



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2019/22224

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

.....
L.J. DU BRUYN

31 MARCH 2021

In the matter between:

T[...], G[...] J[...]

Applicant / Plaintiff

and

T[.] S[...] A[...]
(born **L[...]**)

Respondent / Defendant

JUDGMENT

- [1] This is an application in terms of rule 30. In order to understand the issues in this application, it is helpful to start by setting out the relevant history of the litigation between the parties. I do so under a separate heading below.
- [2] The litigation between the parties that is relevant to this application started with an action for divorce instituted by the Applicant against the Respondent. I refer to that action as “the divorce action”. The divorce action was followed by at least an application in terms of rule 43 and this application. The Respondent in this application is the applicant in the application in terms of rule 43. To avoid confusion, I refer to the parties as they are cited in the divorce action. Thus, I refer to the Applicant in this application as “the Plaintiff” and to the Respondent in this application as “the Defendant”. Where I quote documents in which the parties are not referred to as cited in the divorce action, I change such references to “the Plaintiff” and “the Defendant” respectively.

THE RELEVANT HISTORY OF THE LITIGATION BETWEEN THE PARTIES

The divorce action

- [3] The Plaintiff instituted the divorce action against the Defendant in June 2019. He claims a decree of divorce and ancillary relief in that action. The Defendant defends the divorce action. She filed a counterclaim in which she also claims a decree of divorce and ancillary relief.

The Defendant’s application in terms of rule 43

- [4] The Defendant launched an application in terms of rule 43 during July 2020. I refer to that application as “the rule 43 application”.
- [5] The founding papers in the rule 43 application consist of a document headed “*Application in terms of rule 43*”, a founding statement and annexures thereto. In the notice of motion and founding affidavit in the present application, the document headed “*Application in terms of rule 43*” is referred to as the “[*Defendant’s*] Notice of Motion in the URC 43 application”, “*the Notice of Motion*” and “[*the Defendant’s*] notice of motion”. In the answering affidavit in the present application the said document is referred to as “[*t*]he Notice of Motion” and “*the Rule 43 Notice*”. I accept that the document headed “*Application in terms of rule 43*” constitutes the notice in terms of rule 43 as contemplated in rule 43(2) and Form 17 of the First Schedule. I refer to it as “the rule 43 notice”. I refer to the Defendant’s founding statement in the rule 43 application as “the rule 43 statement”.

THE PROCEEDINGS IN TERMS OF RULE 30

The Plaintiff's notice in terms of rule 30(2)(b)

- [6] The Plaintiff served a notice in terms of rule 30(2)(b) on 8 August 2020. I refer to that notice as “the rule 30 notice”.
- [7] The Plaintiff alleged in the rule 30 notice that the rule 43 notice and the rule 43 statement “*constitute an irregularity and/or impropriety*” on three grounds. First, it was alleged that the relief claimed by the Defendant in the rule 43 application is incompetent. Second, it was alleged that the rule 43 notice does not correspond with Form 17 of the First Schedule. Third, it was alleged that the rule 43 application is inordinately prolix. I refer to these causes of complaint as “the first cause of complaint”, “the second cause of complaint” and “the third cause of complaint” respectively.

This application in terms of rule 30

- [8] The Plaintiff launched this application and seeks the following relief:

- “1. The following portion of the [Defendant's] sworn statement in support of her application in terms of Uniform Rule of Court 43 dated 27 July 2020 (“*the URC 43 application*”) are set aside and/or struck out:
 - 1.1 Paragraphs 66.5 and 66.6;
 - 1.2 The words “*after the granting of a Decree of Divorce*” in paragraph 67.1;
 - 1.3 Annexures ST3.1, ST3.2, ST3.3, ST3.4, ST3.5 and ST3.6;
 - 1.4 Annexures ST9, ST9.2 and paginated pages 8-115 to 8-117;
2. *Alternatively* to prayer 1.3 as read with 1 above, the [Defendant] is granted leave, within 10 days of any order in this regard, to:
 - 2.1 file a supplementary affidavit in which affidavit the [Defendant] shall indicate precisely which portions of Annexures ST3.1, ST3.2, ST3.3, ST3.4, ST3.5 and ST3.6 she intends relying upon, which must be relevant to the issues in dispute in the URC 43 application;
 - 2.2 replace, in the caselines bundle, said Annexures with either only the relevant extracts thereof *alternatively* versions of said Annexures with all irrelevant, repetitive, and prolix material therein contained being redacted.
3. The [Defendant] is granted leave, within 10 days from the granting of any order in this regard, to duly amend her Notice of Motion in the URC 43 application in accordance with Form 17 of the Uniform Rules of Court.
4. The [Defendant] is ordered to pay the [Plaintiff's] costs in respect of the notice in terms of URC 30(2)(b) and this application on the scale as between attorney and client.”

