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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

CASE NO: 2026-006447

In the matter between:

TRACEY AMANDA DICKER N.O.
(in her capacity as *curator ad litem* of

P[...] H[...] V[...] D[...] W[...]

Applicant

(Born U[...])

And

S[...] J[...] V[...] D[...] W[...]

Respondent

Coram: Pangarker J

Hearing dates: 2 July 2026

Judgment delivered: 7 September 2026

Summary: *Appealability of refusal of postponement application and costs contribution in Rule 43 application* – Respondent applies for leave to appeal orders granted in Rule 43 proceedings - Section 16(3) of the Superior Courts Act 10 of 2013 is a complete legal bar to appeals of Rule 43 orders – Is the refusal of a postponement application in Rule 43 proceedings, an order as contemplated in section 16(3)? – Despite several requests and warnings that section 16(3) and recent Constitutional Court and Supreme Court of Appeal decisions confirm that Rule 43 orders are not appealable, the Respondent's attorneys persisted with a leave to appeal application – The conduct of the Respondent's attorney(s) warrants an order of costs on an attorney and client scale *de bonis propriis* - Application for leave to appeal dismissed.

ORDER

1. The application for leave to appeal is dismissed.
 2. The Respondent's legal representatives, Theron & Partners/Vennote, Stellenbosch, are ordered to pay the costs of the leave to appeal application on an attorney and client scale, *de bonis propriis* which shall include the costs of senior counsel.
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JUDGMENT

PANGARKER J

Introduction

[1] The respondent seeks to appeal orders refusing an application for postponement and costs contribution granted in Rule 43 proceedings heard in March 2026. The application was opposed and despite the applicant alerting the respondent's attorney that the orders are not capable of appeal and should be withdrawn, the respondent and his attorneys have persisted with the application for leave to appeal.

Issues to decide

[2] Two issues arise for determination:

2.1 Whether the leave to appeal application is competent; and

2.2 Whether an order of costs de *bonis propriis* on an attorney and client scale should be granted against the firm of attorneys representing the respondent, Theron and Associates of Stellenbosch.

Brief background to the Rule 43 application

[3] In order to address the above, it becomes necessary to set out the relevant chronology of the matter and other material aspects. The parties are referred to as in the Rule 43 application and with reference to the legal representatives, I simply refer to them as "attorneys", so as to not confuse them with counsel briefed in the matter.

[4] The parties were married in 1979 and are currently embroiled in a defended divorce action instituted by the wife under case number 2025-036604 in March 2025. She is the plaintiff and has long-standing medical issues. In 2000, she was diagnosed with stage 3 breast cancer and underwent a bilateral mastectomy. At the time of the Rule 43 application, she was in remission.

[5] In 2019, she was diagnosed with osmotic demyelination syndrome which led to structural brain damage and in 2024, with temporal lobe epilepsy and mild dysexecutive disorder. She received treatment for chronic obstructive pulmonary disease, causing breathing difficulties. She is frail, is constantly monitored by medical professionals and was moved to a higher level of assisted living, also as a result of a fall in December 2025 which caused a stable pelvic fracture.

[6] It is, unfortunately necessary to point out an incident which occurred in early July 2025. The applicant (wife) was temporarily residing with one of the parties' daughters and attempted to commit suicide by jumping from the balcony of an 8th floor building. As a result, she sustained serious injuries from the fall and was treated in the intensive care unit of a private hospital, followed by in-patient rehabilitation and further treatment for her mental health.

[7] The applicant also received treatment from a psychiatrist and at the time of the Rule 43 application, she resided in the northern suburbs.

[8] On 30 July 2025, Cooke AJ granted an order appointing Tracey Dicker SC, a senior member of the Cape Bar, as the *curator ad litem* for the wife, (patient). The Rule 43 application was issued on 15 January 2026 under case number 2026-006447.

The postponement application and Rule 43 proceedings

[9] On 9 March 2026, the Rule 43 application came before me for hearing on the Third Division Motion Court roll. The parties were represented by attorneys and

counsel. The husband (respondent) had made a certain tender in respect of his wife's interim maintenance, accommodation, medical expenses and ancillaries, pending finalisation of the divorce action.

[10] The Rule 43 application (*"the application"*) was unopposed and was served on the respondent on 15 January 2026. It was evident that the parties, through their legal representatives, had engaged on the disputed issues in the matrimonial matter. The time to deliver a sworn reply to the application had lapsed 10 days after the application was served and thus, by 9 March 2026, the respondent was automatically barred from opposing the application.

[11] At, or shortly after 17h00 on Sunday 8 March 2026, the attorneys of the respondent served a formal postponement application on the applicant's attorneys, Catto Neethling Wiid of Cape Town. The request, in summary, was that the Rule 43 application set down for the next day, be postponed to another date for the respondent to be afforded time to consult with his attorney and prepare a condonation application with an answering affidavit. No condonation application was before the Court on 9 March 2026.

[12] At this juncture I do not intend to set out additional detail regarding the application for postponement. As will be evident from the further chronology below, the postponement application was vehemently opposed and was fully argued.

