IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
HELD AT JOHANNESBURG

CASE NO: 44450/22
DATE: 2022-09-12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES.
(2) OF INTEREST TO OTHER JUDGES: YES.
(3) REVISED.
DATE 30 September 2022

SIGNATURE

In the matter between

H **Applicant**

and

H **Respondent**

J U D G M E N T

Summary – Rule 43 – Constitutional right of a child to be heard. A constitutional interpretation of Rule 43 in relation to an interim contribution to costs in divorce proceedings

VICTOR J:

[1] A calamitous future looms ahead for these very young children. The level of acrimony between the parents has reached a critical and dangerous level. The Rule 43 papers have burgeoned to almost 1000 pages. There were several lengthy expert reports concerning the best interests of the minor children and it is important to note that the Court took the precaution of asking the Family Advocate to conduct an independent investigation into what was best for the children since there were allegations of the experts being bribed and biased, none of these perceptions were convincing. But caution was indicated and it was essential to bring in the Family Advocate to address the current best interests of the children in the light of the allegations. Of course, this was to no avail as the respondent criticised the Family Advocate's decision and recommendation.

[2] In addition, the last full analysis was done Dr Duchen, more than a year ago and it would seem that matters did not settle down after her very extensive report, amounting to almost 300 pages, and also some other therapists that added to the 1000 pages referred to. It was therefore imperative that the Family Advocate bring a fresh approach to the matter.

[3] It is without doubt clear that the dispute about the care of the children, the interim maintenance, and the contribution to legal costs must be viewed through the prism of the Constitution and of course also in relation to the Children's Act.

[4] Consistent with this constitutional approach, it was prudent for the Family Advocate to become involved and who could give an objective report on the current situation and to take into account the voices of the children. Ms. Naidoo, the social worker for the Family Advocate has been in practice for many years, in fact more than two decades and she has had an opportunity to consider the situation objectively having regard to all the reports and her interviews with the parties.

[5] The main dispute between the parties with regard to the exercise of their respective parental responsibilities and rights towards the children has been ongoing since their separation in 2020 to date. It is clear that all the professional intervention, even from the very in-depth report by Dr Duchen, the disputes are persistent and at issue now is the current care of the children and their living arrangements.

[6] Whilst it is clear that the living arrangements are not the only source of dispute, there is no co-parenting between the parties, due to the lack of effective communication brought about by the high conflict. I have repeatedly urged the parents to change their mindset towards their parental role in the face of this separation. But the level of hatred towards each other is at a toxic level.

[7] Much of the acrimony arises, to a large extent from the fact that the parties do not talk to each other, they do not respect each other and to the very end, that is until the last hearing, the respondent continued to make the most callous accusations against the applicant. It is clear that whilst this badgering and unnecessary criticism of each other continues, the parties will not resolve their differences and all this in the face of their knowledge that it redounds to the disadvantage of the children.

[8] It is clear, even from the allegations made to the family advocate that the children are the casualties in this scenario, and they are the worst affected. The family advocate has referred to the U K case of T v T [2010] EWCA Civ 1366 at paragraph 49, where Lady Justice Black said speaking for the Full Court stated:

> "49. In parting with the case, I would invite the attention of all of the parties once again to what the Recorder said to them at the end of his judgment. He told them that they must put aside their differences and that if the adults do not manage to resolve things by communicating with each other, the children inevitably suffer, and the adults may also pay the price when the children are old enough to be aware of what has been going on. It is a great shame that that sound advice does not appear to have been heeded. It is a tremendous privilege to be involved in bringing up a child. Childhood is over all too quickly and, whilst I appreciate that both sides think that they are motivated only by concern for the children, it is still very sad to see it being allowed to slip away whilst energy is devoted to adult wrangles and to litigation. What is particularly unfair is that the legacy of a childhood tainted in that way is likely to remain with the children into their own adult lives.

[9] This admonishment by Lady Justice Black quintessentially applies to this case. It seems to me that it is Z the eldest child aged 9 years is affected to a considerable extent by this ongoing conflict. B is 6 years old and has challenges for which he requires therapy and J is really very young and is being exposed to this acrimony. This can never be good for the children.

[10] The parties have got different parenting styles. They see their roles very differently and it seems to me that despite the intervention of many experts there is absolutely no improvement, now, almost two years after the parties separated. They continue to make disparaging allegations and whilst they are both mature and competent people, it seems to me that they are unable to understand what this conflict is doing to the children. On balance it is the respondent who keeps disparaging the applicant in the most egregious way.

[11] The family advocate rendered a report analysing whether the question of the children's residency should be changed. The children's contact was essentially shared between the parties.

Background facts to the separation of the parties

[12] In considering the background of this high degree of conflict, it seems to me that the events which the applicant was subjected to when the marriage broke up has had a lingering effect. Not only on her, but also on the children.

[13] From just a brief perusal of the applicant's case that she puts forward, it is clear that she did go through a very difficult time at the point of separation. The papers are lengthy, as I have indicated, and they contain allegations on which I do not make findings, but I simply refer to them because of context and the necessity to bring the extreme conflict to an end, hopefully.

[14] It would seem that the applicant was subjected to being locked up, interrogated, she even had to go through a polygraph test. It would seem that at some stage four of the respondent's bodyguards entered her house with semi-

automatic weapons, that is now the matrimonial home which is owned by the applicant, and that resulted in severe trauma for her and the children. She then took an overdose of what was essentially Panado and she was hospitalised for a few days. This too had a very dramatic and negative effect on the children. They saw it as her being locked up in goal.

[15] The other aspect which is troubling is the continued allegations made by the respondent about the applicant's sexual predilections. He has, what she terms, made bizarre and defamatory allegations about her, and her alleged extra-marital affairs were even part of the interrogation that she had to undergo at the hands of the respondent's agents.

[16] He alleges that she had affairs with a fellow surgeon, one Dr W T, that she distributed naked pictures of herself and that she had affairs with ten men and that he had a list of these ten men, and to date even Dr Duchen notes that these allegations have not been proven. He also accuses her of transmitting to him the HIV virus, trichomonas and probably syphilis as well. He also accuses of having a sexual affair with another doctor, by the name of Dr Z A, whom the applicant had not even met and he threatened to harm him.

