43 Interim relief in matrimonial matters

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

(a) Maintenance *pendente lite*;

(b) A contribution towards the costs of a matrimonial action, pending or about to fbe instituted;

(c) Interim care of any child;

(d) Interim contact with any child.

(2)*(a)* An applicant applying for any relief referred to in subrule (1) shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, together with a notice to the respondent corresponding with Form 17 of the First Schedule.

(b) The statement and notice shall be signed by the applicant or the applicant's attorney and shall give an address within 25 kilometres of the office of the registrar and an electronic mail address, where available, as referred to in rule 6(5)*(b)* at either of which addresses service will be accepted.

[Paragraph *(b)* substituted by GN R3397 of 12 May 2023.]

(c) The application shall be served by the sheriff: Provided that where the respondent is represented by an attorney, the application may be served on the respondent's attorney of record, other than by the sheriff.

[Subrule (2) substituted by GN R2021 of 5 November 1971 and amended by GN R960 of 28 May 1993.]

(3)*(a)* The respondent shall within 10 days after receiving the application deliver a sworn reply in the nature of a plea.

(b) The reply shall be signed by the respondent or the respondent's attorney and shall give an address for service within 15 kilometres of the office of the registrar, as referred to in rule 6(5)*(b)*.

(c) In default of delivery of a reply referred to in paragraph *(a)*, the respondent shall be automatically barred.

[Subrule (3) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(4) As soon as possible after the expiry of the period referred to in paragraph *(a)* of subrule (3), the registrar shall bring the matter before the court for summary hearing, on 10 days' notice to the parties: Provided that no notice need be given to the respondent if the respondent is in default.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.

[Subrules (3) and (5) substituted by GN R235 of 18 February 1966.]

(6) The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

(7) . . .

[Subrule (7) repealed by GN R1055 of 29 September 2017.]

(8) . . .

[Subrule (8) repealed by GN R1055 of 29 September 2017.]

[Rule 43 substituted by GN R1318 of 30 November 2018.]

Commentary

Form. Notice in terms of rule 43, 17.

General. Rule 43 is a special rule governing certain specific applications in contrast with the provisions of rule 6 which govern applications in general. Urgency does not take applications for relief under this rule outside the scope and limitations of the rule. [1] The provisions of rule 6 can find application only in respect of aspects which are not governed by this rule. The only such provisions are those relating to urgency contained in subrule (12)*(a)* and *(b)* of rule 6, but the applicability of those provisions does not mean that an applicant has a choice which enables him to proceed under rule 6 and thus escape the limitations imposed by this rule. [2] The first proviso to subrule (5)*(b)*(iii) of rule 6, in terms of which the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for the delivery of a notice of intention to oppose or of any affidavit for purposes of that subrule, does not apply to applications under rule 43. [3]

The usual order relating to costs of the application under rule 43 is that the costs should be costs in the trial. The court hearing the application for a contribution towards costs in terms of subrule (1)*(b)* is usually in the best position to determine the issue of costs in the application. In such case, a court should be reluctant to refer the determination of the costs of the application to the trial court and do so in only exceptional circumstances. [4]

In *CT v MT* [5] it was held [6] that, to the extent that the applicant intended to advance a case that rule 43 is invalid for violating one or more of the sections of the Bill of Rights, such argument was rejected. The rules of court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law. [7] 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 that 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). [8]

There is no appeal from a judgment of a court on any matter governed by the rule. [9]

Subrule (1): 'This rule shall apply whenever.' Rule 43 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The rule governs procedure and does not affect the substantive law. [10] The object of the rule is that

applications of the kind contemplated therein should be dealt with as inexpensively and expeditiously as possible; prolixity in averments and the unnecessary proliferation of papers and affidavits should be avoided. [11] Rule 67A(2)*(c)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary or prolix drafting and unnecessary annexures.

The rule applies to a pending divorce action between spouses married under Muslim law. [12]

In *SJ v SE* [13] the respondent raised a point *in limine* in an application under rule 43 to the effect that he had issued a *Talaq* against the applicant, to whom he had been married in terms of Islamic law, thereby divorcing her. The court held that the parties owed each other the reciprocal duty of support arising from the Islamic marriage and the question of the legal effect of the *Talaq* was an issue for determination in the pending divorce action. Until that issue was resolved there was a matrimonial dispute between the parties that served as a jurisdictional factor for the rule 43 application and, accordingly, the point *in limine* stood to be dismissed. [14]

Ancillary or *pendente lite* relief contemplated under the Divorce Act 70 of 1979 is available to same-sex partners in an action for the dissolution of a same-sex marriage or same-sex civil partnership concluded under the Civil Union Act 17 of

2006. [15] The rule, accordingly, also applies to a pending action for such dissolution.

If the respondent is resident within the jurisdiction, the court is entitled to grant ancillary relief *pendente lite* under this rule even where the jurisdiction of the court to issue a decree of divorce in the main action is in dispute. [16]

'A spouse seeks relief.' 'Spouse' includes one who claims to be a spouse, even where that allegation be denied; in other words rule 43 also applies where the validity of the marriage or its subsistence is disputed. [17]

The legal rules pertaining to the reciprocal duty of support between spouses are gender neutral so that an indigent husband may claim support from an affluent wife. [18]

'From the court.' The application should, in the absence of urgency, be brought in the court where the main *lis* between the parties is pending and not in another court which may have jurisdiction to hear a divorce action between the parties. [19] In *SW v SW* [20] it was held [21] that a litigant who is a party to a divorce action pending before a magistrate's court for a regional division

cannot invoke the jurisdiction of the High Court to secure relief in terms of this rule. The High Court could, however, exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order, notwithstanding such proceedings. To invoke such inherent jurisdiction the applicant must establish *(a)* that considerations of urgency justify the intervention; and *(b)* that intervention is necessary to protect the best interests of the minor. It is not a jurisdiction that will be lightly exercised by the High Court. [22]

In *TC v SC* [23] the main issue in an application in terms of rule 43 for interim relief pending a matrimonial action was whether the High Court had the power, by virtue of its common-law inherent jurisdiction as the upper guardian of minor children, to make an interim order appointing a parenting coordinator ('PC') to deal with parenting disputes over the objection of one of the parents. In summary the court held: [24]

> '[71] To summarise then: I consider that a High Court may, in the exercise of its inherent jurisdiction as the upper guardian of minor children:
>
> [71.1] appoint a PC *with the consent of both parties*, provided that:
>
> *(a)* there is already an agreed parenting plan in existence, whether interim or final, which has been made an order of court;
>
> *(b)* the role of the PC is expressly limited to supervising the implementation of and compliance with the court order;
>
> *(c)* any decision-making powers conferred on the PC are confined to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order;
>
> *(d)* all rulings or directives of the PC are subject to judicial oversight in the form of an appeal in the wide sense described in *Tikly and Others v Johannes NO and Others*, [25] i e "complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information".
>
> [71.2] appoint a PC *without the consent of both parties*, provided that the court is satisfied not only that the conditions listed in *(a)–(d)* are met, but also that:
>
> *(e)* the welfare of the child is at risk from exposure to chronic parental conflict based on evidence of the parents' inability or unwillingness to co-parent peacefully;
>
> *(f)* mediation has been attempted and was unsuccessful, or is inappropriate in the particular case;
>
> *(g)* the person proposed for appointment as the PC is suitably qualified and experienced to fulfil the role of PC;
>
> *(h)* the fees charged by the proposed PC are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the PC, and that at least one of the parents agrees to pay for the services of the PC.'