[13] After hearing counsel for the parties on the postponement and an appropriate costs order, and having considered the application, I delivered an *ex tempore* judgment immediately. The judgment concluded that, amongst other aspects, the prejudice to the patient/applicant were a postponement to be granted, outweighed prejudice to the respondent. An order was thus granted refusing the postponement with costs to stand over for determination of the Rule 43 order.

[14] The Rule 43 application was argued by Ms Buikman SC on behalf of the applicant and the legal representatives (attorney and counsel) of the respondent remained present in court during the application. After hearing counsel, a proposed draft order was handed up on the applicant's behalf. I adjourned the proceedings which stood down for consideration of an order and reasons to be delivered later.

Events after the Rule 43 hearing

[15] Having excused the legal representatives after hearing the Rule 43 application, and on return to chambers, I considered the papers, submissions, authorities and suggested draft order in more detail. It thus came as a surprise that Ms Vermaak of Theron and Partners emailed my registrar¹, seeking leave of the Court that the confirmatory affidavit by attorney and costs consultant, Ms CS van der Merwe, be incorporated in the Rule 43 application before judgment and in respect of costs.

[16] The email sought, quite irregularly, to place the affidavit before me after the postponement application was refused and the Rule 43 was argued on an unopposed basis. Unsurprisingly, Ms J Havermahl of Catto Neethling Wiid responded urgently to her colleague's email and included the registrar in the correspondence. Ms Havermahl informed Theron and Partners that in respect of the Rule 43, the respondent was barred, and his postponement application was refused prior to the filing of the van der Merwe confirmatory affidavit. The attempt to thus place the affidavit before the court in those circumstances were described as *"irregular and opportunistic in the extreme."*² Ms Havermahl requested that the affidavit be withdrawn, failing which appropriate steps would be taken and I would be approached urgently the next day regarding the irregular affidavit.

[17] Prior to 09h00 on 10 March 2026, at my request, the registrar informed the legal representatives that the postponement application was refused and an ex

¹ At 14h44

² Catto Neethling Wiid letter, 9 March 2026

tempore judgment was delivered on 9 March; that at that stage, the van der Merwe affidavit was not before the Court and in those circumstances, the respondent's attorneys could not subsequently seek/request to place the affidavit before the Court. The legal representatives were further informed that while the affidavit would be placed in the Court file, it was not before the Court. It ordinarily meant that the request for a meeting with me in chambers, was declined as there was no point in convening a meeting.

[18] On 10 March 2026, I granted an order in the Rule 43 application which included the payment by the respondent of the patient's interim maintenance, accommodation and ancillary expenses³; a costs contribution of R1 million which could be paid in instalments as well as future legal costs and costs of the application. On the first page of the order and with specific reference to the refusal of the postponement application of 9 March 2026, I granted a costs order against the respondent on an attorney and client scale⁴.

[19] The 10 March 2026 order was issued by the registrar on 11 March 2026 and emailed to all the legal representatives. On 13 March 2026, Ms Vermaak emailed the registrar, requesting that I be advised that they (the attorneys) requested written reasons in respect of the 10 March 2026 order. The e-mail also requested the audio recording of the Rule 43 application heard on 9 March. Attached to this e-mail, which included the legal representatives of the applicant, was a document called 'Request for written reasons'.

[20] The request for written reasons sought written reasons for the "*judgment and order, insofar as they relate to paragraph 1 of the order*"⁵. The request noted that an *ex tempore* judgment was delivered in respect of the postponement application and indicated that the respondent was considering an application for leave to appeal against paragraph 1 of the order. It is important to state that paragraph 1 of the order was the refusal of the postponement with costs on an attorney and client scale. I

³ Some of these orders were in line with the tender and the suggested draft order handed in on 9 March 2026.

⁴ Order 10 March 2026, par 1 – Costs stood over from 9 March 2026

⁵ Request for written reasons dated 13 March 2026

considered the correspondence and requested, on the same day,⁶ that the registrar obtains the transcribed *ex tempore* judgment in relation to the refusal of the postponement application.

[21] The transcript of the *ex tempore* judgment was received on 13 April 2026 and I proceeded to draft my response to the request for written reasons for the refusal of the postponement. For purposes of this judgment, suffice to point out that the written reasons largely echoed the *ex tempore* judgment but also referred to certain authorities regarding the principles related to postponements, which the *ex tempore* judgment does not do. A copy of the transcribed *ex tempore* judgment was attached to the written reasons for refusal of the postponement application and these were despatched electronically to all the legal representatives on 29 April 2026.

[22] During the last week of the term, on 25 March 2026, Theron and Partners indicated to the registrar per email that the respondent intended to apply for leave to appeal. Attached to the email was an application for leave to appeal to the SCA, alternatively the Full Court of this Division, against the whole of the judgment and order granted on 10 March 2026. In summary, the findings of fact and rulings of law appealed against are briefly, as follows:

- i. The Court erred in refusing the postponement and such refusal constitutes a misdirection.
- ii. The Court erred in granting an order related to payment of past legal costs.
- iii. The Court erred in granting costs of the postponement application on a punitive scale.

