IS THERE A PRESCRIBED LENGTH FOR A DECLARATION BY AN APPLICANT AND/OR A PLEA BY A RESPONDENT IN RULE 43(2) AND (3) APPLICATIONS?

> "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 either in passing constitutional scrutiny or being capable of meeting the requirements that the outcome will serve the child's best interests." (Spilg J in *TS v TS* 2018 (3) SA 572 (GJ))

1 Introduction

This case note investigates the interpretation of Rule 43(2) and (3) of the Uniform Rules of Court. It determines whether there is a prescribed length for such applications and pleas under the Rules. It takes a historical perspective, tracing two contradictory views in case law and considers how the courts have interpreted these two views in their different judgments. Some courts have interpreted the Rules strictly; they have held that such applications and pleas should be brief, succinct and to the point. Others have disagreed with the strict interpretation and allowed prolixity. The input of the legal fraternity (the Cape Bar and the Law Society of South Africa) on the shortcomings of the Rules, and how they could be amended, is discussed. The ruling of the full bench of the Gauteng Local Division of the High Court has answered the question. It has held that there is no one-size-fits-all approach under the rule. Each case must be determined according to its own merits. Simple cases may be disposed of expeditiously, but complicated cases should not be struck off the roll because of prolixity.

A litigant in divorce proceedings can approach the court to grant a Rule 43 order in respect of interim maintenance for minor children as well as financial aid to assist the needy spouse to alleviate financial needs. A Rule 43 application was designed to provide divorcing parties with an inexpensive procedure to get interim relief in a divorce action. At its inception, the main purpose of Rule 43 applications was to provide for an inexpensive and expeditious way of dealing with maintenance of the indigent spouse and the children during the divorce process. As divorce actions take a long time to finalise, the interim order has significant consequences for the parties. It resolves issues of maintenance for the spouses and the children and the costs of the main divorce action.

The interpretation of Rule 43(2) and (3) has been a bone of contention among legal practitioners and the courts for the last five decades. Some courts have considered that the applicant's declaration and the respondent's

plea should be short, succinct and to the point – failing which, they should be thrown out of court. However, other courts have entertained lengthy declarations and pleas, as long as the information is relevant to the question before the court. Only recently, in 2019, was the question decisively answered by the full bench of the Gauteng High Court.

2 The Rule 43 provisions

Rule 43(1) and (2) provide that whenever a spouse seeks relief from the court in respect of one or more matters (such as maintenance *pendente lite*, a contribution towards the costs of a pending matrimonial action, and interim custody and access to a child), the applicant must deliver a sworn statement by way of a declaration, setting out the relief claimed and the grounds for it, together with a notice to the respondent (Rule 43(1)–(6)) of the Uniform Rules of Court: The Superior Courts Act 10 of 2013). The statement and the notice must be signed by the applicant or their attorney, must give an address for service within eight kilometres of the office of the registrar, and must be served by the sheriff. Rule 43(3) provides that the respondent must within 10 days of receiving the statement deliver a sworn reply in the form of a plea, signed and giving an address as aforesaid, in default of which they will *ipso facto* be barred. A court may hear such evidence as it considers necessary and may dismiss the application or make such an order as it thinks fit to ensure a just and expeditious decision (Rule 43(5)). A court may also, using the same procedure, vary its decision in the event of a material change in the circumstances of either party or child, or if the contribution towards costs proves inadequate (Rule 43(6)). Rule 43(2) and (3) do not prescribe the length of the declaration and the plea. Consequently, how long these documents should be, has been a bone of contention among legal practitioners and the courts.

Some courts have interpreted the provisions strictly by providing that the application and the plea should be succinct and to the point (*Colman v Colman* 1967 (1) SA 291 (C)). Others have adopted a relaxed approach allowing for prolixity, as long as the information in the declaration and plea is relevant to the issues before the court (*Boulle v Boulle* 1966 (1) SA 446 (D)).

3 Background to the two contradictory views

3 1 Cases that interpreted the Rules strictly

The view that a Rule 43(2) application should be concise, succinct and to the point was proclaimed 55 years ago by Judge Theron in *Colman v Colman* (*supra*). In this case, the applicant brought a Rule 43 application in which she sought custody of the three children of the marriage with reasonable access granted to the respondent; R40 maintenance per child per month; and a R100 contribution to her divorce action legal costs and the costs of the application. The judge observed that both parties had submitted voluminous affidavits contrary to the provisions of Rule 43(2) and (3), which provides that the applicant must submit a sworn statement in the form of a declaration, and the respondent must deliver a sworn reply in the nature of a plea. Judge Theron declared:

> "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*." (*Colman v Colman supra,* per Theron J 292 A)

Accordingly, the judge ordered the respondent to pay the costs of the application. He instructed the taxing master to exclude the costs of all the irrelevant voluminous affidavits filed by the applicant and charge costs for the affidavits contemplated in Rule 43(2).