- [9] The Plaintiff's attorney of record, Mr Merchak, deposed to a founding affidavit in support of this application. The Plaintiff deposed to a confirmatory affidavit.
- [10] The Defendant opposes this application. Her attorney of record, Mr Nowitz, deposed to an answering affidavit. The Defendant did not depose to a confirmatory affidavit.

THE DEFENDANT'S POINT *IN LIMINE* RAISED IN RESPECT OF THE IRREGULARITIES ALLEGED IN THIS APPLICATION

[11] Mr Nowitz states in his answering affidavit that this application is fatally defective and that it should be dismissed with costs. He contends *in limine* that rule 30 –

“contemplates that an applicant should rely on his/her own Notice when launching the application pursuant thereto. It is inconceivable that the [Plaintiff] can divert from the items complained about in its Notice and rely on new facts in the application itself.”

[12] At the hearing of this application, it was submitted on behalf of the Defendant that it cannot be logical that a litigant can file a notice in terms of rule 30(2)(b) alleging certain causes of complaint and then launch an application in terms of rule 30 in which different irregularities are alleged. I agree.

[13] Counsel for the Defendant argued *in limine* that the irregularities alleged by the Plaintiff in this application differ from the causes of complaint alleged in the rule 30 notice. I now compare the irregularities alleged in this application with the causes of complaint alleged in the rule 30 notice to determine whether there is merit in this contention.

[14] The first cause of complaint, as set out in the rule 30 notice, was that the relief claimed by the Defendant in the rule 43 application is allegedly incompetent.

14.1 At paragraphs 66.5, 66.6 and 67.1 respectively of the rule 43 statement, the Defendant claims orders directing the Plaintiff to, *inter alia*, pay for the tertiary education expenses of the parties' children (“the children”), provide each of the children with a motor vehicle upon that child completing matric and pay for ancillary expenses, and pay maintenance to the Defendant after the granting of a decree of divorce.

14.2 Neither the rule 30 notice nor the founding affidavit refers by number to paragraphs 66.5, 66.6 and 67.1 of the rule 43 statement. However, the relief alleged to be the first cause of the complaint in the rule 30 notice and alleged to be the corresponding irregularity in the founding affidavit is a clear reference to paragraphs 66.5, 66.6 and 67.1 of the rule 43 statement. The latter paragraphs are referred to by number at paragraphs 1.1 and 1.2 of the notice of motion.

14.3 I am satisfied that the alleged incompetence of the relief claimed by the Defendant at paragraphs 66.5, 66.6 and 67.1 of the rule 43 statement was alleged as a cause of complaint in the rule 30 notice and is alleged as an irregularity in this application. In the result, there is no merit in the point *in limine* argued by counsel for the Defendant with regard to the first cause of complaint and the corresponding alleged irregularity.

[15] The second cause of complaint, as set out in the rule 30 notice, was that the rule 43 notice allegedly does not correspond with Form 17 of the First Schedule. This is also alleged as an irregularity in the founding affidavit and referred to at paragraph 3 of the notice of motion. I am satisfied that the alleged failure of the rule 43 notice to correspond with Form 17 of the First Schedule was alleged as a cause of complaint in the rule 30 notice and is alleged as an irregularity in this application. In the result, there is no merit in the point *in limine* argued by counsel for the Defendant with regard to the second cause of complaint and the corresponding alleged irregularity.

[16] The third cause of complaint, as set out in the rule 30 notice, was that the rule 43 application is allegedly inordinately prolix.

