

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 5 August 2021

Case No: 2021/13610

In the matter between:

F[....] I[....]

Applicant

and

A[....] P[....]

Respondent

REASONS FOR ORDER DATED 4 AUGUST 2021

WILSON AJ:

- 1 This application under Rule 43 for maintenance *pendente lite*, a contribution to costs and an order regulating custody of, and access to, the parties' minor child came before me on 4 August 2021. I decided a number of preliminary points. Based on my disposition of those points, the parties agreed that the

matter should postpone *sine die* on the terms set out at the end of these reasons.

2 The preliminary points were as follows –

2.1 whether the applicant (“Ms. I[....]”) had ensured that the respondent (“Mr. P[....]”) had been given ten days’ notice of the hearing of the matter, as required in terms of Rule 43 (4);

2.2 whether a supplementary affidavit sought to be introduced by Ms. I[....] should be admitted;

2.3 whether Rule 43 applies to the parties at all, given that, so it was contended for Mr. P[....], the parties are not “spouses”, because their marriage, concluded in terms of Islamic law, had been dissolved before the decision of the Supreme Court of Appeal in *President of the Republic of South Africa v Women’s Legal Centre Trust* 2021 (2) SA 381 (SCA) (“*Women’s Legal Centre Trust*”), and the main action had not been instituted until after that decision was handed down; and

2.4 whether the respondent ought to be ordered to make financial disclosure in terms of the decision of this court in *E v E* 2019 (5) SA 566 (GJ) (“*E v E*”).

3 I address each of these points in turn.

Non-compliance with Rule 43 (4)

- 4 Rule 43 (4) requires that a respondent be afforded ten days' notice of any hearing of an application in terms of Rule 43 (1). In this case, the respondent was given notice of the enrolment of the application on 23 July 2021. The matter was enrolled for 3 August 2021, three court days less than required by Rule 43 (4). Ms. Ternent, who appeared for Ms. I[...], conceded the short notice, but submitted that there had been no prejudice to Mr. P[...]. Ms. Segal, who appeared for Mr. P[...], conceded that there had been no prejudice, and accepted that I had the discretion to condone the non-compliance with Rule 43 (4).
- 5 Given the slightness of the short notice, and the absence of prejudice, I condoned the non-compliance with Rule 43 (4).

The supplementary affidavit

- 6 Ms. Ternent sought leave to introduce a supplementary affidavit on Ms. I[...]'s behalf. The content of the affidavit was mostly a commentary on some of the allegations in Mr. P[...]'s sworn replying statement, and some legal submissions. The only new fact was an allegation about the termination of a cell phone contract, the relevance of which I struggled to ascertain. While I accept Ms. Ternent's submission that there may be circumstances in which a further affidavit, beyond those permitted in terms of Rule 43 (2) and (3), ought to be received, I did not agree that those circumstances were present in this case.
- 7 Ms. Ternent's submissions that a supplementary affidavit ought to be allowed to enable an applicant to deal with misleading or inadequate financial disclosure in the sworn replying statement carried some weight. But

the problem in this case is that Mr. P[...] has not yet made the disclosures required by the Rule, read with the *E v E* decision. If, in light of those disclosures, when they are made, Ms. I[...] is advised to seek leave to file a supplementary affidavit, the court hearing the merits of the application will be free, if it chooses, to admit that affidavit.

- 8 Accordingly, the effect of my refusal to admit the supplementary affidavit tendered before me is not, as Ms. Segal submitted, to disbar Ms. I[...] from seeking leave to file a supplementary affidavit at a later stage. Whether such an application will be made, and what its merits will be, are issues for another court to decide.

Does Rule 43 apply?

- 9 The parties were married in terms of Islamic law. The marriage subsisted for almost 24 years. It was entered into by way of a “nikah”, which is a written agreement commencing a marriage known to Islamic law, on 1 June 1996. It was dissolved on 19 January 2020, by way of a “khula”, which is effectively an annulment agreement in terms of Islamic law. Ms. I[...] instituted an action in terms of the Divorce Act 70 of 1979 on 17 March 2021.
- 10 Ms. Segal submitted that, because the marriage did not subsist at the time the action in terms of the Divorce Act was instituted, the parties were not “spouses” for the purposes of Rule 43, and Rule 43 accordingly does not apply.
- 11 Ms. Segal amplified her submission by reference to the decision of the Supreme Court of Appeal in *Women’s Legal Centre Trust*. In that matter, the

Supreme Court of Appeal declared various sections of the Divorce Act unconstitutional because the Act fails to provide recognition to marriages concluded under Islamic law. It suspended its declaration of invalidity, and granted interim relief requiring the Divorce Act to be read to apply to “a union, validly concluded as a marriage in terms of Sharia law and subsisting at the date of this order, or, which has been terminated in terms of Sharia law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order”. This interim arrangement is intended to last until the Divorce Act is amended by Parliament.

