

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 3145/2015

Date Heard: 10 August 2017

Date Delivered: 22 August 2017

In the matter between:

J. A. W.

Applicant

and

G. S. M. W.

Respondent

JUDGMENT

EKSTEEN J:

[1] The parties are engaged in protracted and acrimonious divorce proceedings. In June 2017 the applicant launched an application in terms of the provisions of rule 43 of the Uniform Rules of Court (the rules) for maintenance *pendente lite* in respect of herself and two dependent adult sons and a substantial contribution towards her costs in the litigation. The rule 43 application was met by an application launched by the respondent in terms of rule 30 of the rules to strike out the entire rule 43 application contending that the application was an irregular step. The present proceedings relate only to the rule 30 application.

Background

[2] The parties are married to one another out of community of property in terms of an ante nuptial contract which incorporates the accrual system. The respondent is

a successful businessman who has accumulated considerable wealth both locally and abroad, the bulk of which is held in various trusts.

[3] In August 2015 the applicant issued summons for divorce in which the respondent was cited as the first defendant. In addition, however, she has cited numerous further defendants being the trustees for the time being of eight different trusts which she contends are controlled by the respondent. The applicant avers in the rule 43 application that she has discovered a number of additional trusts after the commencement of the divorce proceedings and that she will be required to give consideration to joining them as further defendants in the divorce action. Finally, she contends that the respondent is the settlor of the Christim Trust and the Highway Trust which have not been joined as defendants and which have been established offshore and hold certain assets abroad.

[4] In the divorce action the applicant claims extensive maintenance. It is fair to say that her claim in respect of the division of the accrual is complex and would require considerable evidence relating to the respondent's financial affairs to be obtained and adduced. In respect of the latter claim it is alleged in the particulars of claim in the divorce action that during the course of the marriage the respondent contributed to the financing of the acquisition of trust assets and assisted in the financing of the maintenance and running costs of the trust assets through his personal estate. It is contended that he caused the trustees to acquire the assets of the trusts joined in the proceedings and in doing so he intended to retain control of such assets for his personal benefit and to treat them as if they were his own personal assets. On this basis it is alleged that during the subsistence of the

marriage, and with the tacit consent of the trustees in the various trusts, the respondent conducted the affairs of the trusts and controlled the assets ostensibly held in the name of the trusts as if such assets were his personal assets and that he has been in effective control of such assets since their acquisition. He has, so it is alleged, utilised trust assets without remuneration to the trusts and certain provisions of the Trust Property Act (57 of 1988), have been breached. On these grounds the particulars of claim contend that the assets vesting in the trusts are beneficially owned and controlled by the respondent and the transactions by which they were acquired were in fact simulated transactions which fall to be set aside so as to reflect the respondent as the true owner of the assets.

[5] It is not necessary for present purposes to consider the actual extent of the alleged assets vesting in the trusts. Suffice it to say that the rule 43 application alleges that the respondent has a personal estate of approximately R22 million whilst the assets held in the BMI Trust, the trustees of which have been joined in the divorce action, were valued in February 2016 at R857 million. The further trust joined are not alleged to hold the same degree of wealth as the BMI Trust, however, their joint value is also alleged to be in excess of R50 million.

[6] The applicant in her particulars of claim in the divorce action, seeks an order declaring that the assets acquired by the trustees of the various trusts, which the trustees ostensibly hold in their capacities as trustees, are in fact held by the respondent in his personal capacity and for his personal benefit. She accordingly seeks an order in the divorce action that in calculating the accrual of the respondent's personal estate the nett value of the assets held by the various trusts at

the time of the dissolution of the marriage is to be taken into account as forming part of the respondent's personal assets. In the event that it is found, as the applicant contends, that the respondent has insufficient assets in his personal estate to pay her share of the accrual calculated as aforesaid, she seeks an order in the divorce action that the trustees of the trusts cited in the litigation shall transfer to the respondent, in his personal capacity, at his cost, the assets held by them.