'In one or more of the following matters.' Rule 43 deals only with pending matrimonial disputes and has no application to any matrimonial dispute which has come to an end by a final divorce. [26] A matrimonial action may be 'pending' even though summons has not yet been issued. [27]

Subrule (1)*(a)*: 'Maintenance *pendente lite*.' It was held in *Gunston v Gunston* [28] that a wife cannot apply for maintenance *pendente lite* under this subrule unless the contemplated *lis* is a matrimonial one, i e an action for divorce or nullity, and proceedings incidental to such actions, such as an application by the wife for leave to sue *in forma pauperis* or for a contribution towards her costs, or for maintenance *pendente lite*, or for an interdict restraining her husband from disposing of assets *pendente lite*, or for an order awarding her the custody of the minor children of the marriage *pendente lite* or on divorce. [29]

As stated in *Nilsson v Nilsson*, [30] a rule 43 order is not meant to provide an interim meal ticket to a person who quite clearly at the trial will not be able to establish a right to maintenance.

In *TM v ZJ* [31] the wife sought maintenance *pendente lite*, and certain other relief, for herself and two minor children pending a divorce action against her husband. The marriage was one under Islamic law and was not registered under the Marriage Act 25 of 1961. In the divorce action the wife sought, *inter alia*, recognition of the validity of the marriage under the Marriage Act 25 of 1961. The husband objected *in limine*, arguing that no marriage existed and that rule 43 accordingly did not apply. His grounds for so arguing were that he had already terminated the marriage by pronouncing a *Talaq* (i e divorce) and that the marriage according to Islamic law was not valid in terms of the Marriage Act 25 of 1961. The court held [32] that it was unnecessary for the applicant in a rule 43 application to prove prima facie the validity of the marriage. The entitlement to maintenance *pendente lite* arose from the general duty of the husband to support his wife and children. Accordingly, the wife could not be precluded from obtaining relief in terms of rule 43 by virtue of a Muslim marriage, irrespective of whether the husband had pronounced a *Talaq* or not.

It is against public policy that a woman should be entitled to claim maintenance *pendente lite* from her husband when she is flagrantly living with another man. [33]

Each case decided under this subrule must depend upon its own particular facts. [34] There are, however, certain basic principles which govern applications under the subrule. Maintenance *pendente lite* is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. [35]

The applicant is entitled to reasonable maintenance *pendente lite* dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements [36] and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. [37] If a dependent child and

the spouse against whom the divorce is sought live in the marital home and consume household items, the spouse seeking maintenance *pendente lite* is entitled to such maintenance to cover the expenditure on household items as increased by consumption of those items by the dependent child and other spouse. [38] A court dealing with an application under this subrule should be satisfied that major children of the marriage who are still financially dependent on the spouses are properly provided for. [39] It has been held that a dependent major child retains *locus standi* in rule 43 maintenance claims on such child's behalf and must be joined (or must at the very least file a confirmatory affidavit) in the proceedings. This would ensure that the child's financial needs are squarely before the court and protect children from having to bring discrete maintenance claims against their parents. Failure to join the child could negatively affect the applicant's claim in respect of the child. [40]

It has been said that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to that of one who is seeking to evade them. [41]

The court usually orders periodic payments of money but may order that other assets (such as furniture) be made available for use by the applicant. [42] The court has no jurisdiction under this subrule to award lump sum payments. [43]

Under a writ of execution issued in the High Court pursuant to an order in terms of this subrule, a pension benefit falling under the Pension Funds Act 24 of 1956 can be attached. [44]

A maintenance court has in terms of s 16(1)*(b)* of the Maintenance Act 99 of 1998 jurisdiction to substitute or discharge an order for the payment of maintenance *pendente lite* made under this subrule. [45] The maintenance court, however, has to display caution in such circumstances and not lightly change an order made in terms of rule 43 in the absence of altered circumstances. [46]

Subrule (1)*(b)*: 'A contribution towards the costs.' It is well established that the claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in Roman-Dutch procedure and has been sanctioned through many decades in High Court practice. [47] Its basis is the duty of support the spouses owe each other. [48] The legal rules pertaining to the reciprocal duty of support between spouses are gender neutral so that an indigent husband may claim support from an affluent wife but the reality must be acknowledged that given traditional childcare roles and the wealth disparity between men and women, it has usually been women who have had to approach the court for a contribution towards costs in divorce litigation. [49]

The purpose of the remedy provided by the subrule has consistently been recognized as being to enable the party in the principal divorce litigation who is comparatively financially disadvantaged in relation to the other side, to adequately put such party's case before the court. [50]

In our constitutional dispensation the subrule must be interpreted and applied through the prism of the Constitution, with specific regard to the right to equality. [51] In *AF v MF* [52] Davis AJ stated (footnotes omitted):

> '[41] The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse — usually the wife — will be forced to settle for less than that to which she is legally entitled, simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts, requires that courts come to the aid of spouses who are without means, to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.' [53]

Thus, in exercising its discretion in the determination of the *quantum* of the contribution towards the costs to be awarded, a court is bound by s 9(1) of the Constitution to guarantee both parties the rights to equality before the law and equal protection of the law. [54] In addition, the court is bound to ensure access to court as envisaged in s 34 of the Constitution. [55] The right to dignity in s 10 of the Constitution is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees — in effect to act as her 'banker'. [56]

The cases are not harmonious on the question whether a court may order a contribution to legal costs that have already been incurred. [57] In *AF v MF* [58] Davis AJ, after an analysis of the different approaches and relevant principles, [59] convincingly concluded that past legal costs, including debts incurred to fund legal costs, could be taken into account in the assessment of an appropriate contribution towards costs in terms of rule 43(1)*(b)*, at least to the extent that the court considers the past expenditure to be reasonable. [60] In *A.L.G v L.L.G* [61] Binns-Ward J held [62] that rule 43 fell to be construed and applied in the context of the modern legal environment and, accordingly, could not conceive why there should be any obstacle to the making of an order for a contribution towards costs that included costs already incurred.

The cases are also not harmonious on the question whether a court may order a contribution towards the costs of interim applications in the principal divorce proceedings. On the one hand, it has been held that the costs of such applications are excluded from the operation of this subrule. [63] On the other hand, and this seems to be the preferable approach, it has been held that such costs are included under the subrule, provided that they relate to applications which are truly interlocutory to the principal divorce proceedings. [64]

An applicant for a contribution towards costs must show that, if she [65] is the plaintiff in the main action, that she has a prima facie case; if she is the defendant, that she is defending in good faith. [66] The applicant must further show that she has insufficient means of her own. [67]

It has been held that the applicant is not entitled to all her anticipated costs, even though the respondent can well afford to pay them, but only a substantial contribution towards them. [68] In contrast, it has been held that by interpreting rule 43(6) through the prism of the Constitution, it is possible for one spouse to be entitled to a claim for all her legal costs. [69] It is respectfully submitted that the correctness of this approach is not beyond doubt. The court's power to make orders for a contribution towards costs is a power which vests in it by virtue of substantive law, i e the common law. It is a power that was exercised for many decades before rule 43 was introduced. Rule 43 only regulates procedure, and if it were abolished, the substantive power would not disappear. The starting point in determining a spouse's entitlement to claim a contribution to costs should therefore be the common law and not rule 43. The common-law position was set out as follows by Ogilvie Thompson J in *Van Rippen v Van Rippen*: [70]

> 'In the short time which has been available to me I have not had any opportunity to canvass the Roman-Dutch authorities; but these, so far as they are cited in the reported cases, appear to me to support the view which was expressed by MASON, J., in

van Gorkom and Noonan v Davis (1914 TPD 572 at p. 575) in these words:

> "The wife, however, can only obtain these costs upon the specific order of a Judge, who has discretion not only as to the amount but also to the granting or refusal of the order. That discretion he exercises upon consideration of the condition and position of both the parties, and the circumstances of the case."