- 12 *Women’s Legal Centre Trust* was decided on 18 December 2020. Ms. Segal submitted that, because the interim relief provided for in *Women’s Legal Centre Trust* does not, on its face, permit the parties’ Islamic marriage to be dealt with in terms of the Divorce Act, the main action is not a divorce action, and Ms. I[...] is not a “spouse” seeking matrimonial relief for the purposes of Rule 43 (1).
- 13 There was some debate about whether the interim relief granted in *Women’s Legal Centre Trust* does in fact exclude the parties’ Islamic marriage from its ambit. But that is not an issue that I need to decide.
- 14 Ms. Segal’s submission loses sight of the plain text of section 167 (5) of the Constitution, 1996. Section 167 (5) states that “[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of

invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force”.

15 The Supreme Court of Appeal’s decision in *Women’s Legal Centre Trust* has been referred to the Constitutional Court, which is yet to pronounce on the matter. Unless and until it does so, the Supreme Court of Appeal’s order of invalidity, of which the interim relief is a mere incident, has no force or effect.

16 Ms. Segal submitted that the mere fact that the matter is before the Constitutional Court makes no difference to the inquiry. I must determine the matter on the Supreme Court of Appeal’s decision, because that is the decision that is currently in force. In light of section 167 (5) of the Constitution, 1996, that submission cannot be sustained. The situation is quite the reverse. The Supreme Court of Appeal’s order has no force unless and until the Constitutional Court says so. It is, furthermore, very common for the Constitutional Court to vary the scope of declarations of invalidity made by the High Court and the Supreme Court of Appeal. It is even more common for the Constitutional Court to interfere with, and even completely expunge, interim orders regulating the retrospectivity of declarations of invalidity that lower courts make. I do not know what the Constitutional Court will do, and how it will affect the parties in this case.

17 It follows that the decision in *Women’s Legal Centre Trust* constitutes no obstacle to this application.

18 Moreover, the validity of the parties’ Islamic marriage, its consequences in South African matrimonial law, the availability of remedies under the Divorce Act, and any other issue bearing on the merits of the divorce action are

matters for the trial court. They are beyond the scope of a Rule 43 application.

19 Ms. Ternent very fairly conceded that I must at least be satisfied that there is a matrimonial *lis* between the parties before entertaining the Rule 43 application. But no-one was able to tell me what more I needed to know, in this case, other than that Ms. I[...] has instituted an action in terms of the Divorce Act. If that action is said to be bad in law, there are remedies available to the parties, in the prosecution and defence of the main action, to ventilate those issues.

20 But it falls far beyond anything relevant to a Rule 43 application. I would ordinarily be slow to decide any issue in a Rule 43 application that might bear on the main action. I am even more reluctant to make sweeping findings on the validity and effect of the parties' Islamic marriage in circumstances where the issues are far from clear and straightforward, and the status and regulation of those marriages is currently receiving the attention of the Constitutional Court.

21 It is trite that the word "spouse" in Rule 43 (1) includes a person who claims to be a spouse, even if that is denied. "In other words, the Rule also applies where the validity of the marriage or its subsistence is disputed" (*Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) at 346G-H). Ms. I[...] clearly claims to be a spouse (there would be no Rule 43 application otherwise), and there is an action in terms of the Divorce Act pending. Rule 43 plainly applies.

Financial disclosure

22 That being so, Mr. P[....] is required to make the financial disclosures required in terms of the decision of this court in *E v E*. I asked Ms. Ternent whether Ms. I[....] wished to proceed in the absence of those disclosures. In that event, I would have had to have made an order on the merits of the Rule 43 application based on whatever inferences it was appropriate to draw from Mr. P[....]'s failure to make such disclosure.

23 Ms. Ternent submitted, however, that Ms. I[....] was entitled to the disclosures, and did not wish to proceed with the Rule 43 application without them. Ms. Segal, too, submitted that the matter should postpone for those disclosures to be made.

24 It was for these reasons that I condoned the non-compliance with Rule 43 (4), refused Ms. I[....] leave to file her supplementary affidavit, dismissed Mr. P[....]'s point *in limine* relating to the application of Rule 43, directed Mr. P[....] to make the appropriate financial disclosures and postponed the Rule 43 application *sine die*.

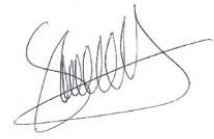
25 In the result, I made the following order –

25.1 The respondent's point *in limine* is dismissed.

25.2 The application is postponed *sine die*.

25.3 The respondent is directed to file his Financial Disclosure Form within 10 days from the date of this order, as required by the decision of this Court in the matter in *E v E* 2019 (5) SA 566 (GJ) and the relevant practice directives of this division.

25.4 The costs of the application are reserved.



S D J WILSON
Acting Judge of the High Court

These reasons were prepared and authored by Acting Judge Wilson. They are handed down electronically by circulation to the parties or their legal representatives by email and by uploading them to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 5 August 2021.

HEARD ON: 4 August 2021

DATE OF ORDER: 4 August 2021

DATE OF REASONS: 5 August 2021

For the Applicant: PV Ternent

Instructed by Shaheed Dolie Inc

For the Respondent: L Segal SC

Instructed by Deanne Kahn Attorneys