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

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISON, PORT ELIZABETH

CASE NO: 2875/2015
Date heard: 30 July 2015
Date delivered: 13 August 2015

REPORTABLE

In the matter between

[S…..] [W….] **Applicant**

And

[S…….] [W…….] **First Respondent**

KONRAD VAN STADEN **Second Respondent**

Rule 43 application – jurisdiction of High Court to adjudicate application when divorce proceedings pending before regional court – *Held* court has no jurisdiction to hear application in terms of Rule 43 – inherent jurisdiction to deal with urgent matter concerning interests of minor child when divorce proceedings pending before another court not exercised in terms of Rule 43 – *Held further* that where main *lis* is pending before another court inherent jurisdiction not lightly exercised – court will need to be persuaded that interests of minor such as to require urgent protection – court retains discretion not to exercise jurisdiction to avoid jurisdictional conflict and multiplicity of actions.
Rule 43 application – equivalent Rule in magistrate's court Rule 58 – *In casu* proceedings already commenced in terms of Rule 58 before regional court before which main *lis* pending – withdrawal of proceedings without tender of costs not resulting in those application proceedings being brought to end – respondent entitled to have outstanding costs determination resolved in terms of Rule 22 of magistrate' court rules – tender of such costs from bar ineffective – matter still pending before regional court.

Rule 43 application – urgency – applicant seeking urgent intervention of High Court by reason of postponement of equivalent application in regional court – not amounting to ground of urgency – not established that operative arrangements for care of and contact with minor child requiring urgent variation pending finalisation of divorce proceedings.
Rule 43 application – abuse of the process – applicant seeking orders which are not competent in terms of the Rule – application brought to circumvent litigation process before regional court – no grounds for urgency established on the papers and no justification for truncating already shortened time periods as provided by the Rule – application papers extending to over 500 pages – conduct of application constituting abuse of process.
Costs – conduct of applicant justifying punitive costs award in favour of first respondent – circumstances warranting an order that applicant's representatives not be entitled to charge the applicant fees for the application

JUDGMENT

GOOSEN, J.

[1] This is an urgent application brought in terms of Rule 43 of the Uniform Rules. It is opposed on the ground that it is not urgent and that it constitutes an abuse of the process. First respondent filed a counter-application seeking, in the event that the application is not dismissed for the reasons stated, that it be postponed to enable her to deal comprehensively with the applicant's papers.

[2] The papers filed by the applicant comprise some 516 pages. Such prolixity in a Rule 43 application would usually result in it being struck-off the roll without more. It was however argued that there are exceptional circumstances which warrant such prolixity. I shall return to this aspect hereunder. It is first necessary to set out the background to this application.

[3] Divorce proceedings between the applicant and the first respondent are presently pending before the Regional Court Port Elizabeth. The litigation has been in process since 2012. The litigation has been, so I am informed, acrimonious and

hard-fought. A central issue in the litigation concerns the care and residence of the parties' six-year-old minor child. That dispute involves allegations and counter allegations relating to what is termed parental alienation. The minor child is presently in the care of the first respondent in accordance with an order granted by the Regional Court in terms of Rule 58 of the Magistrates Court Rules on 8 November 2013. According to that order the applicant enjoys defined and structured contact with the minor child.

[4] The question of what care and contact arrangements are in the best interests of the minor child has been considered by several experts appointed by the parties respectively. The office of the Family Advocate has also undertaken investigations, utilising its own appointed experts. As is to be expected the reports of the experts are extensive (a number of been annexed to the papers). It is not necessary to canvass these. It suffices to state that one of the reports of the Family Advocate favours a recommendation that the first respondent should have primary care of the minor child. That issue, of course, is one to be decided at trial and is a matter in dispute between the parties. However, in what is referred to as an addendum to the report, the Family Advocate recommended certain changes to the present contact arrangements. This is motivated on the basis that it would be in the best interests of the minor child to develop closer contact with the applicant sooner rather than later. It is a recommendation which appears to enjoy some support, even from the experts appointed by the first respondent.

[5] It is at this point that the litigation saga which brings the parties before this court begins. The Family Advocate Addendum report became available in February 2015. On 14 May 2015 the applicant launched a rule 58 (2) (a) application in the Regional Court. In that application the applicant sought:

(a) rescission, substitution or variation of the order of the Regional Court of 10 December 2012, relating to a reduction in the maintenance payable by the applicant;

(b) rescission, substitution or variation of the order of 8 November 2013 in terms of which the second respondent was appointed as a case manager; and
(c) the implementation of the Family Advocate's recommendations contained in the February addendum report.