16.1 The cause of complaint, according to the rule 30 notice, is that –

“[t]he [rule 43] application ... is inordinately prolix as, *inter alia*, the [Defendant] has appended annexures comprising some 280 pages of which she has appended some 10 letters exchanged between the respective attorneys of record of the [Defendant] and the [Plaintiff], comprising some 73 pages, the content of which is largely irrelevant and/or repetitive.”

16.2 Paragraph 6.4 of the founding affidavit reads:

“[T]he URC 43 application is inordinately prolix as, *inter alia*, the [Defendant] has appended annexures comprising some 280 pages of which she has appended some 10 letters exchanged between the respective attorneys of record of the [Defendant] and the [Plaintiff], comprising some 73 pages, the content of which is largely irrelevant and/or repetitive.”

16.3 It would appear at first blush that the third cause of complaint, as alleged in the rule 30 notice, is the same than the irregularity alleged in the founding affidavit. However, this is not the case.

16.4 At paragraphs 9.4 and 9.5 of the founding affidavit, under the heading “*The annexing of unnecessary correspondence resulting in the URC 43 application being unduly prolix*”, Mr Merchak specifies the particulars of the irregularity alleged at paragraph 6.4 of the founding affidavit. That alleged irregularity has two prongs. First, it is alleged at paragraph 9.4 of the founding affidavit that the Defendant failed to point out precisely which portions of the letters attached to the rule 43 statement she intends relying upon in the rule 43 application. Second, it is alleged at paragraph 9.5 of the founding affidavit that the Defendant has attached more than one copy of numerous letters to the rule 43 statement. The third cause of complaint was not set out in these terms in the rule 30 notice.

16.5 I am not persuaded that the third cause of complaint, as alleged in the rule 30 notice, can be interpreted as being the same than the irregularities alleged at paragraphs 9.4 and 9.5 of the founding affidavit. I find that the irregularities

alleged at paragraphs 9.4 and 9.5 of the founding affidavit were not alleged in the rule 30 notice.

- 16.6 The point *in limine* argued by counsel for the Defendant must succeed insofar as it relates to the third cause of complaint and the corresponding alleged irregularity. I find that the Plaintiff may not rely on the alleged irregularity of which the particulars are specified at paragraphs 9.4 and 9.5 of the founding affidavit and that relates to paragraphs 1.3, 1.4 and 2 of the notice of motion. As a result, the application must fail in respect of the relief claimed at paragraphs 1.3, 1.4 and 2 of the notice of motion.

FINDINGS ON THE IRREGULARITIES ALLEGED BY THE PLAINTIFF IN RESPECT OF THE DEFENDANT'S RULE 43 APPLICATION

The first alleged irregularity: The relief claimed by the Defendant in the rule 43 application is incompetent

- [17] The first irregularity specified in the founding affidavit is that the relief claimed by the Defendant in the rule 43 application is allegedly incompetent.
- [18] Mr Merchak contends in his founding affidavit that the Defendant's claims for spousal maintenance post-divorce, payment of the costs of the children's tertiary education, the provision of motor vehicles to the children and the payment of ancillary costs are not maintenance *pendente lite*. He further contends that the Defendant's claim for the provision of motor vehicles to the children would constitute lump sum maintenance. To put the contentions on behalf of the Plaintiff in relation to the maintenance claimed by the Defendant in respect of the children into perspective, it should be mentioned that the children are presently 9 years and 7 years old respectively. Mr Merchak states, unsurprisingly, that the children do not attend any institution of tertiary education and that they have not written matric.
- [19] Mr Nowitz accepts the incompetence of the relief claimed by the Defendant in paragraphs 66.5, 66.6 and 67.1 of the rule 43 statement. I refer to that relief as "the incompetent relief". Mr Nowitz states at paragraph 21.1 of his answering affidavit that –

"certain typographical errors ... cropped up in the affidavit in support of Rule 43, but that same have been cured and the [Plaintiff's] attorney advised thereof along with what the true intention of the [Defendant] was in seeking the relief that she has."

He goes on to state, *inter alia*, as follows at paragraph 23 of his answering affidavit:

"The Notice addressed to the [Plaintiff's] attorney, ... does, with respect, cure any perceived difficulties with the relief sought by the [Defendant] in her Rule 43 Notice. It is brought to the attention of the above Honourable Court, respectfully, that a litigant is perfectly entitled to abandon relief that she may have originally sought and that is exactly what the [Defendant] did in this instance."

