IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no. 1215/19

In the matter between:

K T	Applicant
and	
A T	First Respondent
P T (N.O)	Second Respondent
U T (N.O)	Third Respondent
A T (N.O.)	Fourth Respondent

JUDGMENT DELIVERED ON 30 OCTOBER 2019

SHER, J:

1. I have before me two applications: a rule 43 application in terms of which the applicant seeks an order for maintenance and a contribution to costs, together with ancillary relief *pendente lite*, and in response thereto an application in terms of rule 30 whereby an order is sought striking the rule 43 application from the roll with costs and directing that it should not be re-enrolled, unless and until there has been due and proper compliance with the provisions of rule 43. The basis for

the application in terms of rule 30 is a complaint that the rule 43 application is irregular and constitutes an abuse of process.

The background

2. The applicant is the plaintiff in a pending divorce action. In her summons which was issued on 31 January 2019 she cited not only her husband, but also his parents, in their capacity as co-trustees of a trust. No relief is sought against them in the divorce proceedings and they have merely been cited as interested parties. This is not the only unusual feature of the divorce action. The applicant also seeks, by way of principal relief, an order annulling the marriage and awarding her the sum of R 9 mil in lieu of damages: R 5 mil of which is claimed as general damages for emotional pain and psychological trauma she alleges she has suffered and the remaining R 4 mil of which is claimed by way of special damages for alleged loss of income and 'financial prejudice'. The basis for the damages claim and the extraordinary sums which are sought in terms thereof is that the defendant is alleged to have 'misrepresented' to her, prior to their marriage, that he was a heterosexual male who wished to marry her so that they could have children in a heterosexual, monogamous union.
3. The applicant alleges that as a result of this misrepresentation she was induced into entering into a marriage with the first respondent in November 2012, only to be informed by him some 6 years later in September 2018 that he was homosexual, since which time they have no longer lived together as man and wife. The applicant avers that until this revelation in September 2018 she was unaware of first's respondent sexual orientation.
4. In the rule 30 application first respondent has raised a number of issues which he has with the rule 43 application. He points out that the rule provides a means whereby interim relief may be sought and obtained in matrimonial matters, as between spouses or partners to a marriage or civil union (concluded in terms of the Marriage Act[1] or the Civil Union Act[2]) and he accordingly submits that the remedy afforded by the rule is not one available in a suit as between a spouse or

[1] Act 25 of 1961.
[2] Act 17 of 2006.

partner to a marriage or civil union and an outsider ie a person who is not party to such a marriage or union, such as the trustees to a trust.

5. In this regard, whilst in the divorce action the applicant only cited her husband's parents as interested parties, in the rule 43 application she seeks an order holding them jointly and severally liable for the contribution to costs which she claims from him in respect of the divorce action. The basis for the claim against her in-laws is that they are 'active' litigants (sic) in the divorce action, as they gave notice that they intended to defend the matter, together with their son.

6. Given the view that I take of how this matter should be dealt with it is not necessary for me to rule on the joinder of the applicant's in-laws to these proceedings and the claim which is made against them, albeit in the alternative, other than to state that it is startling and novel, to say the least.

7. At the commencement of her affidavit in the rule 43 application the applicant said that she had been advised that it should be drafted with brevity and without prolixity. Thus she said that insofar as she sought to annex or refer to documents which had already been filed with the court (presumably this is a reference to documents which were filed in the divorce action), she had only 'restated' their content where doing so was 'beneficial for the sake of expediency or ease of reference'. However, to the extent that this had not been done the documents were to be treated as having been expressly incorporated in her affidavit.

8. The applicant's affidavit comprises 68 pages. To this affidavit 290 pages of annexures were attached. If one includes the confirmatory affidavits and the notice of motion the application runs, in total, to 368 pages. And this does not even include any answering affidavits, as the respondents have adopted the attitude that they should only be required to formally respond to the rule 43 application once the Court has ruled upon their application in terms of rule 30.

The law

9. Rule 43(2)(a) stipulates that a party who seeks interim relief *pendente lite* in a matrimonial matter shall do so by way of a sworn statement (ie an affidavit) which is in the nature of a 'declaration', which sets out the relief claimed and the

grounds on which it is based. The requirement that the affidavit should be set out in a manner akin to a declaration has been held to be a reference to rule 20, which provides that in the case where a simple summons has been issued in respect of a debt or liquidated demand, once the defendant has entered an appearance to defend the plaintiff is required to file a declaration in response thereto, which must set forth the nature of the claim, the conclusions of law which are deduced from the facts set out therein, and the relief which is claimed. In response to a sworn statement the respondent in a rule 43 application is entitled to file a reply which must be equally abbreviated and formal, in that it must be in the nature of a plea.[3]

10. Clearly therefore, the affidavits which are envisaged by the rule are not the same as the affidavits which are customarily lodged in applications, in terms of which a party is not only allowed greater latitude as to what may be set out therein, but is in fact required to set out chapter and verse of its case and the evidence which it seeks to rely on in proof thereof.