[6] That application was enrolled for 23 June 2015. It was postponed on that date to 22 July 2015 to allow the first respondent to deal with the matters raised. Before the hearing of that application, on 21 July 2015, the applicant launched a further application in terms of rule 58 (5) in which he sought to adduce further evidence relevant to the issues to be decided. This concerned a report by Mr. Mark Eaton, in which he subjected the methodology employed by Mr. Stigant, the expert appointed by the Family Advocate, to criticism. The import of this was, so it was suggested, to call into question the general recommendation of the Family Advocate relating to the primary care of the minor child. As a result of this the first respondent applied for a postponement of the Rule 58 proceedings, so as to address the issues raised in the Rule 58 (5) application. The magistrate postponed the matter *sine die*.

[7] On 24 July 2015 the applicant withdrew the Rule 58 applications, although no costs were tendered in the notice, and immediately launched these proceedings.

[8] In this application the relief sought may be summarised as follows:

(1) an order directing the Family Advocate to reinvestigate the issue of parental responsibilities in relation to the primary care and residence of the minor child and to report on the investigation.
(2) pending the finalisation of that reinvestigation and pending the finalisation of the divorce proceedings,
    a. to rescind, vary or substitute orders made in relation to the maintenance of the minor child by the Regional Court; and

b. to rescind, very or substitute the orders made by the Regional Court in relation to:

(i) the powers of the second respondent who was appointed as a case manager; and

(ii) to make provision for structured and phased-in contact between the applicant and the minor child in accordance with the recommendations made by the Family Advocate, the details of which relate to the midweek, telephonic, weekend and holiday contact;

(3) the postponement of certain final relief pending the finalisation of the re-investigation application; and

(4) that the first respondent be ordered to pay the costs of two opposed applications in terms of Rule 58 (2) (a) and Rule 58 (5) of the Magistrates Court Rules respectively.

[9] During the course of the hearing, and as a result of particular concerns raised by the court, the applicant abandoned some of the relief sought. I shall deal with this hereunder when considering the nature and form of this application.

[10] It is necessary to begin with the issue of jurisdiction. The applicant submitted that this court has jurisdiction to deal with the application by reason of the fact that the issue concerns the best interests of the minor child and, as upper guardian of minors, this court has inherent jurisdiction to deal with the issue. It was also argued that this court has jurisdiction to intervene in the best interests of the minor child notwithstanding that the divorce is pending before the Regional Court.

[11] The applicant expressly founded its application as one in terms of Rule 43. Regard must therefore be had to that rule in examining the jurisdictional issue. Rule 43 (1) reads as follows:

> 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 pending matrimonial action;
(c) interim custody of any child;
(d) interim access to any child.

[12] Rule 43 applies to matrimonial proceedings which are pending before "the court". It is a procedure, calculated to be expeditious and inexpensive, whereby defined issues may be resolved on an interim basis pending the final adjudication of the divorce. "The court" before which the procedure may be invoked is that court before which the main action is pending. A "court" is defined in the Rules to mean a court constituted in terms of s 13 of the Supreme Court Act 59 of 1959. Although the Rules have not been amended the definition must be read to refer to the equivalent section in the Superior Courts Act, 10 of 2013, namely section 14, which is to all intents and purposes identical in its terms to the erstwhile section 13, save that it used utilises the changed names of the courts and refers to the High Court.

[13] A reading of Rule 43 in the light of the relevant provisions of the Superior Courts Act, indicates that the procedure provided by the rule may only be invoked before the court in which the main *lis* in the divorce action is pending.

[14] In Green v Green[1] the question arose whether a claim for interim maintenance in terms of Rule 43 may be adjudicated in one division of the High Court when the main action was pending before another division. The conclusion to which the court came, having considered a number of authorities, was that "in the absence of considerations of urgency our law of practice and procedure lays down that no such competence exists."[2] In coming to this conclusion, Jones J distinguished the case of Massey v Massey [3] which concerned the question whether a court has jurisdiction to make an interim order in terms of Rule 43 when the jurisdiction of that court was disputed in the main action.