[17] What follows is a rather strange situation. The respondent took the applicant to one Pastor Ken, in January of 2021 to exorcise demons from her and "to excise Jesibel", that is the name of the demon and to remove it from the house in which the parties lived. At the time of separation, the respondent evicted her. He says she left voluntarily. This apparent voluntary departure took place where she left without a car, a cellphone and her laptop and it would also seem that two of her phones were smashed.

[18] I do not make findings on all these allegations. The respondent also has made very serious allegations about her ability as a mother, and he has no confidence in her as a mother and then continues with his tirade against her.

[19] The applicant also describes the difficulties that she had with the respondent. She describes the very high lifestyle they led with overseas trips, and she was given bonusses. She worked for one of the companies, in the stable of companies in which the respondent is the CEO. The applicant contends that he continues to live a very high lifestyle, in particular she says that he has purchased a house for R10 million just near her home and has made extensive and luxurious renovations to the house. He drives luxury motor vehicles and has a team of security guards at all times.

[20] She also alleges that through one of the companies the respondent has a home at Knysna, which was purchased for R7.5 million. He has four au-pairs to care for the children, based on the current contact arrangements. He says that from his side he has tried to comply with the various therapies and tests and programs that the experts have suggested, and in particular, what Dr Duchen suggested.

[21] Unfortunately, however, with all the good will in the world that Dr Duchen had in mind, the therapies have not served the purpose of bringing order and de-escalating the conflict between the parties. In fact, it is far worse. The applicant contends that the respondent is trying to interfere in her relationship with the children. She, in addition, does not have the money to complete the various courses that have been suggested.

[22] It is for this reason, and because of the suspicion, and allegations of bribery of the experts, that the court is going to make an order that an independent social worker be appointed to deal with the parental conflict. I shall deal with this aspect later, to try and address the dysfunction between the applicant and the respondent, and I would urge the applicant and the respondent to comply with the program.

[23] In the face of the intense acrimony they have got to develop insight into responsible parenting, and must overcome the current dysfunctional parenting models. It seems to me that the applicant does, on her side, try, but the healing of the dysfunctional relationship has to be reciprocal.

[24] Ms. Naidoo the Family Advocate social worker describes and advised the Court of the extensive investigation that she did. Of course, she could only interview Z and B because they were old enough. J, of course, was too young. She interviewed the children and the parents, one after the other on the date that she did the investigation.

[25] The family advocate notes that they await a further report from Ms. Mary Bothma and that report was not forthcoming prior to the finalisation of their report. Both Dr Duchen and Ms. Bothma filed further reports, with Dr Duchen noting that she had not been able to see the parties after the report by the family advocate.

[26] The children do have difficulties. Z's grades have dropped, she has to attend extra English lessons and speeches and the applicant contends that her projects are not done whilst in the respondent's care. Z is in grade 4. She has many academic demands on her. She has cycle tests, and it would seem that the disruption of moving between mother and father is affecting her schoolwork and of course the high conflict that she is exposed to, also has an effect.

[27] B is in grade R at Kings School, he attends speech therapy and occupational therapy. He has to do exercises to improve his coordination. He was initially at a special needs school because of the condition that he has, but the respondent would not allow him to continue because he felt that it would really be isolating him from main school. So, he too is at Kings School.

[28] The respondent frequently takes the children to the Vaal River for weekends being one of the luxury property referred to below. The applicant contends that the children's homework is not properly done while they are there. The respondent, on the other hand, states that the applicant shouts, screams and smacks the children. He has video footage of this, and he alleges that the applicant does not view the children as persons with whom she should have a relationship.

[29] He alleges that she manipulates, creates guilt trips on them, threatens and intimidates them and, he says, also threatens them physically. He says that this also happened while they were living in the same home. It seems to me that the respondent is not happy that the children should have any form of relationship with the applicant.

[30] The respondent has moved on. He has a partner; they have a baby, and it would seem that the children have adjusted to this new family unit. The respondent contends that Z loves the baby dearly and enjoys feeding her and it would seem that the other children also have a good relationship with his new partner. They are going to get married once the divorce is concluded. But as it is at the moment, it is a family unit.

[31] The respondent views himself as the children's primary caregiver and of course the applicant views herself as the primary caregiver. It would seem that the children, in particular Z, wants to be with the applicant and does not have a good relationship with her father. It would seem that Z has become involved in the matrimonial conflict and this the respondent describes as the alienation of Z by the applicant.

[32] There was a stage where he called Z fat and suggested that she should, and on Ms. Bothma's recommendation consult a dietician. This upset Z. She questioned whether she was fat or ugly. It is reprehensible that the respondent, who occupies a senior position cannot understand that to start criticising a child as young as Z for being overweight can lead to features such as low esteem and goodness knows where that can lead.

[33] It seems to me that he has now desisted from that conduct, and it is necessary then for him to make time alone time with Z to heal any of the misperceptions that she might have about her self-image.

[34] A further concerning problem is that the applicant feels that she is still being watched in her house. He says that all the internal cameras were destroyed, but she denies that. It would seem that B also has experiences discomfort about the house, and feels that it is “weird”.

[35] The applicant has an au-pair, Kaylen, who has been working with her since September 2020. Kaylen works in the afternoons from Monday to Friday. The applicant has a new domestic worker, the former staff moved with the respondent.

[36] B has a sensory processing disorder that has to be addressed and is being addressed. He has speech therapy at school as well as occupational therapy and all these should continue. It would seem that there is normal competition between the children but there are some difficulties between J and B, but, of course, if the problem becomes worse the children are already in a good school and will receive all the necessary intervention therapies.

[37] Z and the applicant seem to have a good relationship. They also have a good relationship, with a social worker, Ms. Richards and there is no reason why that therapy should not continue. Z does not want to attend therapy with Ms. Bothma, and there is no reason why she should be forced to. A child’s voice must be heard.

[38] The court is mindful of the Constitutional rights of minor children, in particular that the children have a right to make comments about what they want. Obviously, it must all be age appropriate and it would seem that both B and Z have formed a close relationship with the applicant. For example, B’s three wishes are that he wants to stay at the applicant’s home, because he likes and loves her. He wants lots of toys. It would seem that he has an ample number of toys at his father’s home. B would also like a big house.

[39] One of the children refers to the fact that the applicant is poor and obviously now the children have reached the stage where they are picking up on the financial disparity between the applicant and the respondent, who leads a very high lifestyle.