It is strange and inexplicable that *Colman* subsequently gained so much popularity and currency in the legal fraternity because it is a very short and unreasoned judgment. Interestingly, the judge did not discuss the voluminous documents he referred to in the judgment. He neither specified the number of pages of the applicant's application nor that of the respondent's plea. As a result, the extent of prolixity is uncertain. In other words, it is unclear what length the judge viewed as a voluminous declaration/plea. Judge Theron insisted that the documents should be "short, succinct and to the point". And yet, he did not elaborate on this. How many pages of a declaration/plea are acceptable in order to be succinct and to the point? Bear in mind that the rule, as indicated above, is silent on the required length of these documents. Judge Theron's interpretation is thus open to conjecture. It could thus be argued that in the judge's opinion, as this was an interlocutory application, the matter should be dealt with as expeditiously as possible. According to him, more detailed information should be reserved for the pending "main divorce action". It is equally intriguing that Theron J did not refer to *Boulle v Boulle*, a 1966 judgment of the Durban and Coast Local Division, which allowed for prolixity. (It would have been interesting to know why Theron J disagreed with *Boulle*, although he was not bound by the decision of a local division of another province.)

Five cases (discussed below) from diverse local and provincial divisions applied and followed Judge Theron's interpretation of the Rules (*Smit v Smit* 1978 (2) SA 720 (W)*; Visser v Visser* 1992 (4) SA 530 (SE); *Patmore v Patmore* 1997 (4) SA 785 (W); *Du Preez v Du Preez* 2009 (6) SA 28 (T); *Marr v Marr* [2016] ZAECGHC 140). However, none of these addressed the shortcomings of Judge Theron's judgment, as discussed above. None answered the following questions: Why must the application and the plea be short, succinct and to the point? What does the phrase "short, succinct and to the point" mean? How many pages should the application/plea be? None of these judgments referred to *Boulle*'s case.

In *Smit*, the applicant applied in terms of Rule 43(2) for an order for maintenance *pendente lite* and a contribution towards her legal costs. The founding affidavit with annexures was 24 pages long, and the replying affidavit with annexures was 45 pages long. King AJ remarked that the documents were voluminous and contained unnecessary detail, which was not needed for determining the application. The judge observed that over five pages of the applicant's affidavit dealt with the financial affairs of the parties and certain assets in the erstwhile joint estate in respect of which she contributed approximately R6 000. (Interestingly, and in contrast, in 2018,

Spilg J in *TS v TS* (supra) concluded that he needed more detailed information on the financial affairs of both parties and ordered them to furnish him with the requisite information (pp 602–603); this case is dealt with in more detail below. Furthermore, the judge pointed out the applicant provided unnecessary detail on matrimonial wrongs and disputes. According to the judge, arguments on the ownership of the car and correspondence between the applicant's attorney and herself were irrelevant. King AJ concluded that the affidavits filed by both parties amounted to an abuse of the court process. Consequently, in exercising the inherent jurisdiction of the court, he made no order on the application and its costs.

In *Visser v Visser* (*supra*), Kroon J held that a 34-page founding affidavit and a 100-page reply were voluminous. He noted that both affidavits could have been much shorter. He decried the tendency by some legal practitioners to disregard the provisions of Rule 43(2) and (3). He remarked that "there is a tendency for the provisions of rule 43 to be disregarded and for the applications and replies thereto to assume voluminous proportions" (*Visser v Visser supra* 531 D). He added that the practice had to be firmly discouraged. Accordingly, he concluded that the parties should not be saddled with the payment of the costs because they were not aware of the Rule 43 provisions – but their attorneys should be. He thus struck the matter off the roll and did not make a costs order. He further ordered that the attorneys not charge their clients any fees in respect of the application and the plea. Kroon J cited with approval the case of *Nienaber v Nienaber* (1980 (2) SA 803 (O)) where the respondent objected to the voluminous applicant's application. In *Nienaber*, the matter was struck off the roll and the applicant was ordered to pay the costs.

Epstein AJ discussed the disadvantages of prolix applications and replies in *Patmore v Patmore* (*supra*). He warned that in the Witwatersrand Local Division there were many Rule 43 applications every week. Lengthy affidavits containing unnecessary and irrelevant information were, first, a waste of the judge's time as they had to peruse them for hearing. Secondly, they resulted in unnecessary costs for the parties who could often ill afford them. He distinguished between matters that pertain to the Rule 43(2) and (3) applications and those pertaining to the main divorce action. He believed that some legal practitioners conflated and confused these two issues – hence the lengthy affidavits with unnecessary and irrelevant information. He reiterated that conflation of these issues tended to obstruct the expeditious resolution of these matters, which he considered should be decided speedily and inexpensively. In *Patmore*, the applicant's Rule 43 affidavit and supporting annexures were 47 pages long, and the respondent's opposing affidavit was 17 pages long. Epstein AJ held that the applicant's affidavit was an abuse of the court's process. He said that to prevent such abuse, which he had an inherent power to do, the application should be struck off the roll with costs. Interestingly, part of the "irrelevant" information that the applicant was chastised for was the declaration of her assets, income, and expenses. She also set out the respondent's financial position. However, as is discussed below, in *TS v TS* (*supra*), Judge Spilg demanded such detailed information from both parties in order for him to reach an equitable and well-informed decision.

