule 43 and to deliver a sworn affidavit with all the material, relevant

and essential facts.[32] The Applicant's rule 43 application is in my mind not self-contained. A court should not be required to search for answers as to how for instance the maintenance amount is arrived at. [33]

[76] The fact that the Respondent earns substantially more than the Applicant does not necessarily entitle the Applicant to the relief claimed. The Applicant still has to establish her need. It is trite that the person claiming maintenance must establish a need to be supported.[34]

[77] In order to establish a need the Applicant had to plead material facts as to:

i) the amount claimed as interim maintenance,
ii) why she pursues accounting whilst she prefers teaching where her earning capacity will be substantially more,
iii) give a detailed breakdown and discussion of her expenses and the reasonableness thereof,
iv) explain why she is entitled to a life of luxury after a short-lived marriage of one year and four months and
v) how she managed to survive financially for a period of four months after vacating the common household.

[78] The essential and material allegations set out in paragraph 77 here in above are lacking in the application before me.

[79] In *Taute v Taute*[35] the following was stated:
"*The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits as indeed is contemplated and intended by Rule 43*." (my emphasis).

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[32] *Van der Walt v Van der Walt* 1979 4 SA 891 (T);
[33] *Carstens v Carstens* 1985 2 SA 351 (SE).
[34] Harlech-Jones v Harlech-Jones [2012] JOL 27095 (SCA)
[35] 1974 (2) SA 674 (E)

[80] The principle that an Applicant is confined to the contents as set out in her founding affidavit in a rule 43 application is confirmed in *E v E and related matters [2019] 3 All SA 519 (GJ)* where the following is said:

> "|23] *Rule 43 applications as presently structured, are a deviation from normal motion proceedings in that the rule does not make provision for a third set of affidavits. The applicant is confined to what is set out in the founding affidavit, which must be in the nature of a declaration, setting out the relief claimed and on what grounds. On receipt, the respondent is required to file an answering affidavit in the nature of a plea. It is precisely this prohibition that causes the applicant to say more than what is required, knowing very well that there is no second opportunity to say more, which may in true prompt the respondent to file a lengthy answer.*" (my emphasis)

[81] The disclosure of all material facts is essential in a rule 43 application. This was voiced in *C.A v H.A (5578/2022) [2024] ZAWCHC 25 (6 February 2024)* where the following was said:

> *"[27] In a Rule 43 proceedings, it is prudent that the court should be satisfied that an applicant acts in good faith. Thus, an applicant simply cannot afford to omit facts in the founding affidavit that are vital to the application. Surely, if the applicant was willing not to reveal certain facts in her founding affidavit, she must certainly be willing not to be frank about weighty facts that would reveal the true state of her finances."* (my emphasis)

[82] Without a frank and full disclosure of all the material facts a court can simply not make a determination as to the Applicant's need and cannot quantify such a need.

[83] The Applicant before me selectively disclosed facts regarding her financial circumstances and did so at her own peril.

[84] As alluded to here in before the Applicant's calculation of interim maintenance of **R25 000.00** remains unexplained save for reference to her FDF which totals her

monthly expenses at **R55 729.73**. The reasonableness of her monthly expenses are not canvassed in the affidavit by the Applicant all.

[85] The Applicant in addition did not fully deal with and elaborate on the amounts which she paid to the Respondent which he would then pay in respect of her monthly expenses. She does not provide evidence of or proof as to when and for how long she in actual fact maintained these payments.

[86] Annexed to the Applicant's papers is also Annexure *MN*[36] which makes reference to the IRP 5 codes pertaining to a pension.[37] The Applicant did however not deal with any pension received in her papers.

[87] The Applicant also omitted to mention that since August 2023 she was employed part time at Trinity House and what she earned.

[88] The Applicant also did not fully and in detail explain how she managed to financially cope for four months since she vacated the common home.

[89] It was further the Respondent who advised the court as to the difference obtained as a result of the sale of the Mini – Cooper and the purchase of the Suzuki Swift. He indicated that she received **R199 250.00** which was deposited on 21 November 2023. [38] Although the Applicant mentioned the sale of the Mini Cooper she did not indicate the amounts received or how she utilized same. The value of the Applicant's mother's contribution to the Applicant's expenses was also not disclosed to the court.

[90] The Applicant's grandmother's loan to her in respect of the Applicant's legal fees was referred to by the Applicant, but there is not any details as to the contribution made by the grandmother.

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[36] 01-123
[37] 01-128
[38] Paragraph 64.2 at 02-36

[91] It is therefore abundantly clear that the Applicant made selective disclosure of the facts needed to establish her need for the relief sought, but not full disclosure.

[92] Accordingly, the court is of the opinion that the Applicant failed to set out sufficient facts and grounds to sustain her cause of action. All the relevant facts and grounds are not placed before me in order to properly assess whether a need exists and what the exact extent of this need is. Selective facts were disclosed which lead to a distorted and skew picture of the reality and this taints the claim.

[93] I am therefore of the view that the Applicant's cause of action is indeed incomplete and that the facts and grounds pleaded are not sufficient to sustain the Applicant's cause of action and assess the relief sought.

[94] I accordingly uphold the second *point in limine*.

[95] I therefore make the following order:

95.1 The application is dismissed with costs.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 24 July 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be h00 on 24 July 2024

S van Aswegen
Acting Judge of the High Court,
Johannesburg

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