[40] Ms. Naidoo went into great detail about the children, what they do, what they watch, and she also reports that J is happy to be at school. He does have problems with faecal incontinence, and it would seem that there are allegations that when J is with his father, and it is time to go to mother he becomes reluctant and the respondent needs encouragement to return him to his mother. J does attend play therapy and other therapies.

[41] What is important is that here these parents are fully capable of caring for the children but at this stage of their lives they feel more comfortable with their mother. It is the matrimonial conflict that has torn the children apart and this can be seen from the various behavioural problems and observations by therapists.

[42] The Children's Act,[1] was specifically promulgated to give effect to the rights of children as embedded in the Constitution and sets out principles relating to the care and protection of children, and to define parental responsibilities and rights. Every child has the rights set out in Section 28 of the Constitution. The State must respect, protect, promote and fulfil those rights, and that, of course, is also the role of the Court as upper guardian.

[43] A further requirement of cardinal importance is Section 6 of the Children's Act, which sets out how the legislation should be implemented, and how it applies to children. In particular Section 6(4) of the Children's Act provides that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided and a delay in any action or decision to be taken must be avoided as far as possible. The situation cannot continue to muddle along with either parent claiming victory.

[44] It is clear to me that the divorce is some time away, goodness knows, it may take two years or longer. In the meantime, the children have to be protected and a decision has to be taken about their care. The position of children is protected by

[1] No 38 of 2005

various Conventions, including the African Charter on Human Rights and the African Charter on Rights and Welfare of the Child and the various protocols.

[45] There are other international conventions, for example, in 1989 the United Nations General Assembly adopted the convention of the rights of the child, and it is an internationally binding agreement on the rights of children. South Africa is a signatory. Article 3(1) of the Convention provides that in all actions concerning children, including the courts of law, the best interest of the child is a primary consideration. All this is consonant with our Constitution and the Children's Act.

[46] According to General Comment, number 12 of 2009[2] "the right of the child to be heard" is also something to which South Africa has signed up to, and therefore I accept the Family Advocate's view that the children's wishes should also be taken into account. Of course, all this must be in accordance with what is the best interest of the child.

[47] Article 6 of the Declaration of the Rights of the Child (1959) [3] recognises that wherever possible the child shall grow up in the care and under the responsibility of his parents, and in any case, in an atmosphere of affection and of moral and material security. The parental acrimony in this case is inconsistent with these values.

[48] It is therefore incumbent on the applicant and the respondent to be mindful of not only the protections for the children in South Africa and under South African Law, the Children's Act, and the Constitution, but also, it is incumbent on the parents to adopt a different mindset in the best interests of the children.

[2] Convention on the Rights of the Child 12. The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.

[3] **Article 5 - States** Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Because that too is an implicit value and international requirement in the Conventions referred to.

[49] It is clear therefore that the Court must take into account the wishes of B and Z. J is too young at this stage. The respondent has criticised the applicant for still giving J a bottle with a feed formula, I do not know whether that is once or twice a day, but the applicant is an experienced and highly qualified paediatrician, and she presumably must take all these things into account in J's maturation process.

[50] She does indicate that in relation to his faecal incontinence, she is trying to train him to go to the toilet and rewards him. So, it would seem to me that clearly the applicant and the respondent mean well, but it is the applicant at the end of the day who seems to be the primary caregiver of the children. Whilst not criticising the number of au-pairs the respondent has; it is clear that he has work-related demands that requires this number of au pairs. It is also clear that the children are somehow experiencing a level of comfort with the applicant, and this will hopefully lead to the stabilisation of the children's lives, if they are placed with her. The family advocate has suggested that the primary residence should be with her.

[51] The respondent filed further affidavits. He filed an affidavit in relation to the applicant's earning capacity, and then again pursuant to the report of the family advocate. In this further affidavit he disputes that the children should have primary residence with the applicant, and he states that he does take the children to therapy. He describes himself as involved parent.

[52] He is able to manage his workload in such a way that he has time with the children. He is prepared to attend bonding therapy with Z. He wants the applicant to consult a psychologist and he wants both of them to attend some parenting course to support each child's emotional needs, routine, discipline, and then draft a parenting plan. He wishes to have a parenting coordinator.

[53] The court is also mindful of the recommendation by the Family Advocate that there should be a parenting coordinator. As we know, the law is clear at this stage that one must avoid a parenting coordinator having a judicial function, where he or she decides questions of access and other aspects of micro-managing the children's lives.

[54] In my view the parenting coordinator is not necessarily there for the children at this stage. A parenting coordinator must firstly deal with the dysfunctional relationship between the parents, who have not accepted that their time as a married couple is over and the disparaging remarks, in particular by the respondent of the applicant, really serves no purpose.

[55] He, in the supplementary affidavit, suggests that the family advocate's recommendation means that his access and contact is reduced substantially, and what he now concedes is that maybe the children should spend a fixed period of time with him and then a fixed period of time with the applicant.

[56] He criticises the Family Advocate as mischaracterising Dr Duchen's professional intervention. He criticises everything about the family advocate report, and the question of the programme known as the Family Bridge's programme is also a point of contention. The applicant is simply not able to pay for all these therapies and the Family Bridges programme.

[57] It is for that reason that I am going to appoint Ms. Tanya Kriel a social worker to deal with the high level of conflict between the parties. Once that has concluded, it would then be appropriate to come up with a parenting plan.
It seems that the respondent submits that the child's voice alone should not be determinative of where the children should reside and that is just a continuing criticism. He suggests that the applicant must attend psychotherapy, a parenting course, so that she does not influence the children negatively. On behalf of the respondent, it was vigorously argued that the applicant is alienating Z from the respondent. It is of utmost importance that there be no alienation or any criticism

by either parent in front of the children, or where they can hear one of the parents criticising the other to third parties. The parents have got to both be very mindful of what the children can hear, see and understand.

[58] Taking all the above facts into account the result is that the children must have their primary residence with the applicant. The contact by the respondent, the father will be every alternate weekend from Friday after school until Monday morning to be dropped off at school, and the respondent can also have sleepover access on the Wednesday, during a weekend when he does not have access to the school.

[59] This is not what the Family Advocate recommended, but the Court noted that the applicant very properly in her papers suggested that there be the sleepover on a Wednesday. Also, there is the other contact, which is set out in my order, that there is reasonable daily telephonic contact. It deals with Father's Day, father's birthday, Mother's Day, mother's birthday, short and long school holidays, Christmas to be alternated. All this contact is spelt out in the attached court order.