The rule 43 application

[7] In the rule 43 application the applicant seeks extensive interim maintenance including substantial sums of money, orders relating to specific expenses which the respondent is required to pay, *pendente lite*, and occupational rights to various properties in South Africa and in London. Furthermore, she sought, initially, a contribution towards her litigation costs in the amount of R900 000. (It was later increased to R1,25 million as set out below.) The formulation of the relief sought in the rule 43 application runs to ten pages and the affidavit filed in support thereof extends to thirty one pages. Thirty pages of annexures were annexed to the application.

[8] The trial in the divorce action had previously been set down for hearing on 11 October 2016. Prior to the trial date the parties' legal representatives met in an endeavour to settle the dispute between the parties. The applicant explains her understanding that a settlement of the divorce action was in fact achieved at the meeting, however, a document setting out the terms of the agreement was not prepared and signed on this occasion. Subsequent to the conclusion of the agreement, she states, the respondent reneged from the agreement and refused to

sign the deed of settlement. All of this is set out in the applicant's statement in terms of rule 43(2).

[9] At the time when the application in terms of rule 43 was launched the applicant was intent on enforcing the terms of the agreement of settlement and signified her intention to give notice of an application to amend her pleadings so as to claim specific performance of the terms of the settlement agreement. She sets out, in her statement in terms of rule 43(2), certain of the terms of the settlement agreement.

[10] After filing the rule 43 application and prior to the entry of appearance to oppose the application the applicant filed a further supplementary affidavit. It emerges from the supplementary affidavit that the applicant had been advised, that by virtue thereof that the settlement agreement contained provisions for the exchange of rights to immovable properties she could, as a matter of law, not achieve the enforcement of the settlement agreement in the absence of a written deed of settlement which the respondent refused to sign. She accordingly declares that, acting on this advice, she would be required to proceed to trial in respect of the division of the accrual which entails proof of respondent's financial affairs during the subsistence of the marriage. She persisted, however, in her stance that an agreement had in fact previously been achieved and insisted that she was entitled, as a matter of law, to refer to the agreement concluded and the terms thereof. I shall revert to this issue below.

[11] The supplementary affidavit runs to nine pages and is accompanied by an amended “Notice of Motion in terms of Rule 43” which again runs to ten pages and which is largely identical to the original relief claimed, save that the contribution towards costs is increased to R1 250 000. Further annexures extending to four pages were also annexed to the supplementary affidavit. The rule 43 application accordingly runs to ninety four pages in total.

The objection

[12] I have recorded earlier that the rule 43 application was met with the present proceedings in terms of rule 30 of the rules.

[13] In the present proceedings the respondent contends that the rule 43 application should be struck out in its entirety as constituting an irregular step as envisaged in the provisions of rule 30(1). The objection is founded on two grounds. Primarily it is contended that the affidavit and supplementary affidavit filed by the applicant, with annexures thereto, do not comply with the provisions of rule 43 in that:

1. They are unduly voluminous and are not in the form of a declaration, as is required by rule 43(2);
2. they burden the applicant with the duty to respond thereto, which would involve lengthy and expensive consultations and would result in the respondent being unable to comply with rule 43(3), to which I revert below;
3. the applicant has delivered a supplementary affidavit to her founding affidavit, which is not permitted by rule 43, in the absence of an order of this court allowing it to be filed. Such an order has not been sought or obtained.

[14] The second ground for the objection is that the founding and supplementary affidavits filed contain material which is “scandalous, alternatively, vexatious, further alternatively, irrelevant as they:

1. Refer to oral and written settlement negotiations and proposals, which were conducted and made on a “without prejudice” basis, despite the fact that the applicant, on her version, concedes that these negotiations and/or proposals did not result in a settlement being achieved between the parties. The applicant is precluded from referring to the negotiations and/or proposals as they remain privileged and the respondent has not waived this privilege;
2. Contain material which is essentially a paraphrasing of a forensic report obtained by the applicant and, which:
 - 2.1 Is irrelevant to the questions of interim maintenance and a contribution to costs; and
 - 2.2 is designed, rather, to extract a response from the respondent, on oath, to allegations which are relevant only in the main action, but are irrelevant to the application in terms of rule 43.

