

SOUTH AFRICA / JUDGMENT

TS v TS (28917/2016) [2017] ZAGPJHC 244; 2018 (3) SA 572 (GJ) (7 August 2017) [2017] ZAGPJHC 244

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

28917/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 28917/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

7

August 2017

In

the matter between:

TS,
R
Applicant
And
TS,
T
Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. Rule 43 was “merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs”.^[1]
2. If one cares to ask practitioners they will tell you that a rule 43 application is much like playing Russian roulette. The rule is considered to be unpredictable in application and is said to be prone to an unfair result for one if not both of the parties.^[2] This has been a consistent refrain ever since I joined the legal profession.

The problem is that it matters more now because of the significant consequences to the parties of what is procedurally classified as an interim order but in practice is likely to be the only contested hearing during the entire divorce process.

The reason is the length of time it may take for an opposed divorce to come to trial thereby prompting the need for interim parenting

arrangements, maintenance and the like under rule 43. It is also the subsequent realisation, by the one party or both, of the unaffordability of seeing the litigation through to a costly full blown trial.

3. Delay may be due in part to the resources available to a court, by which I include the over-stretched offices of the Family Advocate. It may also arise as a consequence of the increased number of divorce cases coming to the High Court or the conduct of those litigants whose interests are served by maintaining an inequitable status quo in relation to any of the issues which a rule 43 application is intended to address, particularly where that party has sufficiently deep pockets to out-litigate the other.
4. The issues before the High Court have also become more complex since Zaphiriou. Gone are the days of the norm being a single bread winner or that a child should remain with the mother unless it can be shown that she is unfit.^[3]

Not only are both spouses more likely to be working but the structuring of the financial affairs of one or the other may be

complex and intertwined with family trusts or businesses here or off-shore in which they are de facto beneficiaries.^[4]

While the rights of children have always been respected and the courts have conscientiously exercised their common law powers and duties as upper guardian, the recognition of the rights of children being of paramount consideration in all matters affecting them is more accentuated. In the main this is due to s 28 of the Constitution and its adoption into the Children's Act 38 of 2005[5]. Later I consider the impact which the changes brought about by the Children's Act may have on the application of rule 43.

5. A rule 43 order, while interim in nature, will loom large in the negotiations that are invariably conducted between the parties. As a consequence it will affect whether an eventual settlement achieves the desired result of fairness to both parties. On the other hand, if the case cannot be settled then the "successful" party to a rule 43 application (or a rule 58 in the Magistrates' Court) is placed at an advantage as the order will be relied upon before the trial court with the risk that a "reverse onus" is cast on the other party to show why the order was wrong.

6. The consequences of a rule 43 order may also be difficult to undo. This can be illustrated by the following observations.

The order affects the interrelationships of what was once a family unit. It alters parental care and contact arrangements which, irrespective of the obligation to give due consideration to the views of the other parent on any major decision affecting a child[6], de facto can give the one parent greater control over the way in which the child will be brought up.

The rule 43 order also impacts on the level of support provided to a child. This in turn may affect not only the quality of education that ought to be provided but also the child's general quality of life and access to opportunities. It is therefore vital that both parties are frank about the available financial resources that should be provided in order to assist their children to attain their full potential. Where both parents work, a rule 43 order in respect of child support imposes financial obligations on each of them and therefore may disproportionately prejudice the financial security and long term wellbeing of the one party to the unfair benefit of the other.

7. These various considerations demonstrate that a rule 43 order cannot be equated with an interim order in an ordinary commercial matter.

It is not a holding position. It is axiomatic that a rule 43 order involving children impacts fundamentally on their rights. Where it affects only spousal maintenance then other rights may also be involved.

APPLICATION OF RULE 43

8. Personal experiences in legal practice or on the Bench[7] and the anecdotes of those in the professions are insufficient to provide the necessary support for a judgment that is based on the potential shortcomings of rule 43 applications in a given case. It was therefore of value to have been referred by a member of the bar to the representations made by the Cape Law Society in 2015 which also endorsed views held by members of the Cape Bar. The content of their submissions accords with the experiences related by practitioners in this Division.
9. On 15 November 2015 The Cape Law Society (“the CLS”) presented to The Law Society of South Africa the comments of its Magistrates Court and its Family Law and Gender Committees[8]. Although the submissions were directed at the proposed amendments to the tariff for rule 43 applications and its mirror provisions in the Magistrates’ Courts rules[9] they dealt essentially with how the rule was applied in practice. In addition copies were provided of submissions made in respect of the same issues by certain members of the Cape Bar[10] to the General Council of the Bar’s Rule Committee. Key submissions made by counsel were endorsed in the body of the CLS’

representations.

10. The Magistrates Court Committee of the CLS contended that rule 43 applications (which is to be understood to include the Magistrates’ Court equivalent);

“have become complex with the introduction of additional legislation such as the Children’s Act which should be taken into consideration and determination of this matter” [11]

The second set of submissions drawn by the Family Law and Gender Committee referred to a lag time of two years between the date when pleadings are closed and the date of trial.

11. The concern I expressed earlier that a rule 43 order may in practice harden into an order with final effect with potentially unequitable results finds support in the

following paragraphs of the Family Law and Gender Committee’s comments:

“The outcome of a Rule 43 application in these matters, has in practice often determined the eventual outcome of the case.”[12]

and at paras 4 to 8 the following submissions were made:

“4. An inappropriate[13] Rule 43 order or a too onerous one or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable manner, often puts an end to the matter or affects the matter inequitably with the result that settlements are reached or

orders

are granted which do not serve equity or justice. This has often caused parties to question the fairness of the process and the

Rules and procedures available to them. Furthermore, it is difficult to meet the requirements of the application of a variation of a Rule 43 Court Order.

5. Unfortunately often Judges are simply put in an impossible situation as they are unable to judge factual disputes which arise from the papers. Often factual versions or financial versions are diametrically opposed. In terms of the current procedure these disputes remain untested as there is no right to reply nor the automatic right to lead oral evidence nor the right of subpoena.
6. It is often impossible for the presiding judge to make a balanced and informed judgement and to have a proper insight into the factual situation. Parties abuse the system sometimes by creating artificial factual disputes on the papers which may in the long term affect their credibility but in the short term give them results and affect the other party detrimentally. A balance has to be achieved.
7. We would not wish to burden the court with a prolixity of papers, however, and are supportive of the fact that these applications should not be voluminous. However, in view of our experience that injustice does frequently result in the finalization of the matter due to these order we are strongly of the opinion that the Rules should be amended to accommodate for a process of reply.
8. In view of the long delays before trial dates are allocated injustice may result, and often does, particularly in view of the fact that no automatic Headline inflation increases are linked to the cash orders. The onus would be on a party wishing to amend the orders to base this on a substantial change in circumstance.[14] The proposal of this committee was to allow for a replying affidavit and that the court should have the discretion to request further

documentary information or affidavits to clarify issues (paragraph 10.1 and 10.3) in relation to the representations made regarding

applying the ordinary tariff to costs it was observed that Rule 43 applications are often used to endeavour to settle the matter

overall.”