The cost of all this professional therapy must be shared 25 percent by the applicant and 75 percent by the respondent in relation to those costs that the medical aid does not pay.

Interim maintenance.

[60] It is clear to me that the respondent is a man of considerable means, he is a highly successful businessman and there is no reason why he should not be able to maintain the applicant and the children at a level which is reasonable, and which they enjoyed when they lived together. I have already referred to the high standard of living, the luxury homes to which the respondent has access, teams of security guards and also the luxury cars to which he has access.

[61] The applicant has set out a detailed schedule and Ms. Ternent on behalf of the applicant made certain concessions and she provided a schedule to the court

which shows that the total expenditure for everything is R220 149.00 per month, and then she deducted the direct expenses which the respondent tendered, bringing the amount down to R185 905.00. She also reduced certain expenses and made additional deductions including the amount of R10 000.00 for holiday camps.

[62] The total nett income after her deductions and of her earnings from the Affinity company in the respondent's group of companies which he heads and that she works for. She also earns a modest amount from her own practice at this stage, in the amount of approximately R2000.00 per month after all deductions for her receptionist and other expenses. It is clear that despite the fact that she is working very hard and of course spending time away from the children, this is very difficult for her.

[63] She used to work once a week when the parties were together, but upon the acrimonious separation it would seem that she was then required to work more hours per week, failing which she would be dismissed. So, she accepted the conditions because there is nothing more she can do. Her shortfall is R104 302.17, per month.

[64] I have considered the expenses, and it seems to me that none of the expenses are out of kilter with the level at which the parties lived at the time. The respondent has also put up a schedule and he claims that he is paying. If one takes into account his expenses and the direct expenses that he pays for the children, this amounts to R177 023.33 per month. He says that he simply cannot afford to make any further contributions to the applicant in regard to interim maintenance.

[65] In the applicant's heads of argument, she sets out that the respondent is able to meet the expenses that she requires and that includes direct expenses and the monthly interim amounts of maintenance. He is the chief executive officer of Affinity Enterprise Holdings. He is also the chief executive officer of the investment holding company known as Affinity International, based in Bermuda and this also brought him in quite a few hundred thousand rand.

[66] She criticises his maintenance needs of R177 023.00 per month, as she describes how, whilst they were together his business partner earned and drew approximately a million to a million and a half rand per month. The applicant submitted that the respondent's income should be consistent with this amount. In the last year he acquired properties and the renovations in the amount of R17 500 000. He does not set out his flights to luxury destinations such as Ballito, Knysna and Cape Town. He has a personal trainer and four au-pairs. She states that he has a security detail. She states that his gift and entertainment expenses are incorrect or implausible.

[67] I have referred to the Knysna property and also to the current property, which was bought, apparently all in the name of a company. However, what is important to note is that I do not see perquisite tax for the use of these luxury items as being claimed in his expenditure. He also has access to an Aston Martin, Ferrari, BMW X7, M50D sport, and an old Porsch Cayenne vehicle. He has a pool of cars to which he has access. The au-pairs earn good money, in the amounts between R14 000.00, R12 000.00 and R7 000.00 per month. Therefore, that cost alone is R33 000.00 per month. The applicant states that he has fulltime day and night guards. When he left the matrimonial home, he lived in luxury apartments.

[68] He claims that he only paid R19 000.00 per month for this luxury accommodation. The applicant claims that that accommodation was closer to R60 000.00 per month. He attends to his person very carefully and she describes all the cosmetic procedures and also, for example, he spent R250 000.00 on four suits. She says he is a wealthy man who is not disclosing to this Court what he really earns. He filed numerous supplementary affidavits and one in particular to criticise the applicant as being untruthful because she was earning much more than what she disclosed.

[69] However, based on the information that he produced there was woven into that a speculative amount as to her earnings. In fact, he does not take into account

that she is working as hard as she can. She obviously does not earn anywhere near what he earns, and the Court is mindful of the limitations that she has as a professional woman and as a mother. In summary she earns R58 929.05 from her work as a medical director within the Affinity Group and her net income from her private practice is approximately R2000.00 net per month after payment of all expenses. She obviously cannot live or litigate at the same level as the respondent.

[70] She has asked for a contribution towards legal costs in the amount of R830 000.00, payable within 10 court days. She has set out the details for this contribution and these are not inconsistent with what he has spent on legal fees as alleged by the applicant. I am also of the view that the amount of R104 000.00 which she claims per month is reasonable in the circumstances.

Contribution to legal costs

The right to equality, rule 43, the exercise of judicial discretion, and the proper approach to interpretation

Introduction

[71] Rule 43 of the Uniform Rules of Court (rule 43) provides an interim remedy to assist an applicant for a limited period of time before a divorce is finalised, in respect of, *inter alia*, contribution to legal costs. The rationale behind rule 43 is to ensure that neither party is prejudiced during the divorce proceedings by a lack of resources to maintain a reasonable standard of living, or to pursue their case in the main action. Often one party, usually the wife, will not be in a position to institute or defend a divorce due to a lack of financial means. Accordingly, rule 43(1) provides 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 matrimonial action, pending or about to be instituted;
>
> (c) Interim care of any child;

(d) Interim contact with any child."

This judgment relates specifically to part (b) of rule 43(1), that is, the obligation to contribute to legal costs.

[72] The claim for a contribution towards costs in a matrimonial suit is *sui generis*: an incident of the duty of support which spouses owe to each other.[4] "The purpose of the remedy has consistently been recognised as being to enable the party in the principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place [his or her] case before the Court."[5] The claim has its origins in Roman-Dutch procedure, and the principle that is now enshrined in rule 43 first crystallised as a common law principle through many decades of jurisprudence. Rule 43 now regulates the procedure to be followed where a contribution to costs is sought and is intended to provide for inexpensive and expeditious interim relief.[6] In *Eke v Parsons*, it was stated that, under the constitutional dispensation, "the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and to further the administration of justice."[7]

[73] Rule 43 must therefore be applied so as to ensure effective and expeditious access to court. As a Uniform Rule of Court, it must be interpreted and applied by Judges exercising judicial discretion. This raises the question: how should rule 43 be interpreted and applied to ensure a fair and timeous trial? And of what relevance is the Constitution to this exercise? It is important to emphasise that the Rule must be interpreted and applied through the prism of the Constitution, with specific regard to the right to equality.