11. It is clear from the wording of the subrule that what is intended is that the applicant should simply set out in summary form the essence of his or her claim ie the cardinal facts which underpin the cause of action (be it for maintenance, a contribution to costs or interim care or contact with a child), and the conclusions of fact and law which are sought to be derived therefrom, in support of the relief which is claimed. No more and no less than this is required.

12. Ever since the rule was first introduced the Courts have regularly warned against parties straying outside the bounds of what is permissible in terms thereof. Already some 30 years ago Van den Heever J warned in *Micklem v Micklem*[4] that filing unduly lengthy affidavits and annexures which would in the normal course not be attached to a pleading would amount to an abuse of process. But notwithstanding numerous and irregular admonishments by Courts over the succeeding years the frequency with which the rule is transgressed appears to have increased, so much so that in the course of this year alone both this division

[3] Rule 43(3)(a).
[4] 1988 (3) SA 259 (C) at 262C.

as well as the Gauteng division have again had cause to remind practitioners of what is required in this regard.

13. In *E v E; R v R; M v M* [5] the full bench of the Gauteng division reiterated that affidavits filed in terms of rule 43 should only contain material which is relevant to the issues under consideration, failing which the Court has the power to strike it out and to make an 'appropriate' costs order. In addition, with a view to ensuring that proper financial disclosure is made by the parties in such applications and that volumes of superfluous and irrelevant material are not annexed to the affidavits the Court proposed that the division's practice directives be amended in order to provide for the compulsory completion and filing of a financial disclosure form which the Court crafted, which allows for a succinct but comprehensive exposition of the parties' financial circumstances, including every class and type of asset and form of liability they have, and the entire spectrum of their income and expenditure.

14. On 10 July 2019 in the matter of *RM v AM* [6] Rogers J similarly reminded practitioners in this division that affidavits in rule 43 proceedings should not stray into extraneous matter and should not contain emotive or pejorative allegations as these were irrelevant and served little purpose, for the Court could hardly ever base its judgment on them, and given the mandatory requirement that the affidavit should be in the nature of a declaration, rhetoric and a lengthy narrative were not required and the essential facts could ordinarily be set out 'virtually in point form'.[7]

15. A month later in *ME v AE* [8] Binns-Ward J also warned that the papers in rule 43 applications should be succinct, and should set out each party's case on affidavit in a manner which is analogous to that adopted in a pleading.[9] He pointed out that the production of unnecessarily voluminous papers in rule 43 applications was not only an abuse of process and an irritant to judges seized with such

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[5] 2019 (5) SA 566 (GJ).
[6] [2019] ZAWCHC 86.
[7] *Id*, para (2).
[8] [2019] ZAWCHC 108, decided on 26 August 2019.
[9] *Id*, para [6].

matters, but was against the best interests of the parties.[10] His words echo the remark made by the Court in *Patmore*[11] that the filing of a prolix application which contains material which is irrelevant for the issues in a rule 43 application not only places an unnecessary burden on judges but frustrates the very object of the rule.

16. In *ME* Binns-Ward J expressly warned practitioners in this Court that applications which were drafted in flagrant breach of the rule were liable to being struck from the roll without being heard.

The law applied

17. No doubt with a view to warding off the criticism which was inevitably going to come their way, the applicant's attorneys cynically set about comparing the number of pages in some of the reported decisions involving rule 43 applications, with those in this matter, with a view to demonstrating that in such matters the Courts entertained applications which were no less prolix than this one. Thus, they point out that in *ME* this Court heard an application which encompassed a total of 172 pages, and in *E v E* the Gauteng Court allowed affidavits in a rule 43 application which comprised a total of 195 pages: 86 pages for the applicant's sworn statement and 109 pages for the reply.

18. The approach which has been adopted by the applicants is disingenuous and unhelpful. In considering whether or not a party's papers fall within the bounds of what is envisaged by the rule, and whether it has at least attempted to abide by the spirit if not the letter thereof it is not a question of tallying up the total number of pages involved. Rather, it is about considering what is said in the affidavits which have been filed and the content and relevancy of the supporting documents which are annexed thereto, in relation to the claims which are made and the relief which is sought in the application.

19. Whereas in one matter a short affidavit a few pages long and without any supporting annexures might suffice, in another a lengthier one with a number of supporting annexures may be required. In each matter what will reasonably be

[10] *Id*, para [8].
[11] *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D.

required will depend on the facts and circumstances. Thus, for example, where the matter concerns a claim in respect of relief sought in relation to the care of, or contact to, a child and the parties have been embroiled in a long and bitter tussle it may be necessary to set out, in some detail, the sad and sorry saga which has led up to the application and the alleged misbehaviour in which the parties are alleged to have engaged, inasmuch as this may be relevant to a determination of whether or not they are fit and responsible enough parents to have a child in their care, or to have contact with him/her.