In *Du Preez*, Murphy J was faced with two main issues: prolixity of the applicant's application and non-disclosure by the applicant of a material fact. The applicant requested R13 600 maintenance for herself and her three daughters pending the outcome of the divorce action. She also asked the respondent to pay the bond repayments, home insurance premiums, utility accounts, DSTV monthly instalments, R4 211 arrears in medical expenses, R44 229 for repairs to the common home, and R40 000 towards her legal costs. Her application was 139 pages long and the respondent's plea was 46 pages long. Murphy J applied and followed *Colman*, *Smit*, *Visser* and *Patmore* discussed above. He observed with dismay that the applicant's first application was dismissed because of prolixity. He also noted that the applicant had failed to disclose the R3 000 she received monthly from an investment, and she was thus guilty of a material non-disclosure to the court. The judge reiterated that as the applicant had failed to act in good faith, she had to be denied the relief she sought.

In *Marr*, the applicant made Rule 43(1) and 43(6) applications, which dealt, respectively, with interim access to children and the variation of the court's order in the event of a material change in the circumstances of either party or a child. Bloem J criticised the applicant's long affidavit and annexures, saying they were an abuse of the court's process. He ordered that the matter be struck off the roll, that the applicant pay the respondent's costs, and that the applicant's attorneys not charge her fees in respect of the application. In *Van Beest Van Andel v Van Beest Van Andel* (GJ 27869/2007) the respondent opposed the application on the basis of non-compliance with Rule 43(2), in that the founding affidavit was not a declaration. He complained that it was unnecessarily long and contained irrelevant facts and annexures. Surprisingly, the respondent also filed a voluminous answering affidavit and counter-application. According to Judge Tsoka, both the applicant's application and the respondent's reply did not comply strictly with Rule 43(2) and (3). Consequently, he dismissed both the application and the counter-application.

Different courts have penalised prolix applications in various ways. They have either struck the application off the roll, penalised the prolix party, penalised the applicant's or respondent's attorney, or not made a costs order.

3 2 Penalties for prolixity

How did the courts deal with prolix applications and pleas in the cases discussed above? Different courts and judges penalised prolix applications in different ways. For instance, in *Nienaber*, the matter was struck off the roll because of its length and the applicant was ordered to pay the costs. So was the case in *Patmore*, but the court took the matter a step further by penalising the applicant's attorney. It ordered that the applicant's attorney not claim any costs in respect of the drafting and preparation of the application. Furthermore, the court ordered that such costs only be taxed after the final conclusion of the divorce proceedings. In *Du Preez*, the matter was also struck off the roll and the court ordered that neither of the parties be charged by their attorneys in respect of the application and the opposing affidavits. In *Marr*, the matter was struck off the roll and the applicant was

ordered to pay the respondent's costs. The court also penalised the applicant's attorneys by ordering them not to charge her any fees in respect of the application.

Some courts penalised the prolix party, as in *Colman* where the respondent was absolved from paying the costs of the applicant's voluminous affidavit. The court reiterated that the respondent had to pay the costs of the applicant's affidavit as Rule 43(2) contemplated that there had to be a concise and succinct application. The difficulty with this order is that the judge does not discuss or describe what he means by this. In terms of costs, one wonders how the taxing master addressed and determined this problem. In *Smit*, King J made no costs order, as was the case in *Visser*. Some courts allowed prolixity as long as the information was relevant. Interestingly, during the same period in which these five cases were decided, other local and provincial judgments disagreed and allowed prolixity.

3 3 The cases that allowed prolixity

Not all courts followed *Colman's* strict interpretation of the rule. Seven cases discussed below allowed voluminous applications and pleas. Five were local or provincial decisions, one was a High Court single-judge judgment, and the seventh which finally declared the correct position of the law in this debate was the full bench of the Gauteng High Court.

In *Boulle v Boulle* (*supra*), the wife brought a Rule 43(2) application against her husband for custody and maintenance of their two children, and a contribution to the costs of the pending action for the restitution of conjugal rights, failing which divorce on the grounds of constructive desertion. She provided detailed information on her earnings and that of her daughter, and how the money was spent. She declared the respondent's salary and his regular expenditure known to her. Lastly, she gave details of the respondent's constructive desertion. The respondent took a point in *limine* that the applicant's statement did not comply with Rule 43(2) in that it was not a statement in the nature of a declaration – as it set out a great deal of detail. He said that the provisions of Rule 43(2) requiring that the applicant's statement be by nature of a declaration were peremptory. He also argued that non-compliance with the terms of the rule nullified the proceedings. Milne JP was not persuaded that the Rule 43(2) provisions were peremptory. He said that the rule expected the application to be concise. However, in this case, it appeared that it was desirable that some detail be given to enable the court to deal with the application without recourse to oral evidence. The judge agreed with the applicant that the details of the constructive desertion and of the applicant's household expenditure were necessary. He concluded that "it seems to me that the particulars which have been given by the applicant in her statement, though they have to some extent been set out with undue prolixity, comply essentially with the intention of the rule" (*Boulle v Boulle supra* 450 C). The objection *in limine* was overruled.