⁶ 13 March 2026

[23] The leave to appeal application also stated that the application may be supplemented on receipt of reasons for the judgment and order and that exceptional circumstances exist which warrant the granting of leave to appeal.

[24] The registrar informed Theron and Partners on the same day that they were required to file a hard copy of the leave to appeal application and the court file⁷; that she had requested a copy of the *ex tempore* judgment, that recess would commence on Monday 30 March and that the second term commenced 13 April. They would be advised of a date once the steps indicated were fulfilled.

[25] Further correspondence in the Court file dated 2 April 2026 indicates that Ms Havermahl alerted Theron and Partners to the fact that no appeal lies from an order granted in terms of Rule 43, including a contribution to costs; that the leave to appeal was not competent, does not suspend the Rule 43 order and should be withdrawn, failing which a punitive costs order would be sought. In addition, Ms Havermahl also indicated that the respondent had failed to comply with certain of the monetary orders in the Rule 43 order and he was given until close of business on 2 April to do so.

[26] I must point out that when the leave to appeal was emailed to the registrar, the respondent's attorney had as yet not brought the file to her as required by Practice Directive 45B. I thus issued no directive in respect of the leave to appeal hearing date. In my view at the time, a Rule 43 order which includes a costs contribution and a refusal of a postponement application in Rule 43 proceedings, were not capable of being appealed in light of the provisions of section 16(3) of the Act. As requested, written reasons were delivered in respect of the refusal of the postponement application.

⁷ In terms of Practice Note 45B

[27] On 29 April 2026, in terms of Rule 42(1)(b), I granted an order amending paragraphs 4 and 5 of the Rule 43 order dated 10 March 2026. The amendment related only to the dates on which the respondent was to commence his instalment payments of the costs' contribution. All the other orders in the Rule 43 order remained the same. At this stage, the end of April 2026, there was still no clarity as to the leave to appeal application and I was advised by the registrar that as the Court file had still not been delivered to her, no date could be allocated for the hearing of the leave to appeal. The amended order was emailed to all legal representatives on 29 April 2026.

[28] On 1 June 2026, attorney Ms Haywood of Theron and Partners, emailed the registrar noting that no date had yet been allocated for the hearing of the leave to appeal and reiterated that they awaited a hearing date. On checking with the registrar, the *status quo* remained: the registrar had requested Theron and Partners to deliver the Court file to her and still awaited same.

[29] During the week of 8 to 12 June, Theron and Partners eventually delivered the Court file plus an application for leave to appeal to my registrar, who placed the file and application before me for allocation of a hearing date. This signified the first time that the file and leave to appeal were formally delivered. It is also important to note that at this stage, three months had passed since the granting of the order refusing the postponement and the Rule 43 order. There was no withdrawal of the leave to appeal application and I decided to draft reasons for the Rule 43 order more especially as the leave to appeal included an attack on the costs contribution related to past legal costs. I emphasise that the Rule 43 application on 9 March 2026 was unopposed.

[30] On 10 June 2026, Ms Havermahl addressed correspondence to Theron and Partners informing them that notwithstanding drawing their attention to section 16(3) of the Superior Courts Act, which provides that no appeal lies against Rule 43 interim relief, the respondent was nonetheless persisting with the application for leave to

appeal. She indicated that *“it is the dismissal of your client's postponement application that is at the heart of your client's appeal”*⁸.

[31] Significantly, Ms Havermahl also emphasised that it was trite that no appeal lies against any judgment or order in connection with a Rule 43 application, including a postponement application. Furthermore, the order was not suspended by the application for leave to appeal and that they would proceed to enforce the Rule 43 order.

[32] Written reasons for the Rule 43 order were delivered on 17 June 2026. My view was that the leave to appeal should be heard as soon as possible, however, all the legal representatives were not available on the proposed dates. As I was on recess duty during the week 28 June to 3 July, the date of 2 July was set for the hearing of the leave to appeal application but the legal representatives were advised that as I was presiding in the urgent fast lane Court on the day, time limitations would apply in respect of the leave to appeal application and the urgent matters would be heard from 10h00.

The leave to appeal application on 2 July 2026

[33] At the hearing of the leave to appeal, the respondent was represented by Mr Felix, of the Cape Bar, who was not involved in the initial Rule 43 application in March 2026. At the commencement of his argument, he referred to the written reasons for the postponement refusal. It then became very clear that Mr Felix was unaware that on 9 March 2026, I had delivered an *ex tempore* judgment in respect of the postponement application and that the transcribed judgment was provided with the written reasons to all the legal representatives in April 2026.

[34] Mr Felix's instructing attorney -and I am unsure whether the attorney was Ms Vermaak or Ms Haywood-was present in Court during the hearing. From my vantage

⁸ Catto Neethling Wiid letter, 10 June 2026

point in Court, she clearly provided no visible assistance to Mr Felix, on his realisation that he was unaware of the judgment which I referred to.

