CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 147/18

In the matter between:

S Applicant

and

S First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

and

CENTRE FOR CHILD LAW Amicus Curiae

Neutral citation: *S v S and Another* [2019] ZACC 22

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgment: Nicholls AJ (unanimous)

Heard on: 12 March 2019

Decided on: 27 June 2019

Summary: Superior Courts Act 10 of 2013 — constitutionality of section 16(3)

Uniform Rules of Court — rule 43

Best interests of the child — equality before the law — access to court — section is constitutional

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay the costs of the first respondent.

JUDGMENT

NICHOLLS AJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J and Theron J concurring):

Introduction

[1] It is an inescapable fact of modern life that marriages often end in divorce. According to Statistics South Africa, 25 326 divorce orders in courts were granted in 2016. Of these, 55% involved children under the age of 18 years.[1] In most divorce cases, one of the parties approaches the court to adjudicate upon an application in terms of rule 43 of the Rules of Court (Uniform Rules or Rules) for interim relief, *pendente lite* (during litigation).[2]

[1] Statistics South Africa "Marriages and Divorces" (2016), available at http://www.statssa.gov.za/?page_id=1856&PPN=P0307&SCH=7344.

[2] Rule 58 of the Magistrate Court Rules provides for similar interim relief in matrimonial matters. It applies whenever a spouse seeks relief from the court in respect of interim maintenance, contribution towards the costs of a pending matrimonial action, interim care of any child, or interim contact with any child.

[2] Rule 43 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) Maintenance *pendente lite*;

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

(c) Interim care of any child;

(d) Interim contact with any child.

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

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

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

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

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

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

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

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

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

[3] Applicants in rule 43 applications are almost invariably women who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. Black women in South Africa historically have been doubly oppressed by both their race and gender. The inferior economic position of women is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts. This is particularly apparent in applications for maintenance where systemic failures to enforce maintenance orders have negatively impacted the rule of law.[3] It is women who are primarily left to nurture their children and shoulder the related financial burden. To alleviate this burden our courts must ensure that the existing legal framework, to protect the most vulnerable groups in society, operates effectively.[4]

Background

[4] The applicant is Mr S. The first respondent is Mrs S. The second respondent is the Minister of Justice and Correctional Services. The Centre for Child Law (CCL) has been admitted as an amicus curiae.

[5] Mr and Mrs S married each other on 14 November 2008 and have three minor children aged 15, 11 and 5 years. They are in the midst of divorce proceedings. In the course of the breakdown of their marriage during September 2016 Mrs S vacated the family home. The children remained in the care and custody of their father.

[6] In this instance it was Mr S who instituted an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) to be awarded interim care and

[3] As noted by Mokgoro J in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at para 32.

[4] Id at para 27.

custody of the minor children, pending the outcome of the divorce, in terms of rule 43. At the hearing the presiding Judge granted maintenance to Mrs S in a sum which Mr S contends is financially untenable. The court order was thus made *per incuriam* (without care).

[7] Mr S wishes to appeal the maintenance order granted by the High Court but is precluded from doing so by section 16(3) of the Superior Courts Act (Act),[5] which prohibits any appeal against rule 43 orders. This blanket prohibition, argues Mr S, infringes various constitutional rights, namely the rights of children in terms of section 28(2),[6] the right to equality in terms of section 9[7] and the right to access to courts in terms of section 34[8] of the Constitution.

Litigation history

[8] In September 2016, Mr S instituted an action for divorce.

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[5] 10 of 2013.

[6] Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

[7] Section 9 of the Constitution states:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[8] Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[9] On 15 March 2017, he brought an application for interim relief in terms of rule 43 to confirm the children's *de facto* (in fact) primary care and residence with himself, pending an investigation by the family advocate and a private psychologist to establish what would be in the children's best interests. Apart from agreeing to pay all the costs associated with the minor children, he tendered an amount of R12 000 per month for Mrs S's personal maintenance.