20. On the other hand, where the application is simply a follow up one for a further contribution to costs incurred during a trial which has already commenced, an account of the long and winding road which the parties have followed up to that point in time would be irrelevant and there would be no need to set out a lengthy historical narrative going back aeons in time to the commencement of the break-down of their relationship.

21. Although the applicant's attorney contends in his heads of argument that the 'extraordinary' nature of the application justifies the length of the papers the relief which is sought is (in the main), of the kind commonly sought in rule 43 applications viz maintenance for the applicant[12] *pendente lite* and a contribution to costs. Perhaps the applicant's attorney was referring to the extraordinary amount of R400,000 which the applicant seeks as a contribution to costs (even though pleadings have only just closed a few months ago, full discovery has not been made, no trial date is remotely close to being allocated and the case flow management procedure in terms of rule 37 has not yet been engaged).

22. As such, what was required of the applicant by way of a statement in terms of the rule was to set out a brief and succinct chronological exposition of the legal process in the pending divorce action from summons to close of pleadings, the nature of the claims which she was putting forward as plaintiff in the divorce action, and the first respondent's defence thereto, in summary form, and then to deal with her claims for maintenance and for a contribution to costs, setting out

[12] She also requires 'maintenance' for the parties' two dogs, which are in her custody.

what was claimed and why, with reference to the party's financial circumstances, particularly her needs and the first respondent's means.

23. Even allowing for the fact that her claims may have required bolstering by reference to supporting documents in relation to her expenses and first respondent's financial circumstances (it is alleged that he is the owner of a profitable business which operates via the medium of a close corporation of which he is the sole member), I cannot see how an affidavit of anywhere near even a third of the length of that which was submitted by the applicant in this case would ever be justified or warranted, not to mention the 300 odd pages of annexures.

24. If one proceeds to consider the contents of the affidavit and the annexures which were submitted then one will understand why they are excessive in the extreme. The first part of the applicant's affidavit is largely devoted to narrating, in the finest and most intimate detail how first respondent came to reveal that he was homosexual, and goes on to set out in further explicit detail the contents of highly private and personal communications which took place between the parties pursuant to this disclosure. In similar vein, the applicant makes reference to the outcome of internet searches which she conducted in relation to respondent's private internet browsing activity, and even the contents of very private and personal communications between him and his priest are set out in her affidavit.

25. None of this material is in any way relevant to, or necessary for, a determination of the issues in the application and whether or not the first respondent should be directed to pay maintenance and a contribution to costs, in the amounts sought by the applicant. In my view, publication of this material could be said to constitute an unjustified breach of the first respondent's rights to privacy, if not that of the applicant herself. I say this because it is evident that the rule 43 statement was drawn up by the applicant's attorney and she would hardly have known what was required in this regard, and much of what is set out in the affidavit appears to have been drawn directly, if not verbatim, from the privileged and confidential instructions which she no doubt gave her attorneys.

26. Another part of the affidavit is devoted to attempting to demonstrate that the defences which have apparently been put forward by the first respondent in the divorce proceedings are untruthful or unreliable. In doing so, the applicant once again makes reference to private communications between her and first respondent, which deal with his sexual orientation and proclivities. All of this material is also clearly devoid of any relevance, either to the claim for maintenance or to the claim for a contribution to costs. In heads of argument which he filed on behalf of the applicant her attorney quite candidly admits[13] that a number of the annexures, including the voluminous record of WhatsApp messages and other correspondence, were simply attached in order to 'cast doubt' on the denials pleaded by first respondent in his plea and certain allegations which he made in his counterclaim, as well as to cast doubt on the veracity of allegations which were made in correspondence between the parties' attorneys. Once again, none of this is in any way relevant to the applicant's claim for maintenance and a contribution to costs.

27. The applicant's attorney even annexed copies of complaints which were lodged against him by the respondents, with the newly established Legal Practice Council. In this regard it appears that he previously assisted first respondent's parents with their estate planning and the drafting of their will, and also provided legal advice in relation to the very same trust of which they have been cited as trustees, and in addition it is alleged that he advised first respondent in regard to the purchase or sale of one of his properties. As a result, the respondents complained that he was in possession of confidential and privileged information which he obtained from them on an attorney-client basis, and they contended that he was in a position where he could not legitimately act against them, on behalf of the applicant. Once again, the material which has been annexed in this regard is of no relevance whatsoever to the issues which require determination in the rule 43 application. If anything, the inclusion of such material only serves to raise troubling questions about the conduct of the applicant's attorney.

[13] At para [117].

