THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 10825/14

In the matter between

CT	**APPLICANT**
and	
MT	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS WESTERN CAPE	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**

Coram: Rogers J

Heard: 9 December 2019

Delivered: 29 January 2020

JUDGMENT

Rogers J

[1] The applicant, who appears in person, has applied to have rule 43 declared constitutionally invalid. The first respondent is his erstwhile wife from whom he was divorced by an order of Cloete J on 8 February 2017. The applicant told me that he wishes to appeal the divorce order, which was granted at the instance of the first respondent, *inter alia* because in his view she was not and is not of sound mind. The second respondent is the Director of Public Prosecutions, Western Cape ('DPP'). The third respondent is the Minister of Justice and Correctional Services ('Minister).

[2] The DPP does not have a legal interest in the validity of rule 43 though he features in some of the applicant's matrimonial travails. In-house counsel for the DPP filed heads of argument, and Mr Stephen SC (not the author of the heads) appeared at the hearing. He agreed that the DPP does not have a legal interest but remained present to observe proceedings. The Minister was represented by Ms Mayosi.

[3] Since a final order of divorce has been made, it is doubtful whether the applicant retains a practical interest in the validity of rule 43. His stated case does not assert that he is acting in the public interest or in the interest of any other group of persons. However, no challenge to his standing was taken, and in the circumstances I think it better to deal with the merits of his challenge.

[4] The matter has come before me in a curious way. The case started as an application issued in the latter part of 2014. In April 2015 the applicant caused a rule 16A notice to be issued. In March 2019 the parties met with the Judge-

President who directed that in terms of rule 33(1) they should present the constitutional challenge to rule 43 for adjudication by way of a special case in terms of rule 33(1). On 29 May 2019 the Minister's counsel filed a 'stated case', which – having regard to its content – would more accurately have been called heads of argument. The DPP filed a similarly styled document of a similar kind. On 1 June 2019 the applicant filed his 'stated case', which was a mixture of factual material concerning his own matrimonial litigation and legal submissions. This is the only material placed before me. I was not given the application itself.

[5] The 'special case' contemplated in rule 33(1) is a single document submitted by the parties jointly, setting out *inter alia* a written statement of the agreed facts. Here the parties have submitted separate documents, essentially in the nature of argument. The facts contained in the applicant's 'stated case', to the extent that they are relevant to the adjudication of the constitutional challenge, have not been presented to the court as agreed facts.

[6] However, I have decided to overlook these procedural shortcomings. As I explained to the applicant, and as he accepted, the facts of his own saga are not germane to the validity of rule 43 except perhaps as illustrating (in his view) some of the hardships to which the rule can give rise. I shall thus record his matrimonial litigation in bare outline. Meaning no disrespect to the parties, I shall refer to the applicant and the first respondent as Henry and Mary (not their real names).

[7] Henry and Mary were married in June 2003. A son was born to them in August 2006. In September 2008 Mary instituted divorce proceedings in the Durban High Court, she residing within that court's area of jurisdiction at the time. In January 2009 Mary obtained an order from the Durban High Court in terms of rule 43 which obliged Henry to pay maintenance for her and the child. In June 2009 Henry succeeded in getting a reduction of maintenance from the

Durban maintenance court but an appeal by Mary against that reduction succeeded. In October 2010 Henry's attempt to have the rule 43 order varied in terms of rule 43(6) failed.

[8] In November 2011 Henry was arrested in Gauteng for alleged non-compliance with the order. This initially proceeded as a criminal case in the Somerset West Magistrate's Court. In October 2012 those proceedings were converted into a maintenance enquiry in view of Henry's claim of impecuniosity. Shortly afterwards the maintenance investigator closed the file because Mary withdrew her complaint, claiming that it was a waste of time.

[9] Henry laid charges against Mary for failing to give him access to his son in terms of an order granted by the Durban High Court in August 2012. In May 2014 the same court ordered that Mary be arrested and brought to court on 22 May to show cause why she should not be incarcerated for contempt. On that day the court transferred the divorce action and the related rule 43 proceedings to this court, since Mary had relocated from Durban to Cape Town.

[10] In the meanwhile Henry had applied to the Constitutional Court for direct access to challenge the validity of rule 43. In March 2012 the apex court dismissed his application, ruling that it was not in the interests of justice to hear the challenge at first instance.