[35] I indicated on record that the transcribed judgment was attached to the written reasons which the registrar emailed to all the legal representatives on 29 April 2026. It was clear to Ms Buikman as well that Mr Felix was unaware that I had delivered a judgment on the postponement application. To her credit, she indicated that it was no fault of Mr Felix that his attorney had not provided him with a copy of the transcribed judgment when briefing him for the leave to appeal.

[36] At that stage, and aware that urgent applications were already waiting in the wings to be heard at 10h00, Mr Felix requested an indulgence that the leave to appeal application stands down for a short while in order that he be provided with a copy of the transcribed judgment. Understandably, Ms Buikman and her attorney were unimpressed with the turn of events and the further delay but as stated, counsel appreciated her colleague's predicament and embarrassment.

[37] Certainly, at that stage my view was that it was not Mr Felix's fault that he was not provided with the transcribed judgment. My contemporaneous notes of the day indicate that the matter stood down at 10h00 for the urgent matters and I indicated that the leave to appeal would proceed at 14h15, but that the necessary time limits remained in light of the Fast Lane urgent matters which in my view, took preference.

The parties' submissions

[38] When the matter was recalled after the lunch adjournment at 14h15, Mr. Felix indicated that he had familiarised himself with the *ex tempore* judgment on the postponement application. He proceeded to address the Court on the leave to appeal application and argued that the Court committed a misdirection when it refused the postponement application. Mr Felix reiterated that the respondent wanted a

postponement in order to deal with and consult with a costs consultant and that settlement of the Rule 43 was previously attempted.

[39] Mr Felix submitted further that there was nothing materially wrong in the Court granting a short postponement of the Rule 43 application as well as costs against the respondent, as opposed to refusing the postponement and thus causing severe prejudice to him (the respondent). It was submitted on behalf of the respondent that another Court would reasonably come to a different conclusion on the postponement application.

[40] Insofar as the order for a costs contribution was concerned, the respondent's view was that the order of 10 March was extreme and drastic as it ordered the payment of a large sum of money. Counsel submitted that the Court should at least have allowed the respondent to put up a version regarding the applicant's prayer (in the Rule 43 application) for a costs contribution. The further submission was that past legal costs do not form part of relief under Rule 43.

[41] Ms Buikman reminded the Court that the respondent was not entitled to argue the leave to appeal in the first instance. In this regard, she referred the Court to section 16(3) of the Act, the Constitutional Court judgment of **S v S and Another**⁹ ("**S v S**") and the SCA's recent 2026 judgment in **BE v NT and Others**¹⁰ ("**BE v NT**"). She submitted that considering the legal principles and legislation, a Rule 43 order was not appealable, and this included an order for a costs contribution as set out in paragraph 4 of the Court's order dated 10 March 2026.

[42] Insofar as the Court's order refusing the respondent's application for a postponement of the Rule 43 hearing, Ms Buikman referred the Court to section 16(3) which specifically refers to orders or judgments in connection with Rule 43

⁹ 2019 (6) SA 1 (CC)

¹⁰ [2026] ZASCA 25

orders. Her submission was that this reference includes a postponement related to Rule 43 proceedings. Furthermore, she drew my attention to **EB v CB**, a Full Bench appeal decision of the Free State Division, Bloemfontein¹¹ where at paragraph 11.3 of the judgment, that Court had no doubt that the words “*any judgment or order in connection with*”¹² in section 16(3) include a reference to an order refusing a postponement in a Rule 43 application.

[43] Ms Buikman submitted furthermore that on three occasions her attorney had alerted Theron and Partners that in terms of section 16(3) of the Act, an application for leave to appeal was not competent and that the application should be withdrawn. She further emphasized that if the Court were to grant leave to appeal its orders, then it would mean that the Rule 43 order would be suspended for a year or more until it is heard by the Full Court of this Division, and that if the appellate Court were to find that the refusal of the postponement was wrong, then the Rule 43 application would be referred back to a single Judge for hearing. She argued that this was not the purpose of Rule 43 proceedings, if regard is had to section 16(3) and **S v S**, and that the application for leave to appeal was an abuse of the Court’s process. She contended that in all the circumstances, the leave to appeal application should have been withdrawn.

[44] In reply, Mr. Felix was of the view that section 16(3) does not specifically refer to a postponement and that generally, refusals of postponements are appealable. Insofar as the judgment of **EB v CB** was concerned, his submission was that the decision of the Full Bench of the Free State Division is not binding on this Court. Furthermore, the aspects raised in the leave to appeal application related to past legal costs was arguable.

Discussion and findings

¹¹ Case number A22/2020, delivered by Daffue J and Nekosie AJ on 19 October 2020

¹² Section 16(3) Superior Courts Act

[45] The respondent and his legal representatives hold the view that: (i) an order for past legal costs in a Rule 43 application does not constitute a costs contribution order in terms of Rule 43(1)(b) therefore it is capable of being appealed; and, (ii) an order refusing a postponement in Rule 43 proceedings is capable of being appealed as section 16(3) of the Superior Courts Act does not specifically refer to a postponement.

