

SOUTH AFRICA / JUDGMENT

I.P v N.P (16768/2023) [2023] ZAWCHC 287 (20 November 2023)

[2023] ZAWCHC 287**COURT**

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

16768/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case****No: 16768/2023****In**the Rule 30 application
between:IP
Applicant
and
NP
Respondent
IN
RE
Inthe Rule 43 application
between:NP
Applicant
and
IP
Respondent**Coram:**

Justice J Cloete

Heard:17 November 2023
Delivered
electronically: 20 November 2023

JUDGMENT

CLOETE J:

- [1] There are two applications before me. One is an opposed rule 30 application brought at the instance of the applicant, which centres on the manner in which the respondent has approached this court in terms of rule 43. The other is the respondent's application, to the extent necessary, for condonation for the prolixity of her rule 43 papers. During argument it was accepted that should the rule 30 application succeed, then as a consequence the condonation application would fall away.
- [2] It is well-nigh impossible to sift through and deal with all the allegations and counter-allegations contained in the copious correspondence exchanged between the parties' respective attorneys, much of which was simply annexed to the papers without being properly dealt with in the affidavits themselves. Suffice it to say that the tone and content of some of that correspondence, in particular from the respondent's attorney, is most unfortunate as well as irrelevant for present purposes.
- [3] On 29 September 2023 the respondent launched her rule 43 application in which she seeks extensive and wide-ranging relief, predominantly for maintenance pendente lite for herself and the parties' dependant child and a substantial contribution to her costs in excess of R1 million. In addition, and this is the focus of the rule 30 application, she claims the following. First, an order compelling the applicant to complete what she describes as a Financial Disclosure Form ("FDF") coupled with the 'required annexures' (which it seems is 28 pages excluding those annexures), and until such time as he has done so 'in full to the satisfaction' of the court, and the rule 43 application is thereafter determined, he must pay, i.e. in the interim, all the maintenance detailed in the rule 43 notice. Second, she seeks an order directing that at the hearing of the rule 43 application she may refer to the FDF information and documentation, plus a bundle of other documents not yet placed before the court but which apparently runs to 288 pages (including the FDF), 'to the extent necessary to ensure a just and expeditious decision'. I will refer to the former as the "FDF relief".
- [4] Importantly, it is clear from the respondent's rule 43 affidavit that on her version she will not be able to prove her claims without the FDF information, which makes the issue of whether or not she is entitled to it in rule 43 proceedings integral to the determination of the other relief she seeks (i.e. maintenance and the contribution towards her costs).
- [5] There is the following single prayer in the rule 43 notice, namely 'to the extent necessary condoning the applicant's non-compliance with the strictures of Rule 43'. In the affidavit deposed to by the respondent in support of the rule 43 application she deals with the issue of condonation as follows:

‘18. To properly advise the court regarding the reasonableness of the relief that I seek, which is novel and extensive, I am not able to simply provide a succinct summary of the respondent’s resources, with limited annexures. The issues in dispute are complex, the background needs to be explained and the respondent has placed the affordability of my claims in dispute. The relief that I seek is exceptional. I accordingly seek condonation to the extent that this affidavit is prolix.

19. I also do not attach all the documents that contain the evidence to which I refer. I rather include the documents in a separate bundle (“the Bundle”) that I will serve with this application. If the respondent disputes any of the averments made by me where I refer to documents in the Bundle, I ask the court for leave in terms of Rule 43(5) to refer to the further evidence in the Bundle at the hearing, so that a just and expeditious determination of the issues can be made.’