In *Williams v Williams* (1971 (2) SA 620 (O)), the issue before the court was whether annexures to the applying or answering affidavits were allowed. The applicant's counsel objected to the respondent's voluminous answering affidavit with annexures. Erasmus J noted that annexures to a plea under

Rule 43(3) were not forbidden. He stated that the annexures were necessary as the information they provided was relevant to the allegations made by the applicant. Furthermore, the judge averred, the annexures explained and supported the respondent's denial of abusive language towards the applicant. Consequently, the judge concluded that the annexures were neither irregular nor prejudicial to the applicant. In *Zoutendijk v Zoutendijk* (1975 (3) SA 490 (T)), the applicant applied for an order granting her interim custody or daily access to the two children *pendente lite*, maintenance for the children and herself, and a contribution to her legal costs. The applicant's sworn statement was 27 pages long and the respondent's answering affidavit was 90 pages long. The applicant applied in terms of Rule 30 to have the document struck out as it did not comply with the provisions of Rule 43(3), and for leave to amplify her original affidavit by including matters that had subsequently occurred. The court allowed the applicant's 27-page statement because she had to respond to the allegations refusing her access to the children save under supervision of the mother-in-law. The court observed that the allegations were very serious. The applicant also had to set out in some detail the conduct of the respondent as she relied on this as grounds for condonation by the court of her own admitted adultery. Nicholas J conceded that the applicant's affidavit was prolix and repetitious (*Zoutendijk v Zoutendijk supra* 492 H), but it did not offend against the letter or the spirit of Rule 43(2). However, he retorted that it did not justify the respondent's 90-page affidavit and granted the order to strike it out.

Dodo v Dodo (1990 (2) SA 77 (W)) was an acrimonious, protracted divorce that spanned four years. The delay was caused partly by accusations of infidelity and dishonesty that the parties traded against each other. The applicant sought an increase in maintenance and a contribution to her legal costs, respectively, because of her changed circumstances (Rule 43(5)): she had lost her job. Accordingly, she claimed an increase in maintenance from R600 per month in terms of the existing order, to R2 300 per month. Secondly, she asked for a contribution to her legal costs in the sum of R62 663, over and above the sum of R1 400 that the court had ordered. She noted that when the court made the previous orders, it took cognisance of the fact that she was employed at the time.

On the issue of prolixity, Wulfsohn AJ agreed with the general rule laid down by Judge Theron in *Colman*. However, he believed that the general rule was not applicable to all Rule 43 cases. He observed that there were special circumstances in the case that warranted a departure from the general rule. These were the fact that the applicant had to explain how she lost her job and why she could not find another one. She had to defend the charge of infidelity levelled against her by the respondent. She had also attached a draft bill of the costs she claimed – hence, the acceptance of a 21-page affidavit by the judge. The respondent was vehemently against the applicant's application. He blamed her for the loss of her job and asserted that she could find another job if she looked seriously enough. He claimed that she forfeited her right to increased maintenance because of her infidelity. On the increased legal costs, the respondent alleged that the application was premature as the applicant could only apply for a contribution at the start of the trial. Furthermore, he retorted, the claim was

excessive and outrageous. Finally, the respondent asserted that certain items of the draft bill should not have been included and others could be reduced.

The court upheld the applicant's request and agreed that her circumstances had changed. She had lost her job through no fault of hers and was entitled to the increased maintenance. The court noted that it would not, as a general rule, order arrears maintenance. However, it observed, in the circumstances it was necessary to make a retrospective order from the time the applicant lost her job. On the question of a contribution to her legal costs, the court noted that the respondent was a very wealthy man litigating at a luxurious scale. In this regard, he had made a deposit of R100 000 with his attorneys for his disbursements. In the same vein, the court observed, the applicant had to be put in a position to present her case adequately before the court. Accordingly, the court concluded that the applicant's claim of R62 663 for costs was not excessive and awarded her R58 000. It found that the respondent's allegation of his wife's infidelity was based on hearsay and dismissed it.

The question of prolixity occurred again in *W v W* ([2014] ZAGPPHC 765). The applicant made a Rule 43 application of 67 pages, an affidavit of 7 pages and 60 pages of annexures. The respondent opposed the application vehemently on the ground that it did not comply with Rule 43(2) and should be dismissed with costs. The applicant's attorney averred that the annexures were necessary to prove the allegations made in the founding affidavit. He also argued that since the applicant was not allowed to file a replying affidavit, she had to put all the information before the court. Kubushi J held that the annexures were necessary to found the applicant's case and were therefore not prolix. However, he did not discuss the content and relevance of the annexures in detail. Consequently, it is unclear why 60 pages was not prolix in this case. If the case was as simple and straightforward as the judge claimed, why was the applicant's application so long? Regrettably, the judge did not cite or discuss a single case in support of his judgment. The points raised by the respondent *in limine* were dismissed. He was ordered to maintain the applicant and to contribute R10 000 to her legal costs in the main divorce action.