[20] Mr Nowitz refers to “[t]he Notice addressed to the [Plaintiff’s] attorney”. This was a document headed “[Defendant’s] response to [Plaintiff’s] notice in terms of rule 30(2)(b) dated 8 August 2020”. It was delivered by Mr Nowitz to Mr Merchak on 11 August 2020. I refer to that document as “the rule 30 response”. It reads as follows in relevant part:

“**BE PLEASED TO TAKE NOTICE** that the [Defendant] sets out below her response to the [Plaintiff’s] Notice in terms of Rule 30(2)(b) dated 8 August 2020 and served on Saturday, 8 August 2020 as follows:

1. **AD PARAGRAPHS 1 TO 1.2.1.1**

1.1 A perusal of the prayers recorded on page 16 of the Founding Statement expressly, unambiguously and clearly records that the [Defendant] prays for an order “*Pendente Lite, in the following terms*”.

1.2 Accordingly, the reference in paragraph 67.1 to “a Decree of Divorce” was a typographical error and should have stated “*after the granting of an Order in terms of a Rule 43*”. Accordingly, at the hearing of this matter, reference shall be made only to an Order in terms of Rule 43 and not a Decree of Divorce.

2. **AD PARAGRAPH 1.2.1.2 TO 1.2.4**

The relief sought in these paragraphs with reference to tertiary education and a motor vehicle and payment in respect of ancillary costs in respect thereof is hereby abandoned.”

[21] Counsel for the Plaintiff submitted that rule 30 does not provide for a response to a notice in terms of rule 30(2)(b) in the form of the rule 30 response. It seems to me that the purpose of a notice in terms of rule 30(2)(b) is to afford the party that has taken an alleged irregular step an opportunity of removing the cause of complaint. The rule does not prescribe how the cause of complaint must be removed. Different causes of complaint are removed differently. Certain causes of complaint are removed by following procedures in terms of the rules, for example the amendment of a pleading or document other than a sworn statement in terms of rule 28. Other causes of complaint are not removed by following procedures in terms of the rules because the rules do not provide for such procedures. The abandoning of relief claimed is an example of the latter type of removal of a cause of complaint. Where, as in the present instance, the cause of complaint is the incompetence of relief claimed, that complaint is removed by abandoning the relevant relief. The rules do not provide for a procedure to be followed by a party wishing to abandon relief claimed. Parties regularly abandon relief claimed, often by way of counsel informing the court thereof from the bar at the hearing of a matter.

[22] It is not in dispute that Mr Nowitz is the Defendant’s attorney of record. The Plaintiff does not contend that Mr Nowitz did not have instructions from the Defendant to serve the rule 30 response. The Plaintiff also does not dispute Mr Nowitz’s contention that the rule 30 response is the Defendant’s response to the rule 30 notice. In these circumstances, I am satisfied that the Defendant could, as she did, use the rule 30 response to abandon the relief claimed at paragraphs 66.5 and 66.6 of the rule 43 statement. This happened on 11 August 2020, about three weeks before this application was launched in September

2020. As a result, the application must fail in respect of the relief claimed at paragraph 1.1 of the notice of motion.

[23] The position is different in respect of the relief claimed by the Defendant at paragraph 67.1 of the rule 43 statement. That relief was not abandoned in the rule 30 response. It was described as “*a typographical error*” and the Defendant claims new relief in its stead. The rule 43 statement, in which the Defendant claims the incompetent relief at paragraph 67.1, was deposed to by her under oath. The only way in which the Defendant could claim new relief that would replace the incompetent relief claimed at paragraph 67.1 of the rule 43 statement was by deposing to a further statement under oath. In that statement, the Defendant would have had to identify the incompetent relief and provide an explanation of how it came about that she had claimed it. She would then have had to explain why she no longer wished to claim the incompetent relief and set out the new relief she claims in its stead. This was not done.

