

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



**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO.5472022

In the matter between:

J V W

Applicant

And

P V W

Respondent

JUDGMENT

TOKOTA J

[1] The applicant and the respondent were married to each other out of community of property on 9 February 1991. The parties are embroiled in divorce proceedings before this Court. Pending the finalisation of the divorce, the applicant is approaching this court seeking an order, *pendente lite*, in the following terms:

- (a) Maintenance for herself and her daughter, who is 23 years old, in the amount of R54 801.50;
- (b) Contribution towards her past legal costs in the amount of R33 954.80;
- (c) Contribution towards future legal costs in the amount of R199 939.00;
- (d) Contribution towards costs of forensic accountant in the amount of R500 000;
- (e) Contribution towards costs of appraised evaluator in the amount of R29 100.

The application is opposed by the respondent.

[2] At the hearing of this matter, I raised a legal point that my *prima facie* view was that the application did not comply with Rule 43 of the Uniform Rules of Court. Mr *Kotze* appearing for the respondent did not have his heads of argument and sought leave to file them later and would deal with my concerns in those heads of argument. Mr *Cole* SC who appeared for the applicant had filed his heads of argument but indicated that he would like an opportunity to file further heads of argument to deal with the point raised as well. I granted leave to both of them to submit their heads of argument in this regard. Mr *Kotze* delivered his heads of argument on 15 June 2022 and I received heads of argument from the applicant's attorneys on 22 June 2022. I'm indebted to both parties for their heads. At the hearing of the matter I allowed oral argument.

[3] My concern was not only based on the bulkiness of the papers but also on the substance, including annexures and the manner in which the claim was presented. There are four matters to be sought in terms of Rule 43. The purpose of the Rule is to provide a party with a speedy and inexpensive remedy, instead of waiting for a prolonged battle of a divorce action, enabling the party to seek maintenance; a

contribution towards the costs of matrimonial action pending or about to be instituted; interim care; or contact with a child *pendent lite*. The sworn statement filed by the applicant is not in the nature of a declaration as envisaged in Rule 43. Mr Kotze who appeared for the respondent submitted that the reply by the respondent to the applicant's founding affidavit was prompted by the nature of the applicant's affidavit hence it is also not in the nature of a plea.

[4] It is expedient at this juncture to quote the relevant provisions of the Rule:

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.

(2)(a) An applicant applying for any relief referred to in subrule (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.

(b)...

(3)(a) The respondent shall within 10 days after receiving the application deliver a sworn reply in the nature of a plea.

(b)...

(c)...

(4)...

(5) 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] The point of non-compliance with Rule 43 was not raised in the papers by the respondent. Ngcobo J in **CUSA v Tao Ying Metal Industries**¹stated:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.'

[6] In **Paddock Motors (Pty) Ltd v Igesund**² Jansen JA said:

*'... it would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part ...'*³

[7] More than thirty years ago rule 43 applications have been identified as sort of a hybrid procedure. In **Willies v Willies**⁴ Fannin J said:*'In considering the question before us it must not be ignored, I think, that the rule 43 procedure was a novel procedure, a sort of hybrid procedure, largely of the nature of a motion or application (being commenced with a notice supported by an affidavit) but partly of the nature of an action, in which a document in the nature of a declaration has to be filed and in which evidence can be led.'*

[8] Rule 43(2)(a) provides that the sworn statement must be in the nature of a declaration and Rule 43(3) provides that the respondent's reply must be in the nature of a plea. The declaration in the legal sense is a separate document in which the

¹*CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) (2009 (1) BCLR 1; [2009] 1 BLLR 1; (2008) 29 ILJ 2461; [2008] ZACC 15) para 68.

² 1976(3)SA 16 (A)at 23F.

³*Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) ([2011] 3 All SA 261) para18;*Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) (2017 (1) BCLR 1; [2016] ZACC 39) para189.

⁴ 1973(3) SA 257 (D) at 259C-D.

plaintiff sets out his particulars of claim in the same precise manner as he would in a combined summons. This means that Rule 18(4) applies. Rule 18(4) provides:

'every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

In **Maree v Maree**⁵ sê die geleerde Regter:

"Dit moet steeds in gedagte gehou word dat die prosedure deur Reël 43 beoog geensins 'n gewone aansoek is wat by wyse van 'n kennisgewing van mosie geloods word nie, maar wel 'n aansoek in verkorte vorm wat op spoedige en kostebesparende wyse afgehandel behoort te word.[Onderstreping is myne]

[9] However, I agree with Sher J in **KT v ATand Others**⁶ where the Learned Judge says:

"Whereas in one matter a short affidavit a few pages long and without any supporting annexures might suffice, in another a lengthier one with a number of supporting annexures may be required. In each matter what will reasonably be required will depend on the facts and circumstances. Thus, for example, where the matter concerns a claim in respect of relief sought in relation to the care of, or contact with, a child and the parties have been embroiled in a long and bitter tussle it may be necessary to set out, in some detail, the sad and sorry saga which has led up to the application and the alleged misbehaviour in which the parties have engaged, inasmuch as this may be relevant to a determination of whether or not they are fit and responsible enough parents to have a child in their care, or to have contact with him/her."

