**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 12583/17**
**20739/18**
**5954/18**

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|---|---|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |

In the matter between:

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| **E v E** | 12583/2017 |
| **R v R** | 20739/2018 |
| **M v M** | 5954/2018 |

**JUDGMENT**

**MAKUME J:**

**Background**

[1] The above matters were referred to the full court by the Judge President of this Division pursuant to an order by Van Vuuren AJ dated the 20th September 2018. The order reads as follows:

*"The hearing of the applications in the following cases are discontinued before me and are referred to a full court of this division under S.14 (1) (b) of the Superior Court Act 10 of 2013:*

*E v E Case No.: 12583/2017*

*R v R Case No.: 20739/2018*

*M v M Case No.: 5954/2018"*

[2] All three applications were brought in terms of Rule 43 (1) of the Uniform Rules of Court. The applicants sought relief *pendent lite* for interim maintenance, custody and contribution to costs pending the finalisation of their divorce actions.

[3] In his reasoning for referring these matters to be heard by the full court as a court of first instance, Van Vuuren AJ says that the conflicting judgements in this division being that by Tsoka J in **Van Beest Van Andel vs Van Beest Van Andel EP case number 27869/2007** (7th October 2009) and that of Spilg J in **TS, R vs TS, T case number 28917/2016** (7th August 2017) have brought subrule 43(2) and (3) into focus.

[4] Subsequently, the Judge President issued a directive inviting interested parties to apply to the full court to be admitted as *amicus curiae*. He also outlined further questions for consideration by the full court.

**The Amicus Curiae**

[5] Legal Aid South Africa and the Gauteng Family Law Forum applied to be admitted as *amicus curiae.*

[6] Legal Aid South Africa is a statutory public entity established in terms of Section 2(1) of the Legal Aid South Africa Act 39 of 2014. The preamble to the Legal Aid Act describes its mandate in the following terms: "To ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the constitution and to render or make legal aid and legal advice available."

[7] Amongst the laws that require the State to provide legal assistance to indigent persons through the services of legal aid is the Divorce Act 70 of 1979, the Children's Act 38 of 2005, the Matrimonial Property Act 88 of 1984 and The Civil Union Act 17 of 2006. Rule 43 applications fall within the ambit of matters in which the Legal Aid Board provides legal assistance to indigent litigants.

[8] Gauteng Family Law Forum ("The Forum") is a voluntary association of legal practitioners, attorneys, counsel and academics who specialise in family law matters which include, all matters pertaining to children including maintenance, divorce matters including the maintenances of spouses, as well as domestic violence matters.

[9] A reading of the Forum's Constitution and its code of conduct endorses the fact that the subject matter raised in the directive falls squarely within the Forum's knowledge and expertise.

[10] It is common cause that the applications raise important questions related to Rule 43 applications in matrimonial matters. The outcome of this application will directly impact the Forum mentioned and the public.

[11] The *amici* are admitted into these proceedings without opposition. I am indebted to the *amici* for their invaluable oral and written submissions.

**The Parties**

E v E Case Number: 12583/2017

[12] The Applicant sought an order *pendente lite,* that the Respondent pays her interim spousal maintenance and a contribution towards legal costs.

[13] The Applicant's founding papers comprise 86 pages, 34 of which constitute the sworn statements. The Respondent's answering affidavit

stretches over 109 pages, plus a further 48 pages of annexures, which makes a total of 157 pages.

R v R Case Number: 20739/2018

[14] The Applicant's sworn statement comprises of 19 pages, to which is attached 32 pages as annexures. The Respondent's answering affidavit, together with annexures, comprises a total of 31 pages. There he raises a point in *limine* that the Applicant's papers are prolix and not in compliance with the requirements of Rule 43(2).

M v M Case Number: 5954/2018

[15] The Applicant sought an order in respect of maintenance *pendente lite* for their minor child as well as contribution to legal costs.