In *TS v TS* (*supra*), Spilg J held that it was necessary for a proper determination of a Rule 43 application for a party to make a full and frank disclosure of their financial affairs, thus permitting longer affidavits. He held that without proper financial disclosure the court had little to work on other than the product of competing typewriters. He ordered both parties to submit detailed affidavits on their income and expenditure (*TS v TS supra* 602–603). Earlier, in 2007, Judge Tsoka had, in the same court, interpreted the same rule strictly; he followed *Colman* as discussed above (*Van Beest Van Andel v Van Beest Van Andel* (*C–D*). In 2019, Van Vuuren AJ was confronted with the same problem – the interpretation of Rule 43(2) and (3). Frustrated by these two diametrically opposed views of the same court on the interpretation of these rules, he discontinued the applications and referred them to the full bench of the Gauteng Local Division of the High Court for consideration and determination (*E v E*; *R v R*; *M v M* 2019 (5) SA 566 (GJ); Maresa "A New Future for Family Law: Significant Changes for r43 Applications" 2019 *De Rebus DR* 10).

All three applications were brought in terms of Rule 43(2) of the Rules of the High Court. The applicants sought relief during their divorce proceedings for interim maintenance, custody of children and a contribution to their legal costs pending the finalisation of their divorce actions. In *E v E*, the applicant sought an order *pendente lite* that the respondent pay her interim spousal maintenance and a contribution to legal costs. The applicant's founding papers comprised 86 pages, 34 of which were sworn statements. The respondent's answering affidavit was 109 pages long, plus 48 pages of annexures. In *R v R*, the applicant's sworn statement comprised 19 pages and 32 pages of annexures. The respondent's answering affidavit with annexures comprised 31 pages. The respondent raised a point *in limine* that the applicant's papers were prolix and not compliant with the requirements of Rule 43(2). In *M v M*, the applicant sought an order for maintenance *pendente lite* for their minor child and a contribution to her legal costs. The applicant's sworn statement was concise. However, she attached to it a copy of the particulars of claim in the divorce action and other annexures. The respondent filed a succinct response of 10 pages and 70 pages of annexures. Van Vuuren AJ believed that the parties had departed from, respectively, delivering a statement in the nature of a declaration and a reply in the nature of a plea, having regard to Rule 43(2) and (3) – hence his referral of the three applications to the full bench of the High Court.

The issues for determination for the referral court were threefold. First, while Rule 43 applications require the submission of succinct sets of papers, does the court have the discretion to permit the filing of applications that have departed from the strict provisions of Rule 43(2) and (3)? Secondly, if the court does not have such a discretion, should the Practice Manual direct that all Rule 43 applications conform to a specific form, particularly in terms of length, and would imposition of a restriction on the length of Rule 43 applications withstand constitutional muster? Thirdly, if the court has such a discretion, what are the factors to consider in order for it to exercise its discretion reasonably and are these factors exhaustive (*E v E supra* 570 A–C)?

On the first question, all the parties agreed that the court did not have such discretion unless it decides to call for further evidence in terms of Rule 43(6). The parties believed that there should be no limitation to the number of pages filed as long as what is contained in the affidavits and the annexures is relevant and admissible as evidence. The Gauteng Family Law Forum, which was admitted as a friend of the court, submitted that the above questions should be determined bearing in mind the constitutional considerations in respect of the right to a fair hearing as entrenched in section 34 of the Constitution (*E v E supra* 576; The Constitution of the Republic of South Africa, 1996 (the Constitution)).

On the second question, the parties concurred that it was constitutionally imperative and practically necessary to amend the Practice Manual, so as to permit Rule 43 applications to be filed without restrictions. They opined that such an allowance would not only promote fairness and transparency between the litigants but would also promote and protect the best interests of children. They proposed that a party who abuses the court process by filing irrelevant information should be mulcted with costs. On the third question, the parties conceded that the court has a discretion under Rule

43(6) to call for more evidence in spite of the limitations of Rule 43(2) and (3). They pointed out that the current problem with Rule 43(2) and (3) was that the respondent often raises a new issue that the applicant is unable to respond to because of the restrictions in the Rules: the applicant has no right of reply. In order to obviate this problem, the parties suggested that the Rules should be amended to allow for an automatic right of reply by the applicant. They noted that a further restriction to the Rules is the fact that an order made under them is not appealable, a point confirmed by the Constitutional Court in *S v S* (2019 (6) SA 1 (CC), discussed in more detail below).

The court ordered that a judge hearing a Rule 43 application must request both parties to furnish supplementary affidavits making a full and frank disclosure of their financial and other relevant circumstances to the court and the other party; that the affidavits should be accompanied by a financial disclosure form, which should be filed seven days before the date of hearing; and that the affidavits should contain averments relevant to the issues for consideration. The court held that it must not be competent for a court to dismiss an application on the grounds of prolixity alone. Should a court be presented with lengthy and irrelevant information, it has the right to strike off the irrelevant and inadmissible material from the affidavit in question and to make an appropriate costs order. The Judge President was asked to amend the Practice Directive to give effect to the court's judgment.