12. As was pointed out in these submissions, the presiding judge has an unenviable task. It is often difficult to discern whose version is to be believed; with each party making out a compelling case on paper. A party may even present a plausible explanation to account for excess expenditure over disclosed net remuneration on the ground that property was sold, that money had to be borrowed or that capital is being eaten into in order to make ends meet. There is no way of testing these allegations if regard is had to the limitations

inherent in receiving two brief sets of affidavits as practice requires under the rule. There may also be inequality of treatment in regard to interim maintenance applications because there will be cases where discovery has already been made by both parties (e.g. where the trial was postponed) and no issue has been taken with their adequacy; in such a case there will already be documentary evidence that makes the task of the parties much easier in presenting brief affidavits or refer to external documents contained in court bundles. [15]

13. Limiting the illustration to children's maintenance, the court hearing a rule 43 would generally be expected to deal with the following series of questions: What are the historic expenditure figures? Is there any reason to reduce or increase them (e.g.; if the income source has changed or become depleted and, where applicable, what account if any should be taken of providing for the additional cost of accommodation for the children)? Should there be an annual adjustment for inflation? Once the expenditure figure is determined what would be its equitable apportionment between the parties having regard to their respective net worth, their income or other financial benefits actually enjoyed, their own reasonable expenditure, and any other relevant factors arising in the particular case that should be considered?
14. At face value this might appear to be a straightforward exercise. In some cases it is. In other cases, income, assets or other economic benefits might be provided via drawings, under the guise of a loan (whether directly or through ostensible intermediaries), or in the case of a benefit, is contended to be for temporary use only without any rights being acquired to the property or other asset in question.

Moreover, emoluments may be deferred or, as with assets and other benefits, may be concealed through trusts, nominees, family operated businesses, share options, corporate entities or other businesses or employment structures in relationships that would generally involve connected persons (and accordingly raise the question of whether these are likely to be genuine arms-length relationships).[16] And while a court may on occasion have enough to pierce the structure employed it is rarely in a position to calculate the actual quantum of the benefits received, preferring to err on the side of a conservative assessment.[17]

15. The relationships or structures employed result in the individual concerned maintaining a particular standard of living or accumulating

rights and other benefits that are not accounted for by the payslips and list of registered assets produced in court. In a number of cases the one party has re-arranged his or her affairs in a manner which has resulted in a significant drop in earning capacity[18] or the reduction of assets through their disposal or dissipation.

Without the requirement of a proper disclosure, and possibly the utilisation of oral evidence in appropriate cases, rule 43 proceedings favour the unscrupulous party or the one who takes advantage of a practice that does not insist on up-front disclosure of the true state of financial affairs. [19] Realistically there is also no risk of contempt of court proceedings or of a criminal charge for fraudulent non-disclosure.

16. Secondly a presiding officer's personal or relative perspective of a reasonable expense may affect the determination of that side of the equation, whereas the issue should be concerned with the parties' reasonable expenditure having regard to their living standards and their access to income. Naturally this will be tempered by the reality that with the split in households there is an inevitable increase in expenditure for either one or both of the parties (or possibly even a reduction for one of them at the expense of the other).
17. Each of the considerations mentioned in the previous set of paragraphs may in its own way result in an interim award for support failing to have regard to the child's best interests.
18. The focus of this judgment has so far been limited to the impact a rule 43 order maintenance order may have on a child's wellbeing.

While this is the main ground for considering that proper disclosure appears to be a pre-requisite in appropriate cases, I have mentioned earlier that there are other relevant factors which a court may be obliged to consider in a particular case. The most obvious one is that a failure of either party to make a full and frank disclosure affects the apportionment of the burden of child support. As a result there may be grave and potentially long term adverse consequences on the ability of the one party to support himself or herself while the other party's burden is correspondingly alleviated- effectively allowing one spouse to unfairly prosper at the other's expense.

19. In cases where both parties run businesses, the brevity required in the papers filed is unlikely to provide the presiding officer with enough information to fairly determine how to apportion between the parties the amount necessary to maintain the level of support to which their children are entitled.

On analysis each party's contribution will come out of business drawings. However the impact on the ability of either business to provide on-going financial stability for the respective party concerned may be quite different: The one spouse may already have

property and enjoy the benefit of a well-established business that can readily provide long term financial security while the other

spouse may have to rent accommodation and his or her business may be at an embryonic stage. In such a case earnings would have to be ploughed back in order for the business to maintain itself, let alone achieve sustainable growth so as to provide a reasonable lifestyle and long term financial security in all the circumstances.

20. These issues are likely to arise more frequently because of the growth of small to medium sized businesses. Yet the presiding officer will struggle to make a fair apportionment with the limited information contained in rule compliant affidavits.[20]

The situation is aggravated where the one party may claim that the business has fallen on hard times. In such a case two basic questions

come to mind: How is the presiding officer to determine if the allegation is genuine? And if it is genuine; how does one assess if the other party is able to make up the shortfall so as to continue providing the child with support at prevailing levels, which might include being able to keep the child at the same school, without there being a material adverse financial consequence to that party?

21. These matters would require consideration if a fair balance is to be struck between;
- a. ensuring on the one and that the best interests of the children remain paramount by, as far as possible, realising the parent's previously shared expectations for the child's future based on their pooled financial ability; and
 - b. recognising, on the other, that the apportionment of the amount each parent must contribute should not result in a de facto inequality of treatment when all relevant factors and financial consequences are properly considered.
22. Without a proper up-front disclosure procedure judicial officers may be compelled to elevate an anomaly in one party's papers to an overall adverse credibility finding which impacts on the maintenance ordered to be paid, whereas it might be that the other party was more adept at juggling income and expenditure figures. In cases where it is apparent that both parties have exaggerated expenses or minimised income there is the temptation to simply split the differences. In either case a respondent may also enjoy an unintended advantage because the applicant does not have an automatic right of reply.
23. Parenting arrangements may suffer the same fate if treated superficially since, as already illustrated, a rule 43 order is in practice not interim but casts its shadow over, and may be determinative of, the ultimate outcome without there being a fair and proper resolution of the children's best interests as required by s 7 and s 9 read with s 6(2) of the Children's Act (which will be considered later).

This consequence may be more readily appreciated in cases where arrangements fail to take proper account of one or other party's

emotional immaturity or where the parents do not share common goals and values in regard to the nurturing of their children. How are these issues to be placed before a court to prevent an entrenchment of an unworkable situation that continues to fester and is deleterious to the children's wellbeing thereby indirectly, but nonetheless fundamentally, having "an adverse effect on, the child's living conditions, education, health, personal relations with a parent ... or, generally, the child's well-being"?[21] How does a court, whether it is under rule 58 of the

Magistrates' Court rules or rule 43 of ours, distinguish a genuine concern by a parent from trumped up accusations and counter-accusations in order to determine what will be best for the children; bearing in mind that the rule 43 order is likely to have long term repercussions on them.

24. Perpetuating unworkable existing arrangements or fashioning a compromise solution based on the papers and possibly a social worker's assessment

[22] may have adverse consequences for the children and, as already mentioned, may result in the rule's application not meeting the requirements of ss 7 and 9 read with s 6(2) of the Children's Act.[23]

Section 9 expressly provides that:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

25. In the present case the residence of the children has now been resolved. It is therefore inappropriate to consider whether the ordinary

application of rule 43 in a specific case might frustrate account being taken of the considerations stipulated under ss 6(2), 7, 9 and possibly s 28(4) of the Children's Act.[24] Nonetheless it is necessary to bear in mind that a consideration of the adequacy of rule 43 procedures to deal with the maintenance and contribution towards costs issues before me may have ramifications on parental responsibility, care and contact issues.

