Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 094387/23

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **YES**

22 April 2024
DATE SIGNATURE

M[…] N[…] Applicant

And

A[…] L[…] N[…] Respondent

ORDER

The application is dismissed with costs

JUDGMENT

NEUKIRCHER J:

[1] This rule 43 application was launched by the applicant on 27 November 2023. The founding affidavit is 58 pages long and, together with its annexures, is 144 pages. The confirmatory affidavits, of which there are 4, are unsigned and signed copies were then filed separately bringing the entirety of the founding papers to 160 pages. To this, the respondent then had to answer. As a result, his answer is 76 pages long. In addition, both parties filed further affidavits in terms of rule 43(5): the respondent's rule 43(5) is 17 pages whilst the applicant's is 90 pages. The applicant then also filed an amended notice of motion.

[2] The parties then each filed heads of argument – those total another 133 pages. And then, lest it be forgotten, each party filed their respective Financial Disclosure Forms (FDF) – these total another 265 pages.

[3] Rule 43 is a *sui generis* type of application. The rule itself makes provision for the filing of affidavits and the time periods within which a party must do so. It also makes provision for the manner in which a matter is to be set down for hearing. This being so, and the rule being specific and self-contained, rule 6 does not apply to rule 43

applications, and a party does not have a choice as to which rule of court to follow when launching rule 43 proceedings.[1]

[4] This also applies to the filing of any supplementary affidavit as rule 43(5) provides:

> *"The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision."*

[5] Rules 43(2) and 43(3) regulate the affidavits to be filed:

a) rule 43(2)(a) provides that the applicant *"shall deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds therefor…"*

b) rule 43(3)(a) provides that the opposing affidavit shall be *"in the nature of a plea."*

[6] One cannot lose sight of the fact that pleadings consist of a summary of the facts upon which a party will rely in order to either bring its suit or defend a suit. A pleading does not, and should not, contain evidence. But – in general - the eventual trial will conclude, and be decided, based on the evidence *inter alia*, presented by various witnesses. Motion proceedings brought in terms of rule 6 are very different – affidavits must contain evidence upon which a party relies to found or oppose an application. A rule 43 application is no different save in one material respect: rule 6 does not provide at all for the length of the affidavits that may be filed and allows for 3 sets of affidavits to

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[1] Leppan v Leppan 1988 (4) SA 455 (W) at 57E-G

be filed; rule 43 is markedly different as it provides for the affidavits to be filed *"in the nature of"* a declaration and a plea and also provides that only 2 sets of affidavits may be filed unless the court permits further evidence under rule 43(5). In *CT v MT and Others*[2], this was explained as follows:

> *"…the rule-maker is saying, I think, that in the quest for brevity the claim and defence should be more like a declaration and a plea than like a founding affidavit and opposing affidavit."*[3]

[7] The reason for this is clearly contained in rule 43(5): it is *"to ensure a just and expeditious decision"* and a court cannot *"amend a Rule of Court by simply following its own head."*[4]

[8] In a host of authorities as far back as 1961,[5] until 2019,[6] our courts roundly discouraged the type of abuse of process evident in this case, by either striking the matter from the roll or dismissing it or making no order on the papers. In *Smit v Smit*[7] the application was 69 pages long and the court remarked:

> *"To frustrate and/or defeat the purpose or object of a Rule of the Court is an abuse of the process of this Court. When the Rule was first promulgated, the parties had to file an unsworn statement in the nature of a declaration or a plea.*

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2 2020 (3) SA 409 (WCC)

3 At para 23

4 Leppam v Leppan (supra)

5 Colman v Colman 1967 (1) SA 291 (C) at 292H: *"the whole spirit of Rule 43 seems to me to demand that there should be only a very brief statement by the applicant of the reasons why he or she is asking for the relied claimed and an equally succinct reply by the respondent and that the Court is then to do its best to arrive expeditiously at a decision as to what order should be made pendente lite."*

6 E v E 2019 (5) SA 566 (GJ)

7 1978 (2) SA720 (W)

The rulemaker then saw fit to change the Rule so that a sworn statement in the nature of a declaration or a plea had to be filed. Initially the unsworn statements were in the nature of declarations or pleas. After the Rule was changed so that the sworn statements had to be filed, these statements became more and more detailed. I am advised by the Registrar of this Court that it has now become almost a common practice to file lengthy affidavits and annexures, which would not properly form part of a pleading, in Rule 43 proceedings, nothwithstanding the judgment in this and other Divisions to the contrary.