[1] 1987 (3) SA 131 (SECLD)
[2] At 132H
[3] 1968 (2) SA 199 (T)

[15] Jones J went on to say the following[4]:

> It would, I think, be going too far to lay down that under no circumstances will a Court of one Division or country entertain a Rule 43 application in respect of the divorce action pending in another Division or country. Reference has already been made in *Venter's* case *supra* to the possibility of a Court making an interim custody award in the circumstances where this is urgently required in the best interests of the child. In appropriate circumstances the reasoning in *Massey's* case may justify a Court in exercising jurisdiction in preliminary matters though the main action is pending elsewhere. But in the ordinary course authority and common sense dictates that a claim which is *pendente lite* should be tried in the Court in which the the *lis* itself is to be tried.

[16] The court accepted that there may be circumstances which would justify a court exercising, in a matrimonial proceedings, its inherent jurisdiction to protect the best interests of a minor child in circumstances where that is urgently required. It is this a statement upon which the applicant relied in support of its contention that this court has the jurisdiction to entertain a Rule 43 application, notwithstanding that the divorce action is pending before the regional court.

[17] Although the Green judgment refers to the possibility of a court entertaining a "rule 43 application" a reading of the judgment, together with the authorities referred to in that judgment suggests that the jurisdiction referred to, namely to intervene in the interests of the minor child, is not in fact the exercise of jurisdiction in terms of Rule 43.

[18] The passage quoted above is followed by the following[5]:

> In my view, neither the wording, nor the spirit of s 2 of the Divorce Act gives a Court special jurisdiction to hear Rule 43 applications in respect of main claims pending elsewhere. The section read with the definition of 'divorce action' means no more than that a Court with jurisdiction to grant a decree of divorce in terms of s 2 also has jurisdiction to make orders in respect of matters ancillary and preliminary to *that* divorce action.

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[4] At 134B-C
[5] At 134D

[19] The jurisdiction of the court to make orders *pendente lite* arises in the first instance from the fact that the litigation is pending before that court. Where, however, the court *otherwise has jurisdiction* it may be able to exercise its general or inherent jurisdiction in relation to proceedings pending before another court. When it does so, it does not, in matrimonial matters, do so on the basis of the provisions of Rule 43. Rule 43 regulates the procedure in matrimonial matters by which the court exercises its jurisdiction to make appropriate orders *pendente lite* in relation to matters *pending before it*. The jurisdiction referred to in Green, is not jurisdiction which the court exercises by virtue of the divorce action being pending. It is an aspect of its inherent jurisdiction to protect the interests of minor children (cf. Girdwood v Girdwood [6]; Narodien v Andrews [7]). In exercising that jurisdiction the court is enjoined to give effect to the paramount best interests of the minor child (cf. McCall v McCall [8] ; F v F [9]).

[20] Two things flow from this. The first is that a litigant who is party to a divorce action pending before another court cannot invoke the jurisdiction of this court to secure the relief contemplated in Rule 43 by the exercise of the procedure provided in Rule 43. In other words a Rule 43 application cannot be brought in this court if there is a divorce action pending in another court. That much is clear from the case of Venter v Venter[10] and Van der Sandt v Van der Sandt[11] referred to in Green. What was left open in those cases was not the possibility of utilising the Rule 43 procedure. Rather it was that a court could exercise its inherent common law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order notwithstanding that there are proceedings pending before another court. The second is that in order to invoke that common law inherent jurisdiction the applicant must establish (a) that considerations of

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[6] 1995 (4) SA 698 (C) at 708J-709A
[7] 2002 (3) SA 500 (C) at 512D-E
[8] 1994 (3) SA 201 (C)
[9] 2006 (3) SA 42 (SCA)
[10] 1970 (1) SA 11 (T) at 12H
[11] 1947 (1) SA 259 (T)

urgency justify the intervention and (b) that the intervention is necessary to protect the best interests of the minor child.

[21] Even although the High Court has such jurisdiction, it is not a jurisdiction that will be lightly exercised.[12] The court retains an inherent discretion not to exercise such jurisdiction in order to avoid a multiplicity of suits with the concomitant risk of jurisdictional conflict (see Steinberg v Steinberg [13]; Schlesinger v Schlesinger [14]).

[22] These considerations of jurisdictional conflict are, in my view, all the more significant in the light of the significant changes to the jurisdictional scheme, relating to matrimonial matters. In this regard it is important to note that when Green, was decided only the High Court (as it is now known) had jurisdiction to adjudicate matrimonial matters. Now Regional Courts, whose jurisdiction is conferred by statute, also enjoy jurisdiction to adjudicate matrimonial matters. A Regional Court is an entirely separate court exercising wholly distinct jurisdiction and it is, furthermore, a court which is bound on the principle of *stare decisis* by the judgments and rulings of the High Court. These considerations will undoubtedly weigh heavily in the exercise this discretion.