[16] The Applicant's sworn statement is concise, however, she attached to it a copy of the particulars of claim in the divorce action, besides other annexures. The Respondent filed a succinct response comprising of 10 pages and 70 pages of annexures.

**Judgement in two Parts**

[17] After hearing argument, this court reserved judgment. In doing so, it expressed an intention to deliver judgment in two parts. Firstly the court would summarily deal with the relief the parties seek, by way of a court order, so it does not frustrate the speedy and expeditious nature of these applications.

Then the court would hand down a reasoned ruling addressing the questions raised in the referral judgment. The court granted the orders in respect of the relief sought by each party on 7 December 2018, being satisfied that the respective applicants made out a case for the relief set out in the respective applications. In this judgment, the court addresses the issues raised in the referral judgment.

**Issues for Determination**

[18] In coming to a decision to refer these applications to the full court, Van Vuuren AJ said that the parties have generally departed from respectively delivering a statement in the nature of a declaration and a reply in the nature of a plea, having regard to sub-rules 43(2) and (3). It is that observation that prompted the Judge President to direct that this full court hear submissions to dispose of the three applications, as well as to determine the following issues:

i) While Rule 43 applications generally require the submission of a succinct set of papers, does the court have the discretion to permit the filling of applications that have departed from the strict provisions of Rule 43(2) and (3)?

ii) If the Court does not have such a discretion, should the Practice Manual direct that all Rule 43 application conform to a specific form, particularly

in terms of length? Would the imposition of a restriction on the length of Rule 43 applications withstand constitutional muster?

iii) If the court does have such a discretion, what are the factors to consider in order to reasonably exercise this discretion? Are these factors exhaustive?

[19] Rule 43 as it presently reads provides an interim remedy to assist an applicant to obtain relief speedily and expeditiously in respect of the following:

a) interim care, residency and contact with the children;

b) maintenance for a spouse and or children;

c) the enforcement of specified necessary payments such as bond repayments on a residential property, municipal rates and taxes, electricity consumption, school fees, medical and clothing as well as relocation costs;

d) contribution towards legal costs of the divorce action.

[20] The Children's Act, directs that the best interests of the child is of paramount importance in every matter concerning children. Similarly Section 28 of the Constitution requires that a fair hearing is observed and that the child's best interests are protected in all proceedings concerning the child.

[21] This court is called upon to deal with sub-rule 43(2) and (3) which read as follows:

> "(2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds thereof together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule. The statement and notice shall be signed by the applicant or his attorneys and shall give an address for service within eight kilometres of the office of the registrar and shall be served by the sheriff.
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> (3) The Respondent shall within ten days after receiving the Statement, deliver a sworn reply in the nature of a plea, signed
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> and giving an address as aforesaid, in default of which he shall
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> be *ipso facto* barred."

[22] In answering the questions posed, it will be necessary also to consider the effect of Rule 43(5). This rule provides:

> "(5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.

[23] Rule 43 applications as presently structured, are a deviation from normal motion proceedings in that the Rule does not make provision for a third set of affidavits. The applicant is confined to what is set out in the founding affidavit, which must be in the nature of a declaration, setting out the relief claimed and on what grounds. On receipt, the Respondent is required to file an answering affidavit in the nature of a plea. It is precisely this prohibition that causes the Applicant to say more than what is required, knowing very well that there is no second opportunity to say more, which may in true prompt the respondent to file a lengthily answer.

[24] The question that arises is how then, should parties deal with a dispute of fact that arises from the Respondent's answering affidavit. In my view the answer lies in the provisions of Rule 43(5) which gives the court a discretion to hear such evidence as it considers necessary. The applicant may seek leave to file a further affidavit in terms of Rule 43(5), to dispute the
Respondent's version as set out in his or her answering affidavit.

[25] The procedure envisaged in Rule 43 is not that of a normal application commenced by way of notice of motion. It is a succinct application, aimed at providing the applicant interim relief, speedily and expeditiously (See: **Maree v Maree 1972 (1) 261 CPD at 264 A**).