26. The manner by which a court is expected to make a decision in a rule 43 application presupposes at least two things: The first is that a rule 43 order is interim and therefore any harm is short-lived and capable of being undone with little real prejudice to either the parties or the children. Experience and the content of the submissions made by the Cape Bar and Side-Bar indicate otherwise. The second is that the process must be expeditious, which comes down to no third set of affidavits and preferably affidavits of some 20 pages in length irrespective of whether the only issue is children's maintenance or if the disputes involve contentious parenting arrangements, a contribution towards costs and allegations of undisclosed income and assets.[25]

27. The inclusion of annexures to the papers has been approved and this may alleviate the difficulties faced by a court to some degree.[26] Nonetheless there are cases which hold that lengthy affidavits should only be allowed with the leave of the court (under pain of the matter being struck from the roll) and that the court should not have to wade through annexures. Accordingly it is difficult for a party to draw a conclusion by reference to the contents of documents without setting out the portions relied on in the body of the affidavit. See *Dodo v Dodo* 1990 (2) SA 77 (W) at 79 C to F and *Carstons v Carstons* 1985 (2) SA 351 (E) respectively.

28. In the result, without proper financial disclosure, the court has little to work on in cases involving child support other than the product of competing typewriters.
29. The justification for brevity in rule 43 applications is found in *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T) at 492C.

The court held that the nature of statements envisaged by sub-rules (2) and (3) is couched in terms which contemplate, respectively, a declaration and a plea.[27]

The result is expressed in the following passage *Colman v Colman* 1967

(1) SA 291 (C) at 292A-B:

"The whole spirit of Rule 43 seems to me to demand that there is to be only a very brief succinct 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*." (emphasis added)

30. The highlighted portion from *Colman* should be contrasted with the submissions by members of the Cape Bar mentioned earlier. They commented that:

"6. The hearing fulfils a strategic role and often sets the tone for the divorce action. It concerns matters of crucial importance which are in dispute;

6.1 care and contact arrangements for minor children which often implicate the constitutional rights of children, and require expertise in this area;

6.2 financial issues which will impact on the lives of the litigants for lengthy period (including the viability and profitability of family businesses or trusts) which often requires expertise in various areas of commercial and trust law;

6.3 in some matters, particularly where large estates are involved, substantial costs contributions are claimed and ordered;

6.7. the court often has to grapple with complex financial structures in order to determine questions of affordability. In most rule 43 matters one is not dealing with salaried litigants or simple asset structure...

8. If these issues are not properly ventilated considered and determined the rule 43 order can;

8.1. unfairly hamper one of the party's ability to litigate effectively in the divorce action;

8.2. cause undue hardship to one party (and / or the children born of the marriage)

8.3 place one party in a vulnerable position vis- a- vis the other party in regard to settlement negotiations;

none of which serves the interests of justice.

9. The order is not appealable. Consequently, maintenance orders care and contact orders in respect of children and contribution in respect of pending matrimonial actions are determined only once prior to the divorce action. In regard to maintenance and care and contact orders, Rule 43(6) only permits a further Rule 43 application in the event of a material change taking place. This rule has been strictly interpreted by our court.”[28]
31. The submissions of the CLS and members of the Cape Bar were adopted by the Law Society of South Africa in its comments on the tariff provisions of rule 43 (and rule 58 of the Magistrates’ Court Rules). The Law Society of South Africa then offered the following observations and submissions;
- a. Firstly that rule 43 should be reviewed in its totality[29];
 - b. It is “also common practice that practitioners put significant energy into the Rule 43 and 58 applications because such applications often have the potential to settle the entire divorce, and often do so. This means speedier resolution of the entire dispute which means faster access to true justice”;
 - c. It noted that applications “are often fraught with factual disputes which cannot be adequately addressed within the limits reflected in the Rules.”
 - d. After commenting that parties are not afforded the opportunity to reply it continued;
“Courts are faced with the unenviable task of having to deal with factual disputes arising from the paper. The situation may be further
- escalated through the creation of artificial factual disputes by the Parties. This may result in injustice to the parties on crucial matters pertaining to maintenance, custody, etc.”
32. While it is accepted that the representations were directed at the fees issue they did identify the tension that exists between two critical features of rule 43 applications. The first is the acknowledgement that the rule provides a crucial process for not only interim determinations but can result in resolving the entire divorce. The second follows from the first; that in practice the very nature of the process may result in an injustice.
- As I understand the submissions the situation is aggravated because the rule 43 order is used as a negotiating device and therefore any injustices that may arise are likely to be perpetuated in the final settlement. If one has regard to the cost of a contested divorce it is unlikely that most parties can afford to litigate beyond the rule
43. They are therefore compelled to settle; which will include having to settle issues that may have a significant impact on their children’s future.

FLEXIBILITY OF RULE 43

33. The key provisions to Rule 43 read:

“Matrimonial Matters

- (1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
 - (a) Maintenance pendente lite;
 - (b) a contribution towards the costs of a pending matrimonial action;
 - (c) interim custody of any child;
 - (d) interim access to any child”
- (2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, 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 attorney and shall give an address for service within eight kilometres of the office of the registrar, and shall be served by the sheriff.
- (3) The respondent shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea, signed and giving an address as aforesaid, in default of which he shall be ipso facto barred.
- (4) As soon as possible thereafter the registrar shall bring the matter before the court for summary hearing, on ten days' notice to the parties, unless the respondent is in default.
- (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.
- (6) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

It has already been noted that subparas (7) and (8) are cost restricting provisions.

34. While sub-rule (3) may limit the number of affidavits before the court, sub-rule (5) expressly entitles the court to hear such evidence as it considers necessary.
35. Accordingly sub-rule (5) has always vested a residual power in the courts to direct the receipt of further evidence. See especially *Terblanche v Terblanche* 1992 (1) SA 501 (W) where van Zyl J said at 503 B-C:

“Even if the said decision should bear the restricted meaning propounded by Cloete AJ, the learned Judge failed to give due consideration to Rule 43(5) which provides, inter alia, that the Court may 'make such order as it thinks fit to ensure a just and expeditious decision'. The power of a Court to make such an order is unqualified and unrestricted, provided that it is directed at achieving 'a just and expeditious decision' on the facts and issues before it.”

The court expanded on what it meant by “the facts and issues before it”;

“when a Court sits as upper-guardian in a custody matter, it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes” [33]

In *P and another v P and another* 2002 (6) SA 105 (N) at 110D Hurt J after indicating that a court is bound to take everything into account when considering the best interests of the child added :

“Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.”