[15] It is not contentious that rule 43 provides a remedy by which a party in pending matrimonial disputes may claim, *inter alia*, maintenance *pendente lite* and a contribution to the costs of the pending matrimonial action. Rule 43 affords to the parties a procedure intended to be quick and inexpensive. To this end rule 43(2) provides that the applicant, “shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefore”. Rule 43(3)

provides that a respondent “shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea”. No replying affidavits are permitted as of right. It has been held that rule 43 proceedings should be self-contained so that it is not necessary for the court to search for and peruse the file of papers relating to the main action (see **Carstens v Carstens** 1985 (2) SA 351 (SE) at 352E). There is, however, no reason why a party should be prevented from referring to the pleadings in the divorce action (see **Dodo v Dodo** 1990 (2) SA 77 (W) at 89H).

[16] In **Micklem v Micklem** 1988 (3) SA 259 (C) Van den Heever J summarised the principles applicable to rule 43 applications. To the extent that these principles find application to the present matter Van den Heever J stated at 262A-263A:

“1. Wealth is an undoubted advantage in litigating, in that a litigant with means can obtain the services of experts which may not be available to someone with a more modest purse. No authority was quoted, and I would be astonished to discover that any existed, that a man of means is entitled to rewrite the rules to suit his own convenience and still less that he should be obliged to permit his opposition to do so, even if she is his wife.

2. Rule 43(2) sets out the type of affidavits that should be put before the Court. The cases are clear that unduly lengthy affidavits and annexures, that would not in the normal course be annexed to be a pleading, may amount to an abuse of the process of the Court. The aim of Rule 43 is to conserve the parties' energies for the trial itself and provide speedy and inexpensive *interim* relief - even for millionaire spouses.

3. ...

4. ...

5. The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs (*Grasso v Grasso* 1987 (1) SA 48 (C) at 59G - H). What she is entitled to, is to maintain the standard of living to which she was accustomed, not to increase that.

6. A wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the Court nor all costs incurred to date. In a matter such as the present, this may clash with the 'paramount consideration' that she should be enabled 'adequately to place her case before the Court' (*Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 638 - 9) in which the question of essential disbursements is a material factor. And what are *essential* disbursements is adjudged against the background of (a) the depth of his purse and (b) his own scale of litigation. (*Glazer v Glazer* 1959 (3) SA 928 (W).)"

[17] What clearly emerges from the authorities is that lengthy affidavits which frustrate the objects of the rule to decide applications thereon as expeditiously and inexpensively as possible may, for that reason, amount to an abuse of process and may, result in no order being made. (See for example, **Micklem v Micklem** *supra*; **Visser v Visser** 1992 (4) SA 530 (SE) at 531D; **Patmore v Patmore** 1997 (4) SA 785 (W) at 788D; and **Du Preez v Du Preez** 2009 (6) SA 28 (T) at 33B.) (Compare also **Zoutendijk v Zoutendijk** 1975 (3) SA 490 (T) at 492C in respect of the form of the affidavit envisaged.) The courts will generally hold the parties to the rule and would not readily entertain applications which clearly do not conform to the requirements of rule 43.

[18] The rule is, however, not absolute. Rule 27(3) of the rules provides for a court, on good cause shown, to condone any non-compliance with the rules. In **Dodo v Dodo** *supra* Wulfsohn AJ remarked in the context of rule 43, that there should be no reason why special circumstances may not justify a deviation from the norm. This is clearly correct. Each case must be decided on its own facts. The length of the affidavit, in itself, is not decisive of the issue. Where the circumstances of the case and the interests of justice dictate that lengthier affidavits are necessary

in order to adequately set out the grounds for the relief claimed the courts will be slow to penalise a litigant who merely seeks to make out a case for the amount required to be able adequately to place her case before the court.

[19] The applicant avers in the rule 43 application that she is obliged to make reference to documents (annexures to the rule 43(2) affidavit) and to explain in some detail what she knows about the financial affairs of the respondent in order to properly enable the court to come to a just and expeditious determination in terms of rule 43. To the extent that the application may appear to be prolix she avers that it is an unavoidable consequence of the complexity of the matter and the manner in which the respondent has sought to protect and control his financial affairs.