[24] Rule 43(1) provides as follows in relevant part:

“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*;

[25] Rule 43 provides for maintenance *pendente lite*. It does not provide for spousal maintenance post-divorce as claimed by the Defendant at paragraph 67.1 of the rule 43 statement. Consequently, the Defendant's claim for payment of maintenance to her by the Plaintiff “*after the granting of a Decree of Divorce*”, as set out at paragraph 67.1 of the rule 43 statement, is irregular.

The second alleged irregularity: The rule 43 notice does not correspond with Form 17 of the First Schedule

[26] The second irregularity specified in the founding affidavit is that the rule 43 notice allegedly does not correspond with Form 17 of the First Schedule.

[27] Rule 43(2)(a) provides as follows in relevant part:

“An applicant applying for any relief referred to in subrule (1) shall deliver ... a notice to the respondent corresponding with Form 17 of the First Schedule.”

[28] Mr Merchak contends in his founding affidavit that, contrary to the requirements of Form 17 of the First Schedule, the rule 43 notice does not detail the relief claimed by the Defendant in the rule 43 application. Mr Nowitz states in his answering affidavit that –

“[the] complaint about the format of the Rule 43 Notice ... is over-technical and on a proper reading of the affidavit, it can be seen that the prayers in the [Defendant's] founding affidavit are that which could be incorporated into the format of a Form 17.”

[29] The rule 43 notice reads:

“TO: THE ABOVE-NAMED RESPONDENT

TAKE NOTICE THAT if you intend to defend this claim, you must, within ten (10) days from date of service hereof, file a reply with the Registrar of this Court, giving an address for service as referred to in Rule 6(5)(b) of the Uniform Rules of Court, and serve a copy thereof on the Applicant’s attorney.

TAKE FURTHER NOTICE that if you do not do these things, you will automatically be barred from defending, and judgment may be given against you as claimed. Your Reply must indicate what allegations in the [Defendant’s] Statement you admit or deny, and must concisely set out your defence.”

[30] The relevant portion of Form 17 of the First Schedule reads:

“To the above-named respondent:

Take Notice that ... (the applicant herein) intends to make application to the above honourable court for the following orders:

- (1) ...
- (2) ...
- (3) ...”

[31] Rule 43(2)(a) makes plain that the notice delivered must correspond with Form 17 of the First Schedule. It is clear that Form 17 of the First Schedule provides for the applicant in an application in terms of rule 43 to set out the relief claimed. The Defendant has failed to do so. In the result, the rule 43 notice is irregular.

The third alleged irregularity: The rule 43 application is inordinately prolix

[32] The third irregularity specified in the founding affidavit is that the rule 43 application is allegedly inordinately prolix. I set out the particulars of this alleged irregularity above and found that the point *in limine* argued by counsel for the Defendant must succeed insofar as it relates to the third cause of complaint and the corresponding alleged irregularity. Even if I am wrong in that regard, I do not believe that there is merit in at least a portion of the third alleged irregularity.

[33] The Defendant attached, *inter alia*, the following annexures, to which I jointly refer as “the annexures”, to the rule 43 statement:

33.1 Annexure “ST3.1” is an email that was addressed to Mr Merchak by Mr Nowitz on 3 April 2020.

33.2 Annexure “ST3.2” is a letter that was addressed to Mr Nowitz by Mr Merchak on 15 April 2020.

33.3 Annexure “ST3.3” is a letter that was addressed to Mr Nowitz by Mr Merchak on 19 May 2020.

33.4 Annexure “ST3.4” is an email that was addressed to Mr Merchak by Mr Nowitz on 25 May 2020. This annexure is duplicated at pages 08-115 to 08-117.

33.5 Annexure “ST3.5” is a letter that was addressed to Mr Nowitz by Mr Merchak on 27 May 2020.

33.6 Annexure “ST3.6” is an email that was addressed to the Defendant by the Plaintiff on 12 July 2020.

33.7 Annexure “ST9” is a duplication of annexure “ST3.2”.

33.8 Annexure “ST9.2” is a duplication of annexure “ST3.3”.

[34] With reference to the annexures, counsel for the Plaintiff argued that the Defendant failed to point out precisely which portions of the correspondence she intends relying upon in the rule 43 application. Counsel referred me to what Zondo J, as he then was, held in *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC):¹