This landmark judgment settled the debate on prolixity. It confirmed and endorsed the notion that there was no one-size-fits-all approach in Rule 43 applications. A simple case may be decided on short, succinct papers. However, a more complex case should not be struck off the roll just because of its prolixity. Under such circumstances, the judge should determine the relevance of the information presented. Each case should be dealt with according to its merits. A judge may not strike off voluminous applications willy-nilly. They need to decide on the relevance of the information presented. Much also depends on how complex a case is. The court was also guided by the socio-economic and legal developments that have taken place since the judgment in *Colman*.

4 Legal developments since 1967

Much has changed since Judge Theron declared the rule in *Colman* that a Rule 43 application should be concise, succinct and to the point. Several laws that have a bearing on Rule 43 applications have been promulgated. The Divorce Act 70 of 1979 introduced a fundamental change in divorce law; it introduced the irretrievable breakdown of marriage principle. It also retained the application of Rule 43 to divorce proceedings (Barnard *The New Divorce Law* (1979) 96–97). The Maintenance Act 99 of 1998, promulgated in 1998, endorsed the common-law reciprocal duty of maintenance between the spouses, as well as the children's right to maintenance by both parents. It also preserved the Rule 43 applications (Van Zyl *Handbook of the South African Law of Maintenance* (2010) 53–54). 1996 ushered in a new political dispensation; South Africa became a constitutional democracy with the Constitution as the country's supreme law, which accentuates the common-law principle of the best interests of the child in dealing with matters

pertaining to children (Spilg J in *TS v TS* 595 E–F). The courts have always respected the best interests of the child in the exercise of their common-law powers and duties as the upper guardian of children. The protection of children's rights is declared in section 28 of the Constitution and is adopted in the Children's Act 38 of 2005. As a broad statement, the Children's Act is intended to give effect, *inter alia*, to the constitutional rights of children to family and parental care (Spilg J in *TS v TS* 595 G–H*)*. The Children's Act endorses the common-law principle 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". Section 6(2) of the Children's Act directs that in all proceedings, actions or decisions in a matter concerning a child, the courts must 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 the Act subject to any lawful limitations. Section 34 of the Constitution provides for a right to a fair hearing for everyone. This means levelling the litigation ground for both wife and husband in Rule 43 applications and pleas.

5 Contribution of the legal fraternity to the debate on the relevance of the rule

In February 2010, the Cape Bar Council (CBC) wrote a letter to the chairman of the General Council of the Bar of South Africa (GCBSA) recommending that the Rules Board for the courts of law (RBC) abolish Rule 58(7) and (8) of the magistrates' courts costs structure entirely, and that the Rules be amended to make provision for a realistic costs structure. Submissions on behalf of a number of counsel from the Cape Bar (CB) to the General Council of Bar's Rule Committee (GCBRC) in respect of Uniform Rule 43(7) were made. The second submission, entitled "Proposed Amendments to Rule 43 of the Uniform Rules of Court", was by Adv J Anderson (CB Adv. Anderson). The Law Society of South Africa (LSSA) also commented on Uniform Rule 43(7) and (8) and on the magistrates' courts Rule 58(7) and (8) on tariff provisions ("Comments by the Law Society of South Africa on Uniform Rule 43(7) and (8) and Magistrates' courts Rule 58(7) and (8): Tariff Provisions"). These inputs contributed to the debate on the amendment of the High Court Rule 43(7) and (8) and the magistrates' court Rule 58(7) and (8), respectively. These sections deal with the prescribed costs for Rule 43 and 58 applications. Rule 43(7) and (8) was criticised by the legal profession for the low tariff, which was out of sync with the workload involved. Although the Cape Bar and the LSSA made separate submissions, they agreed on the current shortcomings of the Rules and how they could be amended. In order to avoid repetition, their contributions and suggestions are discussed together. They deplored the current prescribed costs, which were disproportionately low compared to the amount of work to be done in Rule 43 and 58 applications (CB Adv. Anderson par 18). Their presentation dealt in detail with the problem of costs under the Rules and only peripherally with substantive matters. At a substantive level, they suggested several changes to Rule 43 applications. They observed that whereas Rule 43 applications were heard timeously and expeditiously in the past, currently there was a delay of at least two years between the date the application is determined

and the actual divorce action (CB Adv. Anderson par 3). They further noted that in most divorce actions the Rule 43 application had become the most significant interlocutory application, fulfilling a strategic role, and often set the tone for the divorce action (CB Adv. Anderson par 6). They observed it was likely to be the only contested hearing during the divorce. Consequently, they affirmed, a Rule 43 order may in practice harden into an order with a final effect, with potentially inequitable results. A Rule 43 order usually dealt with matters of crucial importance that were in dispute between the litigants pertaining to maintenance of one of the spouses and the children, and care and contact arrangements for minor children (CB Adv. Anderson par 4).