Merula and *Leyser*, quoted in *Boezaart and Potgieter v Wenke* (1931 TPD 70 at p. 84), cited by Mr. *Friedlander*, appear to me to be in conformity with this view. The former says:

> "In *causa divortii* word by provisie geageerd dat de gedaagde gecondemneerd zy d'Impetrant te geven alimentatie en uit te reiken de kosten noodig tot uitvoeringe van den processe."

And *Leyser* — who uses the phrase "ein gewisses *quantum"* appears to be to the same effect. See also the case of *Motatamoli v Motatamoli* (1946 OPD 316 at p. 320 *et seq.).*

In my view the governing principle in regard to these matters is not that submitted by Mr. *Lang*, but is that the *quantum* which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court. In the exercise of that discretion the Court should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the

> parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court. In any such assessment the question of essential disbursements must necessarily be a very material factor. Equally it seems to me that it is inevitable in the procedure that the solicitor acting for the wife must run some potential risk, to this extent, that he is not fully secured in advance; he has not, in the usual phrase, full cover in advance for his fees. That appears to me to be unfortunate, but also to be inevitable. The paramount consideration is that, as I have indicated, the Court should have as its object the determining of an amount which in its discretion it considers necessary for the wife adequately to place her case before the Court. Beyond that it is, in my view, undesirable to attempt to state any more specific rules. In matters of discretion it is not desirable to attempt to propound detailed rules.'

The common-law position appears to be in harmony with the constitutional values of equality, dignity and access to court.

It is submitted that the sum to be contributed is determined by the court's view, in the exercise of its discretion, of the amount necessary for the applicant adequately to put her case before the court. [71] If she herself is unable to contribute at all to her costs, the respondent must contribute the whole amount required. [72] So too if the applicant is able to contribute only in part to the costs required to enable her to litigate on a scale commensurate with that of the respondent. [73] This does not, however, mean that a court should award an impecunious wife all her estimated litigation costs in advance, regardless of the stage of the litigation. Obviously, where future costs are under consideration, a court will take into account that the matter may settle, and will only award what is reasonably required at that particular stage of the litigation, knowing that further contributions to costs may, under rule 43(6), be ordered if required. [74] Thus, there may be instances where, upon exercising its discretion in the light of all relevant factors and circumstances, only a partial rather than a full contribution would be found reasonable by the court. [75] It is submitted that the applicant will have to make out a reasonable claim from the outset if she actually requires full costs adequately to put her case before the court. [76]

An applicant is not entitled to have her attorney and client costs covered or substantially covered. [77] The contribution to the applicant's costs may include the applicant's attorneys' fees. [78] The emphasis in obtaining a contribution on this basis is premised on the following: (1) the fees so payable have to be reasonable and as ordinarily payable as between an attorney

and his own client; (2) not all the fees payable on the criteria set out in (1) should be granted in advance in an application under rule 43 and the attorney should bear some risk with regard to his fees; and (3) the fees set out in (1) are those that are necessary and as would be adequate for the applicant to prepare for and conduct her pending litigation. [79] Before trial, the applicant is ordinarily entitled to be awarded a contribution only up to and including the first day of trial; the *rationale* for this restriction is said to be that the case may be settled, as such cases often are, on the first day of trial. [80] In determining the *quantum* of the contribution, the court will have regard to the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation. The question of essential disbursements is a material factor to be considered, as well as the scale on which the party from whom the contribution was required was litigating. [81]

If a party against whom an order for a contribution towards costs has been made fails to comply with such order and proves that such failure is due to his poverty, an application for his committal for contempt of court will fail. [82]

'Of a matrimonial action.' The subrule applies both to pending matrimonial actions and to matrimonial actions to be instituted. See further the notes to subrule (1) s v 'In one or more of the following matters' and the notes to subrule (1)*(a)* s v 'Maintenance *pendente lite*' above.

Subrule (1)*(c)*: 'Interim care of any child.' The court will generally be reluctant to upset the status quo concerning the care of minor children. The principle of preserving the status quo is, however, subject to the considerations that the paramount interest of the children must nevertheless prevail [83] and that the status quo must not constitute an unreasonable state of affairs. [84] Normally young children should go to the mother; [85] the separation of children from one another should where possible be avoided; [86] and only in exceptional circumstances will the courts permit children to be placed in the hands of third persons. [87]

The court is entitled to refer an application for interim care under this subrule to the family advocate in terms of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987. [88] The function of the family advocate, in a matter in which the care of minor children is in issue, is to assist the court by placing facts and a balanced recommendation before the court;

the family advocate should not take sides in the dispute, nor create the impression that he has taken a decision and wishes to prescribe to the court. [89]

The procedure under this rule cannot be used to vary an existing order made by a maintenance court, though in exceptional circumstances the court may be requested to supplement the order of the maintenance court. [90]

A court in which a divorce action and an application in terms of this subrule are pending is entitled to make an order for the handing over to its custodian parent of a child which had been removed from the jurisdiction by the non-custodian parent, despite the fact that the child is outside the jurisdiction of the court. [91]

It has been held that the High Court's inherent common-law powers as upper guardian of all minors to make any order which it deems fit in the best interests of the child include the power to set aside an interim protection order granted in a magistrate's court in terms of the Domestic Violence Act 116 of 1998. [92]

Subrule (1)*(d)*: 'Interim contact with any child.' See the notes to subrule (1)*(c)* s v 'Interim care of any child' above.

Subrule (2)*(a)*: 'A sworn statement in the nature of a declaration.' It has been suggested that in the use of these words the draftsman of the rule presumably had in contemplation the requirements of a declaration as set out in rule 20(2). [93] Rule 20(2) provides that a declaration must set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed.

Lengthy affidavits may frustrate the object of the rule to decide applications thereunder as inexpensively and expeditiously as possible, and may for that reason amount to an abuse of the process of the court and may result in no order being made on the application. [94]

Rule 67A(2)*(c)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary or prolix drafting, unnecessary annexures and unnecessary procedures followed in proceedings.

In *Dodo v Dodo* [95] it was held that in special circumstances deviation from this norm may be justified. In *E v E* [96] the full court, however, held that:

(a) the High Court does not have a discretion to permit departure from the strict provisions of rule 43(2) and (3) unless it decides to call for further evidence in terms of rule 43(5);

(b) the discretion provided by rule 43(5) ought to be exercised where the respondent's affidavit raises a dispute of fact in order to allow the applicant to file a further affidavit;

(c) relevance should govern the length of the papers, and so long as facts were relevant, it should be admitted;

(d) any predetermined length restriction would likely be unconstitutional.