[46] Section 16 of the Act deals with appeals generally. Section 16(3) states 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 the 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.

[47] Section 16(3) must be read with Rule 43(1):

43 Interim relief in matrimonial matters

1. *This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:*

(a) Maintenance pendente lite;

(b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

- (c) *Interim care of any child;*
- (d) *Interim contact with any child.*

[48] Interim care and contact issues were not applicable in the Rule 43 application. It is evident from section 16(3) that no appeal lies in respect of an order or judgment in proceedings in connection with an application for interim maintenance between spouses and an application for a contribution towards the costs of a pending divorce¹³. Section 16(3) clearly refers to relief falling under the categories in Rule 43(1)(a) to (d).

[49] In the written reasons dated 17 June 2026 relating to the Rule 43 order, I referred to the judgment of Binns-Ward J in **AG v LG**¹⁴, wherein he found that there was no obstacle hampering an applicant in a Rule 43 application from seeking an order for a costs contribution which includes past legal costs or costs already incurred in relation to the main proceedings. In this regard, Binns-Ward J had regard to certain authorities, the principal of these being **AF v MF**¹⁵, a judgment by Davis J¹⁶.

[50] In a comprehensive analysis of previous authorities and sections 9 and 39(2) of the Constitution of the Republic of South Africa, 1996, Davis J concluded in **AF v MF** that a Court in a Rule 43 application for a costs contribution, was entitled to consider legal costs already incurred including debts incurred to fund such legal costs. Similarly, my written reasons related to the Rule 43 order also referred to **RM v AM**¹⁷, where Rogers J allowed costs related to interlocutory applications and an application to compel discovery as he considered these to fall within the ambit of Rule 43(1)(b).

¹³ My emphasis

¹⁴ [2020] ZAWCHC 83 par [16]

¹⁵ 2019(6) SA 422 (WCC) para [45]-[46]

¹⁶ At the time of the judgment, she was an acting Judge

¹⁷ [2019] ZAWCHC 86 par [24]

[51] From the above references, it is evident that decisions in this Division consider past legal costs as being included in the category of a costs contribution falling under Rule 43(1)(b). I share these views. The reference to the decisions of Rogers J and Binns-Ward J (as above) reinforced my view that an order granted in Rule 43 proceedings for past legal costs incurred is indeed included in an order for costs contribution in terms of Rule 43(1)(b). In my view the respondent's submission that an order for past legal costs, as granted at paragraph 4 of the 10 March 2026 order, is not an order in terms of Rule 43(1)(b), cannot be sustained.

[52] Turning to the postponement issue, section 16(3) states that “*no appeal lies from any judgment or order in proceedings in connection with...*” an application for interim maintenance, a contribution to costs of pending litigation, and interim custody and access of a child in pending matrimonial actions¹⁸. I agree with Mr Felix that section 16(3) of the Act does not specifically refer to an order refusing or relating to a postponement application. However, as seen below, there is a critical flaw in the argument advanced by the respondent.

[53] As recently as 11 March 2026, Govindjee AJA, writing the unanimous judgment for the SCA in **BE v NT**, expressed the SCA's view on the issue of its jurisdiction to entertain an appeal against a Rule 43 order where the SCA's intervention was sought on the basis of the all-inclusive mantle, the interests of justice:

“[17] A central consideration in the interests of justice analysis is the express statutory scheme. Section 16(3) of the Act provides, notwithstanding any other law, that no appeal lies from any judgment or order in proceedings in connection with an application by one spouse against the other for maintenance pendente lite. The relief granted in paragraph 1.1 of the high court's order, which directed the payment of R40 000 per month as cash maintenance pendente lite, falls squarely within the ambit of this subsection.

¹⁸ Section 16(3)(a) – (d)

The order was made under rule 43 and is, by its nature and terms, interim and operative only pending the final determination of the divorce proceedings. So too are the other orders the appellant seeks to appeal. The existence of a clear statutory bar is a weighty consideration against appealability, reflecting a deliberate legislative choice to exclude interim matrimonial orders from appellate scrutiny.”

[54] In paragraph [17] of **BE**, the SCA thus sounded a reminder to parties and legal practitioners that there exists express statutory exclusion of the appealability of Rule 43 orders in the form of section 16(3) of the Act. While the detail and merits of **BE** are not relevant to this matter, in my view, **BE** entrenched the earlier 2019 finding by the Constitutional Court in **S v S**¹⁹ which held, *inter alia*, that parties are prevented from appealing Rule 43 orders in terms of section 16(3)²⁰.