36. The difficulty is that the breadth of the enquiry must still fulfil the objective of expedition; otherwise it becomes an unruly horse.
37. Insofar as financial matters are concerned it appears that, even without a revision of the rule as proposed by the Law Society of South Africa, rule 43(5) is sufficiently elastic to allow a procedure that can reconcile the application of the other provisions of rule 43 with both s 28 of the Constitution and the relevant sections of the Children’s Act. In relation to financial issues an up-front proper disclosure of each party’s financial affairs coupled with the existing sanctions that apply on breach of a court order may be adequate.
38. It is accepted that without a rule revision, or possibly a practice directive, a pre-hearing disclosure in a rule 43 application would be rudimentary and would require a motion court to first consider the justification of a request for early discovery under Uniform rules 35(1) and (13)[34]. A more focused disclosure could be required at the rule 43 hearing under the provisions of rule 43(5) once the matter is before the judge and the issues have crystallised. See generally *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972
- (1) SA 773 (A) at 783A-D which explained that the construction of a rule can be expanded upon in order to assist the administration of justice[35]. The disadvantage is that, absent case management, each separate application for disclosure will add to cost burden.
39. The requirement of disclosure in interim maintenance orders is not a unique process. Both the English and Australian court rules provide for it. In England it is commonly known as a Form E disclosure. This refers to the form that is completed in an application for a financial order inter alia in divorce proceedings before the High Court or the Family Courts in England and Wales.
40. The English decision of *Livesey(formerly Jenkins) v Jenkins* [1984] UKHL 3; [1985] 1 All ER 106 (HL) was concerned with the provisions of the Matrimonial Causes Act of 1973 which at the time provided in s25(1) that, when deciding

whether to exercise its powers to make orders under ss 23 and 24 of that Act for financial provision and property adjustments

following a divorce, it was the duty of a court to have;

“regard to all the circumstances of the case including the following matters, that is to say- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future ... “ [36]

41. The relevance of *Livesey* is that, in the context of section 25(1) of the Matrimonial Causes Act, the House of Lords considered that unless the parties make full and frank disclosure of all material matters, a court cannot lawfully or properly exercise the discretion it is given to make an order under ss 23 or 24 of that Act[37]. This is an attractive line of reasoning if regard is had to provisions of s 7(1) (c) read with ss 6(2) and 9 of our Children’s

Act.

42. Since *Livesey* a significant set of procedural rules was introduced in England to regulate family court proceedings in respect of ancillary relief in a divorce. See now Practice Direction (family proceedings; ancillary relief) [2000] 3 All ER 379 which introduced a pre-application protocol involving disclosure and negotiation with the objective of enabling the parties to settle the case fairly and early without litigation. Form E is introduced at this stage of the process.

43. The Practice Direction imposes on the parties a duty to make a full, frank and clear disclosure to the court of all financial and other relevant circumstances. Where a party is deliberately untruthful a case of statutory fraud may be brought. The offending party would also be subject to contempt of court proceedings.

44. Form E contains financial disclosure requirements that must be complied with in the English Court’s equivalent of our rule 43 type applications.

45. The comprehensive nature of the disclosure requirement is self-evident.

The Form is divided into a number of sections. Where relevant, documents are required to be attached while in other cases the party has an election to produce documents in support of the information provided.

The first section deals with general information including present and proposed future educational arrangements where children are involved, and child support calculations.

The next section is concerned with financial details and is divided into a number of parts. The first part deals with immovable and movable property. It requires each party to disclose whether he or she has a legal or beneficial interest in any property or asset, to provide details of all personal bank and similar accounts held or in which the party has an interest. The details required include accounts held within the previous year, details of policies and cash sums held as well as monies owed to the party.

Part 2 of the second section requires the disclosure of all liabilities and a list of all credit and store cards held. Part 3 of the financial details section requires the disclosure of all business interests which, depending on their nature, requires the party to provide business accounts for the past two financial years and the current value of the business. Furthermore an explanation must be provided if there are either inaccuracies or if a material change is anticipated. The information required includes any sums owed by way of a director's loan account, partnership capital or current account and all directorships held. Parts 4 and 5 of the second section deal with the balance of items on capital account. They include details of pension rights, compensation entitlements and a catch-all disclosure requirement of any other assets of any nature whatsoever.

Parts 6 to 10 of the second section require the disclosures of all income from every possible source, including any benefits in the form of perks, regular drawings and investment income with income tax details. They include the disclosure of income over the past twelve months, even if it has since ceased

Section 3 requires each party to set out his or her income and capital needs. These include the needs of those children living with the party concerned. Section 4 provides for details of any significant changes in the party's assets or income and certain other information. Possibly one of the more significant requests is for brief details "of the standard of living enjoyed by you and your spouse/civil partner during the marriage/civil partnership".

Section 5 requires the party to identify the orders sought regarding property, any spousal maintenance, a property settlement or variation of any ante-nuptial or post-nuptial settlement. There then follows a statement of truth signed by the party concerning the information provided with a warning that contempt proceedings may be brought if any false statement is made. Finally the form contains a check-list schedule which specifically identifies all the documents that must be attached and explains their nature or purpose.

46. A number of other jurisdictions have adopted a similar up-front financial disclosure requirement. In Australia the Family Court procedures impose a duty on the parties under rule 13.01 to make full and frank disclosure of all information relevant to the

issues

in dispute in a timely manner. There are also pre-action procedures which require the exchange of documents relevant to the source of each party's emoluments and include records such as tax returns, company financial statements or business activity statements and trust deeds in appropriate cases.

47. Returning to our jurisdiction. Child maintenance may be inextricably tied up with issues of the child's residence. In some cases shared residence may be pursued by one spouse more in order to avoid maintenance obligations than out of a concern for the child's best interests. The burden placed on an under resourced Family Advocates' office has been mentioned earlier but the average litigant cannot afford the cost of engaging social workers or similarly qualified experts in private practice.
48. I raise these issues because in the present case the dispute concerning the children's residence was part of the rule 43 application. This has fortunately become settled and it will only be necessary to record the terms agreed upon. Two aspects of maintenance for the minor children remain outstanding. There are also the issues of whether the applicant should receive any maintenance pending the outcome of the divorce and whether she is entitled to a contribution towards her legal costs.

RULE 43 AND THE CHILDREN'S ACT

49. The first question to be asked is whether the Children's Act is an umbrella provision to which the uniform rules are subject.
50. It is trite that as a matter of substantive law a statute would supersede a delegated rule making power.[38] More so where the statute is the legislative expression of a constitutional right [39] subject of course to reasonable and justifiable limitations under s 36 of the Constitution. While rules of court are intended to provide an inexpensive and expeditious means of resolving disputes they are required under s 38 of the Constitution to ensure a fair trial or hearing.[40]
51. As a broad statement, the Children's Act is intended to give effect inter alia to the constitutional rights of children to family or parental care. It directs that the best interests of a child are "of paramount importance in every matter concerning the child" and its general purpose is "to promote the protection, development and well-being of children" (emphasis added). See the objects provisions in s 2 (b) (i) and (iv) and (f) of the Act.

Accordingly s 2 extends the reach of the Act into every aspect of law and society that may affect a child's wellbeing. The section is reinforced by the implementation provisions of s 4.[41]

52. Section 6 sets out the general principles that guide the implementation of legislation and proceedings involving a child, including court proceedings. [42]

Insofar as the latter is concerned s 6(2) is relevant in parental rights and child support issues:

“(2) All proceedings, actions or decisions in a matter concerning a child must-

- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child's inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
 - (e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
 - (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.
- (4) In any matter concerning a child-
- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

53. There are also provisions in the Act which deal with specific types of court proceedings.

Section 28 is concerned with any alteration to parental responsibility and rights.

Sections 28 (1) and (3) (a) are particularly relevant and read:

“Termination, extension, suspension or restriction of parental responsibilities and rights

- (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-
 - (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
 - (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

...

- (3) An application for an order referred to in subsection (1) may be brought-
- (a) by a co-holder of parental responsibilities and rights in respect of the child;
- (emphasis added)

54. In terms of the s 1 the phrase “parental responsibility and rights” which is used in s 28 means, in relation to a child, “the responsibilities and the rights referred to in section 18”.

Section 18(2) provides:

“The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.”

55. Section 29(1) confirms that an application envisaged under s 28 may be brought in the High Court. It provides:

“Court proceeding

An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.”