[11] As I have said, the constitutional challenge to rule 43 was launched in this court in the latter part of 2014. Why it has taken so long for it to come to adjudication is unclear. Also unclear is why it took until February 2017 for the divorce case to be heard, save to record that in March 2016 Gamble J found Mary to be in contempt for failure to comply with case management directions (the judgment is reported at 2016 (4) SA 193 (WCC)). Henry applied to the Constitutional Court for leave to pursue an appeal against the divorce order

directly to that court. In January 2018 the apex court dismissed the application, ruling that it was not in the interests of justice to hear the matter at that stage.

[12] Since the applicant appears in person, it is understandable that the distinction between 'administrative action' reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), and other exercises of public power reviewable in terms of the principle of legality, was not present to his mind. The Uniform Rules are akin to regulations. The last word has not been spoken as to whether and when the exercise of regulation-making power constitutes 'administrative action' subject to PAJA (*Mostert NO v Registrar of Pension Funds & others* [2017] ZASCA 108; 2018 (2) SA 53 (SCA) paras 8-10; *Minister of Mineral Resources v Stern & others; Treasure the Karoo Action Group & another v Department of Mineral Resources & others* [2019] ZASCA 99; [2019] 3 All SA 684 (SCA) para 50).

[13] The applicant has made no mention of PAJA and I thus take his application to be based on the principle of legality. No point of delay has been taken by the Minister.

[14] In para 115.1 of his stated case the applicant identifies the key features of rule 43 which in his view make it unconstitutional: '[I]t contains no guidelines, timelines, is indefinite and non-appealable.'

[15] In para 118 of his stated case the applicant lists various provisions of the Bill of Rights, presumably because he regards rule 43 as implicating them in some way. These fundamental rights are: equality before the law (s 9(1)); dignity (s 10); the right not to be treated or punished in a cruel, inhuman or degrading way (s 12(*e*)); privacy in the form of the right not to have one's possessions seized (s 14(*c*)); access to information (s 32(1)(*b*)); the right to lawful, reasonable and procedurally fair administrative action (s 33(1)); and the right to have any dispute

that can be resolved by the application of law decided in a fair public hearing before a court (s 34).

[16] In para 127 he says that although rule 43 on its face seems to be neutral and non-discriminatory, it has or could have discriminatory effects, one of which is arbitrary deprivation of a spouse's assets. This might be thought to be a reference to s 25(1) of the Constitution.

[17] In paras 154-158 he says that rule 43 does not contain adequate protections and safeguards for children, and he refers in this regard to the rights of children in terms of s 28(1) of the Constitution and the Children's Act 38 of 2005.

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

[19] However, to the extent that the applicant intended to advance the case that the rule is invalid for violating one or more of the above sections of the Bill of Rights, I reject the argument. I remind myself at the outset that the rules of court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law (*United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463B-E; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions & others* 2012 (5) SA 267 (GSJ) para 21; *Standard Bank of South Africa Limited v Hendricks & another and five similar cases* 2019 (2) SA 620 (WCC) para 26). Specifically in relation to rule 43, Vos J in this division said in *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E-F that rule 43 governs procedure and does not affect the

substantive law (see also *Jeanes v Jeanes & another* 1977 (2) SA 703 (W) at 706F-G).

[20] The court's power to make *pendente lite* orders for maintenance, contribution to costs, and access to and custody of children, is a power which vests in it by virtue of substantive law. It is a power which was exercised for many decades before rule 43 was introduced. If rule 43 were abolished, the substantive power would not disappear. Only the procedure by which it is invoked would change (a spouse would seek *pendente lite* relief by way of an ordinary application).

[21] It follows that in a challenge to the constitutional validity of rule 43 one is not concerned with the notional detriment which spouses may suffer from orders made against them *pendente lite* in accordance with substantive law but only with such detriment as flows from the specific procedure laid down in rule 43 for obtaining such orders.

[22] In regard to procedure, the applicant has not complained about the requirement in rule 43 that the claim should be made by a sworn statement 'in the nature of the declaration' (rule 43(2)) and that the defence should be made by a sworn reply 'in the nature of a plea'. Precisely what the quoted phrases mean is open to debate. Clearly the rule-maker intended that the sworn statements should not be prolix. Rule 43 was intended to provide for inexpensive and expeditious interim relief (*S v S & another* [2019] ZACC 22; 2019 (6) SA 1 (CC) para 43).