28. Similarly, a large part of the affidavit is devoted to dealing with the shock and anguish applicant avers she suffered pursuant to the disclosures which were made by the first respondent. This too bears no relevance to the issues which require determination in the rule 43 application.

29. As far as the voluminous annexures are concerned, apart from a lengthy verbatim record of telephonic WhatsApp communications (which are mundane) there are also a number of other annexures which contain material which is largely extraneous and irrelevant to the issues at hand. Included amongst these are page after page of credit card vouchers in relation to expenses incurred at a number of departmental stores, lengthy bank statements pertaining both to the applicant's account as well as that of the first respondent, so-called company overview reports of the applicant's business for a period of some 6 months between October 2018 and April 2019, and the full set of financial statements of first respondent's close corporation for the years 2015 to 2018. If the content of any of these annexures was relevant there was no need for hundreds of pages to have been attached and a schedule which tabulated the relevant information which needed to be imparted, in summary form, would have sufficed, or if this would not do only the necessary pages should have been extracted and attached. Instead, one gets the impression that everything which was to hand, short of the proverbial kitchen sink, was thrown in to the application without any attempt being made to consider whether it was relevant or not, and a lot of what was thrown into the affidavit was nothing more than mud, which was aimed at embarrassing first respondent.

Conclusion

30. In my view, the respondents are correct when they say that the application constitutes a wide-ranging and egregious abuse of process and the rules of Court, and they should not be compelled to respond to it unless and until it is brought in the proper format. To require them to respond to it in its current form would be to subject them to a vexatious and unnecessarily arduous process, at great and unnecessary cost in terms of both time and money, and would do

violence to the object of the remedy which is provided for in terms of the rule, which is intended to allow for expeditious and prompt relief by way of abbreviated process.

31. In the circumstances the application should be struck from the roll and the applicant should only be allowed to re-enrol it when it is brought in the proper form, in compliance with what the rule envisages, as set out in the numerous cases to which I have referred.

32. The impression which one has from the papers is that the application was deliberately inflated. This is a matter of great concern to the Court. I note that on 20 February this year applicant's attorneys rendered her an account for R 132 850 in lieu of fees and disbursements which were incurred in the short two month period between 2 December 2018 (when the applicant first consulted them in relation to instituting divorce proceedings) and 31 January 2019 when the summons was issued, and at the end of June 2019 they rendered a further account in the amount of R 73 725 in respect of fees and disbursements for the period between February and June 2019. Thus, as at end June this year the applicant already owed her attorneys just over R 200 000, and this no doubt explains the extraordinary amount of R 400 000 which was claimed as a contribution to the applicant's costs. I note with further concern that in a detailed costs' estimate which they provided to her on 5 December 2018 her attorneys indicated that the divorce would cost her a minimum of R 946 000 in lieu of legal fees. By any standard this seems to be an excessive amount for a divorce of the kind which is before me, notwithstanding the parties' societal standing, first respondent's alleged means and the scale of the litigation thus far.

33. As far as costs are concerned I am of the view that this is a matter where fairness and justice dictates not only that the respondents should not be required to bear any share of the costs of either application, but neither should the applicant, and in addition, as a mark of the Court's displeasure, a special costs order is warranted against the applicant's attorneys, given that very loud and clear warnings were issued by this Court in July and August this year in the two reported matters I have referred to, whereby practitioners were warned what

would happen in the event of continued flagrant disregard for what is required by the rule.

34. Given that they were responsible for preparing and drafting the papers as they did, in flagrant breach of the rule, and given further that they were afforded an opportunity in terms of the notice which was filed in terms of rule 30 to remove the cause of complaint within 10 days (which they could have done by withdrawing the application and filing a fresh application which complied with the rule), which they elected not to do, thereby resulting in the matter having to be heard at unnecessary additional cost both to the applicant as well as to first respondent, I am of the view that the applicant's attorneys should be directed to bear the costs, *de bonis propriis.*

35. In the result I make the following Order:

35.1 In terms of rule 30 (read together with rule 30A), the rule 43 application which was filed in the above matter is declared to constitute an irregular step and an abuse of process.

35.2 The rule 43 application is struck from the roll, and shall not be re-enrolled unless and until it duly complies with the prescripts and requirements of rule 43.

35.3 The applicant's attorneys in the rule 43 application shall be liable *de bonis propriis* for the costs of both the rule 30 application as well as the rule 43 application, on the scale as between attorney and own client.

35.4 The applicant's attorneys in the rule 43 application shall not be entitled to recover any costs in respect of either application, or any costs which are payable in terms of this Order, from the applicant.

M SHER

Judge of the High Court

Attendances:

Applicant's attorney: Dr F Moosa (Fareed Moosa & Associates)

Respondents' counsel: Adv J Anderssen

Respondents' attorneys: Machanik Attorneys