The full court made the following order: [97]

> '1. On receipt of the rule 43(2) and 43(3) affidavits, the judge allocated to hear the matter shall, if he or she deems it appropriate, issue a directive to the parties in terms of rule 43(5) calling on the applicant and/or the respondent to file (a) supplementary affidavit(s) making a full and frank disclosure of their financial and other relevant circumstances to the court and to the other party.
>
> 2. The affidavits referred to above must be accompanied by a financial disclosure form, annexed hereto, [98] which must be filed seven days before the date of hearing.
>
> 3. Affidavits filed in terms of rule 43(2) and (3) shall only contain material or averments relevant to the issues for consideration. It shall not be competent for a court to dismiss an application in terms of rule 43, only on the basis of prolixity. If the court finds that the papers filed by a party contain irrelevant material, the court only has the power to strike off the irrelevant and inadmissible material from the affidavit in question, and make an appropriate cost order.'

In *KT v AT* [99] the applicant's affidavit in support of maintenance *pendente lite* and a contribution towards costs was 68 pages long; its supporting annexures 290 pages; and confirmatory affidavits and notice of motion another 10 pages. The first respondent contended that the application was an irregular step under rule 30. In upholding this contention, [100] the court found that the rule 43 application constituted a wide-ranging and egregious abuse of process and the rules of court, and that the first respondent should not be compelled to respond to it unless and until it was brought in the proper format. [101] The application was accordingly struck from the roll and the applicant's attorneys in the rule 43 application were ordered to be liable *de bonis propriis* for the costs of both the rule 30 application and the rule 43 application, on the scale as between attorney and own client. It was also ordered that the applicant's attorneys in the rule 43 application were not entitled to recover from the applicant any costs in respect of either application, or any costs which were payable in terms of the court's order.

Sufficient details should be given in the applicant's affidavit to enable the court to deal with the matter, if possible, without recourse to further evidence under subrule (5). [102]

Supporting affidavits are not allowed except by an order of court under subrule (5). [103] So too supplementary affidavits. [104]

Annexures to affidavits are admissible [105] provided that *(a)* the contents thereof constitute admissible evidence; and *(b)* they are documents which may be annexed to a pleading such as a declaration or a plea. [106]

'And the grounds therefor.' The word 'grounds' in this subrule embraces factual allegations and not merely the inference which an applicant makes and alleges from facts which he has not set out. [107]

The application must disclose facts showing that the court has jurisdiction to grant the interim relief. [108] See further the notes to subrule (1) s v 'This rule shall apply whenever' above.

The proceedings under the rule should be self-contained and the court should not be required to search for and peruse another file of papers, such as the file in the main action between the parties. [109]

'Notice to the respondent corresponding with Form 17.' A notice that does not set out the order that is prayed for as required by Form 17 is an irregular step as contemplated in rule 30. [110]

Subrule (2)*(b)*: 'An electronic mail address, where available.' Where an electronic mail address is not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the applicant is the one appointed by the applicant within 25 kilometers of the office of the registrar. The subrule, unlike rule 6(5)*(b)*(ii), does not provide for the applicant to state the applicant's postal or facsimile addresses, where available. The subrule is not included in the provisions of rule 4A above, and the provisions of that rule therefore do not apply to the subrule. The reasons for these omissions are unclear.

Subrule (3)*(a)*: 'A sworn reply in the nature of a plea.' It has been suggested that in the use of these words the draftsman of the rule presumably had in contemplation the requirements of a plea as set out in rule 22(2). [111] Rule 22(2) provides that a defendant must in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and must clearly and concisely state all material facts upon which he relies.

The rule makes no provision for the filing of a replying affidavit by the applicant. [112]

See further the notes to subrule (2) s v 'A sworn statement in the nature of a declaration' above.

'An address for service within 15 kilometres . . . as referred to in rule 6(5)*(b)*.' This provision is in need of an amendment by the Rules Board for Courts of Law to bring it in line with the distance of '25 kilometres' provided for in rule 6(5)*(d)*(i).

Subrule (3)*(c)*: 'Shall be automatically barred.' The fact that a respondent is barred from delivering a sworn reply does not

debar him from appearing at the hearing of the application and arguing the application on the sworn statement of the applicant [113] or convincing the court to hear such evidence as is considered necessary in terms of subrule (5).

Subrule (4): 'On 10 days' notice to the parties.' In terms of the proviso to this subrule notice need not be given to the respondent if he is in default. If an application under this subrule is postponed *sine die* and then reinstated, ten days' notice of the new date for hearing must be given. [114]

Subrule (5): 'Hear such evidence as it considers necessary.' The further evidence which the court may receive in terms of this subrule may be either orally or adduced on affidavit. In either case such evidence should be received only as a result of a deliberate decision of the court — no party can adduce such evidence as of right. [115]

The court should be wary of hearing evidence and giving rulings on credibility and probabilities which may lead to the prejudging of issues more properly left to the trial court. [116]

In an application under subrule (1)*(c)* for the interim custody of any child, the court is entitled to refer the application to the family advocate in terms of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987. [117] Indeed, a court sitting as upper guardian in a custody matter has wide powers in establishing what is in the best interests of minor children; it is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the parties and may have recourse to any source of information that may assist it. [118]

'Such order as it deems fit to ensure a just and expeditious decision.' Subrule (5) gives a court the power to manage and order disclosure of financial information and specified financial documents regarding the parties' income and assets. [119]

Subrule (6): 'On the same procedure.' This means that in the event of a material change in circumstances as set out in this subrule, an application in terms of rule 43 can be made. [120]

'In the event of a material change.' This subrule must be strictly interpreted and employed only in the circumstances set out therein, i e where there has been a material change in the circumstances of either party or a child, or where a contribution towards costs proves inadequate. [121] If an application is not necessarily an abuse of the court process but unreasonable the court may exercise its discretion against the applicant and dismiss the application. [122]

In an application in terms of this subrule for a reduction in the interim maintenance payable based on a decline in the financial situation of the applicant, a 'full and frank disclosure in regard to all of the numerous and varied elements which make up the broad overview of the applicant's financial situation' should be made. [123] The applicant bears the onus of establishing on a balance of probabilities that a material change has occurred. To succeed in that endeavour, an applicant must demonstrate, not only that a change or even a significant

change in circumstances has occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant's broader financial circumstances. [124] Stress from divorce proceedings is not material enough a factor as to warrant the intervention of a court as envisaged in the subrule. [125]