[my emphasis]

[6] Accordingly no case is made out in the founding affidavit to “condone” – if indeed this were permissible – the FDF relief. The condonation sought is limited only to the extent that the respondent’s papers in the rule 43 application are found to be prolix and nothing more. The FDF relief is instead premised on the respondent’s (separate) averment that the applicant has failed to make full discovery in the parties’

pending divorce action. Apparently for this reason, she alleges that:

‘24. I am advised that because of the concerns raised by the courts considering Rule 43 applications in Gauteng, that litigants were not being frank with the court, the Judge President of the Gauteng Division issued Practice Directive 2 of 2020 (“the Directive”). Paragraph 3.5 of the Practice Manual of the Gauteng Division now includes a peremptory provision relevant only to divorce actions and Rule 43 applications for parties to make disclosure of their financial resources by completing and exchanging a... FDF. A similar procedure is available in the Eastern Cape Division... Litigants are directed to complete a similar disclosure form prior to the hearing of a Rule 43 application...

28. A similar practice is not compulsory in this court. I am thus not afforded the same opportunity as litigants in Gauteng and the Eastern Cape to receive full disclosure prior to a hearing. The court is also not afforded the same advantage in adjudicating interim relief applications. I am unfairly disadvantaged and discriminated against in my access to justice. My constitutional right to a fair hearing is unfairly prejudiced by this. There is no prejudice to the respondent requiring him to properly complete the FDF.’

[7] Excluding the separate bundle of 288 pages, the respondent’s

rule 43 application comprises of 117 pages. It is trite that where condonation is sought it must be properly motivated. During argument before me counsel for the respondent however argued that condonation is no longer even necessary in light of various recent decisions in the Gauteng High Court. The merit of that argument is not something I need determine given what follows.

[8] On 13 October 2023 the applicant delivered a notice in terms of rule

30. In short, he maintained that the respondent's rule 43 application constitutes an irregular step (or proceeding) since she has failed to comply with rule 43(2), which directs her to deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds therefor. He summarised the respects in which he alleged the respondent had failed to do so, and on a reading of the notice as a whole (instead of cherry-picking parts of it as the respondent would have the court do) he took issue with the FDF relief, purportedly in terms of rule 43 that '...the applicant may refer to the financial disclosure forms (to be) completed by the parties as well as the bundle of documents referred

to in paragraph 2.4 above' [being the bundle of 288 pages]. As a matter of logic the respondent could only ask for the relief she seeks under rule 43(5) if the applicant is first compelled to comply with her FDF relief.

[9] The respondent did not remove the cause of complaint whereafter the applicant launched the present application on 3 November 2023. The pertinent paragraphs of his founding affidavit read as follows:

'12. I am advised that there is no such [FDF] directive in application in the Western Cape High Court...

14. I am advised that some of the content of the financial disclosure form will result in a duplication of information of what is contained in a sworn statement and a sworn reply in rule 43 applications and that some of the information sought is irrelevant to the issues in a rule 43 application...

16. I am advised that N... has failed to comply with rule 43(2), which directs her to deliver a sworn statement "in the nature of a declaration setting out the relief claimed and the grounds therefor"...

[10] The applicant also dealt with the prejudice to him if the rule 43 application in its current form was allowed to stand. It would seem from correspondence exchanged between the parties' attorneys prior to the launching of the rule 30 application that the respondent's refusal to remove the cause of complaint was essentially based on two grounds, namely (a) the rule 30 notice is pre-emptive of her condonation application which was already pending for determination at the hearing of the rule 43 application itself; and (b) the rule 30 notice is an abuse of process designed solely to delay and frustrate the hearing of that application. As to (a) this has fallen away for the reason I set out later. As to (b), the following.

[11] As I see it, the respondent faces certain insurmountable hurdles which she failed to address in both her rule 43 application and her answering affidavit in the current application. First, when one looks past the hyperbole and emotive content, what she actually seeks is for the court, under the guise of rule 43(5), to override not only the provisions of rule 43(2), but indeed the ambit of the relief claimable under that rule as a whole, by importing into it a practice directive of two other Divisions. The Supreme Court of Appeal has already made

clear that a practice

directive ‘...may not derogate from legislation, the common law or rules of court that have binding force’: see The National Director of Public Prosecutions, (Ex Parte Application).[1]

[12] Second, the respondent has paid no heed to the principle of subsidiarity. As was restated in Mazibuko:[2]