[55] In **S v S**, the Constitutional Court considered the remedy available to a disgruntled litigant pursuant to the granting of a Rule 43 order against them. My understanding of the judgment is that **S v S** considered the remedies available pursuant to a Rule 43 order, to be the following:

- i. The dissatisfied litigant may utilise Rule 43(6) and seek a variation of the order where there is a change in material circumstances, albeit that the sub-rule has its limitations.²¹
- ii. Secondly, in an exceptional case, where no changed circumstances exist, but where “*there is a need to remedy a patently unjust and erroneous order...*”, and where the interests of justice would trump strict adherence to Rule 43(6), the High Court may exercise its inherent power in terms of section 173 of the Constitution.²² I must stress that for this possible course, there must be no changed circumstances relevant to the litigant; their case would have to be exceptional, and, the interests of

¹⁹ 2019 (6) SA 1 (CC)

²⁰ Par [41]

²¹ **S v S** supra, par [49]

²² **S v S** supra, par [58]

justice would have to prevail for the High Court to exercise its inherent power in terms of section 173 of the Constitution.

- iii. Thirdly, **S v S** makes it abundantly clear that a Rule 43 order is of a temporary nature and lasts until the issues in the divorce action are finally determined at a trial. Given that Rule 43 orders often exist longer than initially expected, the Constitutional Court expressed the view that this is “*the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself.*”²³ The dissatisfied litigant against whom the Rule 43 order was granted, has a remedy in that all the issues, including the interim Rule 43 order, would be determined finally at a hopefully expeditious divorce hearing²⁴.

[56] Mr Felix argued that in the *ex tempore* judgment I referred to Rule 43(6) but that it was not available to the respondent as there were no changed circumstances. The submission was made to convince this Court that it is arguable that section 16(3) applied in such circumstances. To clarify, the *ex tempore* judgment on the postponement states that Rule 43 has its own mechanism available to it in respect of a variation application²⁵.

[57] With respect, the argument does not get out of the starting blocks. Despite the definitive statement issued by the Constitutional Court in **S v S** that section 16(3) of the Act serves as a legislative bar to an appeal of a Rule 43 order, the respondent and his attorney have paid little or no attention to the findings in **S v S** and **BE v NT**.

[58] Section 16(3) very clearly states that no appeal lies from any judgment or order in proceedings in connection with a Rule 43 application. There can simply be no debate that the words “*any judgment or order in proceedings in connection with...*” excludes a refusal of postponement order and a costs contribution related to

²³ Par [54]

²⁴ S v S supra par [55]

²⁵ Transcribed judgment 9 March 2026, p6

past legal costs. At the risk of stating the obvious, a postponement application does not occur in isolation or independently of the main proceedings/action/case, whether the latter is criminal or civil in nature.

[59] In this matter, the respondent, because he wished to bring a condonation application, applied for a postponement of the Rule 43 application on 9 March 2026. The postponement thus related to the main Rule 43 application and it follows that the order which I granted at the conclusion of the *ex tempore* judgment, refusing the postponement, was an order in the proceedings in connection with the applicant's Rule 43 application.

[60] Furthermore, in my view, the finding of the Full Bench of the Free State in **EB v CB** is correct and I align myself with that Court's interpretation of section 16(3) of the Act Daffue J (with Nekosie AJ concurring) states as follows:

*"I have emphasised the words "any judgment or order in connection with." There cannot be any doubt that this includes an order refusing an application for postponement in connection with an application by one spouse against the other for, inter alia, maintenance pendente lite and/or a contribution towards costs in a pending matrimonial action."*²⁶

[61] In view of the findings in the above-mentioned cases as read with section 16(3), I thus accept the submission of Ms Buikman that this Court's order which refused the respondent's postponement application on 9 March 2026, is not capable of being appealed. Section 16(3) constitutes a permanent bar on an attempt to appeal such order.

[62] In respect of the order of 10 March 2026 which granted a costs contribution including the payment for past legal costs, the respondent's view that the order is

²⁶ P6, par 11.3

appealable suffers a similar fate. The alleged unfairness of the order and steep amount of the costs contribution are not issues for this judgment. I have already explained above why an order for past legal costs in Rule 43 proceedings is a competent order and forms part of a Rule 43(1)(b) order.

[63] To be clear, all the orders granted in the Rule 43 order of 10 March 2026, which thus include the order for past legal costs²⁷, are simply not capable of being appealed because they are orders granted under or in terms of a Rule 43 application.

[64] Had there been any doubt about the wording and interpretation of section 16(3) of the Act ²⁸ and there should not have been, then **S v S** and **BE v NT**, had they been considered by Theron and Partners, should have put paid to such doubt. In conclusion, and considering the above discussion and findings, the order refusing the postponement application (9 March 2026) and the Rule 43 order including the costs orders (10 March 2026) are not capable of being appealed. Accordingly, the application for leave to appeal shall be dismissed.

The request for costs *de bonis propriis* against Theron and Partners

[65] I turn to the question of costs. Ms Buikman requested that an award of costs on an attorney and client scale *de bonis propriis* should be granted against Theron and Partners for several reasons.

[66] She submitted that on three occasions, her attorney had informed Theron and Partners that the application for leave to appeal was incompetent because it was not allowed in terms of section 16(3) and the correspondence was simply ignored. The

²⁷ Par 4 of the order

²⁸ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18], which inter alia, makes it clear that a sensible meaning is to be preferred when interpreting a statutory instrument

request to withdraw the leave to appeal was refused and Theron and Partners insisted on proceeding with the leave to appeal application. She submitted further that the application was an abuse of the Court process, led to a delay in the implementation of the costs contribution and that the actions of the respondent are assisted by his attorney.