[23] In this division, at any rate, rule 43 is not in my experience understood as meaning that (save for being sworn) the claim must in fact be a declaration as envisaged in rule 20 read with rule 18 and that the defence must in fact be a plea as envisaged in rule 22. Some evidence, which would be objectionable in a declaration or plea, is not merely allowed but expected. In a declaration it might

suffice, for example, for a wife to plead that she reasonably requires RX per month to maintain herself and that the husband can afford to pay it. In a rule 43 statement, by contrast, the court would expect a breakdown of and some evidence to support the wife's alleged maintenance requirements, and some evidence as to why she says the husband can afford to pay the amount. When the rule-maker says that the claim or defence should be 'in the nature' of a declaration or plea, the rule-maker is saying, I think, that in the quest for brevity the claim and defence should be more like a declaration and plea than like a founding affidavit and opposing affidavit.

[24] Shortly after the introduction of rule 43, Van Winsen J in *Varkel v Varkel* 1967 (4) SA 129 (C) appears to have thought that in the ordinary course the parties would, following their brief sworn statements, appear before a judge and give oral evidence in terms of rule 43(5), which was the proper occasion to produce material in support of their respective averments (at 132C-F). That is not, however, the view that has prevailed. Except perhaps where the interests of children are at stake, it is the exception rather than the norm for oral evidence to be heard. Judges expect succinctly-stated evidence in support of the points of claim or defence to be contained in the sworn statements. This was the view taken by Milne JP in *Boulle v Boulle* 1966 (1) SA 446 (D), also shortly after the introduction of the rule, when he said (at 449 *in fine*):

'No doubt the intention of the rule is that the essential facts relied upon by the applicant should be stated concisely, but it appears to me to be *prima facie* desirable that some details should be given so as to enable the court to deal with the application, if possible, without recourse to *viva voce* evidence.'

(See also *Eksteen v Eksteen* 1969 (1) SA 23 (O) at 24H-25C. The question of the permissible length of sworn statements in terms of rule 43, and the further question whether replying affidavits should sometimes be allowed, were recently considered by a full court in Johannesburg in *E v E* 2019 (5) SA 566 (GJ). It is

unnecessary for me to express an opinion on the views contained in that judgment. According to my enquiries, the practice directives of that court have not yet been amended in line with the proposals in *E v E*.)

[25] Against this background, I deal briefly with each of the fundamental rights which the applicant mentions:

(a) In regard to equality (s 9(1)), all spouses are subject to the same rule. To the extent that the rule creates differential treatment between matrimonial litigants (who are subject to the said rule in respect of the matters governed thereby) and other litigants (to whom ordinary motion and action rules apply), the differential treatment has not been shown to be irrational or discriminatory.

(b) In regard to dignity (s 10), it is not an affront to a person's dignity to be required to advance or defend a claim for *pendente lite* matrimonial relief in accordance with the prescripts of rule 43, any more than it is an affront to dignity to be required to advance or defend other claims in accordance with the prescripts relating to actions or applications as the case might be.

(c) In regard to degrading, inhuman or cruel treatment or punishment (s 12(1)(*e*)), an interim matrimonial order may result in hardship for the burdened party but cannot be regarded as degrading, inhuman or cruel within the meaning of the Bill of Rights. Anyway, the order would be sourced in substantive law, not the rule.

(d) In regard to the possible seizure of possessions (s 14(*c*)) and deprivation of property (s 25(1)), this is not a consequence of rule 43 but of the substantive power to make matrimonial orders *pendente lite*, coupled with the provisions of legislation and the rules concerning execution of judgments in general.

(e) In regard to access to information (s 32(1)(*b*)), rule 43 does not stand in the way of a person's right to information as guaranteed by that section read with the Promotion of Access to Information Act 2 of 2000. This does not mean, of course, that a rule 43 respondent can compel the opposing party to produce whatever

information he regards as necessary to advance his defence, any more than an ordinary respondent could in ordinary motion proceedings. If, however, a rule 43 respondent considers that the applicant is withholding important information which would refute her claim for relief *pendente lite*, and that without such information the applicant might unjustly obtain relief by passing off sparseness as conciseness, he can ask the court to call for further evidence, either orally or by way of further affidavits.