**The Approach of the Courts to Date**

[26] In all the current applications, one or two respondents apply for the dismissal of the application or for a punitive costs order on the basis of prolixity and failure to comply with the strict provisions of Rule 43(2) and (3). The desirability of keeping the costs of Rule 43 applications as low as possible has been emphasised in many decided cases. In **Willies vs Willies 1973 (3) SA at 259 C-D** Fannin J said:

> *In considering the question before us it must not be ignored, I think, that the Rule 43 procedure was a novel procedure, a sort of hybrid procedure, largely of the nature of a motion or application (being commenced with a notice supported by an affidavit) but partly of the nature of an action, in which a document "in the nature of a declaration" has to be filed and in which evidence can be led."*

[27] In **Varkel vs Varkel 1967 (4) SA 129 © at 131 G-H,** Van Winten J said: "rule 43 was devised and promulgated with the object of providing an expeditious and inexpensive procedure for obtaining interim relief in matters relating to matrimonial disputes pending or about to be instituted."

[28] The nub of the question to be answered is what interpretation of rule 43 will ensure a speedy and efficient resolution of the application while at the same time protecting the rights of women and children who are prevalently vulnerable

in Rule 43 applications? Is the interpretation in ***TS, R vs TS,T*** to be preferred over that in **Van Beest Van Andel vs Van Beest Van Andel**, by Tsoka J or *vice versa*?

[29] In Van Andel, the Respondent opposed the application on the basis of non-compliance with Rule 43 (2) in that the founding affidavit was not in the form of a declaration, it was unnecessarily long and contained irrelevant facts and annexures. Surprisingly, the Respondent also filed a voluminous answering affidavit as well as a counter-application. Both these documents did not comply strictly with Rule 43(2) and (3). Tsoka J held that the provisions of Rule 43 had to be strictly followed and thus dismissed both the application and the counter application.

[30] In **TS v TS**, a judgment delivered on the 7th August 2017, some eight years after Van Andel, Spilg J held that it was necessary for a proper determination of a Rule 43 application for a party to make full and frank disclosure of their financial affairs, thus permitting longer affidavits. He held that without proper financial disclosure the court had little to work on than the product of competing type writers.

[31] I now consider the extent to which the current applications comply with Rule 43 (2) and (3) as interpreted in Van Andel.

[32] In **R v R Van Vuuren** AJ indicated that although the papers were not as voluminous as in the other two matters, the Respondent in his answer raised a point in *limine* that the papers were prolix and did not comply with Rule 43 (2).

[33] The Respondent amongst others relies on the dicta in **Colman vs Colman 1967 (1) SA 291 (1)** in advancing his point in *limine*. It must be taken into consideration that Colman was decided in 1967. Times have changed and the financial burden of spouses are not the same as it was in 1967. As Spilg J has warned, a one size fits all approach cannot suffice and will never be in the best interest of the children. The length of an Applicant's affidavit should not disentitle her to relief. What is important is whether the contents of the affidavit and the annexures are relevant.

[34] In his referral judgment, Van Vuuren AJ observed that the founding affidavit is not voluminous. I agree. Both the affidavit and the annexures total 33 pages. The annexures are 22 pages. In my view, such annexures are indispensable for purposes of making out a case for the relief the Applicant seeks.

[35] In TS, Spilg J correctly found at paragraphs 62 and 63 as follows:

> "[62] While many Rule 43 applications may not require more than a succinct set of affidavits to enable a court to make a proper determination that will serve the best interest of the child, in my respectful view, a one-size-fits-all approach to the sufficiency of evidence that should be placed

before a court may in a given case have difficulty either in passing constitutional scrutiny or being capable of meeting the requirements that the outcome will serve the child's best interests.