1 *Henning v Henning* 1975 (2) SA 787 (O) at 789G; *Leppan v Leppan* 1988 (4) SA 455 (W) at 458A–B.
2 *Leppan v Leppan* 1988 (4) SA 455 (W) at 457F–H.
3 Rule 6(5)*(b)*(iii)*(bb)*.
4 *Senior v Senior* 1999 (4) SA 955 (W) at 967D–H.
5 2020 (3) SA 409 (WCC).
6 At paragraphs [19]–[20].
7 In this regard the court (at paragraph [19]) referred to *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* 2012 (5) SA 267 (GSJ) at paragraph [21]; *Standard Bank of South Africa Ltd v Hendricks and Related Cases* 2019 (2) SA 620 (WCC) at paragraph [26] and, specifically in relation to rule 43, to the judgment of Vos J in *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E–F that rule 43 governs procedure and does not affect the substantive law.
8 At paragraph [20].
9 Section 16(3) of the Superior Courts Act 10 of 2013. See, in this regard, Volume 1 third edition, Part D.
10 *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E; *Jeanes v Jeanes* 1977 (2) SA 703 (W) at 706F; *PT v LT* 2012 (2) SA 623 (WCC) at 634E.
11 *Colman v Colman* 1967 (1) SA 291 (C) at 292A; *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W); *Varkel v Varkel* 1967 (4) SA 129 (C) at 131G; *Mather v Mather* 1970 (4) SA 582 (E); *Maree v Maree* 1972 (1) SA 261 (O); *Henning v Henning* 1975 (2) SA 787 (O) at 789E; *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T); *Verster v Verster* 1975 (3) SA 493 (W); *Smit v Smit* 1978 (2) SA 720 (W); *Van der Walt v Van der Walt* 1979 (4) SA 891 (T); *Nienaber v Nienaber* 1980 (2) SA 803 (O) at 806F; *Andrade v Andrade* 1982 (4) SA 854 (O) at 855F; *Grauman v Grauman* 1984 (3) SA 477 (W) at 478I–479A; *Patmore v Patmore* 1997 (4) SA 785 (W); *Du Preez v Du Preez* 2009 (6) SA 28 (T) at 30C; *TS v TS* 2018 (3) SA 572 (GJ) at 584D–E and 585B–C; *C.A.D v J.D* (unreported, ECMk case no 4017/2021 dated 18 May 2023) at paragraph [2]. See further the notes to rule 43(2)*(a)* s v 'A sworn statement in the nature of a declaration' below.
12 *AM v RM* 2010 (2) SA 223 (ECP); *R.B v S.A.E.R* (unreported, GJ case no 2023/014603 dated 18 September 2023) at paragraph [8]. For a discussion of rule 43 and Muslim divorces, see Fareed Moosa 'Rule 43 and Muslim divorces: Can relief be granted if the marriage was dissolved by Sharia law?' 2023 (July) *De Rebus* 17.
13 2021 (1) SA 563 (GJ). See also *R.B v S.A.E.R* (unreported, GJ case no 2023/014603 dated 18 September 2023) at paragraph 21.3.
14 At paragraph [48].
15 *AS v CS* 2011 (2) SA 360 (WCC) at 366C–D.
16 *Massey v Massey* 1968 (2) SA 199 (T) at 202B–203D; *Glen v Glen* 1971 (3) SA 238 (R) at 239B–H.
17 *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W).
18 *AF v MF* 2019 (6) SA 422 (WCC) at paragraph [14]. See further the notes to subrule (1)(b) s v 'A contribution towards the costs' below.
19 *Van der Sandt v Van der Sandt* 1947 (1) SA 259 (T); *Venter v Venter* 1970 (1) SA 11 (T) at 12H; *Green v Green* 1987 (3) SA 131 (SE) at 132F–134D.
20 2015 (6) SA 300 (ECP).
21 At 305B–C.
22 *SW v SW* 2015 (6) SA 300 (ECP) at 305C–G.
23 2018 (4) SA 530 (WCC). See also Marici C Samuelson 'Parenting coordinators: What is classified as their decision-making powers?' 2018 (September) *De Rebus* 37–8.
24 At 551A–H.
25 *Author's note: Tikly v Johannes NO* 1963 (2) SA 588 (T) at 590G–591A.
26 *Bienenstein v Bienenstein* 1965 (4) SA 449 (T) at 451D–H; *Van Oudenhove De St Gery v Grüber* 1981 (3) SA 737 (E); *NK v KM* 2019 (3) SA 571 (GJ). Rule 43(1)*(b)* now also deals with matrimonial actions about to be instituted.
27 *Bienenstein v Bienenstein* 1965 (4) SA 449 (T) at 451E; *Varkel v Varkel* 1967 (4) SA 129 (C) at 131G; and see *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) at 332B–H.

28 1976 (3) SA 179 (W), approved in, for example, *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraphs [87]–[88].

29 *Gunston v Gunston* 1976 (3) SA 179 (W); Hahlo *Husband and Wife* 237.

30 1984 (2) SA 294 (C) at 295F; and see *B.R v D.R* (unreported, WCC case no 14189/2022 dated 17 March 2023) at paragraph [14]; *S.K v J.L.K* (unreported, WCC case no 3198/23 dated 24 March 2023) at paragraph [16].

31 2016 (1) SA 71 (KZD).

32 At 77B–C.

33 *Carstens v Carstens* 1985 (2) SA 351 (SE) at 353F; *SP v HP* 2009 (5) SA 223 (O) at 225I–226F.

34 *Taute v Taute* 1974 (2) SA 675 (E); *B.R v D.R* (unreported, WCC case no 14189/2022 dated 17 March 2023) at paragraph [4].

35 *Levin v Levin* 1962 (3) SA 330 (W) at 331D; *Taute v Taute* 1974 (2) SA 675 (E) at 676C–D; *Grauman v Grauman* 1984 (3) SA 477 (W) at 479F; *SAT v GJT* (unreported, GJ case no 22224/2019 dated 4 November 2022) at paragraph 4; *B.R v D.R* (unreported, WCC case no 14189/2022 dated 17 March 2023) at paragraph [5]; *Y.B v L.B* (unreported, GP case no 5413/2020 dated 28 March 2023) at paragraph [23].

36 It hardly needs explanation to recognize that a claimant's reasonable requirements depend on the circumstances prevailing when those requirements fall to be met. It is, after all, only with regard to such circumstances that the reasonableness of the requirements can be assessed (*C v C* (unreported, WCC case no 16742/2021 dated 9 November 2021) at paragraph [14]). See also *J.K v E.S.K* [2024] 1 All SA 775 (WCC) at paragraph [49].

37 *Taute v Taute* 1974 (2) SA 675 (E) at 676E; *Botha v Botha* 2009 (3) SA 89 (W) at 105C–106J; *C v C* (unreported, WCC case no 16742/2021 dated 9 November 2021) at paragraph [15]; *B.R v D.R* (unreported, WCC case no 14189/2022 dated 17 March 2023) at paragraph [4]; *Y.B v L.B* (unreported, GP case no 5413/2020 dated 28 March 2023) at paragraphs [26]–[27]; *J.K v E.S.K* [2024] 1 All SA 775 (WCC) at paragraph [49].

38 *JG v CG* 2012 (3) SA 103 (GSJ) at 120D–E.

39 *AF v MF* 2019 (6) SA 422 (WCC) at 438G.

40 *CL v CJL* 2023 (1) SA 513 (WCC) at paragraphs [40]–[44].

41 *Taute v Taute* 1974 (2) SA 675 (E) at 676H; *Y.B v L.B* (unreported, GP case no 5413/2020 dated 28 March 2023) at paragraph [31].

42 *Van der Spuy v Van der Spuy* 1981 (3) SA 638 (C); and see *G v G* (unreported, KZD case no D9175/2020 dated 20 September 2022).