(f) In regard to fair administrative action (s 33), proceedings in terms of rule 43 are not administrative but judicial, so this fundamental right is not engaged.

(g) In regard to access to courts (s 34), rule 43 envisages a public hearing before a court of law. Disputes about interim matrimonial relief are disputes which can and have for decades been decided by the application of our substantive law. Subject to the applicant's complaints that rule 43 contains no guidelines or timelines, is indefinite and non-appealable, which I shall address separately, there is nothing unfair about the rule 43 procedure. It may be somewhat robust, but that is legitimate for relief which is intended only to be interim, with final adjustments to be made, if necessary, in the divorce order. As I have said, the need for the claim or defence to be concise does not preclude the inclusion of evidence in the sworn statements, and rule 43(5) exists as a backstop where additional evidence is needed to dispose of a case fairly.

(h) In regard to the rights of children (s 28), courts hearing rule 43 applications relating to access to and custody of children must comply with the Constitution and the Children's Act. In particular, the court must apply the standard of the best interests of the child. In the nature of things, interim orders cannot be as fully investigated as final orders, but courts hearing rule 43 applications relating to children are likely to be generous in applying the standard of succinctness and in their invocation of rule 43(5) (see *TS v TS* P18 (3) SA 572 (GJ) paras 37 and 60-

66). Rule 43 does not compel the court to act in way which negates the best interests of children.

[26] I turn now to the complaints articulated in para 115.1 of the stated case. In regard to non-appealability, the question has been settled by the Constitutional Court in *S v S supra*. Non-appealability is not unconstitutional. I should add that non-appealability is not imposed by rule 43 but by s 16(3) of the Superior Courts Act 10 of 2013. At the hearing the applicant acknowledged that the appealability question had been settled by *S v S*, but said that in considering his other complaints one must bear in mind there is no appeal as an antidote to unjust decisions.

[27] In regard to the absence of guidelines, the applicant considers that the rule should set out, for example, how spousal support is to be calculated. By way of an example of the sort of guidelines he had in mind, he referred me to the temporary maintenance guidelines apparently adopted by the State of New York – only income, not assets are taken into account; various percentage deductions are made from the annual incomes of the dependent spouse and wealthier spouse; the duration of the award is related to the duration of the marriage and so forth.

[28] This complaint cannot be sustained because it is concerned with substantive law, not procedure. The substantive law governing interim maintenance is our common law, the obligation to pay such maintenance being rooted in a spouse's duty of support. Whether the broad and flexible jurisdiction of the common law (as to which, see eg *Smallberger v Smallberger* 1948 (2) SA 309 (O) at 313-314; *Barass v Barass* 1979 (1) SA 246 (R) at 246 *in fine*) should be replaced by more predictable and mechanical rules is not a matter for procedural rules but substantive legislation. As I have already remarked, if rule 43 were abolished, the court would still have its substantive power to order interim

maintenance, and the current common law would still apply. The only difference would be that the broad and generous jurisdiction of the common law would be invoked by an ordinary application under rule 6 rather than by way of the more truncated procedure of rule 43.

[29] The same applies to the court's power to order a contribution to costs, which is likewise sourced in the spousal duty of support (*Chamani v Chamani* 1979 (4) SA 804 (W) at 806B-H; *AF v MF* [2019] WCHC 111; 2019 (6) 422 (WCC) para 27). In regard to access to and custody of children, the court's common law powers have now largely been superseded by the Children's Act, which contains significant guidance.

[30] In his oral submissions, the applicant said that his complaint about the absence of timelines, and that the rule is indefinite, are really concerned with the same problem, namely that an interim order might end up lasting a very long time, with resultant injustice to the burdened spouse. He referred me to cases where courts have recognised that rule 43 may be abused by a spouse in whose favour a generous interim award has been made. Such a spouse may have an incentive to string out the divorce case far longer than would have been in the court's mind when the interim order was made.

[31] Although I do not know why the applicant's own matrimonial litigation has been so protracted, and am not in a position to judge the rights and wrongs of his case, I can understand that he might see himself as a victim of this type of abuse. On his version he has lost substantially his whole estate, including a pharmacy business, during the pendency of the divorce proceedings. He spoke with obvious emotion about his child with whom he has been able to establish no relationship, having (in his words) seen the boy for only 82 minutes in the last 11 years.