[63] The adjudication of maintenance for children *pendente lite* involves establishing the actual expenditure requirements that have been incurred historically, establishing whether there is any change and if so, why."

[36] In **Du Preez 2009 v Du Preez (6) SA 28 TPD** it was stated as follows regarding relevancy of information:

"*A misstatement of one aspect of relevant information invariably will color other aspects with the possible (or likely) result that fairness will not be done. Consequently I would assume there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith (uberrimae fides) and to disclose fully and all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with "clean hands" and on that ground alone the court will be justified in refusing relief."*

[37] In the final analysis, it is interesting that ultimately the Respondent concedes in his submission regarding the answer to the issue raised that: "*There are tremendous amounts of applications wherein for instance contact*

*and residence of minor children is in dispute. As a result of same many applications consist of social workers reports and psychological reports. This must be incorporated in the Rule 43 application which would no doubt make the application voluminous."*

[38] In conclusion the Respondent at paragraph 43 says that *"It is my humble submission that each matter turns on its specific fact however in matters in general in Rule 43 I am of the view that there should be no limitation to the papers filed and that should there be irrelevant material inserted in such application a Respondent and the honourable court is able to consider application to strike out irrelevant material."*

[39] As regards the answer to the question whether a court should have a discretion to allow papers to deviate from the strict provision of Rule 43(2) and (3), the Respondent proposes that this should not be left to the discretion of the trial court but should be allowed in the Rule itself in order to avoid inconsistencies.

[40] The Applicant is self-employed. The only way to prove her income and of making a full and frank disclosure of her financial position.is by attaching her bank statements.

[41] Therefore, the Respondent's point in *limine* based on prolixity is misplaced and stands to be dismissed.

[42] In **M v M**, the referral court noted that the Applicant's sworn statement is concise, despite her attaching 33 pages of documentary evidence in addition to a copy of the particulars of claim in the divorce action. The Respondent made this worse by filing 70 pages of annexures to the 10 pages of his answering affidavit.

[43] As in **R v R** the issue is not so much the number of pages or annexures, it is whether same are relevant. The answer is to be found in ***William v William* 1971 (2) SA 620 (O)** where the issue of annexures was addressed. There the court said:

> *"The language of Rule 43 (3) does not show that an annexure to an answering affidavit is an offending document. The Rule states that the Respondent shall deliver a sworn reply "in the nature of a plea". Neither does Rule 22 dealing with a plea forbid the possibility of a document being attached to a plea. An annexure forms part of the plea and I can visualise the position where such an annexure may not only*
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> *"clearly" and concisely state certain facts upon which the Respondent relies in regard to some aspect of his defence, but it may also because of its official nature, put the whole matter beyond any doubt, e.g. a Respondent's paysheet to prove his income where he is employed by the South African Railways."*

[44] Neither of the parties raised the issue of prolixity. What is of importance is that the Respondent agrees that it is inconceivable that a party in a Rule 43 application is able to set out all the facts regarding his finances and issues pertaining to contact and residence of the minor children in a concise statement. The Respondent makes the point that restricting the length of the application and the annexures may in certain circumstances, prejudice children and the parties themselves. The Respondent concedes that a Rule 43 application and the subsequent order carries tremendous weight in divorce litigation. Accordingly, it is in the interest of justice and in the best interest of minor children to allow the parties to file substantive but relevant affidavits setting out the basis upon which their relief is sought.

[45] It is for that reason that in **M v M**, the court considered the application on the basis of the papers filed and granted the 7 December 2018 order.

**E v E Case Number: 12583/2017**

[46] The Applicant filed a notice to abide and has not filed heads of argument. This is the one matter out of all three that seem to have caused the referral judge to seek the intervention of the full court as to the correct applicability of Rule 43(2) and 43(3). The applicant's founding papers comprises 86 pages 34 of which is the Rule 43(2) sworn statement. The balance being 53 pages, is made up of annexures. In reply, the Respondent would not be outdone and

went a step further by filing a lengthy answering affidavit comprising of 109 pages and 48 pages of annexures, making his response a total of 157 pages.