[23] Before turning to the question as to whether the applicant has made out a case for the urgent intervention of this court in the interests of the minor child, it is appropriate to consider also the competence of the relief sought in this application.

[24] As is apparent from the summary of the relief the applicant seeks a number of orders that do not fall within the ambit of Rule 43. The most obvious is the order

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[12] Church v Church Case no. 4374/2014, Unreported Judgment Eastern Cape, Port Elizabeth delivered on 13 January 2015 at par [19]

[13] 1962 (4) SA 321 (E) at 324C

[14] 1979 (4) SA 342 (W) at 353D-G where the court remarked "'…where a similar proceeding is pending in another *forum* between the same parties, I agree … that a costly confusion 'too ghastly to contemplate' will ensue if ..[the].. proceedings are allowed to proceed *pari passu* in two jurisdictions."

seeking a determination of the costs payable in the two Rule 58 applications which the applicant launched in the Regional Court.

[25] Rule 58 it should be said is the equivalent of Rule 43 in the magistrate's court. As already indicated the applicant purported to withdraw those applications immediately before launching the present application. When it was pointed out to counsel that seeking a determination of costs of proceedings which were pending before another court is not contemplated by Rule 43, I was immediately informed that the applicant abandons such relief. The immediate abandonment was clearly as a result of a recognition that such relief is in any event not competent in terms of rule 43. Quite why the relief was sought in the first place was not explained.

[26] When asked whether the withdrawal of the applications had the effect of terminating those applications it was submitted that it did. This despite Rule 22 of the magistrate's court rules, which entitles a party to whom no tender of costs is made in a notice of withdrawal to apply for the matter to be set down in order for the costs to be determined. Counsel was however constrained to concede that the effect of Rule 22 is to keep alive the application until the question of costs is determined. Upon realization that this would be fatal to the present application (leaving aside the jurisdictional issues) applicant's counsel made a tender of costs in those applications from the Bar, no doubting seeking thereby to terminate the pending proceedings before the Regional Court. As it turned out the tender was rejected by the first respondent, who pointed out that throughout those proceedings she had contended that the applications were an abuse of the process and had sought a punitive costs order.

[27] There can, to my mind, be no doubt that the proceedings were initiated in the Regional Court were still pending at the time that this application was launched. The applicant's purported withdrawal amounted to no more than that – a purported withdrawal in order to enable these proceedings to be launched. The withdrawal was not effective and did not terminate the *lis* between the parties in the Regional Court. The subsequent tender of costs from the Bar also did not

bring the matters in the Regional court to an end. The irregular attempt to present to this court a copy of a formal ‘notice of withdrawal’ of the applications in the Regional Court, after argument had been presented and judgment had been reserved, also cannot assist. Firstly it was irregular to make such an attempt. Secondly, such withdrawal suffers from the same deficiency that the tender from the Bar suffered from, namely it did not address the first respondent’s entitlement to have the costs determined on a punitive scale. Thirdly, as long as the costs issue remained to be decided so too the merits of the application remained in issue, thereby precluding this court from making any pronouncement on the merits which would have the effect of fettering the Regional Court’s discretion on the issue of costs.

[28] The above illustrates the fundamental difficulty that the applicant faces in this application. Not only does the applicant seek relief which it is not competent to grant in terms of Rule 43, but, as is indicated, this court’s jurisdiction was sought to be invoked in circumstances which point to the process of this court being abused.

[29] That such a conclusion is warranted emerges from consideration of the alleged urgency upon which the applicant relied; the basis upon which the ‘best interests’ of the minor child were invoked; and the form in which the application was brought. I deal with each in turn.

[30] The present application was launched on 24 July 2015. On that date a certificate of urgency was presented to Sandi J, who was the duty judge. The certificate had attached to it a draft notice of motion reflecting the applicant’s intention to move the application on 31 July, i.e. on a Friday. The direction in the court file indicates that the matter may be enrolled on a motion court day, i.e. 30 July.