[10] In this matter, the applicant is claiming maintenance for herself and her daughter who is neither a minor nor a student. In light of the view I take of the matter it is not necessary to decide the question of whether her daughter could and should have acted on her own to seek maintenance directly from her father since she is an

⁵ 1972(1) SA 261(O) at 264A.

⁶ 2020(2) SA 516(WCC) para19.

adult and not a child anymore. Furthermore, it would seem to me that the separate claims for contribution for costs relating to the appointment of an appraised evaluator in the amount of R29 100 and costs of a forensic accountant in the amount of R500 000 have contributed to the bulky nature of the papers. There are several annexures from which no portions have been identified on which reliance is placed for the applicant's case. It is not the number of pages that count but rather the substance of the application and whether an attempt is being made to stick to the letter of Rule 43.

[11] Rule 43 applications are launched and enrolled in the unopposed motion Court roll even though in most instances they are opposed. It is therefore imperative that the parties must make every effort to avoid prolixity thereof as the roll may be congested with other matters, including opposed applications for summary judgments and urgent applications.

[12] In this division urgent matters are heard simultaneously with these applications. The applicant is therefore required to set out succinctly and concisely, by way of a statement in the form of a declaration in terms of the Rule, a chronological exposition of the legal process in the pending divorce action from summons to close of pleadings; the nature of the claims which she was putting forward as plaintiff in the divorce action; and the respondent's defence thereto, very briefly, and then deal with the claims for maintenance and for contribution to legal costs. The rationale for this is that an applicant for a contribution towards costs must show that, if she is the plaintiff in the main action, she has a *prima facie* case; and if she is the defendant, she is defending the action in good faith.⁷

⁷*Jones v Jones* 1974 (1) SA 212 (R) at 214.

[13] The applicant should set out her financial circumstances, particularly her needs and the respondent's means, nothing more nothing less. There is no need to burden the application by simply attaching annexures without identifying the portions thereof on which reliance is placed for the applicant's case. The same goes with the respondent. The only essential annexure that comes to my mind is proof of income. It is sufficient to attach a salary advice or, in the case of a business owner, a certificate from the bookkeeper certifying the average income of the party concerned based on the last three financial years as reflected on tax returns. There is no need to attach financial statements unless this is absolutely necessary. It is unhelpful to attach photos of business offices, as was done in this case.

[14] I am mindful of the fact that Rules are made to facilitate litigation and promote orderly ventilation of issues subject to the overriding discretion of the Court. In *casu*, I am not satisfied that Rule 43 has been complied with in material respects. For this reason, it is not necessary for me to delve into the merits of the application. In **Moulded Components and Roto moulding South Africa (Pty) Ltd v Coucourakis and Another**⁸ Botha J said the following:

'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the

⁸ 1979(2) SA457 (W)at 462-H-463B.

court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'

[15] In the past, attorneys and advocates were limited to the maximum nominal fees they could charge in applications of this nature. This limitation has since been removed. Rule 43 has now been amended in such a way that there is no limit on legal fees to be charged by lawyers. Thus, lengthy affidavits with unnecessary annexures may frustrate the object of the Rule to decide the application inexpensively and expeditiously and for this reason this may amount to an abuse of the Court process.

[16] Mr Cole for the applicant argued that it is permissible to have bulky papers and for this argument he relied on the case of **E v E**⁹. As I understand that case, the full bench of the Gauteng division reiterated that affidavits filed in terms of Rule 43 should only contain material which is relevant to the issues under consideration, failing which the court has the power to strike it out and make an 'appropriate' costs order.

[17] In view of the shortcomings pointed out above I am of the view that the application should be struck from the roll and the applicant should only be allowed to re-enrol the matter when it is brought in the proper form, in compliance with what the Rule envisages.

⁹ 2019(5) SA 566 (GJ).

[18] With regard to costs, I am of the opinion that none of the parties is entitled to costs. The respondent was free to invoke the Rule 30 procedure but did not do so until the parties were invited to address the issue. Fairness dictates, therefore, that the respondent should not benefit from the point which was raised by the Court *mero motu*.

[19] In the result the following order will issue:

1. **The application is struck from the roll with no order as to costs.**

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: S H Cole SC

Instructed by Stirk Yazbek

Attorneys

For the Respondent C D Kotzè

Instructed by Abdo & Abdo

Attorneys

Date of Hearing: 31 May 2022.

Date Delivered: 12 July 2022