[47] The Applicant claims maintenance for herself as well as contribution to legal costs. The Respondent contends that the Applicant is employed and should be able to maintain herself as well as to pay for her legal fees.

[48] In addressing the issue whether the application as well as the reply thereto meets the requirements of Rule 43(2) and (3), the Respondent is at one with the argument raised in **R v R** and **M v M**. The respondent makes the point that the only limitation to annexures and their content is that they must be admissible and relevant in terms of the rules of evidence.

[49] Having found that the content of the applicant's affidavit and annexures were relevant and that she made out a case for the relief sought, the court granted the order of 7th December 2018.

[50] I now consider the legal questions raised by the referral court.

**Questions Referred for Consideration**

[51] In ***Eke v Parsons*** **2016 (3) SA 37 (CC)** it was stated that "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." It is against this backdrop that the issues before this court are considered.

Question 6(a): "Does the court have the discretion to permit the filing of applications that have departed from the strict provisions of Rule 43 (2) and (3)"

[52] This question should not be confused with the discretion that a court has in terms of Rule 43 (5). The question relates to the founding and answering affidavits. All the parties including the *amici,* agree that the court does not have such a discretion unless it decides to call for further evidence in terms of Rule 43 (5). As already stated, the common view expressed by all the parties is that there should be no limitation to the number of pages filed for as long as what is contained in the affidavit and the annexures thereto is relevant and admissible as evidence.

[53] The Gauteng Family Law Foundation submitted that this question ought to be determined bearing in mind constitutional considerations in respect of the right to a fair hearing as entrenched in Section 34 of the

Constitution.

[54] Relying on TS, Legal Aid South Africa supports the view that there should be no limitation to the length or content of the founding and answering affidavit. Concerning this, Spilg J said:

> "While many rule 43 applications may not require more than a succinct set of affidavits to enable a court to make a proper determination that will serve the best interest of the child, a one-size-fits-all approach to the sufficiency of evidence that should be placed before a court may in a given case have difficulty passing either constitutional scrutiny or be capable of meeting the requirements that the outcome will serve the child's best interest."

[55] All the parties and the amici are *ad idem* that a practice directive be issued requiring the parties in all opposed divorce matters to complete and submit a detailed financial disclosure form ("the disclosure form") attached hereto. The disclosure form must be completed under oath. They propose that the disclosure form must either be filed within 20 days of service of the notice of intention to defend, alternatively, that it be filed as an annexure to the parties' respective rule 43 affidavits.

[56] The benefit of making it mandatory to file a financial disclosure form is that firstly, the parties will not need to file lengthy affidavits to make or defend their case. Secondly, parties will be forced to be transparent with each other and with the court at the inception of the divorce action. This makes early settlement possible.

[57] Financial disclosure will place the court hearing the application in a better position to decide the matter in a manner that does justice to the parties and takes care of the best interests of the minor children.

Question 6(b): “If the court does have such a discretion what are factors to consider in order to reasonably exercise this discretion are these factors exhaustive”

[58] In terms of Rule 43(5), the court does have a discretion to call for further evidence despite the limitations imposed by Rule 43(2) and (3). The problem with the present Rule 43(2) and (3) is that invariably, in most instances, the Respondent will raise issues that the Applicant is unable to respond to due to the restriction, unless the court allows the Applicant to utilise Rule 43(5). This process will result in conflicting practices as it has already happened in a number of cases and as highlighted by Spilg J in TS.

[59] Applicant should have an automatic right to file a replying affidavit, otherwise she has no way of responding to allegations that are set out in the Respondent’s answering affidavit.

[60] Lastly, the fact that there is no appeal against a Rule 43 order imposes further restrictions on a party unless that party specifically utilises Rule 43 (6), which is not there for the simple taking. Rule 43 (6) may only be used where there has been a change in circumstances.