“The fact that the second judgment got the point about the auditor’s assurance report from an annexure to one of the affidavits and not from the respondents’ answering affidavit raises the question whether it is permissible in our law to decide a matter on the basis of a point contained in, or based on, an annexure to an affidavit but which is not covered in the relevant affidavit. The answer is No. In *Minister of Land Affairs and Agriculture v D & F Wevell Trust*² the Supreme Court of Appeal said:

‘(T)he case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. *It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein [2006 (1) SA 591 (SCA) in para 28], and the issues and averments in support of the parties’ cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.*”

[35] Counsel for the Plaintiff also referred me to what was held in *Kalisa v Chairperson, Refugee Appeal Board and Others* 2020 (4) SA 256 (WCC):³

“It is also ordinarily not appropriate to indiscriminately attach an entire rule 53 administrative record to an affidavit. The body of an affidavit should pertinently identify the materiality and relevance of every bit of documentary evidence that the deponent sees fit to attach as annexures; the reader should not be expected to undertake an unguided and possibly unprofitable perusal of the documentary attachments to an affidavit.”

¹ *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) at paragraph 171.

² *Minister of Land Affairs and Agriculture v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at paragraph 43.

³ *Kalisa v Chairperson, Refugee Appeal Board and Others* 2020 (4) SA 256 (WCC) at paragraph 44.

[36] In the rule 43 statement, the Defendant states as follows regarding the annexures:

"32. The [Plaintiff] initially attempted to deny the extent of his taxable income. I annex hereto marked annexures "ST3.1" to "ST3.5", being an exchange of correspondence with my attorneys and then directly between the [Plaintiff] and me, with [the Plaintiff] ultimately conceding that indeed he has received more than R7 million in taxable bonuses. In this regard I refer more fully to Annexure "ST3.6". [The Plaintiff] simply refuses to disclose into which accounts these payments were made and I will take issue with certain allegations contained in annexure "ST3.6". However, what is important now is the concession that he has indeed received taxable bonuses in excess of R7 million.

...

54. The said lease terminated on 31 March 2020. At this point in time the [Plaintiff] tendered to pay me monthly maintenance in an amount of only R25,857-00, as appears more fully from Annexure "ST9", and such payment was made for the month of April 2020, as appears more fully from Annexure "ST9.1" hereto. However, the [Plaintiff] unilaterally decided to further decrease this amount to R22,318-00 for the months of May and June 2020 and has not paid me any maintenance for the month of July 2020 yet, as can be seen in Annexures "ST9.2", "ST9.3" and "ST9.4", being my transaction history for these three months respectively. When the [Plaintiff] decides to make payment of maintenance, such maintenance is not only well below the lifestyle that the minor children and I were used to when living in the former matrimonial home but continues to be wholly insufficient. I had to rely on loans from the Second Lamont Family Trust for financial relief as a result of the [Plaintiff's] refusals, failure and/or neglect to properly maintain the minor children and me."

[37] Having regard to what the Defendant states in the above-quoted paragraphs, I am not persuaded that the Plaintiff is expected to undertake an unguided perusal of the annexures.

37.1 Paragraph 32 of the rule 43 statement pertinently identifies the materiality and relevance of annexures "ST3.1", "ST3.2", "ST3.3", "ST3.4", "ST3.5" and "ST3.6" as relating to the Plaintiff's alleged initial attempt *"to deny the extent of his taxable income"*, his alleged ultimate concession *"that indeed he has received more than R7 million in taxable bonuses"* and his alleged refusal *"to disclose into which accounts these payments were made"*.

37.2 The Defendant makes it clear in paragraph 54 of the rule 43 statement that annexure "ST9" is material and relevant with regard to the Plaintiff's alleged tender to pay the Defendant *"monthly maintenance in an amount of only R25,857-00"*.

37.3 The materiality and relevance of annexure "ST9.2" is pertinently identified in paragraph 54 of the rule 43 statement as relating to the Plaintiff's alleged unilateral decision *"to further decrease [the amount of R25 857] to R22,318 for the months of May and June 2020"* and his alleged failure to pay the Defendant *"any maintenance for the month of July 2020"*.