Furthermore, the CB and LSSA commented that Rule 43 applications are usually fraught with factual disputes that are difficult to resolve on paper (CB Adv. Anderson par 6). Often, financial issues are problematic between the parties in such applications. Most of the time, litigants' financial versions are diametrically opposed and yet judges are expected to decide on these opposed versions on paper. While some estates are small and simple, others are massive and complex. As a result, the court often has to grapple with complex financial structures intertwined with family trusts (*RP v DP* 2014 (6) SA 243 (ECP)) or other business ventures in the country or offshore (CB Adv. Anderson par 6). In *RP v DP* (*supra*), the applicant wife claimed that her husband had hidden some of his assets in a family trust he had created. She wanted the court to include the trust assets in his estate, and the value of the assets of the trust established during the subsistence of the marriage to be taken into account in determining his accrual. The husband had abused the trust form to acquire personal wealth and had failed to keep the trust assets separate from his personal estate. Over the years, the net trust assets had grown compared to his personal estate, which had not shown any substantial growth. The court agreed with the applicant and took the value of the assets in the trust as the assets in the personal estate of the respondent.

According to the current procedure, there is no right to reply nor an automatic right to lead oral evidence nor a right to subpoena (CB Adv. Anderson par 6). The LSSA further noted that the applicant is not allowed to reply to the respondent's plea. Under the present procedure, neither litigant is able to challenge any material non-disclosure or misstatement of facts. The CB suggested that there should be a way of exposing such misstatements. In *Du Preez*, where the applicant failed to disclose R3 000 she received from an investment, the court penalised her for the non-disclosure. She was denied the relief she sought as she had acted in bad faith. In *MTC v CMC* (Case No 5430/2020 (C)), the applicant husband sought maintenance of R55 670 *pendente lite* and a contribution of R75 600 to his legal costs. However, it emerged that he had failed to disclose his real monthly income. The court noted that there was a scarcity of information regarding his financial circumstances. Moreover, he had made gross misrepresentations, misstatements and material non-disclosure that skewed the facts. He had also failed to acknowledge his wife's chronic illness. Consequently, his claims for maintenance and legal costs failed because of his gross non-disclosure. In contrast, in *TS v TS*, where both parties were guilty of non-disclosure, Judge Spilg ordered them to fill in detailed

disclosure forms declaring the assets and liabilities they had not divulged in the papers before the court (*TS v TS* 602–603).

The attorneys and counsel further indicated that an order in a Rule 43 application is not appealable (LSSA par 2.5; CB Adv. Anderson par 9). The practical effect is that maintenance orders and care and contact orders in respect of the children and contributions towards costs of such applications are determined once prior to the divorce action (LSSA par 2.5). The Constitutional Court confirmed and endorsed the non-appealability of the rule in *S v S* (*supra* para 46) per Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J; see Ampofu-Anti "Constitutional Court Rules that Interim Divorce Orders May Not Be Appealed" (20 August 2019) http://www.groundup.org.za/article/constitutional-court-rules-interim-divorce-orders-may-not-be-appealed/ (accessed 2022-05-21)). In this case, the court denied Mr S the right to appeal a maintenance order on the ground that the Rule 43 applications were expeditious and unappealable. It went on to explain that the rationale for the non-appealability of the application was to prevent delays and to curtail costs. The court reiterated that to allow an appeal process would contradict the objective of the Rule 43 order (*S v S supra* 17C).

The last point raised by the attorneys and counsel was that a Rule 43 order may be varied only in the event of a material change in the circumstance of either party or a child (CB Adv. Anderson par 15; Rule 43(6); see *Dodo supra* discussed above). A case in point is that of *TS v TS*, where the applicant indicated that her circumstances had changed, and she wished to submit a third set of affidavits to prove it. She declared that her monthly income from one of the businesses had dried up owing to the respondent's foul play. As a result, she needed more maintenance from the respondent. The court believed her story about her changed circumstances and allowed her to file a third set of affidavits detailing the change (*TS v TS supra* 602–603).

The LSSA's focus was on the amount of work involved in the preparation of these applications which was not commensurate with the prescribed fees. Part of the reason they put in so much work, they asserted, was because Rule 43 applications can settle the whole divorce and often do so. Though interlocutory in nature, some of the Rule 43 applications are contentious and complex. The nature of some of the applications means a lot of work for the legal practitioners. The attorneys said they have to ensure there is a succinct reference to pleadings and to the relevant legislation: the Divorce Act 70 of 1979, the Maintenance Act 99 of 1998, the Constitution, the Children's Act 38 of 2005 (LSSA par 2.2.2), international law and protocols where a case involves another jurisdiction or assets stashed in a foreign country, and judgments of local and foreign courts.