[67] In further support of a costs *de bonis propriis* order, Ms Buikman submitted that Court time as well as the time of the administrative officials were taken up during recess for an incompetent leave to appeal application and that the attorney of Theron and Partners embarrassed their counsel who was unaware that a judgment was delivered by failing to provide counsel with a copy of the judgment despite the fact that it was sent to all involved in the matter. She emphasised that the Court should be reminded that Theron and Partners were driving the application and insisted that the leave to appeal proceeds in circumstances where there was a legal bar, resulting in urgent matters, which were preferent, having to wait until the leave to appeal hearing concluded.

[68] In reply Mr. Felix argued that an order of costs *de bonis propriis* was not appropriate because the aspect regarding section 16(3) was not settled in relation to the costs aspect, and that the Court was not bound by the Free State judgment, **EB v CB**. He persisted with the view that the refusal of the postponement is/was appealable and relies on **MEC for Health, Gauteng v Lushaba**²⁹ for the view that Theron and Partners need not have responded to Catto Neethling Wiid's correspondence notifying them that an order of costs *de bonis propriis* would be sought against them. The argument persisted that the 9 and 10 March orders respectively were capable of being appealed and that the matter was therefore arguable.

Discussion and findings on costs

²⁹ 2017(1) SA 106 (CC)

[69] Costs orders are within the discretion of the Court. Generally, punitive costs orders are not the order of the day and various factors and conduct are considered in the exercise of the Court's discretion to grant an award of costs on an attorney and client scale.

[70] It thus comes as no surprise that an order that a legal representative should be held personally liable for the costs of proceedings is an exceptional order. In this regard, I am mindful that *"legal practitioners are expected to pursue their clients' rights and interests fearlessly and vigorously without undue regard for their personal convenience"*³⁰.

[71] In ***Thunder Cats Investments 49 (Pty) Ltd and Others v Fenton***³¹, le Grange J held that an order holding a party's legal practitioner liable for the costs of legal proceedings is unusual and far-reaching. The Court found that counsel's persistence and conduct in the matter put the opposition to unnecessary trouble and expense and ordered that counsel and the first and second respondents pay the applicant's costs, jointly and severally, on an attorney and client scale.

[72] In ***Adendorffs Boerderye v Shabalala and Others***³², there was non-compliance with the rules of the SCA, a change of counsel, and lack of urgency by the respondent's attorney, which led that Court to find that such conduct was slack, unreasonable, discourteous to the Court and opponent, and egregious³³.

[73] I appreciate that errors of law, a failure to comply with the Rules or an administrative oversight is a daily occurrence in litigation, and not ordinarily met with

³⁰ Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) par [34]

³¹ 2009 (4) SA 138 (C) par [30]

³² [2017] ZASCA 37

³³ Par [42]

a costs order *de bonis propriis* against a legal practitioner. The conduct of Theron and Partners, having regard to the leave to appeal application, is summarised below:

- i. The attorney attempted, irregularly so, to place an affidavit before the Court which was not part of the Court record at the time, and after the postponement application was already refused and the Rule 43 application was heard. While this action occurred prior to the leave to appeal, it is indicative of the manner in which Theron and Partners elected to conduct the Rule 43 matter.
- ii. Two sets of written reasons were requested with an expressed intention that they (the attorneys) were considering applying for leave to appeal the postponement refusal, the Rule 43 costs contribution and costs. At that stage already, Theron and Partners should have been alive to the law: section 16(3), **S v S** and **BE v NT** made it clear that the orders are simply not appealable.
- iii. Despite the registrar's requests and further reminder that the Court file should be delivered to her and that a date cannot be allocated for the leave to appeal, it took Theron and Partners more than two months to comply with the Practice Directives of this Division in relation to leave to appeal applications. They insisted in email correspondence that a hearing date be allocated for the leave to appeal, despite the non-compliance with the Practice Directives.
- iv. Furthermore, despite a legitimate request by Catto Neethling Wiid that they withdraw the leave to appeal application and two more notifications that section 16(3) is a bar to an appeal of Rule 43 orders, Theron and Partners were undeterred. They refused to withdraw the leave to appeal even under threat of a notice on 22 June 2026 that a costs *de bonis propriis* order would be sought. Theron and Partners persisted on proceeding with an ill-fated application for leave to appeal on behalf of the respondent.