[38] The Defendant has not attached the annexures without canvassing the conclusions sought to be drawn from them in the rule 43 statement. The Defendant's allegations in

paragraphs 32 and 54 of the rule 43 statement serve as a guide to the Plaintiff in perusing these annexures. The Plaintiff is not left to trawl through the annexures and speculate on the possible relevance of their content. In the result, I find that there is no merit in the argument that the Defendant failed to point out which portions of the correspondence attached to the rule 43 statement she intends relying upon in the rule 43 application.

- [39] Counsel for the Plaintiff further pointed out that certain correspondence between the parties' respective attorneys have been duplicated as annexures to the rule 43 statement. Annexure "ST3.2" is duplicated as annexure "ST9", annexure "ST3.3" is duplicated as annexure "ST9.2", and annexure "ST3.4" is duplicated at pages 08-115 to 08-117. This forms part of the argument that the application in terms of rule 43 is inordinately prolix. The duplicated annexures consist of twenty three pages. Twenty three pages are substantial in the context of a rule 43 application. As a result I find that, if the Defendant's point *in limine* did not succeed in respect of the third irregularity, her duplication of annexures "ST3.2", "ST3.3" and "ST3.4" to the rule 43 statement would have been irregular.

Prejudice

- [40] Prejudice is a prerequisite to success in an application in terms of rule 30. (See *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–H.) The Appellate Division held as follows in *Trans-African Insurance Co. Ltd. v Maluleka* 1956 (2) SA 273 (A):⁴

"In *Foster v. Carlis and Houthakker*, 1924 T.P.D. 247, the Transvaal Provincial Division upheld on appeal the refusal of the Witwatersrand Local Division to cancel a notice of trial which was insufficient in terms of Rule 47, which is couched in peremptory terms. Mason, J.P., who gave the judgment of the Full Court, said at pp. 251-252 in reference to Rule 37,

'It seems to me impossible to construe the Rule otherwise than as conferring upon the Court the power to condone any such irregularity or impropriety'

(as is covered by the Rule)

'because the contrary view would convert the latter part of the Rule into an instruction to the Court to set aside the irregular or improper proceeding ... It seems to me, therefore, that the Court is entitled to overlook in proper cases any irregularity in procedure which does not work any substantial prejudice to the other party.'

This decision has been followed not only in the Transvaal but also in the other Provinces, where Rules similar to Rule 37 exist; ...

...

No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

⁴ *Trans-African Insurance Co. Ltd. v Maluleka* 1956 (2) SA 273 (A) at 276F–H and 278F–G.

[41] Mr Merchak claims in his founding affidavit that the Plaintiff “*will be severely prejudiced if he is obliged to answer the [application in terms of rule 43] in its current form*”. He alleges the following grounds for this claim:

- “10.1 the [Plaintiff] will be put to considerable expense dealing with an unduly prolix application, addressing repetitive and irrelevant allegations;
- 10.2 given the nature of the [Defendant’s] sworn statement as aforesaid, the [Plaintiff] will not be able to answer the URC 43 application in the nature of a plea as is required by URC 43(3);
- 10.3 the sworn reply of the [Plaintiff] will, of necessity, be lengthy, thereby attracting criticism from this Court as a result of the conduct of the [Defendant];
- 10.4 absent the [Defendant] formally and appropriately amending her relief in the URC 43 application, under oath, the [Plaintiff] runs the risk that the [Defendant] alters or disavows herself of the approach hereto as set out in the URC 30 response and persists with such relief in paragraphs 66.5, 66.6 and 67.1.”

[42] These allegations are not persuasive.