In their preparation for these applications, the attorneys confirmed that they have to balance the need to be short and to the point, as required in *Colman supra,* while capturing factual allegations on a wide array of matters that may affect maintenance *pendente lite*, interim custody, and access (LSSA par 3.1.2). They usually take a number of consultations with clients to complete the application fully. Their clients need to complete a schedule of

expenses, which they are often not properly equipped to do and they need assistance and guidance. (For a detailed Financial Disclosure Form, see *E v E supra* 578–597. The form is 20 pages long. The first three pages capture the personal information of the parties and their attorney. The financial details of the parties are dealt with on pages 3–14.) They have to peruse and analyse documents, draft affidavits, annexures and schedules. They also spend much time trying to settle the matter out of court. In practice, an application is only argued in court when settlement fails, and yet, they retorted, if settlement fails, the negotiations to settle and the attendant costs cannot be charged.

In conclusion, counsel and attorneys recommended that: a Rule 43 application should be maintained; an opposing affidavit should be filed within 10 days of service of such an application; a replying affidavit to the opposing affidavit should be filed within five days of receipt of the opposing affidavit (CB Adv. Anderson par 8); the parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party; the existing rules and case law should apply to the scope and format of these applications (CB Adv. Anderson par 9); and the court should have the ability, at its own discretion, to request further documentary information and/or affidavits to clarify issues should it wish to do so. The last three recommendations are new and in addition to the current rules. The LSSA supported the Cape Law Society's recommendations that the ordinary tariff should apply to these applications and that the costs should not be limited. They also agreed that the procedure should be amended to cater for the ordinary, fast-paced procedure of filing papers in opposed applications (LSSA par 3.2).

The LSSA also agreed that Rule 43 applications have become complex, which suggests that there is no one-size-fits-all solution for these cases. They conceded that Rule 43(3) should be amended to allow for a reply to the respondent's plea. The complexity of some of the cases flew in the face of the restricted interpretation of Rule 43 applications. Although their submissions were not directed at prolixity, by implication it can be inferred that given the complexity of some of the cases, it would be hard to stick to the strict interpretation of the rule as in *Colman*. The LSSA advocated a change of the Rules to allow the courts to have more information before they can decide on the complex cases – in other words, allow prolixity as long as the information is relevant.

Judge Spilg disagreed with the LSSA's suggestion that the Rules should be amended to allow the applicant a right to reply to the respondent's plea. He believed that the amendment would be superfluous as Rule 43(5) already allows the court to ask for more information from either party should the need arise. This is what he did in *TS v TS*, discussed above; he asked both parties to supply him with more information on their financial statements. Consequently, he did not see the need for the amendment.

The Rule 43 applications are not appealable. Consequently, the outcome of the interim proceedings is generally final, pending the finalisation of the divorce proceedings. This was the case in *S v S* where Mr S instituted an application to be awarded an interim care and custody order of the children in terms of Rule 43, pending the outcome of the divorce. At the hearing,

Ms S was granted maintenance. Mr S wanted to appeal the maintenance order granted by the High Court but was precluded from doing so by section 16(3) of the Superior Courts Act 10 of 2013, which prohibits an appeal against Rule 43 orders (*S v S* par 46). Disgruntled by this provision, Mr S retorted that the blanket prohibition infringed both the rights of the children in terms of section 28(2), and his right to equality in terms of section 9 of the Constitution, respectively. He went on to say that by prohibiting appeals there was a clear and distinct differentiation between the litigants in Rule 43 proceedings, and all other litigants who are afforded the right to appeal. Furthermore, he asserted, the differentiation was irrational and was a violation of his constitutional right to equality and to access the courts in terms of section 34 of the Constitution, and this was especially so because the outcome of the interim proceedings was generally final pending the finalisation of the divorce proceedings.

The judge said the question was whether by denying disgruntled Rule 43 litigants the right to appeal, section 16(3) had a rational connection to a legitimate statutory purpose. He went on to declare that the purpose of Rule 43 was to provide a speedy and inexpensive remedy, primarily for women and children. The rationale for the non-appealability was to prevent delays and curtail costs. To allow an appeal process would contradict the objective of Rule 43 orders. The statutory differentiation between those litigants who can appeal and those who are precluded from doing so by section 16(3) clearly bore a rational connection to a legitimate government purpose. Moreover, the judge concluded, there was no differentiation between the individual litigants in a Rule 43 dispute as they both bore the same encumbrance. Thus, the equality challenge could not stand.

On the issue of the encroachment of Mr S's right to access the court enshrined in section 34 of the Constitution, the court said not all litigants have the right to appeal. It was not in the interests of justice to appeal an interim order because such an appeal would defeat the interim nature of the order. The question was whether the denial of appeal processes in terms of section 16(3) passed constitutional muster. Under these circumstances, the judge concluded, it must be answered in the positive.

6 Conclusion

The case note examined in detail the provisions of Rule 43(2) and (3) and pointed out that the rule does not specify how long an application or a plea should be. It investigated how the courts have interpreted them. It discussed the two dominant views espoused in case law: one that the application should be short and succinct; and the other that lengthy and voluminous applications and pleas should be allowed. It discussed the landmark case of *E v E*, which quelled the debate and settled the law. It held that each case must be treated according to its own merits. Simple and straightforward cases can be dealt with expeditiously and swiftly. However, complex cases should be treated differently. Under such circumstances, prolixity is allowed, and the applicant should not be penalised for a prolix application.

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