[10] Mrs S filed an affidavit opposing both the maintenance amount tendered and Mr S's claim for the care and custody of the minor children. Her affidavit portrays the lavish lifestyle enjoyed by the couple. She was employed as a financial manager in her husband's companies for which she was paid approximately R64 000 per month. Over and above this, numerous household expenses were paid through the business and she would regularly spend R10 000 to R12 000 per month on a Woolworths credit card. In addition she was provided with a company credit card, was a registered dependent on Mr S's medical aid until January 2017 and had the use of a Toyota Prado motor vehicle. Mrs S alluded to significant wealth, allegedly undisclosed by her husband in his founding affidavit.

[11] She set out what she considered to be her reasonable expenses and claimed maintenance for herself in the sum of R60 353 per month which included payment of rental in the sum of R20 500. From this amount she deducted R12 400 which her live- in partner was contributing.[9] She sought payment of R20 000 as a contribution towards legal costs to be paid in monthly instalments of R2 000 plus all payments, maintenance and insurance pertaining to the Toyota Prado motor vehicle. In addition all reasonable medical and dental costs were to be paid by Mr S who was to retain Mrs S and the children on a comprehensive medical scheme.

[9] This deduction was not reflected in the order she sought claiming R60 353 per month as well as R20 500 rental for accommodation.

[12] Mrs S stated that it would be in the best interests of the children that they reside with her, a claim that was not pursued with much enthusiasm at the hearing. Instead the primary focus was the maintenance that she should be awarded.

[13] The opposing affidavit was filed on 7 April 2017, several weeks out of time. On 8 May 2017, Mr S applied for a postponement in order to file a replying affidavit to address what he described as slanderous allegations relating to his finances, business dealings, personal relationships and parenting skills as contained in Mrs S's affidavit. He alleged that he had been informed by his children that his wife had relocated from the accommodation that he was renting for her and that she had found a new job.

[14] The application for postponement and the rule 43 application were set down together. On 12 May 2017, the High Court dismissed Mr S's application for postponement and simultaneously ruled that Mrs S's opposing affidavit was out of time. Accordingly, it was not received into evidence. Rule 43(3) permits a respondent in a rule 43 application to deliver within 10 days a "sworn reply in the nature of a plea" in default of which "the respondent shall be automatically barred". Having excluded Mrs S's opposing affidavit for being out of time, no weight should have been placed on its contents.

[15] Notwithstanding this, and with only Mr S's affidavit before court, an order was made that Mr S "pay an amount of R40 000 per month in respect of maintenance to the respondent directly".[10] This was in addition to the order that he maintain the children, including all their medical and scholastic expenses, and pay for the maintenance and licensing costs of the Toyota Prado motor vehicle.[11]

[16] This ruling gave rise to an application for leave to appeal on the grounds that the High Court erred in a number of aspects. Firstly, it was alleged that by refusing Mr S's

[10] *S v S*, order of the High Court of South Africa Gauteng Division, Pretoria, Case No 19334/2017 (12 May 2017) at para 7.

[11] Id at para 6.

postponement and disallowing Mrs S's answering affidavit and the subsequent reply thereto the Court had failed to allow a proper ventilation of the issues. Further, insufficient weight was given to the financial prejudice caused to Mr S by having to pay R40 000 per month. Finally, the Court disregarded that Mrs S cohabits with, and is partly maintained by, her new partner.

[17] On 28 July 2017, and in response to a request by Mr S for reasons for his rule 43 order, the Judge provided the following terse reasons:

> "1. Rule 43 applications are interlocutory in nature.
> 2. The order is not appealable as a result.
> 3. No reasons are ordinarily given in rule 43 applications.
> 4. Rule 43(6) is applicable to changed circumstances."[12]

[18] On 26 September 2017 Mr S filed "a supplemented notice of appeal" raising for the first time, as an alternative ground of appeal, the constitutionality of section 16(3) of the Act. A notice in terms of rule 16A of the Uniform Rules was attached in which the constitutional issues he wished to canvass were set out. Simultaneously Mr S filed a notice in terms of rule 10A in which he gave notice of his intention to join the Minister of Justice and Correctional Services.

[19] The application for leave to appeal was heard on 31 October 2017. The High Court granted the application for condonation of the late filing of the supplemented application for leave to appeal but dismissed the application for leave to appeal with punitive costs.[13] The Court's reasoning was that rule 43 protects the best interests of the children. It is interim in nature and therefore susceptible to variation. It was pointed out that should appeals against rule 43 orders be countenanced, there would be a risk of suspension of the orders which would run counter to the best interests of the

[12] *S v S*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 21507/14 (28 July 2017).