56. On an ordinary interpretation it appears that s 28 of the Act includes an application under rule 43 which seeks to suspend temporarily or to circumscribe the exercise of any parental responsibility or right. This would be reinforced, albeit tangentially, by s 1 of the Divorce Act 70 of 1979 which defines a ‘divorce action’ to mean;

“an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-

- (a) an application pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;”

57. If s 28 applies to a rule 43 application then in terms of s 28(4):

“(4) When considering such application the court must take into account-

- (a) the best interests of the child;
- (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
- (c) the degree of commitment that the person has shown towards the child; and
- (d) any other fact that should, in the opinion of the court, be taken into account.”

In addition s 29(4) requires that:

“When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.”

58. Chapter 2 of the Children’s Act includes the provisions of ss7 and 9 which in the case of the former set out the best interest of the child standard (see an earlier footnote for the text) and in relation to s 9 provides that:

“Best interests of child paramount

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.”

59. In the event that s 28 of the Children’s Act does not apply to rule 43 applications then the earlier provisions of ss 6(1) and (2) would expressly apply (since rule 43 is a “divorce action” under the Divorce Act), as would s 7 of the Children’s Act in respect of interim custody, access, child support and possibly a contribution towards costs in cases involving the determination of parental responsibility and rights (as defined in s18(2) of that Act).[43] In passing the judgment of Donen AJ in *Cary v Cary* 1999
- (3) SA 615 (C) at 621D-E would in any event cover the right of one party to litigate at a similar level to the other in divorce proceedings by reason of the equality provision of s 9(1) of the Constitution.[44]
60. It therefore appears that the implementation of rule 43 and proceedings and decisions made under it, to the extent that it affects the rights of children, must be informed by the requirements of the Children’s Act, whether under ss 28 and 29 or under ss 2 and 9 read together with the general principles and standards provided for in ss 6(2) and 7(1).
61. Sub-rule (5) of rule 43 provides a sufficiently flexible platform to enable a court to give due weight to the paramount importance to a child’s best interests and respect the best interests of the child standard as required by ss 2(b) and 6(2) as read with s 7(1) of the Children’s Act. This is borne out by Terblanche.

However in cases involving the care (including residence), contact or maintenance of a child, the application of the ordinary rule 43 procedures without a consideration of rule 43(5) in acrimonious proceedings may not serve the child’s best interests in the manner required by the various sections of the Children’s Act to which reference has been made.

This may open up challenges to a particular rule 43, or Magistrates' Court rule 58, order on the grounds that the procedure adopted in reaching the decision was inconsistent with s 28 of the Constitution or failed to meet the procedural standards implicit in these sections of the Children's Act.[45]

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 interests 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 passing either constitutional scrutiny or be capable of meeting the requirement that the outcome will serve the child's best interests.
63. The adjudication of maintenance for children pendent lite involves establishing the actual expenditure requirements that have been incurred historically, establishing whether there is any change and if so why. This may be particularly important in the case of the children's cost of education, including extra-mural tuition which has gained significance in developing the individual child's talent or assisting a child in overcoming any learning difficulties. Considerations such as the type of institution a child has attended, his or her educational needs and the level of education that both parties had envisaged they would provide for the child are relevant as is the current financial ability to maintain that level or provide a suitable policy to cover future costs of tertiary education. if appropriate, having regard to the pooled resources of the parties.

The next step is to determine how the cost once established should be apportioned between the parties having regard to their respective

earning capacity and comparing the repercussions to the respective parties having regard to the source from which the money is to come.

64. In my view these matters if not decided in an informed manner may adversely affect the children and in any event may debilitate the one or other party's income earning capacity to the point of favouring the one at the expense of the other. In such an event the repercussions will be felt if money that should have gone to working capital to maintain or grow say an embryonic business so as to provide for future income and asset security has been used to off-set child maintenance shortfalls that could have been provided by the other party on a fair and proper apportionment if regard is had to the latter's financial

position (e.g.; if that party has by contrast a well-established business, unencumbered property and long term financial security).

65. Insofar as child support and contribution toward costs issues are concerned each party is able to produce documentary evidence that will indicate his or her respective financial position. If the one party is alleged to be concealing assets or an income stream then a lifestyle questionnaire or a brief hearing covering the lifestyle the parties enjoyed would assist in reaching an informed

decision, as opposed to doing the best one can with the paucity of detail provided on untested affidavit evidence.

66. It is appreciated that a court has a discretion, albeit informed by the constitutional and statutory provisions regarding the protection of children's rights in any proceedings affecting them.

The suggested procedures, mentioned earlier, while not as ideal as the standardised upfront and cost-effective disclosure requirement of the Form E process, do not require a revision of the rules but fit within the existing framework of the rules of discovery and rule 43(5), with possibly a prior case management meeting to further reduce the costs by identifying the issues and disclosure requirements in the particular case.

67. In my respectful view a duty of frank disclosure of each party's financial position is implicit within the context of a contested divorce where a child's wellbeing is affected. Put another way, one's experience and the procedures adopted in England, Australia and elsewhere indicate that the utilisation of disclosure requirements, even where the parties have already made discovery as in Chaney and in the present matter, will in appropriate cases sufficiently supplement the evidential material before the court.

This would provide a better assurance that the children's best interests are not being compromised while retaining the advantage of succinct sets of affidavits to enable an expeditious determination.[46]

THE CHILDREN'S RESIDENCE, ACCESS AND MAINTENANCE

68. There are three children born of the marriage who are 3, 11 and 13 years of age. It has since been resolved that the children are to reside with the applicant. The figures for child support have not been tabulated with precision. Nonetheless the respondent accepts that he is liable for items 3, 4 and 5 (p13 and
- 14) of the orders sought.
69. That leaves an amount for rental or the purchase of a residence suitable for the applicant and minor children as well as transport costs to and from school.
70. Accordingly the only significant amount which it is not possible to fairly determine having regard to the accusations of lack of disclosure each party has levelled against the other concerns whether the respondent should contribute anything towards the costs of a roof over the children's head. This issue directly affects their wellbeing if an informed decision is not made as to the respective means of the parties. It also affects the apportionment between the parties if the respondent is at all obliged to contribute.

SPOUSAL MAINTENANCE

71. There are two difficulties confronting the court. The first is that the applicant contends that her founding statement was based on an assumption that she would continue to derive the same income stream from Westside Trading334 (Pty) Ltd. She now wishes to

file a supplementary affidavit on the basis that circumstances have changed and that the income she claimed to derive of R40 000 per month has dried up because the company effectively is unable to trade due to the actions of the respondent.

72. A formal application for leave to introduce the additional set of affidavits is before me. The application is opposed both on the technical ground that rule 43 only envisages two sets of affidavits and because the facts relied upon for a change in the applicant's financial situation were known prior to the launch of the application.

73. The facts upon which the applicant relies are that the respondent's company, PTH Ltd, had covered any costs incurred in laptops that Westside procured from it as supplier for on-sale in terms of tender awards secured by Westside. The cover would be provided until the customer paid for the laptops. PTH Ltd then insisted that Westside pay up-front for the laptops and informed the customer that it would no longer cover the transaction in the same manner as before. The respondent had also advised that he

was withdrawing sureties which were provided for Westside's liabilities and that these would be replaced by ones from the

applicant herself.