43 *Greenspan v Greenspan* 2000 (2) SA 283 (C), followed in *K.F v M.F* (unreported, WCC case nos 10237/2037; 4001/2023 dated 13 October 2023) at paragraphs 35–41. It is submitted that the decision in *G v G* (unreported, KZD case no D9175/2020 dated 20 September 2022) at paragraph [26] should not be interpreted as being in conflict with that in the *Greenspan* case. No lump-sum payment in the ordinary sense of the word was claimed in *G v G*.

44 *Greenhill v Discovery Preservation Pension Fund* 2022 (3) SA 236 (GJ).

45 *De Witt v De Witt* 1995 (3) SA 700 (T); *Thompson v Thompson* 1998 (4) SA 463 (T).

46 Cf *Thompson v Thompson* 1998 (4) SA 463 (T).

47 See, for example, *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 637; *Chamani v Chamani* 1979 (4) SA 804 (W) at 806C; *AF v MF* 2019 (6) SA 422 (WCC) at 428E; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraphs [16]–[17]; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraph [40]. See also Hahlo *Husband and Wife* 424–9.

48 *Lyons v Lyons* 1923 TPD 345 at 346; *Botes v Botes* 1969 (3) SA 168 (R) at 170C; *Lalla v Lalla* 1973 (2) SA 561 (D) at 564G; *Barass v Barass* 1979 (1) SA 245 (R) at 247F; *Chamani v Chamani* 1979 (4) SA 804 (W) at 806E; *Cary v Cary* 1999 (3) SA 615 (C); *AF v MF* 2019 (6) SA 422 (WCC) at 428E–F; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraph [16]; *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [74]; *S.K v J.L.K* (unreported, WCC case no 3198/23 dated 24 March 2023) at paragraph [16]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [45]; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraph [40]. See, however, *Griesel v Griesel* 1981 (4) SA 270 (O).

49 *AF v MF* 2019 (6) SA 422 (WCC) at paragraph [30]; *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [73]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [47].

50 See, for example, *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 638 and 639; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraph [17]; *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [74]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [43]; *K.F v M.F* (unreported, WCC case nos 10237/2037; 4001/2023 dated 13 October 2023) at paragraph 44; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraph [40].

51 *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [75].

52 2019 (6) SA 422 (WCC). See also *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [50].

53 Implicit in the consideration of a legal costs contribution is the role that gender dynamic plays (*B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [48]). See also *SH v MH* 2023 (6) SA 279 (GJ) at paragraphs [76]–[79], where Victor J (at paragraph [77]) referred to *S v S* 2019 (6) SA 1 (CC) where the Constitutional Court said (at paragraph [31]):

> 'It is the more financially vulnerable spouses, usually the wives, who disproportionately bear the brunt of all this. Generally, they are the ones who launch rule 43 applications. This is so because it is women who, more often than not, are the primary caregivers.'

54 *Cary v Cary* 1999 (3) SA 615 (C) at 621B–D; *AF v MF* 2019 (6) SA 422 (WCC) at paragraph [45]; *SH v MH* 2023 (6) SA 279 (GJ) at paragraphs [83]–[88] and [91]–[92]; *Y.B v L.B* (unreported, GP case no 5413/2020 dated 28 March 2023) at paragraph [32]; *S.K v J.L.K* (unreported, WCC case no 3198/23 dated 24 March 2023) at paragraph [18]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [44]; *L.D.P (Born G) v T.J.D.P* (unreported, ECMk case no 3622/2023 dated 10 November 2023) at paragraph [14]; *J.K v E.S.K* [2024] 1 All SA 775 (WCC) at paragraph [53].

55 *SH v MH* 2023 (6) SA 279 (GJ) at paragraphs [89]–[90].

56 *AF v MF* 2019 (6) SA 422 (WCC) at paragraph [42]; and see *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [105]; *J.K v E.S.K* [2024] 1 All SA 775 (WCC) at paragraph [53].

57 See the observations made by Binns-Ward J in *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraphs [15]–[16] and those made by Marumoagae AJ in *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraphs [50]–[57].

58 2019 (6) SA 422 (WCC), followed by F Bezuidenhout AJ in *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [51]; and see *SH v MH* 2023 (6) SA 279 (GJ) at paragraphs [92]–[93]; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraphs [55]–[57].

59 At 428E–432G.

60 At 432C and 432H–433A. Davis AJ held that, depending on the circumstances, all such costs could be ordered to be paid as a lump sum to the applicant (at 432F–G and 434I). In this regard the relevant questions are (at 434G): '*(a)* whether the costs were reasonably incurred by the applicant; *(b)* how much the applicant can afford to pay towards the costs; and *(c)* how much the respondent can afford to pay towards the costs.'

61 Unreported, WCC case no 9207/2020 dated 25 August 2020, followed by Rogers J in *AVR v JVR* (unreported, WCC case no 4366/2016 dated 23 October 2020) at paragraph [2].

62 At paragraph [16].

63 See, for example, *Service v Service* 1968 (3) SA 526 (D) at 528F; *Micklem v Micklem* 1988 (3) SA 259 (C) at 263B; *Maas v Maas* 1993 (3) SA 885 (O) at 888J–889B.

64 *RM v AM* (unreported, WCC case no 8698/2019 dated 10 July 2019); at paragraph [24]; *AVR v JVR* (unreported, WCC case no 4366/2016 dated 23 October 2020) at paragraph [2]; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraph [2]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraphs [54]–[60].

65 The applicant is usually the wife but can also be an indigent husband (*Lyons v Lyons* 1923 TPD 345; *Von Abo v Von Abo* 1927 OPD 70).

66 Good faith will be presumed in the absence of any indication to the contrary (*Jones v Jones* 1974 (1) SA 212 (R)). See further Hahlo *Husband and Wife* 426n69.

67 See, for example, *Engelbrecht v Engelbrecht* 1944 NPD 186; *Von Broembsen v Von Broembsen* 1948 (1) SA 1194 (O); *Greyling v Greyling* 1959 (3) SA 967 (W); *Harwood v Harwood* 1976 (4) SA 586 (C); *Griesel v Griesel* 1981 (4) SA 270 (O).

68 See, for example, *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 638–41 (a case decided under the court's common-law power to make an order for a contribution towards costs); *Service v Service* 1968 (3) SA 526 (D) at 528B–D; *Dodo v Dodo* 1990 (2) SA 77 (W) at 98F; *Maas v Maas* 1993 (3) SA 885 (O) at 888E; *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 51I; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraph [19].

69 *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [101].

70 1949 (4) SA 634 (C) at 639–640.

71 *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 639–40; *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) at 418G; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262H–263A; *Dodo v Dodo* 1990 (2) SA 77 (W) at 98C–D; *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50D; *AF v MF* 2019

(6) SA 422 (WCC) at 428F–429B; *A.L.G v L.L.G* (unreported, WCC case no 9207/2020 dated 25 August 2020) at paragraphs [17]–[19]; *V v V* (unreported, WCC case no 18559/2016 dated 21 October 2020) at paragraph [18]; *AVR v JVR* (unreported, WCC case no 4366/2016 dated 23 October 2020) at paragraph [2]; *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [83]; *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [43]; *V.N.D v V.N.J-J* (unreported, GP case no 63604/2021 dated 2 August 2023) at paragraph [7] (where it was pointed out that the applicant should be placed in a position adequately to present her case 'as far as the available resources allow'); *K.F v M.F* (unreported, WCC case nos 10237/2037; 4001/2023 dated 13 October 2023) at paragraphs 44 and 51; *L.D.P (Born G) v T.J.D.P* (unreported, ECMk case no 3622/2023 dated 10 November 2023) at paragraph [14].