[4] See *Chamani v Chamani* 1979 (4) SA 804 (W) at 806F – H; and *Van Rippen v Van Rippen* 1949 (4) SA 634 (C).
[5] *AG v LG* [2020] ZAWCHC 83 at para 17. See also *Van Rippen* id.
[6] *S v S* [2019] ZACC 22; 2019 (6) SA 1 (CC); 2019 (8) BCLR 989 (CC) at para 43.
[7] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 40.

Context and the gender-based inequalities that characterise rule 43 applications

[74] Before outlining the jurisprudence on rule 43, it is worth considering the context of rule 43 applications. Most often, these applications are brought by economically disadvantaged spouses who are unable to meet the costs of litigation or who are forced to enter debt to pay hefty legal fees. According to Heaton—

> "It is a financially dependent spouse who applies for a contribution towards costs, frequently in circumstances where the other spouse controls the family resources pending orders in respect of division of assets on divorce. The fact that the applicant spouse has no access to resources is yielded like a strategic weapon to bully an inequitable settlement from an under-resourced spouse who faces the other spouse's legal arsenal without the funds for his or her own legal team."[8]

[75] Typically, those applicants seeking contributions to costs are women. In *AF v MF*, which will be discussed further below, the applicant who was the wife, sought an increase in maintenance, as well as a contribution to her legal costs in the divorce action, where, in order to pay those costs, she had had to borrow from third persons as the applicant has had to do. The facts in *AF v MF* demonstrated that her husband was considerably well off and that she was struggling financially. Whilst she had no means to fund her case in the divorce action, her husband was well able to afford to pay her legal costs.[9] These facts are typical of rule 43 applications. Clearly, the social problem that rule 43 exists to address is a gendered one. The Constitutional Court, when it was seized with the question of the constitutionality of rule 43, commented thus:

> "It is the more financially vulnerable spouses, *usually the wives*, who disproportionately bear the brunt of all this. Generally, they are the ones who launch rule 43 applications. *This is so because it is women, who more often than not, are the primary care-givers*."[10]

[76] Although dealing with legal issues surrounding marital regimes, the High Court in *Greyling* made similar comments, noting that "women's ability to generate an

[8] See Heaton J, *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, 2015) at 544.
[9] *AF v MF* 2019 (6) SA 422 (WCC) at para 14.
[10] *S v S* above n 3 at para 31.

income is reduced by marriage [and this is] statistically proven, and women bear more responsibility for housework and caring labour."[11]

[77] Ultimately, across the jurisprudence and literature, it is not widely contested that "as a consequence of gender discrimination, women tend to be poorer than men and to earn less in the marketplace. Stereotypical roles also entail that women tend to devote more time and effort to childcare and housework which further impacts on their earning capacity."[12] It is important to remind ourselves of the realities facing applicants, who are predominantly women. As stated in *AF v MF*, "the legal rules pertaining to the reciprocal duty of support between spouses are gender-neutral, so that an indigent husband may claim support from an affluent wife,[13] but the reality must be acknowledged that, given traditional childcare roles and the wealth disparity between men and women, it has usually been women who have had to approach the courts for a contribution towards costs in divorce litigation."[14] It would be unwise to ignore the gendered dynamic of rule 43 applications. And, it ought to be against this background that Judges exercise their discretion when interpreting and applying the rule.

The exercise of judicial discretion

[78] The application of rule 43 involves a Judge's discretion, and ultimately, the Judge must make an order that is fair and equitable having regard to the means and needs of the parties in respect of this common law claim. However, it is clear that the exercise of this discretion must take place through the prism of the Constitution. Firstly, the Constitutional Court has consistently upheld the rule that the common law must be interpreted, applied and developed in line with the Constitution. Specifically, the injunction in section 39(2) of the Constitution provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[11] *Greyling v Minister of Home Affairs* [2022] ZAGPPHC 77 at para 13.
[12] Bonthuys E, 'Public Policy and the Enforcement of Antenuptial Contracts: W v H' (2018) 135 SALJ 237 at 241.
[13] See for example, *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 139H – 140A.
[14] *AF v MF* above n 6 at para 30.

In other words, rule 43 cannot be applied in a manner that is inconsistent with the Constitution. To do so would amount to the judiciary developing an unconstitutional common law.

[79] In addition, section 7(3) of the Constitution requires the State, and by implication its' Judiciary, to respect, protect, promote and fulfil the rights conferred in the Bill of Rights. One of the ways that Judges discharge that duty is by interpreting any legislation or provision mindful of those obligations. In other words, by giving meaning to the Constitution by interpreting, applying and developing the law in accordance with the Bill of the Rights.

[80] All of this to say that it is not possible to interpret and apply rule 43 unless doing so through the prism of the Constitution. It would not be in accordance with the Constitution to apply rule 43 in a manner that maintains inequality between the parties or prevents one party from access to justice. The right to equality and access to court, and therefore to justice, lie at the heart of Rule 43 applications.

A legal background to the rights at issue

Section 9 - the right to equality

[81] The right to equality is at the heart of rule 43 matters because where one party cannot afford burdensome legal costs, he or she cannot make his or her case effectively before a court, on an equal footing with the other party. Even before the advent of the Constitution, in 1959, Williamson J said that:

> "I do not say that she is entitled to every luxurious expense in litigation, but she is entitled to litigate upon the basis you would expect rich people to litigate. She is the wife of a rich man who is obviously going to litigate against her on a luxurious basis. . . I think she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate."[15]

[15] In *Glazer v Glazer* 1959 (3) 928 (W) at 928 A-C.

[82] Even before the equality of parties before the law was enshrined in the Constitution, the law recognised that parties must be able to litigate on an equal playing field, and most often, this meant ensuring women were equally able to present their case. In respect of rule 43 applications, *Van Rippen*, is old authority for the rule that the discretion in determining quantum of contribution to costs must be exercised such that "the wife must be enabled to present her case adequately before the Court."[16]

[83] At the birth of the Constitution, the right to equality became a cornerstone of South Africa's constitutional democracy. The very first provision of the Constitution, section 1(a), commits the Republic to the founding values of "human dignity, *the achievement of equality* and the advancement of human rights and freedoms". The Bill of Rights then enshrines the right to equality as an independent right by way of section 9(1), which provides that "everyone is equal before the law and has the right to equal protection and benefit of the law."