‘...This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.’[3]

[13] This applies similarly to a rule of court where condonation alone would not be an appropriate remedy. Here it is important to emphasise that I am not seized with the rule 43 application, which is the stage at which the court may consider any further evidence upon application, or indeed mero motu, to ensure a just and expeditious decision under rule 43(5). It is equally important to emphasise that there is a distinction between attacking offending material in an affidavit (which is where a notice to strike out applies) and an irregular step taken in litigation (when rule 30 applies). In contending that the applicant is limited to a striking out application the respondent conflates the two and misconceives the nature of some of the relief sought by the applicant. What he challenges in addition to what he contends is offending material is the FDF relief under the guise of rule 43.

[14] Although the respondent complains of being ‘...unfairly disadvantaged and discriminated against in my access to justice... my constitutional right to a fair hearing is unfairly prejudiced by this...’ no challenge has been made by her to the constitutionality of rule 43 itself. A different challenge to the rule on the basis that ‘[I]t contains no guidelines, timelines, is indefinite and non-appealable’ was rejected by the court in CT v MT[4] in which it was found as follows:

[18] The applicant’s statement of case does not expand upon the respects in which rule 43 is said to violate rights guaranteed in the Bill of Rights and indeed he does not expressly allege that the rule is invalid for violating these rights. In his oral submissions he confined himself to the complaint that the rule contains no guidelines or timelines and is indefinite.

[19] However, to the extent that the applicant intended to advance the case that the rule is invalid for violating one or more of the above sections of the Bill of Rights, I reject the argument. I remind myself at the outset that the rules of court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law (United Reflective Converters (Pty) Ltd v Levine;[5] Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech with Card Solutions and Others;[6] Standard Bank of South Africa Ltd v Hendricks & Another and 5 similar cases.[7] Specifically in relation to rule 43, Vos J in this Division said in Harwood v Harwood[8] that rule 43 governs procedure and does not affect the substantive law (see also Jeanes v Jeanes and Another).[9]

- [20] The court's power to make pendente lite orders for maintenance, contribution to costs, and access to and custody of children, is a power which vests in it by virtue of substantive law. It is a power which was exercised for many decades before rule 43 was introduced. If rule 43 were abolished, the substantive power would not disappear. Only the procedure by which it is invoked would change (a spouse would seek pendente lite relief by way of an ordinary application).
- [21] It follows that in a challenge to the constitutional validity of rule 43 one is not concerned with the notional detriment which spouses may suffer from orders made against them pendente lite in accordance with substantive law but only with such detriment as flows from the specific procedure laid down in rule 43 for obtaining such orders.'
- [15] So too in an earlier decision of the Constitutional Court in *S v S and Another*[10] the apex court recognised that a challenge to the constitutionality of rule 43 is permissible. It stated that:
- '[53] The root of Mr S problem lies in rule 43 rather than section 16(3). The constitutionality of rule 43 was not in issue before this Court and counsel for the applicant made it clear that his argument was confined to the unconstitutionality of section 16(3). Rule 43 may be wanting in certain respects and there may well be grounds for a review of rule 43(6) in the future to include not only changed circumstances but also "exceptional circumstances". However, this is not a decision this Court is called upon to make.'
- [16] Third, the alleged constitutional violation identified is in reality the absence in rule 43 of a stipulation for advance financial disclosure in applications for relief pendente lite. However in the present case the respondent herself alleges in the rule 43 application that the parties have already made discovery in their pending divorce action, which is under case management; subpoenas have been served on the local banks where the applicant holds accounts; but, since most of the applicant's financial resources are allegedly offshore, she cannot subpoena what she considers to be relevant documents in relation thereto. She states that since the applicant '...has not obliged... I will have to pursue further discovery and issue further subpoenas.'. I raised this with counsel for the respondent during argument and was informed that she has subsequently invoked rule 35(3).
- [17] Peculiarly, the maintenance claimed in the rule 43 application appears to include some kind of "interim interim" mandatory relief – i.e. that the applicant must pay everything the respondent demands as maintenance until the court is satisfied that he has made the financial disclosure which she requires.
- [18] For these reasons, subject to what is set out below, I am persuaded that the rule 30 application must succeed. I also agree with the applicant's submission that a punitive costs order against the

