

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1246/2021

Date Heard: 22 June 2021

Date Delivered: 29 June 2021

In the matter between:

MONIQUE KNICKELBEIN

Applicant

and

DEON KNICKELBEIN

Respondent

JUDGMENT

EKSTEEN J:

[1] The parties are married to one another and there are two minor children born of their union. They are currently embroiled in divorce proceedings in the Regional Court, Port Elizabeth. In the course of this process the applicant launched an application for interim relief *pendente lite* in terms of Rule 58 of the Magistrate's Courts Rules (the Rule 58 application).¹

¹ Rule 58 of the Magistrate's Courts Rules is identical in all material respects to Rule 43 of the Uniform Rules of Court in the High Courts. Rule 58(1) of the Magistrate's Courts Rules provides:

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

- (a) interim maintenance;
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim care of any child; or
- (d) interim contact with any child."

[2] In the Rule 58 application the applicant sought an order:

- "1.1 That the Applicant be granted primary care of the two minor children born of the marriage, from date of order, to the date that a decree of divorce is granted, subject to the Respondent's right to reasonable supervised access;
- 1.2 That the Respondent be ordered to pay interim maintenance in the sum of R50,000.00 for the Applicant and the two minor children;
- 2.1 That the Respondent pay relocation costs in the sum of R200,000.00;
- 2.2 That the Respondent contributes R300,000.00 for the Applicant's legal expenses and disbursements."

[3] On 29 March 2021 the magistrate dismissed the Rule 58 application, however, she provided no reasons for her ruling. Subsequent to these events, on 2 May 2021, the parties concluded an agreement in respect of the care of and contact with the children, to which they have referred as a "parenting plan". Notwithstanding the conclusion of this agreement, on 12 May 2021, the applicant commenced these proceedings, purportedly in terms of Rule 43 of the Uniform Rules of Court in the high court (the Rule 43 application). In the Rule 43 application she claims the same monetary relief which she had sought in the Rule 58 application, together with an order that the "parenting plan" be made an order of court. The proceedings are opposed.

[4] Mr Friedman, who appeared on behalf of the applicant, contended that the high court is entitled to decide the issues in this matter in terms of Rule 43. In the alternative, he argued that I should exercise my inherent jurisdiction to come to the assistance of the applicant, because, so the argument went, the magistrate, having dismissed the Rule 58

application, was *functus officio* and that there was no right of appeal against her order. Accordingly, the applicant would be remediless.

[5] Rule 58 is identical, in all material respects, to Rule 43. The former finds application in proceedings pending in the magistrate's court whilst the latter is concerned with proceedings pending in the high court. In *SW*² this Court held:

"[12] ... 'The court' before which the procedure may be invoked is that court before which the main action is pending. A 'court' is defined in the rules to mean a court constituted in terms of s 13 of the Supreme Court Act 59 of 1959. Although the rules have not been amended, the definition must be read to refer to the equivalent section in the Superior Courts Act 10 of 2013, namely s 14, which is to all intents and purposes identical in its terms to the erstwhile s 13, save that it utilises the changed names of the courts and refers to the High Court.

[13] A reading of rule 43 in the light of the relevant provisions of the Superior Courts Act indicates that the procedure provided by the rule may only be invoked before the court in which the main *lis* in the divorce action is pending."

[6] These findings are decisive of the first argument advanced on behalf of the applicant. The high court does not have jurisdiction in terms of Rule 43 to decide interlocutory applications in respect of matters pending in the regional court. As a single judge, in the same court, I am bound by the decision in *SW* unless I am satisfied that it is clearly wrong. I am not so persuaded, on the contrary, the reasoning therein seems to me to be sound.³

² *SW v SW and Another* 2015 (6) SA 300 (ECP) at para [12] and [13]

³ See *Green v Green* 1987 (3) SA 131 (SECLD) at 134B-C

[7] I turn to consider the second argument advanced. In *Green* Jones J stated:

"Reference has already been made in *Venter's* case *supra* to the possibility of a Court making an interim custody award in these circumstances where this is urgently required in the best interests of the child. In appropriate circumstances the reasoning in *Massey's* case may justify a Court in exercising jurisdiction in preliminary matters though the main action is pending elsewhere. But in the ordinary course authority and common sense dictate that a claim which is *pendente lite* should be tried in the Court in which the *lis* itself is to be tried."⁴

[8] In *SW* Goosen J considered these remarks in *Green* and the cases referred to therein. He concluded that where a court does exercise its inherent jurisdiction it does not, in matrimonial matters, do so on the basis of the provisions of Rule 43. Rule 43, he concluded, regulates the procedure in matrimonial matters by which the court exercises its jurisdiction to make appropriate orders *pendente lite* in relation to matters pending before it. The jurisdiction referred to in *Green* is therefore not jurisdiction by virtue of the divorce action pending. It is an aspect of the inherent jurisdiction to protect the interest of minor children.⁵

[9] I align myself with the conclusions reached in *Green* and *SW*. The application in terms of Rule 43 was misconceived. Mr Friedman, however, argued that even if the application was misconceived I should, as upper guardian of minor children, exercise my inherent jurisdiction in any event. There is no merit in this submission. The minor children are currently resident with the applicant and her mother. As I have said, a parenting plan

⁴ At 134D

⁵ *SW* para [19]

has been agreed upon and is in operation. There is no evidence of any immediate threat to the welfare of the minor children. Applicant has not made out a case for the exercise of my inherent jurisdiction on these grounds.

[10] That brings me to the alleged motivation for the Rule 43 proceedings. As adumbrated earlier, there is no right of appeal against an order made in terms of Rule 58 and it was argued that the magistrate is *functus officio*. On the papers in this Court the applicant contends that the magistrate had considered it inappropriate for her to seek relief in terms of Rule 58 and had taken the position that the applicant's remedy lies in the domestic violence and maintenance courts. She accordingly declined to consider the application on its merits. Assuming, for purposes of this judgment, that these accounts correctly reflect the position, the magistrate clearly erred. The relief sought falls squarely within the ambit of Rule 58 and she was obliged to consider the application on its merits.

[11] The contention on behalf of the applicant that she is left without any remedy in the face of a decision which she considers to be incorrect is, however, fallacious. The argument misconstrues the nature of proceedings in terms of Rule 58. In *South Cape Corporation*⁶ Corbett JA summarised the general effect of a line of cases dealing with interlocutory orders. The material portion of the summary, as set out in *The Civil Practice of the High Court of South Africa*⁷ records:

⁶ *South Cape Corporation Pty Ltd v Engineering and Management Services* 1977 (3) SA 534 (A)

⁷ *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5th ed) at 913-914

- (a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper".
- (b) ...
- (c) The general test as to whether an order is a simple interlocutory one or not was stated by SCHREINER, J.A., in the *Pretoria Garrison Institutes* case⁸, *supra*, as follows :
 "... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'."
- (d) If an order when given effect to or executed bears directly upon and in that way affects the decision in the main suit it is not a purely (or simple) interlocutory order.
- (e) At common law a purely (or simple) interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.

[12] What emerges from this summary is that the general rule that a court may not alter its own judgment does not apply to simple interlocutory orders which are susceptible to variation.⁹ Such orders are open to reconsideration, variation or rescission on good cause shown.¹⁰ Our courts have exercised the power to vary simple interlocutory orders when the facts on which the orders are based have changed¹¹ or where orders were based on an incorrect interpretation of a statute which only became apparent later.¹² In *Zondi*,¹³

⁸ 1948 (1) SA 839 (AD) at 870

⁹ *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E-F

¹⁰ *South Cape Corporation* at 550; *Duncan NO* at 3; and *Zondi v MEC, Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC)

¹¹ See Rule 58(6)

¹² *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA); *Meyer v Meyer* 1948 (1) SA 484 (T)

¹³ At para [30]

Ngcobo J held that the rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.