- 42.1 I don’t agree that the Plaintiff “*will be put to considerable expense dealing with an unduly prolix application*”. The Defendant pertinently identified the materiality and relevance of the annexures in the rule 43 statement. The Plaintiff is not left to trawl through the annexures, speculating on the possible relevance of their contents.
- 42.2 The Plaintiff will not “*be put to considerable expense dealing*” with the three duplicated annexures. In his sworn reply in the rule 43 application, the Plaintiff will either deal with the identified materiality and relevance of each duplicated annexure within the context of the relevant paragraph in the rule 43 statement or state that the annexure is duplicated and has already been dealt with before.
- 42.3 Mr Merchak did not explain what he meant by “*the nature of the [Defendant’s] sworn statement*”. He also did not substantiate his allegation that the Plaintiff “*will not be able to answer the URC 43 application in the nature of a plea*”. In the absence of such explanation and substantiation, I am unable to find that the Plaintiff will be prejudiced.
- 42.4 The Plaintiff did not set out a complaint relating to “*the nature of the [Defendant’s] sworn statement*” in the rule 30 notice. He also did not specify particulars of an irregularity relating to “*the nature of the [Defendant’s] sworn statement*” in this application. For the same reasons as mentioned above in respect of the point *in limine*, the Plaintiff may not rely on “*the nature of the [Defendant’s] sworn statement*” for purposes of this application.
- 42.5 In the event of the Plaintiff “*attracting criticism*” about the length of his sworn reply from the court hearing the rule 43 application, he will have an opportunity of arguing that it was “*as a result of the conduct of the [Defendant]*”.

42.6 The Defendant has abandoned the incompetent relief previously claimed at paragraphs 66.5 and 66.6 of the rule 43 statement. As far as the incompetent relief claimed at paragraph 67.1 of the rule 43 statement is concerned, the Defendant could only claim new relief in its stead by deposing to a further statement under oath. This has not been done. Thus, the Plaintiff does not run *“the risk that the [Defendant] alters or disavows herself of the approach ... as set out in the URC 30 response”*.

[43] I have found the Defendant’s claim for payment of maintenance to her by the Plaintiff *“after the granting of a Decree of Divorce”*, as set out at paragraph 67.1 of the rule 43 statement, to be irregular. I am not persuaded that this irregularity causes substantial prejudice to the Plaintiff. On the contrary, it advances the Plaintiff’s prospects in the rule 43 application. In his sworn reply in the rule 43 application, the Plaintiff will raise the incompetence of the relevant relief claimed by the Defendant and ask the court hearing that application to rule against her in respect thereof.

[44] The rule 43 notice has also been found to be irregular. This irregularity, too, does not cause substantial prejudice to the Plaintiff. The relief claimed by the Defendant in the rule 43 application is set out in detail at paragraphs 65, 66, 67 and 68 of the rule 43 statement.

[45] I have also found that, if the Defendant’s point *in limine* did not succeed in respect of the third irregularity, her duplication of annexures “ST3.2”, “ST3.3” and “ST3.4” to the rule 43 statement would have been irregular. This irregularity would not have caused substantial prejudice to the Plaintiff. As stated, the Plaintiff will, in his sworn reply in the rule 43 application, either deal with the identified materiality and relevance of each duplicated annexure within the context of the relevant paragraph in the rule 43 statement or state that the annexure is duplicated and has already been dealt with before.

[46] Besides not being persuaded that any of the irregularities causes, or would have caused, substantial prejudice to the Plaintiff, I am mindful thereof that the irregularities should not be permitted to interfere with the expeditious and, if possible, inexpensive decision of the rule 43 application on its real merits. This court has a discretion not to uphold objections to irregularities. (See: *National Union of South African Students v. Meyer, Curtis v. Meyer* 1973 (1) SA 363 (T) at 367E–G and *Uitenhage Municipality v. Uys* 1974 (3) SA 800 (E) at 803A–C.) The Appellate Division held in *Northern Assurance Co. Ltd. v. Somdaka* 1960 (1) SA 588 (A) that –

"[o]nce it is seen that the Court has a discretion, it seems to me to follow inescapably that it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity."⁵

[47] In my view, this principle is equally applicable in respect of motion proceedings. In exercising my discretion, I have had due regard to any possible prejudice to both parties. Upon balancing these, I have come to the conclusion that, in all the circumstances, the application should not succeed.

[48] In the result the following order is made:

1. The application is dismissed.
2. The Plaintiff is to pay the Defendant's costs.

This judgment is handed down electronically by uploading it on CaseLines.

L.J. du Bruyn

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date heard: 12 February 2021

Judgment delivered: 31 March 2021

For the Applicant / Plaintiff: A.A. de Wet SC

briefed by Steve Merchak Attorney

For the Respondent / Defendant: S.A. Nathan SC

briefed by Nowitz Attorneys

⁵ *Northern Assurance Co. Ltd. v. Somdaka* 1960 (1) SA 588 (A) at 595A–B.