In my view, the affidavits filed in this matter amount to an abuse of the process of this Court…"[8]

[9] In *Andrade v Andrade*[9], Erasmus J again emphasized that *"(t)he object of the Rule generally accepted by the Courts is that applications of this kind*[10] *should be dealt with as inexpensively and expeditiously as possible"*, and that an application to strike out impermissible unnecessary paragraphs and/or annexures is not a proper procedure under rule 43 as *"(t)he procedures under Rule 43 have been specifically devised by the Rulemaker in order to save time and costs."*[11]

[10] In *Du Preez v Du Preez*[12], the court chastised the attorneys for filing an application of 192 pages and stated:

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8 At 722G-H
9 1982 (4) SA 854 (O) at 855F
10 Whether under rule 43(1) or rule 43(6)
11 At 856A
12 2009 (6) SA 28 (T)

"[3] Rule 43, it is well known, is a special procedure aimed at the expeditious resolution of maintenance issues pendente lite…

[5] Prolixity in a rule 43 proceeding is an abuse of process because it defeats the purpose of the rule…"

[11] In 2020, Rogers J reiterated the position that

"[22] In regard to procedure, the applicant has not complained about the requirement in rule 43 that the claim should be made by a sworn statement 'in the nature of a declaration' (rule 43(2)) and that the defence should be made by a sworn reply 'in the nature of a plea'. Precisely what the quoted phrases mean is open to debate. Clearly the rule-maker intended that the sworn statements should not be prolix. Rule 43 was intended to provide inexpensive and expeditious interim relief (S v S and Another 2019 (6) SA 1 (CC) para 43)."[13]

[12] Whilst this has, in general, been the position held by courts across South Africa, of course there will be circumstances where a court will allow a deviation from the rules in circumstances where the issues may be somewhat complex or difficult.[14] It cannot be over-empahasized that a "one size fits all" approach cannot be implemented in rule 43 applications: each set of circumstances and family dynamics are unique and a court must always bear in mind that, where the interests of minor children are involved, the Constitution provides that in every matter concerning a child, that child's best interests

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13 CT v MT and Others supra

14 Dodo v Dodo 1990 (2) SA 77 (W) at 79C-F

are of paramount importance.[15] This constitutional imperative is repeated in s9 of the Children's Act 38 of 2005.[16]

[13] On 29 September 2017, Rules 43(7) and 43(8) were deleted. These two rules stipulated the fees payable to practitioners. These set fees could not be deviated from without the permission of the court.[17] Whilst lengthy applications were, prior to this, the exception, subsequently it seems that they have become the proverbial rule. The decisions of *TS v TS*[18] and *E v E*[19] it appears, have done little to ameliorate the position and, in fact, are being used liberally to exacerbate it. But I do not interpret these two decisions as allowing the kind of abuse of the rule that parties these days seem to advocate.

[14] In *TS v TS*, Splig J lamented that the Constitutional imperatives particular to adjudicating the 'best interests of the child' principle, particularly in matters regarding the interim maintenance of minor children, are obfuscated by the succinct affidavits required by rules 43(2) and 43(3). However, his solution to the issue was twofold: firstly, that the parties must file a proper FDF which would be available not just for the divorce action, but also to the judge in the rule 43 application, and secondly the provisions of rule 43(5) which would allow for further evidence to be made available to the court at its behest.

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15 S28(2)

16 "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

17 Varkel v Varkel 1967 (4) SA 129 (C) at 131H; Micklem v Micklem 1988 (#) SA 259(C) at 265E-F

18 2018 (3) SA 572 (GJ)

19 2019 (5) SA 566 (GJ)

[15] In *E v E* the Full Court reiterated that *"(t)he procedure envisaged in rule 43 is not of a normal application commenced by way of a notice of motion. It is a succinct application, aimed at providing the applicant interim relief, speedily and expeditiously."*[20] Whilst the Full Court ruled that prolixity may no longer be used by the courts as a reason to strike a matter from the roll,[21] it could not – and certainly did not – remove a court's discretion to prevent an abuse of its process by a litigant. I also do not interpret *E v E* as allowing parties to file applications which are – as in this matter – hundreds of pages long, without proper justification.

[16] The Rules Board is established in terms of s2 of the Rules Board for Courts of Law Act no 107 of 1955. In terms of s6(1):

> *"(1) The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Courts and the lower courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Courts and the lower courts regulating-*
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> > *(a) the practice and procedure in connection with litigation, including the time within which and the manner in which appeal shall be noted;"*

[17] Thus, it falls within the sole purview of the Rules Board to amend the rules of court – this would include rules 43(2) and 43(3). A court's Practice Directives achieve a very different objective: in my view they streamline the conduct of business within a