First ground of objection

[20] Mr **Buchanan SC** who appears together with **Mr Ronassen SC**, on behalf of the respondent argues that the initial affidavit filed in the rule 43 application contains unnecessary detail which could have been formulated with greater brevity. There may be some merit in this suggestion, however, I consider that some latitude must be provided and, although the courts would not permit a litigant to abuse the opportunity, she ought to be given a fair opportunity to set out the grounds for the relief which she seeks with sufficient clarity to enable the court to come to a fair conclusion thereon.

[21] The maintenance relief sought in the rule 43 application currently under consideration could hardly be described as being typical. The applicant claims a monetary contribution of R47 000 per month, *pendente lite* and payment of a number

of additional expenses in respect of herself and the two boys born of the marriage. She seeks rights of occupation to the matrimonial home and use rights to property in London and a contribution towards vacation expenses in the amount of R200 000 per annum for herself and the boys.

[22] The parties in the present matter have lived a luxurious lifestyle with homes in Grahamstown, Port Elizabeth, Cape Town and London. They travelled abroad on a regular basis. They have driven expensive motor vehicles. In order for the applicant herein to set out the grounds for her extensive claims for interim maintenance she must be afforded the opportunity to provide sufficient particularity of the lifestyle of the parties during the marriage, her own financial means and the ability of the respondent to pay the amounts claimed. By virtue of the facts of the present matter I consider that this necessarily requires more detail than would be justified in the vast majority of cases which the courts ordinarily encounter.

[23] On behalf of the respondent it is contended that the ten pages taken up to set out the relief claimed (ten pages being the extent of the notice of motion) is in itself excessive. It is contended that some of the relief claimed, for example occupation rights to various properties other than the primary residence of the applicant, is inappropriate in rule 43 proceedings. The form of the notice of motion too is not in accordance with form 17 of the first schedule to the rules, as prescribed in rule 43. Rule 20(2) of the rules dictates the form of the sworn statement required by rule 43. It requires of a litigant to set out the nature of the claim, the conclusions of law which he is entitled to draw from the facts stated therein and a prayer for relief which he claims. It is for the court hearing the rule 43 application to determine whether the

relief which is sought is appropriate in the circumstances. Rule 30 is not an appropriate procedure to challenge the appropriateness of the relief. It is true that the notice of motion filed is not strictly in accordance with the form prescribed by rule 43, however, I can conceive of no prejudice to the respondent which arises from the form of the notice of motion. Had the relief claimed not been set out in the notice of motion the applicant would have had to set out the relief which she claims in the same format in the body of the affidavit filed.

[24] It cannot be gainsaid that the extent of the contribution towards costs claimed is indeed extraordinary. This is clearly occasioned by the nature of the relief sought in the divorce action, in particular in respect of the financial affairs of various trusts. I cannot at this stage determine the merits of the claims in the divorce action, however, it is abundantly clear from the nature thereof that very extensive evidence would have to be obtained and an analysis carried out by appropriate experts relating to the financial affairs and commercial transactions of the respondent and the various trusts which have been joined and which may yet be joined. This would require forensic investigations both locally and abroad. The alleged value of the various trusts and of the respondent's estate provide some indication of the probable extent of these investigations. Annexed to the rule 43 application are two organograms depicting the structures of the local and offshore trusts involved. The complexity of the structure is readily apparent from the organograms.

[25] In **Dodo's** case, *supra*, Wulfsohn AJ held at 99D-E:

"Because of the luxuriousness of the respondent's scale of litigating with the applicant, his wealth, the potentially enormous capital sum or value which the

applicant may gain in the trial, the extensive scope of the preparation needed for the trial, the scale on which she desires to litigate and the fact that each party has engaged senior and junior counsel for the trial, it is clear that the present application for the contribution towards costs is distinguishable from the far more usual class of case wherein a contribution of a few thousand rand would normally be adequate.”

