

SOUTH AFRICA / JUDGMENT

Du Preez v Du Preez (16043/2008)

[2008] ZAGPHC 334 (24 October 2008)

[2008] ZAGPHC 334**COURT**

High Courts - Gauteng

BEFORE

Murphy

CASE / FILE NUMBER

16043/2008

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(TRANSVAAL****PROVINCIAL DIVISION)****CASE NO: 16043/2008****NOT****REPORTABLE DATE: 24/10/2008****In****the matter between:**

DINA

MARIA CHRISTINA DU PREEZ Applicant

and

WYNAND

COENRAAD JACOBUS DU PREEZ Respondent

JUDGMENT**MURPHY J**

1. The applicant seeks maintenance for herself and her three daughters, (all majors, aged 23,22 and 18) pendente lite in the amount of R13 600. In addition she seeks orders directing the respondent to pay the bond repayments, the home insurance premiums, the utility accounts, DSTV membership, an amount of R4211,48 for arrear medical expenses, a further amount of R44 229,72 to effect repairs to the common home and R40, 000 contribution towards her legal costs.

2. The applicant's application consists of 36 pages with annexures running to an additional 57 pages. To that she has added a supplementary affidavit with annexures of a further 46 pages. In other words her Rule 43 application consists of 139 pages. The respondent has restricted his answer to 46 pages.
3. Rule 43, it is well known, is a special procedure aimed at the expeditious and inexpensive resolution of maintenance issues pendente lite. In *Colman v Colman* 1967(1) SA 291 (c) at 292A Theron J pronounced upon the purpose of and approach to Rule 43 proceedings as follows:

"The whole spirit of Rule 43 seems to me to demand that there should be only a very brief statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent and that the Court is then to do its best to arrive expeditiously at a decision as to what order should be made pendente lite."

4. The applicant's papers are anything but brief and the respondent's reply is less than succinct. The tendency by parties, aided by their legal representatives, to engage in prolixity in Rule 43 proceedings has been criticised more than once by courts across the country. Yet the criticism has been insufficiently heeded. I align myself with the remarks made by Kroon J in *Visser v Visser* 1992 (4) SA 530 (SECLD) at 531 where he observed:

"It is my experience, and I understand that of my Brothers to be the same, that there is a tendency for the provisions of Rule 43 to be disregarded and for the applications and the reply thereto to assume voluminous proportions. That practice must be firmly discouraged and the present is an appropriate case where the discouragement will commence."

5. Prolixity in a Rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule - *Smit v Smit* 1978

(2) SA 720 (W) at 722G.

6. In *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D, Epstein AJ elaborated on the undesirable nature of prolixity in Rule 43 applications as follows:

"In this Division, where there are so many Rule 43 applications on the roll each week, the abuse of the process of this Court (by frustrating and/or defeating the purpose or object of Rule 43) places an unnecessary burden on the Judges who have to read prolix affidavits containing matter irrelevant to the Rule 43 proceedings."

7. In *Patmore* (supra) the application was struck from the roll because the applicant's papers ran to 47 pages. In *Smit* (supra) the application suffered the same fate because the complete set of papers ran to 69 pages. In the present matter the papers total 192 pages.

8. Counsel for the applicant has submitted, keeping in mind the relief sought, that the applicant was compelled to provide comprehensive information in support thereof and in these exceptional circumstances I should not strike the matter from the roll for prolixity. There are admittedly issues raised on the papers that at first glance are out of the ordinary, such as the fact that all the children are majors (one of whom resides with her boyfriend as man and wife), as well as the need to effect repairs to the house.
9. Against that though there is the fact that the applicant's previous Rule 43 was dismissed with costs on the grounds of prolixity. She, or her attorney, appears not to have learnt the lesson. The founding and supplementary affidavits suffer verbosity and the allegations in them could have been considerably more concisely stated.

10 Rule 43 requires the applicant to deliver "a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor". When Rule 43 was first promulgated the parties had to file an unsworn statement in the nature of a declaration or plea. The later introduction of a requirement of a sworn statement seems to have prompted the tendency to prolixity - see *Smit v Smit* (supra at 722H). Greater detail was never the intention, the requirement of a sworn statement, it would seem to me, was to ensure veracity and consequently greater credibility and reliability. The requirement that Rule 43 statements should be concise so that they approximate more to the form of a declaration or a plea has never changed - see *Visser v Visser* (supra at 531A).

11. Both of the applicant's affidavits are prolix, verbose and contain unnecessary and irrelevant information. The annexure containing more than 80 photographs of the marital home is particularly out of place in an application of this kind. A simple quotation from a builder would have sufficed.
12. The respondent's answering statement of 46 pages can perhaps be excused as being a response to an overly detailed declaration. However, he too is given to verbosity and unnecessary statements.
13. I am accordingly unpersuaded that there is any justification for the inordinate prolixity in the papers on the part of both parties. The circumstances are not exceptional to the extent that they excuse the unacceptable length of the papers. Parties and their legal representatives must be encouraged to fashion their pleadings in accordance with the spirit and purport of Rule
43. Their failure to do so is an abuse of process and the court should censure their conduct by appropriately refusing to grant

relief.

14. On the question of costs, other courts have responded to prolixity by awarding costs against the prolix party. I prefer the approach adopted by Kroon J in *Visser v Visser* (supra). On the likelihood that the parties were not aware of the provisions and purpose of Rule 43, but that their attorneys were or should have been, the learned judge (rightly in my respectful

opinion) did not consider it proper to saddle the parties with the costs. Consistent with the policy that prolixity should be discouraged he made no order as to costs and further ordered that neither party be charged any fees by their attorneys. This approach, as I have said, commends itself to me as an effective means of disciplining practitioners and I accordingly propose to follow it.

15. However, before concluding, there is another matter that gives me cause for concern deserving of mention and brief consideration. In my experience, and I gather my colleagues on the Bench have found the same, there is a tendency for parties in Rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in Rule 43 applications. To my mind the practice is distasteful, unacceptable and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury, and in certain circumstances may be the crime of defeating the course of justice. Should such conduct occur in Rule 43 proceedings at the instance of the applicant then relief should be denied.
16. Moreover, the power of the court in Rule 43 proceedings, in terms of Rule 43(5), is to “dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision”. The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour 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 (*uberrime fidei*) and to disclose fully 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.

17. In paragraph 6.4 of her founding affidavit the applicant stated that she earns a net salary of R7 521, 39 per month. In his answering affidavit the respondent pointed out that the applicant failed to include an amount of approximately R3000 per month which she earned on an investment of R320 000. Though the applicant mentions that she has received an amount of about R560 000

from the sale of certain shares, she is ambiguous about how the investment augmented her income. One thing is certain: she did not include the return on investment in her income for the purpose of calculating the shortfall between her income and expenditure, being the basis of her claim for maintenance. In my view a material omission of this kind falls short of what may be expected in Rule 43 proceedings. Because she failed to take the court fully into her confidence she did not act with utmost good faith and should be denied relief on that score as well.

18. Reprehensible as her omission might be, worthy of a costs order against her, the need to send a strong signal against prolixity induces one to make a costs order aimed at inspiring greater discipline among attorneys.

19. I accordingly make the following

orders:

- 1) The matter is struck off the roll.
- 2) There is no order as to costs and it is further ordered that neither of the parties will be charged any fees by their attorneys in respect of the application and the opposition thereto.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 19 August 2008

For the Applicant: Adv NF de Jager, Pretoria

Instructed By: Schoemans Attorneys

For the Respondent: Adv N van Niekerk, Pretoria

Instructed By: EY Stuart Inc.

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