[13] In this matter it was the applicant's contention, as I have explained, that the magistrate misconstrued the provisions of Rule 58 and considered that the applicant's relief lay in the family violence courts and the maintenance courts. If this is correct, she was clearly wrong. An order in terms of Rule 58 has no bearing on the decision in the main suit and is undoubtedly a simple interlocutory order which may be revisited at any time, either by the magistrate who originally made the order, or by any other magistrate sitting in the same court and exercising the same jurisdiction.¹⁴ If an order was made based on an incorrect interpretation of Rule 58 I can conceive of no reason in logic or in law why the application could not be re-enrolled, or a fresh application made, and the decision reconsidered. The magistrate is not *functus officio* and the applicant is not without remedy.

[14] I am alive to the costs implications which flow from the conclusion to which I have come and I have given careful consideration to referring the Rule 43 application to the magistrate for adjudication on its merits. However, for the reasons which are set out hereafter, I consider that it would be inappropriate to do so. Rule 43 (and Rule 58) contemplate a speedy and cost-effective resolution of disputes relating to the subject matter set out in these rules. The rules require that an applicant is to deliver a sworn

¹⁴ Sandell at 634D

statement, in the nature of a declaration, setting out the relief claimed and the grounds therefore. It requires of a respondent thereafter to deliver a sworn reply, in the nature of a plea. What is envisaged is a concise statement of the essential facts relied upon so as to enable the court to determine the issues expeditiously. Lengthy affidavits could serve only to obstruct the purpose of the rule which is to decide applications thereunder as inexpensively and quickly as possible. Prolixity has been held to be an abuse of the process of court.¹⁵ In *Visser Kroon J*, sitting in this Court, observed¹⁶:

"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 that discouragement will commence."

[15] The tendency has re-emerged. The applicant, purporting to approach this Court in terms of Rule 43, filed papers comprising 54 pages with a lengthy affidavit, including numerous aspects which were entirely unnecessary and irrelevant to the issues to which Rule 43 relate. The respondent, apparently enthused by the applicant's disregard for Rule 43, responded in like manner with papers comprising 90 pages. To add insult to injury, when the application was heard, the applicant sought leave to file a further 42 pages in reply to the respondent's statement.

¹⁵ *Maree v Maree* 1972 (1) SA 261 (O) at 263H; *Smit v Smit* 1978 (2) SA 720 (W) at 722G; *Niehaber v Niehaber* 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)

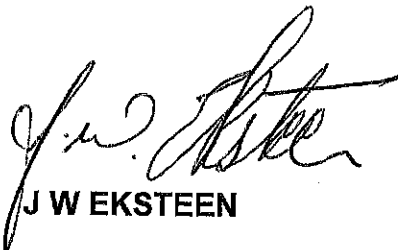
¹⁶ At 531D

[16] I do not suggest that the rule does not permit of exceptions in extraordinary cases, however, this is not such a case. As I have said the papers contain numerous allegations which have no bearing on the relief sought in terms of Rule 43. The application is, in my view, an abuse of the process because it defeats the very purpose of the rule, which is to arrive at an inexpensive and expeditious, interim resolution of disputes.¹⁷ In the circumstances I consider it inappropriate to refer the current application to the magistrate for determination.

[17] That brings me to the issue of costs. Both parties were represented by attorneys of some experience and were equally guilty in their disregard for the rules. In my view the litigants should not be penalized for the abuse of the process by their legal representatives. In the circumstances it would be appropriate to order that neither parties' legal representatives may recover any costs from their respective clients in respect of the drafting, preparation or presentation of the application.

[18] In the result, I make the following order:

1. The application is dismissed.
2. Neither parties' attorney may recover any costs from their respective clients in respect of the drafting, preparation or presentation of the application.



J W EKSTEEN

JUDGE OF THE HIGH COURT

¹⁷ Smit at 722G

Appearances:

For Applicant: Mr Friedman instructed by Friedman Scheckter, Gqeberha

For Respondent: Mr Laubscher instructed by Stuart Laubscher Inc Attorneys,
Gqeberha