Question 6 (c): "If the court does not have such a discretion, should the practice manual request that all Rule 43 applications prescribe to a specific form, particularly in terms of length? Would the imposition of a restriction on the length of a Rule 43 application withstands constitutional scrutiny"?.

[61] The answer to this question is simple and has already been alluded to in developing the answer to question 6(a) above. It is imperative, constitutional and practically necessary to amend the practice manual so as to permit Rule 43 applications being filed without restrictions. This will allow optimization of the best interest of minor children, but will also be fair and promote transparency by all parties.

[62] It is not uncommon for the parties to seek to ventilate the issues in the trial action in the Rule 43 application, causing the affidavits to become replete with allegations and counter allegations that rarely bear relevance to the issues the Rule 43 application. This practice often results in long and irrelevant affidavits. Where this happens the court may, penalise one or both of the parties with an adverse order as to costs. The lifting that this judgment proposes should not become a license to parties to express and advance views and opinions that bear no relevance to the issues before the court.

[63] The proposed financial disclosure form may present confidentiality issues. To avoid this, the form should be filed separate from the affidavits, remain confidential, and only used by the parties and the court for the purpose of the Rule 43 application and the divorce. In TS, Spilg J recommends that the

formulation of a standardised financial disclosure form which must he completed at an early stage in the proceedings appears to be more properly a matter to be addressed in the rules in order to secure uniformity. He proposes that whilst awaiting amendments to the rules that Rule 43 (5) be invoked. While I agree to this proposal, until the Rules are amended, amending the practice directive as proposed in this judgment is the most expedient way of implementing this procedure in this division.

[64] Accordingly, I propose the following order:

**ORDER**

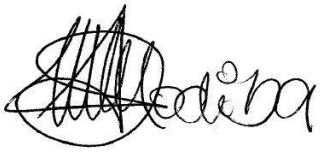
1. On receipt of the Rule 43(2) and 43(3) affidavits, the Judge allocated to hear the matter shall, if he or she deems it appropriate, issue a directive to the parties in terms of Rule 43(5) calling on the Applicant and/ or the Respondent to file (a) supplementary affidavit(s) making a full and frank disclosure of their financial and other relevant circumstances to the court and to the other party.

2. The affidavits referred to above must be accompanied by a financial disclosure form, annexed hereto, which must be filed seven days before the date of hearing.

3. Affidavits filed in terms of Rule 43(2) and (3) shall only contain material or averments relevant to the issues for consideration. It shall not be competent for a court to dismiss an application in terms of Rule 43, only on the basis of prolixity. If the court finds that the papers filed by a party contain irrelevant material, the court only has the power to strike off the irrelevant and inadmissible material from the affidavit in question, and make an appropriate cost order.

4. It is proposed that the Judge President amends the Practice Directive to give effect to this judgment and order.

It is so ordered.



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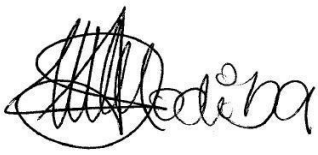
**For Makume J**

I agree.



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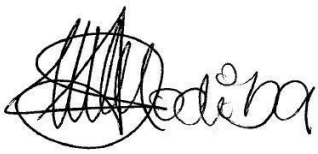
**For Kollapen J**

I agree.



**Modiba J**

**APPEARANCES**

Adv L Segal SC with Adv E Webber and S Kangyangara
Instructed by: Christelis Artemides Attorneys
For Gauteng Family Law Forum (Amicus)

Adv N Skibi with Adv M Steenkamp and Attorney S Kekana
Instructed by: Legal Aid of South Africa (Amicus)

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Adv P Bosman
Instructed by: Brand Potgieter Inc
For the Respondent in EvE

Adv K Pillay SC with N Lombard
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**Date of hearing: 03 DECEMBER 2018**

**Date of judgment: 12 JUNE 2019**