respondent is appropriate. The respondent's attorney saw fit, at an early stage of these proceedings, to threaten the applicant's

counsel and attorney with a costs order *de bonis propriis*. That was entirely unwarranted. This threat could only have been on the instructions of the respondent herself (indeed if this were not so it would be disturbing). The applicant was entitled to approach this court to set aside the irregular step (or proceeding) without first having to deal with the merits of the rule 43 application, and the respondent's failure or refusal to appreciate this resulted in substantial and unnecessary costs being incurred by him.

[19] Further, apart from a bald allegation of urgency tucked away in the rule 43 affidavit (the notice itself is silent on this), after receipt of the rule 30 notice the matter suddenly burgeoned, at the insistence of the respondent's attorney, to one of such apparent dire urgency that the Acting Judge President was approached by her to allocate a special preferential date for the hearing of these two applications in Fourth Division, and for reasons that were

not explained by counsel, by a Judge other than the case management Judge despite Practice Directive 41(4) of this Division. After that request was granted an order was made by the Acting Judge President (by agreement) that the respondent's condonation application would be heard at the same time as the rule 30 application (and indeed that heads of argument would simply be handed up at the hearing). Perhaps the respondent did not give much thought to this but the effect of agreeing to a simultaneous hearing was to dispense with her contention that the rule 30 notice was pre-emptive of her condonation application, which the Judge seized with the rule 43 application would in the normal course have been required to consider and determine.

[20] In conclusion, part of the relief sought by the applicant is an order that the rule 43 application may not be re-enrolled without compliance with the provisions of rule 43(1) and (2). I have given this careful thought and have decided not to grant this portion of the relief for two reasons. First, the respondent may wish to launch a constitutional challenge to rule 43. In my view the rule should have been overhauled by the Rules Board long ago. Save for sub-rules 43(7) and (8), and despite the advent of the Bill of Rights in the Constitution, it has remained unchanged since 1965.

[21] Second, given the manner in which the litigation has progressed thus far, if I were to grant the order sought in respect of rule 43(2) there is a real risk that another court will land up being burdened with a dispute about whether or not the respondent has complied with that sub-rule. In any event, since condonation is permissible in an appropriate case, and indeed in recent times some courts have adopted a far more tolerant approach to rule 43 papers (given that often the issues are complex and strict adherence to rule 43(2) is thus inappropriate) it would be wrong to fetter another court's discretion on this score.

[22] The following order is made:

1. The rule 30 application is granted to the extent set out in paragraphs 2 and 3 below;
2. The respondent's rule 43 application under the above case number is struck from the roll; and

3. The respondent shall pay the applicant's costs of the rule 30 application, as well as any costs incurred by him to date in

respect of the rule 43 application, on the scale as between attorney and client and including the costs of one counsel.

J I CLOETE

For applicant in the rule 30 application: Adv J Anderssen

Instructed by: Mandy Simpson Attorneys (Ms A Simpson)

For respondent in the rule 30 application: Adv L Buikman SC

Instructed by: Catto Neethling Wiid Inc. (Ms A Catto)

- [1] 2022 (1) SACR 1 (SCA) at para [19].
- [2] Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) at para [73].
- [3] See also the long line of cases at fn 54 thereof.
- [4] 2020 (3) SA 409 (WCC).
- [5] 1988 (4) SA 460 (W) at 463B-E.
- [6] 2012 (5) SA 267 (GSJ) at para [21].
- [7] 2019 (2) SA 620 (WCC) at para [26].
- [8] 1976 (4) SA 586 (C) at 588E-F.
- [9] 1977 (2) SA 703 (W) at 706F-G.
- [10] 2019 (6) SA 1 (CC).

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