74. The respondent argued that the correspondence revealed that this was known to the applicant before the application. Firstly that is not so. The applicant launched her application on 18 January 2017. While the issue of sureties may have occurred earlier it did not have the impact which the subsequent events that resulted in the drying up of business created, and which arose only from March onwards.

75. On ordinary principles a change of circumstances entitles a party to introduce a further set of affidavits. Accordingly the third set of affidavits will be received.

76. Ordinarily a respondent is entitled to deal with new matter raised in reply. I understood the respondent to indicate that he wished to avail himself of the opportunity and is entitled to do so.

77. That however does not end the matter. There are still the issues of spousal maintenance and a contribution towards costs. In this regard each party accuses the other of concealing income sources and that discovery has been inadequate. Ex facie the papers this appears to be the case and I do not expect that applications for further and better discovery would have achieved much more as invariably it can be stonewalled.

78. These are perennial problems exacerbated by the applicant's allegation that the respondent dealt with all their financial affairs. It is alleged that he had drawn monies out of Westside to pay for the children's education and other expenses whereas he had claimed that they were out of his own pocket. She contends that her reasonable monthly expenses are R66 348.55. The respondent argues that they are much less.
79. It is on the respective means issue that the parties are even more apart. The applicant avers that the respondent holds numerous directorships including one at PTH Ltd. His salary was disclosed in the answering affidavit to be R146 899. However it is based on a payslip advice from DC only. The respondent's lifestyle shows a person of considerable means. The erstwhile

matrimonial home is worth some R17 million. He possesses a fleet of high performance cars three of which are together worth some

R4million. The respondent discloses his expenses to be some R191 000 pm without including expenses such as entertainment. No credit card details are given.

80. To compound the issues, the respondent denies that the matrimonial home is owned by him. He avers that it is owned by the Masingo Royal Trust ("the Trust") and that all other properties but one are owned by the Trust.

He also contends that while he held a number of directorships he has since resigned from all but DC

81. These averments bring into question whether the respondent has truly divested himself of any rights to capital or income or whether by having a say in the control of one or more of the companies in which he was involved he has a hand in how it will structure his involvement with them; in other words whether the relationship can be regarded as arms-length.
82. The respondent claims that his current financial commitments preclude him for affording to pay the amount the applicant claims and avers that he never provided for her financially during the marriage.
83. In turn the respondent accuses the applicant of not revealing her income. He refers to vacations she has taken and commissions she has earned that have not been disclosed. In addition she purchased a motorcar worth just under R1.2 million on an instalment sale agreement.
84. Until now I have considered the desirability for financial disclosures in the context of cases where two sets of brief affidavits with attachments may not suffice to secure a court order that serves the child's best interests.

However in relation to spousal maintenance and a contribution towards costs (leaving aside the need for a contribution in order to contest the outstanding issues regarding child support) the starting point is whether a failure by one party to make proper, full and frank disclosure of one's financial circumstances results in prejudice to the other spouse.

85. It has already been acknowledged that in practice the rule 43 application is the only contested hearing that the parties are likely to engage in and that its outcome generally impacts on the settlement that is subsequently concluded. Furthermore it is axiomatic that the promotion of resolving divorce issues through negotiation or mediation is to be encouraged. See *Brassey AJ in MB v NB* 2010
- (3) SA 220 (GSJ) at paras 52 to 59 and their endorsement by the Supreme Court of Appeal in *FS v JJ* and another 2011 (3) SA 126 (SCA) at para 54.
86. However as pointed out in the final Access to Justice Report of Lord Woolf MR of July 1996 the development of pre-application protocols included a requirement of pre-application disclosure in order “to build on and increase the benefits of early but well informed settlements which genuinely satisfy both parties to a dispute.”[47](emphasis added)

Albeit In a different setting, further and better discovery of financial records was ordered in *Makate v Vodacom (Pty) Ltd* 2014

- (1) SA 191 (GSJ) at para 29 on the grounds that failing to do so would inhibit the settlement process by precluding a genuine settlement and would defeat the broader considerations of the interests of justice.[48]
87. In the present case the issues for determination include whether or not the Trust is the true beneficial owner of some or all of the bundle of rights enjoyed by the respondent, whether the respondent still retains his income and other benefits in the companies from which he has resigned as director, whether he has rearranged his affairs to reduce his financial profile in form but not necessarily in substance and whether the applicant has been frank about her sources of available income.
88. I am satisfied that in these circumstances a court cannot give a just decision without at least the disclosure of further financial information and documentation by both parties and which are in addition to the documents that may have been discovered for trial under rule 35.

Ideally the parties should complete a lifestyle audit questionnaire which is confirmed under oath. However on the averments before me a limited set of disclosures with supporting documents may suffice. It could yet arise that on receipt of the information the court will require that the parties submit to cross examination.

89. In this judgment I recognise that a court has the power to adopt case management procedures to secure pre-hearing disclosures and can require pre-hearing discovery and production. However the formulation of a standardised financial disclosure form which must be completed at an early stage in the proceedings appears to be more properly a matter to be addressed in the rules to secure uniformity.

At this stage and because I consider that the issues raised cannot be fairly or justly resolved by reference to the papers filed under rules 43 (2) and (3) alone the circumstances of the case requires that rule 43(5) be invoked.

ORDER

90. I accordingly order that:

1. The respondent may deliver an affidavit by no later than 14 August 2017 limited to a response to the allegations contained in the applicant's supplementary affidavit
2. By no later than 22 August 2017 the parties shall depose to an affidavit in which they provide full detail in respect of the following accompanied by copies of the source documents as applicable :
 - a. In the case of the applicant;
 - i. The identity of the originating source of the funds from which the holidays and motor vehicle that were purchased in 2015 through Westrust and in the case of the car the source from which the instalments continue to be paid
 - ii. The basis on which the originating source has provided the funds to the applicant and if pursuant to a contract a copy is require and the material terms are required to be provided
 - iii. Every shareholding of the applicant is required to be identified including the number and of shares, how many shares in total are issued. By shareholding is included every beneficial shareholding in which the applicant has decision making powers or in respect of which he ultimately receives, whether directly or indirectly any dividend or other benefit and if so what is such benefit;
 - iv. All sums of money that are owed to the applicant by any business including company, partnership, other joint venture or trust by way of a loan account, partnership capital, undistributed monies , current account or the like
 - v. A list of all directorships held at any time over the past 2 years and if since resigned;
 - vi. Copies of the last audited financial statements of each of the companies in which the applicant held a directorship at any time over the past two year.
 - vii. Full particulars of any pay-out in respect of any shares in any company in which the applicant held a directorship at any time over the past two years