72 *AF v MF* 2019 (6) SA 422 (WCC) at paragraphs [48]–[51], followed in *SH v MH* 2023 (6) SA 279 (GJ) at paragraphs [94]–[97] and *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraphs [51] and [53].

73 *B.J.M v W.R.M* (unreported, GJ case no 2022/9405 dated 26 April 2023) at paragraph [52].

74 *AF v MF* 2019 (6) SA 422 (WCC) at paragraph [52].

75 *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [98].

76 See also *SH v MH* 2023 (6) SA 279 (GJ) at paragraph [100].

77 *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 51H–J.

78 *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 52B–C.

79 *Senior v Senior* 1999 (4) SA 955 (W) at 963H–964A.

80 *Service v Service* 1968 (3) SA 526 (D) at 528G; *Botes v Botes* 1969 (3) SA 168 (R) at 170D; *Dodo v Dodo* 1990 (2) SA 77 (W) at 98G. See *Brown v Brown* 1970 (2) SA 625 (W); *Maas v Maas* 1993 (3) SA 885 (O) at 888B and 890E–I.

81 *Van Gorkom and Noonan v Davis* 1914 TPD 572 at 575; *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 639 and the authorities there referred to; *Cary v Cary* 1999 (3) SA 615 (C) at 619H–I and 620A–D; *J.K v E.S.K* [2024] 1 All SA 775 (WCC) at paragraph [52]; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraph [40].

82 *Dezius v Dezius* 2006 (6) SA 395 (T). On contempt of court in general, see the *excursus* to s 41 of the Superior Courts Act 10 of 2013 s v 'Contempt of court' in Volume 1 third edition, Part D.

83 As to the paramount interest of a child, see *M v N* (unreported, GJ case no 2021/22911 dated 10 November 2022).

84 *Madden v Madden* 1962 (4) SA 654 (T) at 657B. See also *Cronje v Cronje* 1907 TS 871 at 872; *Ackerman v Ackerman* 1940 CPD 16 at 19; *Hawthorne v Hawthorne* 1944 CPD 491 at 494; *Wille v Wille* 1944 WLD 96 at 99; *Kritzinger v Kritzinger* 1951 (2) SA 11 (N) at 14; *Du Plooy v Du Plooy* 1953 (3) SA 848 (T) at 853F; *Bashford v Bashford* 1957 (1) SA 21 (N) at 24F–25B; *Eksteen v Eksteen* 1969 (1) SA 23 (O) at 25H; *Whitehead v Whitehead* 1993 (3) SA 72 (SE) at 75C–D.

85 *Wille v Wille* 1944 WLD 96 at 99 and 101; *Scheuer v Scheuer* 1945 NPD 232; *Green v Green* 1948 (2) SA 1054 (N) at 1056; *Du Plooy v Du Plooy* 1953 (3) SA 848 (T) at 853; *Bashford v Bashford* 1957 (1) SA 21 (N) at 24H; *Madden v Madden* 1962 (4) SA 654 (T) at 657C and 658C.

86 *Simleit v Cunliffe* 1940 TPD 67 at 82; *Madden v Madden* 1962 (4) SA 654 (T) at 658D.

87 *Madden v Madden* 1962 (4) SA 654 (T) at 657E.

88 *Terblanche v Terblanche* 1992 (1) SA 501 (W) in which the court declined to follow the decision to the contrary in *Davids v Davids* 1991 (4) SA 191 (W).

89 *Whitehead v Whitehead* 1993 (3) SA 72 (SE).

90 *Rabie v Rabie* 1992 (2) SA 306 (W). See also *Bergh v Coetzer and the Minister of Social Welfare* 1963 (4) SA 990 (C) at 992G; *Hoffmann v Hoffmann* 1964 (1) SA 746 (C) at 749C; *Kirk v Kirk* 1970 (1) SA 128 (R).

91 *Desai v Desai* 1987 (4) SA 178 (T).

92 *B v B* 2008 (4) SA 535 (W) at 541F–543E.

93 *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T) at 492C; *TS v TS* 2018 (3) SA 572 (GJ) at 585A–B.

94 *Maree v Maree* 1972 (1) SA 261 (O) at 263H; *Smit v Smit* 1978 (2) SA 720 (W) at 722G; *Nienaber v Nienaber* 1980 (2) SA 803 (O) at 806F; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262C; *Visser v Visser* 1992 (4) SA 530 (SE); *TS v TS* 2018 (3) SA 572 (GJ) at 584D–E and 585A–C; *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D. In the latter case the court ordered that the applicant's attorneys may not claim any costs from the applicant in respect of the drafting and preparation of the application.
In *Du Preez v Du Preez* 2009 (6) SA 28 (T) at 33B Murphy J stated the following:
'The applicant's papers are anything but brief and the respondent's reply is less than succinct. The tendency by parties, aided by their legal representatives, to engage in prolixity in rule 43 proceedings has been criticised more than once by courts across the country. Yet the criticism has been insufficiently heeded. I align myself with the remarks made by Kroon J in *Visser v Visser* 1992 (4) SA 530 (SE) at 531D, where he observed:
"It is my experience, and I understand that of my Brothers to be the same, that there is a tendency for the provisions of rule 43 to be disregarded and for the applications and the reply thereto to assume voluminous proportions. That practice must be firmly discouraged and the present is an appropriate case where the discouragement will commence."
Prolixity in a rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule (*Smit v Smit* 1978 (2) SA 720 (W) at 722G).
In *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D, Epstein AJ elaborated on the undesirable nature of prolixity in rule 43 applications as follows:
"In this Division, where there are so many rule 43 applications on the roll each week, the abuse of the process of this Court (by frustrating and/or defeating the purpose or object of rule 43) places an unnecessary burden on the Judges who have to read prolix affidavits containing matter irrelevant to the rule 43 proceedings."
In *Patmore (supra*) the application was struck from the roll because the applicant's papers ran to 47 pages. In *Smit (supra*) the application suffered the same fate because the complete set of papers ran to 69 pages. In the present matter the papers total 192 pages.'
Murphy J struck the application from the roll, made no order as to costs and ordered that neither party would be charged any fees by their attorneys in respect of the application and the opposition thereto.
In *SAT v GJT* (unreported, GJ case no 22224/2019 dated 4 November 2022) the situation in an application under rule 43 of the Uniform Rules of Court was as follows:
'6 It is often observed that Rule 43 proceedings are frequently allowed to stray beyond the issues that they are meant to address, and to become inappropriately costly and involved. This case is a good example of that tendency. The application has taken over two years to finalise. The papers in it run to 2330 pages. Three sets of affidavits have been filed, instead of the usual one. Despite a directive issued to the parties that they jointly produce "a hardcopy set of those papers on the court file that [they] agree are necessary for the determination of the matter" (Wilson AJ, *Family Court Roll*, 10 October 2022, paragraph 2), the approach was to print out all 2330 pages and deliver them to me in five lever arch files just over 48 hours before the matter was due to be argued.
7 The papers are replete with inappropriate and irrelevant *ad hominem* attacks. Mrs. T speaks to what she considers to be Mr. T's controlling personality and secretive approach to his financial affairs. Mr. T misses few opportunities to emphasise what he believes to be Mrs. T's duplicitous nature and her financial profligacy. The undertone (not very far beneath the surface of Mr. T's affidavits) is that Mrs. T's financial greed has driven her to emotional instability.
8 The papers fail, for the most part, to focus attention on the material issues.'
The court did not strike the application from the roll (at paragraph 9) but was, however, impelled to record its dissatisfaction at the way in which the matter had been litigated, and to observe that special costs orders of the nature granted by Murphy J in the *Du Preez* case (*supra*) might well have to become more frequent if the unfortunate trend towards overworked rule 43 applications was to be arrested (at paragraph 10).
In *SH v MH* 2023 (6) SA 279 (GJ) the rule 43 application concerned maintenance *pendente lite* to the wife and minor children, interim care of the children and a contribution towards the costs of the applicant. The papers had burgeoned to almost 1 000 pages by the time Victor J heard the matter. The papers included lengthy expert reports concerning the best interests of the minor children and a report by the Family Advocate which was compiled at the request of the court. This appears to be an extraordinary case which justified the prolixity of the papers because, as observed by Victor J, 'the level of acrimony between the parents has reached a critical and dangerous level' (at paragraph [1]).
In *I.P v N.P* (unreported, WCC case no 16768/2023 dated 20 November 2023) the rule 43 application was held to be an irregular step in terms of rule 30 for failure to comply with rule 43(2). The application was struck from the roll and the respondent in the rule 30 application was ordered to pay the applicant's costs of the rule 30 application, as well as any costs incurred by him to date in respect of the rule 43 application, on the scale as between attorney and client and including the costs of one counsel (at paragraphs [8]–[18] and [22]).