[84] Albertyn posits that the concept of equality must be developed beyond the idea of equal concern and respect. In discussing the plasticity of the concept of equality, she reminds us that—

> "the goal of equality . . . is to remove systemic barriers to substantive freedom and actively to create conditions of equality, including attention to restructuring relations of equality at individual, institutional and societal inequalities."[17]

And, in *National Coalition for Gay and Lesbian Equality*, the Constitutional Court emphasised that section 9 does not envisage a passive or purely negative concept of equality, but rather, would require positive steps to redress inequalities that led to disadvantage.[18]

[85] In the context of the matter at hand, the interpretation and application of rule 43 can constitute a positive step taken by the Judge. What rule 43 exists to provide is

[16] *Van Rippen* above n 1 at 639.
[17] Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 at 462, as cited in *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at fn 90.
[18] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 16.

equality of arms between the parties so that the disadvantaged party is placed in a position to defend their case. So fundamentally, the application of rule 43 necessarily involves the right to equality and Judges should, when exercising their discretion, interpret and apply rule 43 in the light of the constitutional right to equality.

[86] According to the Constitutional Court:

> "Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality."[19]

[87] It will become clear later that courts have begun to interpret and apply rule 43 through the prism of the constitutional right to equality. As I see it, this is the correct approach.

Section 34 – the right of access to court

[88] Where a party is not able to do place their case effectively before a court as a result of limited resources, the right to access justice is also called into question. Section 34 of the Constitution guarantees a right to a fair public hearing before a court or other independent and impartial tribunal or forum.[20] On the right of access to court, the Constitutional Court has said in *Lesapo* that—

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance."[21]

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[19] *S v S* above n 3 at para 40.

[20] Section 34 of the Constitution states that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[21] *Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (CC) at para 22.

[89] One of the central issues in rule 43 applications is access to justice. Without sufficient contributions, and in the event that one spouse is not able to meet exorbitant legal costs while the other party is able to meet the hefty costs of litigation, he or she might be denied justice. In *Model*, the Court noted the relevance of section 34, and went on to say that "I do not think there can now be any doubt that section 34 constitutionalises the right to a fair civil trial. . . This entails the right of access to court and the right to present one's case properly and effectively. The principle of equality of arms is implicit in the right to a fair trial."[22] All this to say that rule 43 operates to ensure access to court, and is therefore measured against, and guided by, the constitutional right to access court.

What effect does the constitutional imperative of 'equality of arms' have on rule 43 applications?

[90] In 1999, Donen AJ in *Cary* applied rule 43 having carefully considered the old common law authorities. However, notably, Donen AJ went on to consider the constitutional imperatives involved in the proper application of the rule. He carefully weighed the earlier authorities that spoke of the limitations on the extent of the contribution a spouse could claim but took umbrage with them, finding that if the Constitution required him to depart from them, that was paramount. He put it thus:

> "When exercising my discretion in the light of the above authority, I must consider, too, that I am bound by section 9(1) of the Constitution . . . to guarantee both parties the right to equality before the law and to equal protection of the law.
> . . . [The] applicant is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate respondent's financial affairs through the forensic accountant appointed by her. That is applicant will not enjoy equal protection unless she is equally empowered with "'the sinews of war". The question of protecting applicant's right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him. I therefore regard myself as being constitutionally bound to err on the side of the 'paramount consideration that she

[22] *Model v Model* (2004) (unreported case of the High Court of South Africa, Cape of Good Hope Provincial Division) Case No, 9626/2003 at para 14.

should be enabled adequately to place her case before the Court'. The papers before me indicate that respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he be ordered to do so."[23]

[91] Endorsing the approach of Donen AJ in *Cary*, Davis AJ in *AF v MF*, noted how he too was obliged to exercise his discretion under rule 43 *in the light of the fundamental right to equality and equal protection before the law*. He, like Donen AJ, reasoned that there should be 'equality of arms' in order for a divorce trial to be fair. Davis AJ then noted that in the unreported decision of *Du Plessis v Du Plessis*, Van der Merwe J had followed *Cary* and accepted "the relevance of the fundamental right to equality before the law."[24] And, like Van der Merwe, he followed suit and concluded thus:

"I find myself in wholehearted agreement with the approach adopted by Donen AJ and Van der Merwe J, which accords with the injunction in section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law.

The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse — usually the wife — will be forced to settle for less than that to which she is legally entitled, simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. *In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts, requires that courts come to the aid of spouses who are without means, to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.*

The right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees - in effect to act as her "banker". The primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. (The same of course applies if the husband is indigent

[23] *Cary v Cary* 1999 (3) SA 615 (C) at 621 B - G.
[24] *Du Plessis v Du Plessis* [2005] ZAFSHC 105, as considered by Davis AJ in *AF v MF* above n 6 at paras 39-41.

> and the wife affluent.) And where an impecunious spouse has already incurred debts in order to litigate, whether to family or to an attorney, I consider that a court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts."[25]

What *Cary* did was elevate the common law 'equality of arms' principle and put it on a constitutional footing. What *AF v MF* did was to entrench that approach.

[92] Considering rule 43 through the lens of the Constitution is significant. For one, Davis AJ in *AF v MF* rejected the notion that a spouse is prohibited from claiming a lump sum contribution to costs *already incurred*, expressly stating that "like Donen AJ, I believe that constitutional imperatives support this conclusion."[26] It was because of the constitutional right to equality and access to justice that Davis AJ held "as a matter of principle, that a court is entitled to take into account legal costs already incurred, including debts incurred to fund legal costs, in the assessment of an appropriate contribution to costs in terms of rule 43".[27] Davis AJ in fact correctly noted that the contrary position would ignore the reality faced by spouses, most often women, who have to incur debt in order to meet legal costs. This is another significant aspect of the judgment because, as outlined above, it is incontrovertible that women are often forced to enter debt in order to meet legal costs.

[93] Additionally, interpreting rule 43 according to the Constitution seems to have impacted the amount it is possible for a less financially resourced spouse to claim. One of the central questions to seize courts in rule 43 applications is the amount that can be claimed by the applicant seeking a contribution to costs, namely, whether the rule limits the claim to a partial contribution, or permits of a full contribution.