- viii. Copies of all bank account and investment account statements held by or on behalf of the applicant since 1 January 2017 to date
- ix. Copies of all credit card and shopping card statements held by applicant or which she is entitled to use since January 2017
- b. In the case of the respondent;
- i. A copy of the Masingo Royal Trust Deed and all amendments to it;
- ii. The identity of the donor, each trustee and beneficiaries of the Masingo Royal Trust with their contact addresses;
- iii. All letters to the trustees regarding the operation of the trust, including any discretionary powers given to them;
- iv. How the trustees are to exercise their powers;
- v. The basis on which the respondent resides on any of the properties of the trust;
- vi. Whether the respondent has the use, benefit or other right in any other property or asset of the Masingo Royal Trust and when did he commence deriving same;
- vii. What is the value of each of the benefits derived by the respondent from trust identified separately;
- viii. Is the respondent a donor, trustees or beneficiary of any other Trust and if so the contents of all the preceding paragraphs are repeated;
- ix. Every shareholding of the respondent is required to be identified including the number and of shares, how many shares in total are issued. By shareholding is included every beneficial shareholding in which the respondent has decision making powers or in respect of which he ultimately receives, whether directly or indirectly any dividend or other benefit and if so what is such benefit;
- x. All sums of money that are owed to the respondent by any business including company, partnership, other joint venture or trust by way of a loan account, partnership capital, undistributed monies, current account or the like;
- xi. A list of all directorships held at any time over the past 2 years and if resigned;
- xii. Copies of the last audited financial statements of each of the companies in which the respondent held a directorship at any time over the past two years;
- xiii. Full particulars of Any pay-out in respect of any shares in any company in which the respondent held a directorship at any time over the past two years;
- xiv. Copies of all bank account and investment account statements held by or on behalf of the respondent since 1 January 2017 to date;

xv. Copies of all credit card and shopping card statements held by the respondent or which he is entitled to use since January 2017;

SPILG J

DATES OF HEARING: 14 June, 7 August 2017

DATE OF JUDGMENT: 7 August 2017 FOR APPLICANT: Adv K Mokotedi

Lingenfelder & Baloyi Inc

FOR RESPONDENT: Adv M Fhedzisani

Thantsha Attorneys

[1] Per Trollip J (at the time) in *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) at 345 See also Joffe et al, *High Court Motion Procedure: A Practical Guide* para 3.1 (p3-4 (issue 5))

[1] Per Trollip J (at the time) in *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) at 345

See also Joffe et al, *High Court Motion Procedure: A Practical Guide* para 3.1 (p3-4 (issue 5))

[2] See the submissions made by the Cape Law Society referred to below.

[3] See *P v P* 2007 (5) SA 94 (SCA) at para 26

[4] Off-shore trusts are invariably opaque and income and assets effectively derived or held through a discretionary trust, even if local, are unlikely to be revealed without a compelled disclosure.

[5] Especially ss 2 and 9 as read with s 7 and ss 18, 28 and 29 of the Children's Act. The Act only came into effect on 1 April 2010

[6] See s 31(1) (b) read with s 31(2). Section 31(1)(b) (iv) is particularly susceptible to unilateral decisions being imposed by a parent who abuses the control exercised while a child is with him or her. The sub-section is concerned with a decision “ which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being”

[6] See s 31(1) (b) read with s 31(2).

Section 31(1)(b) (iv) is particularly susceptible to unilateral decisions being imposed by a parent who abuses the control exercised while a child is with him or her. The sub-section is concerned with a decision “ which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being”

- [7] Cheney v Cheney at paras 28, 33, 40 and 42 (infra) case no 6944/2014 (GJ) (unrep. judgment of 28 November 2014) demonstrated how a failure by the respondent to be frank with the court in respect of his income would not be picked up in an ordinary rule 43 application. It was also an early attempt on my part to request documents from both parties so that the decision would be more than an arithmetical compromise.
- [8] The representations dated 15 November 2015 were sent under a covering letter addressed by CLS' Head of Department- Professional Affairs.
- [9] Rule 43(7) and (8) of the Uniform Rules and rules 58(7) and (8) of the Magistrates' Courts Rules
- [10] There were two submissions made by members of the Cape Bar. The one was by Adv J Anderson and the other comprised the combined submission on behalf of "A number of counsel from the Cape Bar".
- [11] Para 4 of the submissions on behalf of the Magistrate Committee
- [12] At para 2 of the submissions dated 13 November 2015 addressed on behalf of the Family Law and Gender Committee
- [13] The word was "appropriate" but in the context of the sentence this was a typing error
- [14] Divorce practitioners in Johannesburg complain that proceeding in a Maintenance Court is most unsatisfactory and it would be remiss not to raise it bearing in mind that I had previously raised during a hearing the utilisation of the maintenance court as a more suitable forum to resolve such issues. Practitioners refer to the system favouring the recalcitrant party with regular postponements of a matter, with the maintenance officers making little or no contribution and that an overhaul is required of the functioning and administration of those courts in order for them to provide meaningful access to justice.
- [15] Compare Cheney at para 28 where discovery had occurred and a variation of the rule 43 order was sought: "While in most cases the parties have not reached the stage of discovery where such allegations can be tested, in the present case discovery was made which affords the court greater insight. The discovered documents indicate that the broad canvas painted by the respondent does not reveal the true picture and cannot be relied upon. Since the foundation upon which the figures are provided is unreliable it becomes a pointless exercise to meticulously go through each item. A more robust approach is required where there is a discernible lack of frankness in rule 43 proceedings." In that case I had requested the parties to provide additional financial records (see para 33 of judgment).
- [15] Compare Cheney at para 28 where discovery had occurred and a variation of the rule 43 order was sought:

“While in most cases the parties have not reached the stage of discovery where such allegations can be tested, in the present case discovery was made which affords the court greater insight. The discovered documents indicate that the broad canvas painted by the respondent does not reveal the true picture and cannot be relied upon. Since the foundation upon which the figures are provided is unreliable it becomes a pointless exercise to meticulously go through each item. A more robust approach is required where there is a discernible lack of frankness in rule 43 proceedings.”

In that case I had requested the parties to provide additional financial records (see para 33 of judgment).

[16] See the s 1 interpretation of a “connected person “ in the Income Tax Act 58 of 1962

[17] There are English court decisions which go the other way and assume that a party who it is shown has concealed certain

income or assets is likely to have still more that have not yet been unearthed.

[18] E.g. Cheney at para 40

[19] Cheney at para 42: “Overall, the need to bring the present application arises from the documents discovered by the respondent which demonstrate that there had not been a frank disclosure to the initial court of income or the ability to earn income. It had clearly affected the court’s decision.”

[19] Cheney at para 42:

“Overall, the need to bring the present application arises from the documents discovered by the respondent which demonstrate that there had not been a frank disclosure to the initial court of income or the ability to earn income. It had clearly affected the court’s decision.”

[20] E.g. C v C (supra)

[21] See s 31(1)(b)(iv) of the Children’s Act

[22] Practitioners complain that it is standard practice for the family advocate and the appointed social worker to base their report on an hour long interview which includes a session with both parents together, and then, an interview with the child or children while the parents wait outside. There are other concerns as to the methodology employed but these are matters which practitioners are better informed to deal with through direct representations. It would also be helpful if there were follow up statistics to assist in determining the percentage of successful outcomes to help a court determine the store it should place on reports bearing in mind that very rarely will the author (whether from the Family Advocate or in private practice) be called to testify.

[23] S 6(2) is the general application provision (and is set out later in the judgment) while s 7 identifies the standards to be met when determining cases where the best interests of a child are involved. S 7 includes the following considerations which concern parental responsibility and care issues: “Best interests of child standard

- (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
 - (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and (ii)
 - (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
 - (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

[23] S 6(2) is the general application provision (and is set out later in the judgment) while s 7 identifies the standards to be met when determining cases where the best interests of a child are involved.

S 7 includes the following considerations which concern parental responsibility and care issues:

“Best interests of child standard

- (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
 - (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii)
 - (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and

- (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
- (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

[24] Extracts of these sections appear elsewhere in the judgment

[25] See Superior Court Practice, Erasmus at B1-316A and also High Court Motion Procedure: A Practical Guide at para 3.1. In *Patmore v Patmore* 1997 (4) SA 785 (W) a 47 page affidavit resulted in the application being struck from the roll.