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[20] At para 25

[21] Its view was that the unnecessary or irrelevant material should be struck out

division to ensure the efficient running of the court so that justice may be seen to be done and all litigants – whether in person or represented - have proper access to justice. That can only be achieved if everyone is subjected to the same processes. I say this because parties have, on several occasions, argued that *E v E* has effectively done away with the requirement that the affidavits must be brief – this can never be the interpretation and (as far as I am aware) no directive has been issued by any court in which this is stated. In any event, even if that was the intention of the Full Court, it cannot be sustained because only the Rules Board has the authority to amend the rule.[22]

[18] As I have already explained, the lengthy affidavits filed in this application were not filed at the behest of the court in order to adjudicate the best interests of the two-year old minor child – they were filed at the inception of the matter and in order to oppose it. As I have also set out, this is not the proper procedure to be adopted. Given the manner in which the applicant has litigated this application, I find that the application constitutes little more than an abuse of process. It is impossible to strike out allegations in the affidavit as it is all interwoven and would leave the application without any foundation. Accordingly, the application will be dismissed with costs.

[19] Even were I persuaded that the applicant is entitled, as of right, to file a lengthy application and Rule 43(5) affidavit, I am in any event of the view that her application is an abuse of the rule 43 process.

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[22] And in any event, the Directive of this Division have not been so amended

[20] In this matter, the minor child was born on 7 January 2022 and is now 2 years and 3 months old. The minutiae of the parties' relationship, the allegations levelled by the applicant against the respondent to justify the curtailed contact arrangements she seeks, took some 95 paragraphs to set out and hark back to events in 2015 – i.e. 7 years prior to the minor child's birth. Primary care and residence of the minor child is not in issue in this application; what is in issue is the extent of the respondent's contact to the minor child.

[21] The applicant then not only claims maintenance, but also arrear maintenance for the minor child. Her maintenance claim (as argued) is R35 629,42 per month[23] and the arrear maintenance is approximately R234 784.[24] But context here is everything: lest one may think that the respondent has shirked his financial responsibilities to the minor child, he has not. He has paid maintenance for him of approximately R28 500 per month (including a cash contribution of R13 500 per month) since 2023.

[22] And then one must also take into account the parties respective earning capacities: the respondent earns R81 000 per month net and receives a quarterly bonus. This puts his net salary in the region of about R91 000 per month. He has two sons from a previous marriage for whom he pays a total of R25 000 per month and then he still pays the applicant another R28 500 per month for their two-year old child. Thus, before he pays any of his own expenses, more than half his salary is utilized towards

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[23] Plus 50% of two extra-mural activities on a quarterly basis and 50% of the minor child's speech therapy sessions

[24] Per the Rule 43(5) amendment

the maintenance of his three children. He has no notable assets of value and no notable savings.

[23] In contrast, the applicant earns R64 309 per month and receives a gross bonus of R624 000 annually. She also receives a net rental income from a property of R2 700 per month. This puts her net monthly income at approximately R105 000. Added to this is the fact that she has other assets, including savings of R400 000.

[24] The respondent is presently paying more maintenance for his two-year old son than for both of his older children. This is in circumstances where his financial position cannot be equated to that of the applicant and where she is clearly in a much stronger financial position than he. I find her prayer for more maintenance for the minor child excessive and not commensurate with the parties' means. It is an abuse of process and it is also contrary to the entire ethos of rule 43 which is, *inter alia*, to place parties on as equal a footing as possible vis-à-vis maintenance and litigation.

[25] In sum, this application is an abuse as:

(a) primary care and residence of the minor child is not in dispute and no order is required to settle that issue at this stage. It is undesirable and unnecessary to bring an application simply to confirm a *status quo*;

(b) the respondent's disputed terms of contact require an investigation by the Office of the Family Advocate – both parties seek this relief in their respective orders. There is no reason at all for this court to be burdened with making only

such an order as the parties have had since November 2023 to complete and serve an Annexure B and they can still do so;[25]

(c) the respondent is paying maintenance and has done so since 2023. There is therefore no need demonstrated on these papers for the court to interfere or to protect the minor child's interests by making such an order – again, the court cannot be required to simply confirm a status quo;

(d) the applicant has failed to prove that she has made out a case *pendente lite* for arrear maintenance;

(e) the applicant abandoned her request for a contribution to her legal costs – correctly so in my view.

[26] Therefore, I am of the view that no matter how one views this matter, the application is an abuse of process.

ORDER

[27] The application is dismissed with costs to be taxed on Scale A.

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B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is

[25] In terms of the Mediation of Certain Divorce Matters Act 24 of 1987

reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 April 2024.

Appearances:

For appellant :	Adv LM Nigrini
Instructed by:	Ulrich Roux and Associates
For respondent:	Adv C van Schalkwyk
Instructed by:	Bronwyn May Attorneys Inc
Date of hearing:	15 April 2024
Da te of judgment:	22 April 2024