[26] Each one of the considerations which moved Wulfsohn AJ to hold the case to be a special case finds application in this case, save that in this case each party has engaged two senior counsel. For these reasons I am persuaded that the present matter is an exceptional matter as envisaged in **Dodo’s** case, *supra*, which justifies a deviation from the norm set out in rule 43. I am not persuaded, on the facts of this case, that the volume of the papers and the degree of detail contained therein necessarily constitutes an abuse of the process which would justify an order under rule 30. I find accordingly that on the facts of the present case the papers are not unduly prolix.

[27] The respondent’s objection attacks the procedure followed by the applicant in filing the supplementary affidavit without earlier obtaining the consent of the court to do so. Reliance was placed in argument in support of this contention on the judgment of **Verster v Verster** 1975 (3) SA 493 (W) at 494C. In **Verster** the court was not concerned with a supplementary affidavit but with affidavits attested to by third parties, who were not parties to the divorce proceedings. Rule 43(5) provides that a court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision. In **Verster**, it was held that it was not open to an applicant under rule 43 to file, as annexures, affidavits by third parties and that the appropriate procedure

would be to approach the court to hear the evidence of third parties as envisaged in rule 43(5).

[28] The present matter, I think, is to be distinguished on the facts from the matter in **Verster**. The rule nevertheless does not authorise an applicant, as of right, to proceed to file a supplementary affidavit under rule 43, even in circumstances where the respondent had not yet filed an intention to oppose. In this instance, however, the applicant was alive to the strictures imposed by rule 43. In her supplementary affidavit she explains the change of stance leading to the amendment to the claim for a contribution towards costs and she states that it is necessary for her to seek the amendment in order to provide cover for the additional fees and disbursements which would now become reasonably necessary to be incurred and she seeks the condonation of the court in regard to the supplementary affidavit.

[29] It is true that the applicant did not, prior to filing the supplementary affidavit, seek the leave of the court. In my view, the procedure adopted by the applicant did not constitute a peremption to her right to ask the court hearing the rule 43 application that regard should be had to the supplementary affidavit. The court should always take into account the true intention of the fairness of the rules of court and the realities of the situation (compare: **Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others** 2012 (5) SA 267 (GSJ) at 272 and the authorities referred to therein). The procedure envisaged in rule 43, as set out earlier, is to obtain an expeditious and inexpensive resolution to interim disputes *pendente lite*. To require of a litigant who is already in financial straits to incur the costs of launching a separate application for

leave to file a supplementary affidavit in circumstances where such an affidavit may be justified, or of withdrawing the rule 43 application and filing a fresh application repeating everything which had been covered in the initial application may serve only to undermine the objects of rule 43. To dismiss the rule 43 application as an irregular step would escalate the costs to the parties, cause a delay in the decision of the disputes in the rule 43 application and give rise to an inevitable further delay in the finalisation of the divorce action. In the circumstances I consider that the procedure adopted in this instance to seek condonation for the filing of the supplementary affidavit in the rule 43 proceedings is permissible.

[30] Finally, the respondent contends that the rule 43 application should be struck out on the ground that the volume of the papers filed would burden the respondent with the duty to respond thereto which would involve lengthy and expensive consultations and which would result in the respondent being unable to comply with these obligations in terms of rule 43(3). In this regard I was referred to the decision in **Zoutendijk** *supra* where Nicholas J, as he then was, concluded, after finding that an answering affidavit filed in rule 43 proceedings was unduly prolix, that it would be wrong, in the circumstances of that case, to burden the applicant with the duty of replying to ninety pages of affidavits which would involve lengthy and expensive consultations. During argument before me it was sought to elevate this conclusion to a principle of law. That would not be justified. If once it is found, as I have, that the circumstances of the case justify the volume of the papers and necessitate the detail of the averments made, the inevitable consequence is that it is necessary for the respondent to respond thereto. I am unable to uphold the argument that the respondent would be precluded from complying with the provisions of rule 43(3), by

virtue thereof. Experience has shown that it is not extraordinary in litigation involving significant amounts of money for a “declaration” or “particulars of claim” to exceed the length of the papers in the present rule 43 application. That in itself does not preclude a defendant from pleading thereto.

[31] In these circumstances the first ground of objection cannot be upheld.