95 1990 (2) SA 77 (W) at 79C–F.

96 2019 (5) SA 566 (GJ) at 575B–577A. For a discussion of *E v E* and an investigation of how the courts have interpreted rule 43(2) and (3), see Mothokoa Mamashela '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?' (2023) 44.2 *Obiter* 500. See also Maresa Kurz 'A new future for family law: Significant changes to r 43 applications' 2019 (November) *De Rebus* 10–12.

97 At 577A–E.

98 *Author's note:* The financial disclosure form is reproduced in Appendix K below.

99 2020 (2) SA 516 (WCC).

100 Referring (at paragraphs [12]–[15]) to *Micklem v Micklem* 1988 (3) SA 259 (C); *Patmore v Patmore* 1997 (4) SA 785 (W); *RM v AM* (unreported, WCC case no 8698/2019 dated 10 July 2019); *ME v AE* (unreported, WCC case no 9028/2019 dated 26 August 2019) and *E v E* 2019 (5) SA 566 (GJ).

101 At paragraph [30].

102 *Boulle v Boulle* 1966 (1) SA 446 (D) at 449H; *Eksteen v Eksteen* 1969 (1) SA 23 (O) at 25A; but see *Varkel v Varkel* 1967 (4) SA 129 (C) at 132C–G.

103 *Verster v Verster* 1975 (3) SA 493 (W) at 494A; *Leppan v Leppan* 1988 (4) SA 455 (W) at 458C.

104 *L.D.P (Born G) v T.J.D.P* (unreported, ECMk case no 3622/2023 dated 10 November 2023) at paragraphs [6]–[9].

105 *Williams v Williams* 1971 (2) SA 620 (O) at 622A–C.

106 *Maree v Maree* 1972 (1) SA 261 (O) at 265B; *Henning v Henning* 1975 (2) SA 787 (O) at 790A; *Smit v Smit* 1978 (2) SA 720 (W) at 722E. In *Gerber v Gerber* 1979 (1) SA 352 (C) at 353E it is suggested that in these cases the rule might have been stated too widely and that in certain circumstances a party may be entitled to annex exhibits which, strictly speaking, cannot be annexed to pleadings.

107 *Eksteen v Eksteen* 1969 (1) SA 23 (O) at 24H–25A.

108 *Lawrence v Lawrence* 1967 (1) SA 314 (T).

109 *Carstens v Carstens* 1985 (2) SA 351 (SE).

110 *TJ v TA* (unreported, GJ case no 2019/22224 dated 31 March 2021) at paragraphs [26]–[31]. In this case the application to set aside the notice as an irregular step was, however, dismissed because of lack of proof that the applicant had suffered prejudice (at paragraphs [44] and [48]).

111 *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T) at 492C; and see *Visser v Visser* 1992 (4) SA 530 (SE) at 531B.

112 *Mather v Mather* 1970 (4) SA 582 (E) at 585B; *Henning v Henning* 1975 (2) SA 787 (O) at 789H; *Van der Walt v Van der Walt* 1979 (4) SA 891 (T) at 892C; unless it is in reply to a counter-application by the respondent (*Steenkamp v Steenkamp* 1965 (3) SA 207 (O)).

113 *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D).

114 *Myburgh v Myburgh* 1970 (1) SA 681 (O).

115 *Verster v Verster* 1975 (3) SA 493 (W) at 494C; *Leppan v Leppan* 1988 (4) SA 455 (W) at 458D.

116 *Dodo v Dodo* 1990 (2) SA 77 (W) at 91J–92A.

117 *Terblanche v Terblanche* 1992 (1) SA 501 (W) in which the court declined to follow the decision to the contrary in *Davids v Davids* 1991 (4) SA 191 (W).

118 *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C; and see *Shawzin v Laufer* 1968 (4) SA 657 (A) at 662G–663B.

119 *TS v TS* 2018 (3) SA 572 (GJ) at 588D–E, 601B–E and 602B–603H. See also the notes to subrule (2)*(a)* s v 'A sworn statement in the nature of a declaration' above where reference is made to *E v E* 2019 (5) SA 566 (GJ) and the order made by the full court in that case.

120 *Jeanes v Jeanes* 1977 (2) SA 703 (W) at 706G; *Andrade v Andrade* 1982 (4) SA 854 (O) at 855G.

121 *Grauman v Grauman* 1984 (3) SA 477 (W) at 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262E–G; *Maas v Maas* 1993 (3) SA 885 (O) at 888C; *C.L.J v C.L.E* (unreported, GJ case no 34367/19 dated 26 April 2023) at paragraph [19]; *Z.G v J.G.C.G* (unreported, GP case no 77979/2018 dated 12 January 2024) at paragraphs [43–[44] and the cases there referred to.

122 *Greenspan v Greenspan* 2001 (4) SA 330 (C) at 335E–F; *C.L.J v C.L.E* (unreported, GJ case no 34367/19 dated 26 April 2023) at paragraph [20].

123 *C.L.J v C.L.E* (unreported, GJ case no 34367/19 dated 26 April 2023) at paragraph [22] and the cases there referred to.

124 *C.L.J v C.L.E* (unreported, GJ case no 34367/19 dated 26 April 2023) at paragraph [22] and the cases there referred to.

125 *C.L.J v C.L.E* (unreported, GJ case no 34367/19 dated 26 April 2023) at paragraph [22] and the case there referred to.