[31] The basis for the alleged urgency is twofold. Firstly it is alleged that the applicant has recently come in to possession of an “academic” assessment or critique by a psychologist Mr. Mark Eaton of the approach adopted by Dr. Stigant, who was

appointed by the Family Advocate to consider the assessment of interests of the minor child. This assessment formed the basis of the recommendation of the Family Advocate that the primary care of the minor be awarded to the first respondent. In other words the applicant recently came into possession of an opinion which called into question the basis for the Family Advocate's recommendation for final determination of the issue of primary care and residence. This, so it was contended, justifies a "re-investigation" by the Family Advocate and, pending such re-investigation, a variation or adaption of the existing interim contact arrangements. It is upon this basis, coupled with the assertion that the applicant's attempt to obtain implementation of the February "addendum" recommendation of the Family Advocate to extend certain contact between the minor and the applicant, that the applicant seeks this court's urgent intervention.

[32] There is no explanation, either in the founding papers or the certificate of urgency filed by counsel, which sets out why it is necessary for the matter to be heard other than in the normal course of a Rule 43 application, which already makes provision for truncated time periods. There is no allegation in the applicant's founding papers which suggests that the existing arrangements which are the subject of an interim order issued by the regional court, if not amended will cause imminent risk of harm to the minor child. The applicant simply fails to make out any case for urgency. On this basis alone, this court would be entitled to strike the application from the roll. It was argued that matters concerning the best interests of a minor child are by their nature urgent. Reliance was placed on B v B[15], where the court stated that "where there is a need to remove uncertainty about the future, safety and wellbeing of minor children" the matter will always be urgent. That is, of course, indeed so. It is for this reason that Rule 43 makes provision for a speedy adjudication of such matters. The urgency with which a matter is enrolled must, even where it is contended that the interests of a minor child are involved, be properly established on the papers.

[15] 2008 (4) SA 535 (W) at 541 H

[33] In this instance there is no case made out to suggest that the safety of the minor is at stake or that the child will suffer harm if the present care and contact arrangements are not adapted in accordance with the “addendum” report of the Family Advocate presented in February this year. The additional contact arrangements foreshadowed in the February addendum report of the Family Advocate are founded upon what is considered to be in the best interests of the minor child, namely that there should be greater contact in order to facilitate the development of a relationship between the applicant and the minor child. There is no suggestion that failure to extend such contact immediately will bring about irreparable harm to the child. In this regard it is striking that the applicant only sought implementation of the recommendations, by way of a court application, in May 2015 whereas the recommendations had been made in February 2015.

[34] Finally there is the form of this application. I have already pointed to the fact that the applicant brought the application on an urgent basis when he was not entitled to do so. In addition, the applicant sought to obtain relief from this court in circumstances when he had plainly failed to obtain such relief in the Regional Court. The conclusion is inescapable that the applicant, dissatisfied with the process before the Regional Court, sought to circumvent the difficulty by approaching this court. That, in my view, is an abuse of the process. If the applicant was unrepresented this court might have been prepared to excuse such conduct on the basis that the applicant is a lay person. But that is not the position in this case.

[35] The applicant was represented by an experienced attorney and counsel. Not only did the applicant come to court on flimsy grounds of urgency, he sought relief which is patently incompetent in terms of Rule 43. The applicant’s papers extended to 516 pages – including as annexures both Rule 58 applications which served before the Regional Court, together with hundreds of pages of bank statements and other financial documents. It was suggested in argument that

there were exceptional circumstances warranting such lengthy papers. There are none.

[36] It is well established in Rule 43 matters that the papers are to be as brief as possible. Where the papers are unduly prolix the courts have expressed their dissatisfaction by striking such matters from the roll and by making adverse cost orders affecting the costs recoverable by the legal practitioners involved (cf. Patmore v Patmore [16] and the authorities cited therein).

[37] On the basis of all of these considerations I come to the conclusion that the application must be dismissed on the basis that this court lacks jurisdiction to hear the application. I consider also that the application is an abuse of the process of court for the reasons set out above.

[38] Insofar as costs is concerned the applicant ought to pay the first respondent's cost of opposition. These should include the costs of the conditional counter application for a postponement. That counter-application was prudently launched in the circumstances. In my view those costs should be on an attorney client scale. In addition, the question arises as to whether the applicant's legal representatives, who ought to be well aware of the principles applicable to Rule 43 applications, should be entitled to charge fees for the work done in this application. In my view they should not.

[39] In the result I make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the first respondent's costs on the scale as between attorney and client.

[16] 1997 (4) SA 785 (W)

3. No costs may be claimed by the applicant's attorneys from the applicant in respect of the drafting and preparation of the application.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant
Adv. R de Vos
Instructed by Joanne Anthony Inc.

For the First Respondent
Adv. S. Potgieter
Instructed by Joyzell Obbes Attorneys