[94] The quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge.[28] And, the applicant's entitlement to maintenance must be assessed having regard to the standard of living enjoyed by the parties during the marriage, and ascertaining what contribution would be reasonable in

[25] *AF v MF* above n 6 at paras 40-2.
[26] Id at para 45.
[27] Id. Confirmed in, *inter alia*, *MC v JC* [2021] ZAGPJHC 373.
[28] *Van Rippen* above n 1 at 639.

the circumstances.[29] In *Van Rippen*, the Court articulated that guiding principle for the exercise of discretion in the following terms:

> "The Court should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court."[30]

And, in *Nicholson*, Wunsh J confirmed that "the applicant is entitled, *if the respondent has the means and she does not have them*, to be placed in the position adequately to present her case", in which case the court will consider certain relevant factors in ascertaining the amount of the contribution.[31] Ultimately, the overriding principle is that the applicant must be enabled "adequately to place her case before the Court."[32]

[95] In the past, several cases suggested that the amount to which she is entitled is limited, and that a spouse who applies for a contribution to costs under rule 43 is only entitled to part, *but not all*, of his or her costs.[33] In *Dodo*, for example, Wulfsohn AJ stated that, "as the application is merely for a 'contribution towards her costs', those very words mean that she is not entitled to *all* her costs."[34] Similarly, in *Micklem*, it was said that "a wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the Court nor all costs incurred to date."[35] And, in *AG v LG*, Ashley Binns-Ward J stated that "by ordering a contribution, the Court does provide the sinews of war; but, so far as I am aware, the Court has never under the contribution procedure provided the applicant's attorney with complete advance cover for all his fees."[36]

[96] However, it was acknowledged in *Micklem* that this limitation might clash with the paramount consideration referred to in *Van Rippen*: a partial contribution might

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[29] See *Taute v Taute* 1974 (2) SA 675 (E) at 676D - H and *MC v JC* above n 24 at para 3.
[30] *Van Rippen* above n 1 at 639.
[31] *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50C - G.
[32] *Van Rippen* above n 1 at 638 - 9.
[33] See, for example, *Van Rippen* above n 1 at 638 - 639; *Service v Service* 1968 (3) SA 526 (D) at 528 D - E; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262 I - J; and *Nicholson v Nicholson* above n 28 at 51 H - I.
[34] *Dodo v Dodo* 1990 (2) SA 77 (W) at 98 F.
[35] *Micklem* above n 30 at 262I - 263A.
[36] *AG v LG* above n 2 at para 19.

mean that a spouse *is not able* to adequately place her case before the court. Because of this concern, when Davis AJ considered whether all or only a part of a spouse's legal costs could be ordered to be paid, he came to the following conclusion:

> "In my view the obligation to pay a contribution towards a wife's legal costs does not necessarily postulate an obligation *only to pay for part of those costs*. . . the extent of the contribution should logically depend on how much, if anything, the wife herself is able to contribute.
>
> . . .
>
> To my mind the correct approach to the question of an appropriate contribution towards costs is that adopted in *Zaduck v Zaduck* 1966 (1) SA 78 (SR) at 81A – B by Davies J, who declined to follow the rule that a contribution to costs should not cover all the wife's costs. The learned judge held that:
>
> > '(T)he correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. *If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved.'*
>
> *In my view it is arbitrary to apply an inflexible rule that a wife who has no means of funding the balance of her legal costs is nonetheless only entitled to part of the costs which she reasonably requires to fund her litigation.*
>
> *To my mind logic and fairness dictate that if the wife is indigent and the husband has the wherewithal to fund his own, as well as all the wife's reasonable costs, he should be ordered to do so.* Since legal costs are covered by the duty of spousal support, there can be no justification for a situation where the husband, who controls the purse strings, pays for all his legal costs upfront, while the wife without means is forced to borrow to fund the shortfall, or to ask her attorney to carry the case without full payment. As I have already mentioned, *I consider this an unacceptable impairment of the right to dignity and equal protection of the law.*
>
> *In my respectful opinion the constitutional imperatives to which I have referred require that we jettison the arbitrary rule that a wife may not, by way of a contribution towards costs under rule 43, be awarded all the costs which she reasonably requires to present her case.* The court's discretion regarding the quantum of costs should not be fettered by fixed rules, but should be exercised in the

> light of the reasonable litigation needs of the parties, having regard to their particular circumstances, and their respective abilities to pay."[37] (Emphasis added).

[97] In this case, Davis AJ clearly rejected any arbitrary notion of limiting the extent of the contribution to costs made by one spouse to another. Importantly, he did so on the basis of constitutional imperatives. In practice then, what *AF v MF* achieved was the conclusion that there is no reason why an applicant may not be entitled to all of his or her costs, because what matters most is that the parties are able to place their case before the court on an equal footing. *AF v MF* noticeably departed from the *status quo*, and embarked on a more constitutionally compliant path. And it is plain from the passages above that the Court in *AF v MF* spelled out the proper approach to the application of rule 43: rule 43 must be interpreted and applied through the prism of the Constitution, which requires the court to interpret the rule in a manner that accords with the fundamental constitutional tenet of equality.

[98] Of course, there may be times where, upon exercising judicial discretion in the light of all relevant factors and circumstances, only a partial, rather than full, contribution is deemed reasonable. The judgment of *AG v LG*, handed down subsequent to *AF v MF*, cautioned that whilst a holistic approach should be adopted when considering the appropriate contribution to costs, when a court exercises its discretion an 'equality of arms' approach must be—

> "balanced with maintaining an equitable exposure of both of the adversaries to the risks of the chilly consequences of the ill-considered incurrence of costs. Both parties are required to be realistic about the litigation and should be incentivised to focus on reaching early and mutually beneficial settlements."[38]

[99] Indeed, the helping hand that rule 43 provides does not warrant litigating *ad nauseum*, nor should it permit malicious attempts to drain the pockets of the contributing spouse.[39] In other words, the entitlement to a contribution towards costs in terms of rule 43 should not be seen as equating to a licence to risk-free litigation.[40]

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[37] *AF v MF* above n 6 at paras 47-51.
[38] *AG v LG* above n 2 at para 19.
[39] Id.
[40] Id.

Clearly, in circumstances where one party causes the other to bear unnecessary costs, there is a principled argument as to why said spouse ought not to be entitled to her full costs.[41] There is even a public policy argument that such circumstances would unduly and inappropriately strain judicial time and legal resources. To permit such situations to occur would compromise the integrity of judicial processes surrounding matrimonial proceedings.