- v. On the conduct and facts before me, I am left with no other conclusion but that Theron and Partners were either ignorant of the provisions of section 16(3) and the jurisprudence of the Constitutional Court and SCA on the question of appealability of Rule 43 orders and orders granted in such proceedings, due to a lack of research or they simply failed or refused to appreciate its applicability to the orders granted in March 2026. The arguments presented during the hearing on 2 July 2026, were silent on the Constitutional Court and SCA judgments which Ms Buikman referred to.
- vi. As if all the above factors were not already cause for concern, and having been in possession of the *ex tempore* judgment since 29 April and also having been present in Court on 9 March when the judgment was delivered, the responsible attorney (and it is unclear who the attorney is) of Theron and Partners simply failed to provide their new counsel, Mr Felix, with a copy of the judgment, thus causing him embarrassment in open Court in the presence of colleagues. This negligent conduct by failing to provide their counsel with a proper brief for the leave to appeal smacks of a lack of care and diligence.
- vii. In addition to the above, Theron and Partners did not respond to the notice that a costs order *de bonis propriis* order would be sought. While Mr Felix argued that the notice in the 22 June letter that costs *de bonis propriis* would be sought does not all for a response, Theron and Partners are officers of the Court and as such should assist the Court especially where an exceptional and punitive costs order was sought against them. They failed or refused to do so, once again, displaying a remarkable lack of care and concern. Instead, they continued to punt the view that the refusal of the postponement and costs contribution orders are appealable and that the matter is arguable.

[74] The conduct of Theron and Partners in driving a hopeless case, one which is not sanctioned nor competent in law, has resulted in protracted proceedings, an escalation of costs, and a waste of judicial and Court time. As in the matter which came before Gamble J, **Adams v Adams**³⁴, where the attorney was the driving force behind a hopeless application, so too in this leave to appeal application. The respondent is a 68 year old man, and relies on the legal advice given to him in relation to the Rule 43 application and the subsequent steps taken in the matter in that an application for leave to appeal was competent in the circumstances.

[75] The legal advice that orders granted in Rule 43 proceedings and in connection with a Rule 43 application are capable of being appealed, is simply bad legal advice. Theron and Partners' conduct in simply ignoring legislation and the decisions of the Constitutional Court and SCA, in order to push for an application for leave to appeal the Rule 43 orders, displays reckless litigation, a lack of care, unreasonable conduct toward the applicant, her legal representatives and the Court, and a failure to properly research and consider the law. There is no reason, in my view, why the respondent, an elderly man, should bear the costs of the leave to appeal application.

[76] As a result of the stance adopted by Theron and Partners in persisting with the leave to appeal, an application, which should never have been brought in the first place – the application has had to be accommodated in the recess period and on a day when I was seized with urgent applications. The urgent application which was due to be heard in the afternoon of 2 July, had to wait until I had heard the submissions in this application which, as mentioned above, had to stand down because Theron and Partners had failed to properly brief Mr Felix. Their conduct, considered in light of all the factors, described in this judgment, is egregious and strongly deprecated.

[77] This is not a situation where an attorney had simply made a mistake or failed to comply with the Rules of Court. Such conduct or omission would have been

³⁴ WCC, case no. 23829/2012, delivered on 17 April 2014

understandable. In this instance, Theron and Partners had failed or refused to consider why orders granted in Rule 43 proceedings are simply not appealable. This is to avoid Courts having to hear applications in terms of section 18 of the Act to suspend an order, or urgent appeals, leave to appeals to the SCA and more.³⁵

[78] Rule 43 proceedings should be expeditious, yet by insisting that the orders are appealable, when they are not, Theron and Partners have not only ignored established legal principles but also simply disregarded the fact that the wife/patient is a vulnerable and frail individual, with certain mental health challenges and is under curatorship, and that it would be in the interests of justice that the divorce action is finalised as soon as possible. Instead, I have been seized with an application which required more time, research, consideration of a hopeless argument and having to write a judgment which is the fourth judgment/reasons in a matter emanating from Rule 43 proceedings and orders granted in March 2026.

[79] It would be appropriate to remind practitioners who intend to advise their clients that orders granted in Rule 43 proceedings³⁶ are capable of being appealed, that such advice is bad in law. Furthermore, punting a useless case by insisting that such orders, including a refusal of a postponement in a Rule 43 application are appealable may attract a personal costs order against the legal practitioner who insists on embarking on such a doomed course.

[80] Lastly, Ms Buikman alerted me to the fact that the costs regarding the refusal of the postponement was reserved. That was indeed so on 9 March 2026, but I point out that a costs order on an attorney and client scale was granted on 10 March 2026 in respect of the refusal/dismissal of the postponement application.³⁷

Order

³⁵ Sv S supra par [30]-[32]

³⁶ Also Rule 58 orders in the Regional Courts

³⁷ Par 1 of the order

[81] In the result, I grant the following order:

1. The application for leave to appeal is dismissed.
2. The Respondent's legal representatives, Theron & Partners/Vennote, Stellenbosch, are ordered to pay the costs of the leave to appeal

application on an attorney and client scale, *de bonis propriis* which shall include the costs of senior counsel.

M PANGARKER
JUDGE OF THE HIGH COURT

Appearances

For Plaintiff (Applicant)	Adv L Buikman SC
Instructed by:	Catto Neethling Wiid Attorneys
	CAPE TOWN

For Defendant (Respondent):	Adv K Felix
Instructed by:	Theron & Partners
	STELLENBOSCH