[25] See Superior Court Practice, Erasmus at B1-316A and also High Court Motion Procedure: A Practical Guide at para 3.1.

In *Patmore v Patmore* 1997 (4) SA 785 (W) a 47 page affidavit resulted in the application being struck from the roll.

[26] See *Williams v Williams* 1971 (2) SA 620 (O)

[27] Zoutendijk at 492C : “When Rule 43 (2) refers to a sworn statement in the nature of a declaration, the rule-maker presumably had in contemplation the requirements of a declaration as set out in Rule 20 (2); and when Rule 43 (3) refers to "a sworn reply in the nature of a plea", the rule-maker presumably had in contemplation the requirements of a plea as set out in Rule 22 (2). In both cases the rule-maker also presumably had in contemplation the general rules applicable to pleading (as to which see *Beck, Pleading in Civil Actions*, 3rd ed., sec. 19, pp. 26 - 29).”

[27] Zoutendijk at 492C :

“When Rule 43 (2) refers to a sworn statement in the nature of a declaration, the rule-maker presumably had in contemplation the requirements of a declaration as set out in Rule 20 (2); and when Rule 43 (3) refers to "a sworn reply in the nature of a plea", the rule-maker presumably had in contemplation the requirements of a plea as set out in Rule 22 (2). In both cases the rule-maker also presumably had in contemplation the general rules applicable to pleading (as to which see Beck, Pleading in Civil Actions, 3rd ed., sec. 19, pp. 26 - 29).”

- [28] As to non-appealability see s 16(3) of the Superior Courts Act 10 of 2013 which specifically excludes appeals in respect of interim custody, interim access, maintenance pendente lite and contribution towards costs orders.
- [29] At para 1.1
- [30] At para 1.6
- [31] At para 2.3
- [32] Also at para 2.3
- [33] At 504C-D. Terblanche was followed by the Cape Full Court in *J v J* 2008 (6) SA 30 (C) at para 20. This was a post-divorce urgent application to enrol a child at a preferred school. Erasmus J in *J v J* in turn referred both to P and another (infra) and (at para 20) to AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) [2007] ZACC 27; 2008 (3) SA 183 (CC) at para 30 and said; “the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be 'held to ransom for the sake of legal niceties' (citing *De Gree and Another v Webb and Others* (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA) para 99) and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.
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- [34] See the application of this procedure at a very early stage of the proceedings in *Rail Commuter Action Group and Others v F Transnet Ltd t/a Metrorail and Others* (No 1) 2003 (5) SA 518 (C) at 587C –D where the following reasoning of the full bench appears apposite: “The problem which we have with these submissions made by the respondents is a relatively simple one. First, this would appear to be the kind of case where the applicants could not reasonably or realistically have been expected to make out a proper case in their founding affidavits without access to voluminous background information and knowledge pertaining to the internal affairs and structures of the respondents (especially the first and second respondents).”

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[35] Republikeinse Publikasies at 783A-D: “In verband met die vraag wat appellant presies moes gedoen het nadat respondent sy aansoek gestaak het, is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl. dat die Hof nie vir die Reëls bestaan maar die Reëls vir die Hof. 'n Uitspraak wat hieraan uitdrukking gee, is dié in *Ncoweni v Bezuidenhout*, 1927 CPD 130, waar o.a. gesê word: 'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.' Met verwysing na hierdie uitspraak het WILLIAMSON, R., hom soos volg uitgedruk in *Brown Bros. Ltd. v Doise*, 1955 (1) SA 75 (W) op bl. 77: 'In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines.'”

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*“In verband met die vraag wat appellant presies moes gedoen het nadat respondent sy aansoek gestaak het, is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl. dat die Hof nie vir die Reëls bestaan maar die Reëls vir die Hof. 'n Uitspraak wat hieraan uitdrukking gee, is dié in *Ncoweni v Bezuidenhout*, 1927 CPD 130, waar o.a. gesê word:*

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[36] Livesey at 113

[37] Ibid

[38] See *Western Bank Ltd v Packery* 1977 (3) SA 137 (T) at 141B (per Coetzee J at the time). See also Shongwe JA in *Arendsnies Sweefspoor CC v Botha* 2013

(5) SA 399 (SCA) at para 19

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(5) SA 399 (SCA) at para 19

[39] The relevant provisions of section 28 of the Constitution for present purposes are: "Children

(1) Every child has the right-

(a) ...

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation; ...

(2) A child's best interests are of paramount importance in every matter concerning the child."

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[40] See *Eke v Parsons* 2016 (3) SA 37 (CC) where Madlanga J said at para 40: “Under our 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'. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions.”

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[41] Section 4 of the Children's Act provides: “Implementation of Act

- (1) This Act must be implemented by organs of state in the national, provincial and, where applicable, local spheres of government subject to any specific section of this Act and regulations allocating roles and responsibilities, in an integrated, co-ordinated and uniform manner.
- (2) Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act.”

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[42] See s6(1) which reads: “The general principles set out in this section guide-

- (a) the implementation of all legislation applicable to children, including this Act; and
- (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.”

[42] See s6(1) which reads:

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- (a) the implementation of all legislation applicable to children, including this Act; and
- (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.”

[43] On the ground that it constitutes a necessary ancillary right or power,

[44] Cary at 621D-E: “By similar reasoning in this matter, 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.” See also Hlope DJP (at the time) in Greenspan v Greenspan 2000 (2) SA 283 (C) at para 17 and Heher J (at the time) in National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (W) at para 49.

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[45] This may also bring the non-appealability provisions of s 16(3) of the Superior Courts Act into contention.

[46] It may be possible utilising existing procedures to secure discovery of all relevant financial information, or if needs by also requiring further and better discovery. This would be coupled with the court exercising rule 43(5) powers where it appears appropriate on a consideration of the affidavits and documents produced that there has not been full and

frank disclosure. Alternatively, a founding affidavit can set out the allegations from which the need for discovery arises supplemented with a request to amplify the allegations on receipt of discovery. Case management at a convenient stage may reduce the costs of the discovery cum disclosure process. The provisions of rule 35(9) to (11) could by agreement be made to apply automatically in order to facilitate the documentation being received into evidence, alternatively the same result of securing a just and expeditious decision could be achieved by means of the powers provided under rule 43(5).

[47] See Practice Direction (family proceedings: ancillary relief)

[2000] 3 All ER 379 at para 1.1.1, 1.1.2 and 1.2 of the Introduction to the Pre-Application Protocol

[48] Makate at para 29 “ ... it should not be overlooked that court procedures are not there only to secure the resolution of disputes through a judgment pronounced by a court of law after hearing evidence. On the contrary, the majority of cases are resolved through settlement.... The settlement process would clearly be inhibited by precluding a genuine settlement if one of the parties withheld documents

peculiarly within its possession which are not necessarily confidential, but which allow the other party to fairly appreciate

the value of his claim if successful. It would be wrong for court procedures to encourage settlement if one of the parties is entitled to withhold material information required for an informed decision to be made on the advisability of settling or not, and on what basis. The rules did not intend that a party settles blind, while the other knows exactly what the downside is if it loses on the merits. It also may encourage technical defences to the merits and force settlements where one of the parties has the financial resources to out-litigate the other. In short, the question of whether or not discovery should be deferred in exceptional circumstances has regard to broader considerations, such as those that may impact on the possibility of settlement and what best serves the interests of justice in a particular case.”

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