[100] Likewise, on the basis of what Davis AJ held in *AF v MF*, it would seem that an applicant would need to make a reasonable claim from the outset that she actually requires full costs:

> "Since I can see no justification for an arbitrary rule that a wife cannot be awarded all the legal costs which she reasonably requires to present her case, I would have been inclined to order a contribution in the amount of R 793 632 to cover the whole of the wife's arrear legal costs. *However, since the wife has only claimed a contribution of R 750 000 for her costs, that is the amount which I will award*."[42]

[101] Notwithstanding all of the above, what is important is that the courts are of a mind that interpreting and applying rule 43 through the prism of the Constitution means that *it is possible for one spouse to be entitled to a claim for all her legal costs*. This, because the real question which lies at the heart of rule 43, and upon which all such applications should turn, is whether the spouse, most often the wife, is able to defend her case with an arm that is as long and a purse that is as deep. The question to be asked is whether she has an equal opportunity to have her voice heard. Ultimately, it is to be recalled that rule 43 is not aimed at providing for payment of *all* of the applicant's costs, but to place an applicant in a position to adequately present his or her case. Ordinarily, one would assume that partial costs would be sufficient. But, when the constitutional requirements of equality and access to justice require full legal costs to be ordered to be paid, then based on *AF v MF*, that is a legal possibility. It is therefore not insignificant that the assessment of rule 43 now takes place through the prism of the constitution.

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[41] See also, *CT v MT* 2020 (3) SA 409 (WCC), where Rogers J similarly cautioned of the possibility of abuse of rule 43 applications.
[42] *AF v MF* above n 6 at para 55.

[102] Whereas *Van Rippen* remains the old authority for the principle that an applicant must be able to effectively and adequately present her case, *Cary* and *AF v MF* put that principle on a constitutional footing, affirming it through the constitutional imperative of equality before the law and equal protection of the law. According to Ashley Binns-Ward J in *AG v LG*, "describing the rationale for the remedy in terms of 'constitutional imperative' does not . . really add anything of substance to its historical character in the Roman Dutch common law."[43] It is true that the principle existed long before the advent of the Constitution. However, one would imagine that Donen AJ, Van der Merve J, and Davis AJ, among others, would disagree. Since the Constitution, rule 43 has to be applied in a manner that ensures equality of arms as understood in terms of equality law jurisprudence. Whereas the requirement already existed, it is now a *constitutional* requirement. The gravity of the constitution standing behind the requirement is not insignificant. It is on this basis that I disagree with Ashley Binns-Ward J that "describing the rationale for the remedy in terms of 'constitutional imperative' does not . . really add anything." The import of the constitutional right to equality adds a great deal because it defines the manner in which a Judge *must* exercise their discretion.

[103] The ordinary rules of interpretation apply when interpreting the Uniform Rules of Court. In other words, rule 43 must, like statutory provisions, first be given its plain grammatical meaning. However, it is a tenet of judicial interpretation that the language employed in a provision "must be accorded a generous and purposive meaning to give every citizen the fullest protection afforded"[44] and context is crucial.[45] Ultimately, it must be applied through the prism of the Bill of Rights and the

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[43] *AG v LG* above n 2 at paras 17-8:

> "There is indeed much in the Bill of Rights that is essentially a codification and entrenchment of the common law and the rules of natural justice. The significance of their constitutional entrenchment is to preclude any law or conduct inconsistent with them and to impose an obligation on the state (including, of course, the courts) to respect, protect, promote and fulfil the rights conferred thereby, including by interpreting any legislation mindful of those obligations, and to constrain Parliament's powers of amendment. . . The proper approach to the determination of such applications is well established."

[44] See *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) at para 144.

[45] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

Constitution. This, because there is only one system of law in South Africa and that is the Constitution. Section 2 of the Constitution provides that:

> "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Accordingly, to construe rule 43 in a vacuum, or to interpret it as a mere enactment of an erstwhile common law principle, would constrain the objectives of the Constitution. Rule 43 has to be understood within the constitutional framework.

[104] As set out above, it is trite that equality is a founding value of the Constitution. It lies at the heart of the Bill of rights. And, "the founding values inform most, if not all, of the rights in the Bill of Rights."[46] The right to equality therefore, informs all forms of adjudication. Looking at rule 43 through the lens of section 9 means recognising that everyone must be in a position to be able to present his or her case to a court. If one party embarks on a luxurious degree of litigation, the exorbitance of which means that the other party cannot properly present his or her case, then it cannot be said that the two are equal before the law. To be equal before the law, the parties require equality of arms. In addition to this common law principle, the Constitution requires that when a Judge exercises his or her discretion in determining the extent of the contribution towards costs, he or she is bound by section 9 to guarantee the right to equality before the law and equal protection of it.

[105] *Cary* is a prime example of a court interpreting rule 43 through the prism of the equality provision in section 9(1). The Court found that in exercising its discretion in the determination of the quantum of the contribution towards costs to be awarded, it was bound by section 9(1) to guarantee both parties the right to equality before the law and equal protection of the law. The Court took note of the fact that the parties had agreed during the marriage that the applicant should devote herself to the full-time care of the children, and that the respondent controlled the financial resources, which fettered the applicant's power to present her own case in her own best interests. What the Court did was apply rule 43 by considering the facts and circumstances, *with*

[46] *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 104.

regard to the gendered dynamics of the parties' positions, in the light of the constitutional right to equality and to access court. As I see it, there can be no other way to apply rule 43.

Conclusion on contribution to costs.

[106] Ultimately, the respondent to a rule 43 application is under a common law duty to make a contribution to the applicant's costs, if it is needed and he is able to do so. However, this a duty that must also be interpreted through the prism of the Constitution, since South Africa's is a legal system over which the Constitution reigns supreme. "Rules of Court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law."[47] That may be so. However, rule 43 must give meaning to the substantive right to equality and access to courts. If the exercise of judicial discretion does not yield a result consistent with the right to equality and access to court, then that application of rule 43 is unconstitutional.

[107] In the result I order that the respondent pays an amount of R830 000 as a contribution towards legal costs within 10 days of this order.

The full order dealing with all aspects of this Rule 43 application is attached hereto marked X

_____
Judge of the High Court
Gauteng Local Division

Counsel for applicant	Adv P Ternent
Attorney for applicant	Shaheed Dollie Attorneys
Counsel for respondent	Adv L Segal
Attorney for respondent	Attorney Billy Gundelfinger

[47] *CT v MT* above n 38 at para 19. Similarly, Vos J said in *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E - F that rule 43 governs procedure and does not affect the substantive law.

[107]