[32] I do not think, however, that his unfortunate experience, which may be an extreme example of a more common malaise, can be laid at the door of rule 43. At the risk of repetition, the substantive power to make interim orders of the kind listed in rule 43(1) is a power sourced in our common law. The abuse of which the applicant complains is one that could be caused by any interim matrimonial order by whatsoever procedure obtained.

[33] One possible source of injustice is where the interim order is from the outset unjust. In such a case the problem is not one of absence of temporal limit, though of course the injustice would at least be contained if the order automatically lapsed after a specified period of time. Unfortunately it is always possible that interim orders may be unjust (whether because of dishonest affidavits or poor decision-making) and that they may last longer than anticipated. This danger applies to all forms of interim relief, not only interim matrimonial relief. The non-appealability of rule 43 orders, which is expressly decreed by statute, is in truth a general characteristic of all interim orders. Rule 43(6) will not usually provide a solution since the complaint is that the judge made an unjust order, not that circumstances have materially changed.

[34] Nevertheless, where an order is from the outset manifestly unjust and erroneous, a court may exercise its inherent power in terms of s 173 of the Constitution to remedy the wrong (*S v S supra* para 58). Moreover, where an injustice is compounded by an undue protraction of the divorce proceedings, the delay may itself constitute a material change of circumstance as contemplated in rule 43(6).

[35] The potential abuse of indeterminate interim orders could be avoided by including in the order a provision to the effect that it will lapse after a specified period of time, whereupon the spouse in whose favour it was made would need to

renew his or her application. In many cases it ought to be possible to assess how long the divorce should take to come to trial if diligently conducted. Specifying a fixed period might encourage the benefited spouse to pursue the main case diligently. On the other hand, proceedings can be delayed for many unforeseen circumstances having nothing to do with abuse by the benefited spouse. Whether it is desirable to insist on the expense and inconvenience of a further application is debatable. Furthermore, if the interim order were regarded as unduly parsimonious rather than unduly generous, there may be an incentive on the part of the obligated spouse, rather than the benefited spouse, to drag out the main case.

[36] Be that as it may, if specifying a terminal date in the order were thought desirable, there is nothing at common law or in rule 43 which prevents its imposition. And even in the absence of such a term, the fact that the main case has been delayed significantly longer than could reasonably have been expected when the interim order was made would probably be a basis to ask for a fresh assessment in terms of rule 43(6).

[37] However, and although terms such as those suggested above could be included in rule 43 orders in order to minimise the risk of abuse, the abuse as such is not caused by rule 43. The rules of court as a whole are meant to result in expeditious adjudication. Every procedural step is governed by a time-limit. If the time-limit is not complied with, the rules entitle the other party to apply for relief (eg an order compelling compliance, failing which the claim or defence is struck out). Judicial case-management is a further mechanism designed to ensure that trial preparation is handled efficiently. Provided judges play their part, no case should take as long as the applicant's did, even if one of the litigants were trying to drag it out. Significant abuse can only really happen where a litigant fails to exercise his or her procedural rights or a judge fails to do his or her duty.

[38] It follows that the applicant's challenge to rule 43 must fail. It is not in dispute that in terms of the *Biowatch* principle there should be no order as to costs. Since I have not been furnished with the notice of motion giving rise to the 'stated case', I do not know whether the applicant claimed any relief apart from challenging the constitutionality of rule 43. In those circumstances I am not in a position to dismiss his application, though this will be the practical effect of my order unless there is other relief still to be determined.

[39] Since the applicant appears in person, I remind him that he has 15 court days from the date of delivery of this judgment to file and serve an application for leave to appeal my judgment. If he delivers such an application, I shall make prompt arrangements to hear it. This is not intended as an encouragement to him to seek leave.

[40] I make the following order:

The applicant's application for an order declaring rule 43 to be unconstitutional and invalid is dismissed.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

For Applicant	In person
For Second Respondent	Mr Stephen SC Office of the Director of Public Prosecutions, Western Cape
For Third Respondent	Ms N Mayosi Instructed by: State Attorney 4th Floor, Liberty Centre 22 Long Street Cape Town