Second ground of objection

[32] The second ground of objection proceeds on the basis that allegations made in respect of the conclusion of the settlement agreement and material set out in the rule 43 affidavit which is taken from the forensic report obtained by the applicant are scandalous, vexatious or irrelevant.

[33] In respect of the settlement agreement there is some dispute between the parties as to whether a “settlement agreement” was in fact achieved and whether the references in the rule 43 affidavit relate to the terms of an agreement or to proposals made in the course of negotiations. It is not necessary for me at this stage to address this dispute. I shall accept for purposes hereof, without making any finding in that regard, that a settlement agreement was not achieved and that the references thereto are therefore privileged and irrelevant.

[34] It is trite that averments contained in affidavits which are scandalous, vexatious or irrelevant may be struck out. At common law other inadmissible evidence contained in affidavits may similarly be struck out. The procedure for doing so is set out in rule 6(15) of the rules of court. It would usually require a notice of motion to be filed and for the application to strike out to be heard simultaneously with

the main application. By virtue of the very purpose of rule 43 it has been held that the provisions of rule 6(15) do not apply in rule 43 proceedings. To hold otherwise would simply undermine the objectives of the rule in seeking to achieve an expeditious and inexpensive resolution of the interim dispute between the parties. In **Andrade v Andrade** 1982 (4) SA 854 (O) Erasmus J held at 856D-F:

“The short period of seven days which is allowed and within which a respondent must reply to the application (in terms of rule 43) indicates that applications to strike out were not contemplated by the Rulemaker. There seems to be no good reason why a party who wishes to strike out irrelevant and unnecessary matter in an application or a replying affidavit under the Rule should not object to it in his argument before the Court and ask for a special order as to costs on the application no matter what the result might be on the merits. An aggrieved party may also ask the Court that his opponent be ordered to pay for the costs thus unnecessarily incurred by inadmissible redundant paragraphs and annexures.”

I agree with these sentiments. Whatever the appropriate procedure may be the right of a litigant who is aggrieved by the inclusion of such matter in affidavits is to apply to strike out the offending allegations, not to set aside the process. Rule 30 is not an appropriate procedure by which to attack scandalous, vexatious or irrelevant matter contained in affidavits.

[35] It has been suggested that the procedure under rule 30 is appropriate only for irregularities of form rather than matters of substance. (See for example **Singh v Vorkel** 1947 (3) SA 400 (C) at 406C; **Pyramid Jewellers v South British Insurance Co. Ltd** 1953 (4) SA 24 (N); and *Herbstein and Van Winsen: The Civil Practice of the High Court of South Africa* (5th ed) vol 1 p. 740.) I am alive to the fact that it has also more recently been held that any irregular proceeding may be

attacked under rule 30 and where there is a defect going to the root of the matter in issue there is no reason why the court should be precluded from dealing with the matter under rule 30. (Compare **Deputy Minister of Tribal Authorities and Another v Kekana** 1983 (3) SA 492 (B).) I consider that the view expressed in the earlier cases is to be preferred. In any event, even if I err in this finding, the inclusion of averments which may be scandalous, vexatious or irrelevant is not a defect going to the root of the matter. For these reasons the second objection too must fail.

Costs

[36] Finally there remains the question of costs occasioned by the application. Mr **Fitzgerald SC**, who appeared together with Ms **Dicker SC** seek an order that the respondent pay the costs occasioned by the application, including the cost of two senior counsel. Mr **Buchanan** did not expressly resist this order during argument. I have recorded earlier that the respondent himself has engaged two senior counsel. On a consideration of the luxurious scale of litigation in which both parties have engaged and the potentially enormous capital amounts of money in dispute in the divorce proceedings the request is not an unreasonable one.

[37] In the result, the application to dismiss the rule 43 application as an irregular step is dismissed with costs, such costs to include the cost of two senior counsel, where employed.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv M J Fitzgerald SC and Adv T A Dicker SC instructed by
Catto Neethling Wiid Inc, Cape Town c/o Greyvensteins
Attorneys, Port Elizabeth

For Respondent: Adv R G Buchanan SC and Adv O Ronassen SC instructed by
Miller du Toit Cloete Inc, Cape Town c/o Lexicon Attorneys, Port
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