[13] *S v S* 2017 JDR 2042 (GP) at para 20.

child.[14] Relying on a judgment of that court,[15] it was held that the principle of subsidiarity prohibits direct reliance on section 34 of the Constitution.[16] The Court stated that what should have been challenged, and which Mr S omitted to challenge, was rule 43 which gives effect to the right of access to court.[17]

[20] A petition for leave to appeal to the Supreme Court of Appeal was refused, as was an application for reconsideration by its President.[18] In both these applications, Mr S challenged the constitutional validity of section 16(3) and challenged the High Court's application of the principle of subsidiarity.

In this Court

[21] On 15 June 2018 Mr S lodged an application for leave to appeal to this Court. It was by an order of this Court that the Minister of Justice and Correctional Services was finally joined on 15 August 2018. In February 2019, the CCL was admitted as amicus curiae. The amicus curiae's submissions largely supported those of the applicant.

[22] The second respondent failed to file any affidavits once he was joined by the Court. He only filed written submissions. Counsel for the Minister was unable to provide any explanation for the failure to file an affidavit.

Leave to appeal

[23] This Court has frequently declared its reluctance to decide issues as a court of first and last instance. It is well accepted that this Court functions better if assisted by

[14] Id at para 16.

[15] *Apleni v President of the Republic of South Africa* [2018] 1 All SA 728 (GP).

[16] *S* above n 13 at para 15.

[17] Id.

[18] Section 17(2)(f) states:

> "The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation."

a well-reasoned judgment of the High Court or the Supreme Court of Appeal.[19] The wisdom of this logic cannot be faulted. In this matter the constitutional issue was raised for the first time in the supplemented application for leave to appeal in the High Court, as an alternative ground of appeal.

[24] However, it can hardly be expected of a litigant to launch a rule 43 application on the basis that it is unconstitutional. Moreover, Mr S can be forgiven for failing to anticipate the subsequent events that occurred, that is, that he would be ordered to pay an amount in maintenance entirely unrelated to the evidence before court. Mrs S's evidence which countered his tender of R12 000 maintenance per month had been disallowed and only Mr S's founding affidavit was before court.

[25] At the very next stage, in the application for leave to appeal brought before the High Court, Mr S challenged the constitutionality of section 16(3), albeit without following the proper procedure. It was brought not on affidavit but by way of a supplemented notice of appeal, and the Minister responsible was not cited and only joined much later by this Court. Nonetheless, the High Court in its judgment on the application for leave to appeal, the only judgment in this matter, pertinently dealt with the unconstitutionality of section 16(3). Further, the constitutional challenge was the subject of the petition for leave to appeal to the Supreme Court of Appeal and the reconsideration application to the President of that Court. In both instances, the issue was considered and, in accordance with applicable procedure, dismissed without providing reasons. In the circumstances of this case, the constitutional challenge was raised as soon as it was feasible to do so. Needless to say, our constitutional jurisdiction is engaged.

[26] In addition, this Court's jurisdiction is engaged if the application raises an arguable point of law of general public importance as envisaged by section 167(3)(b)(ii)

[19] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; [2019] JOL 41705 (CC) at paras 19-20.

of the Constitution.[20] Rule 43 applications affect the majority of litigants faced with imminent divorce proceedings. As stated in *TS*, rule 43 proceedings are in most instances the only contested hearings that divorce litigants participate in.[21] It is undeniable that this is a matter of general public importance.

[27] Therefore, notwithstanding the procedural defects in raising the constitutional challenge before this Court, it is, in my view, in the interests of justice to grant leave.

Issues

[28] The issue before this Court is whether section 16(3) of the Act infringes any constitutional rights of a party wishing to appeal a rule 43 order. In other words, is the prohibition on appeals constitutionally permissible? Section 16(3) provides:

> "Notwithstanding any other law, no appeal lies from any judgment or order in proceedings connected with an application—
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> (a) by one spouse against the other for maintenance pendente lite;
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> (b) for contribution towards the costs of a pending matrimonial action;
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> (c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or
>
> (d) by one parent against the other for the interim access to a child when matrimonial action between the parents is pending or about to be instituted."

[20] Section 167 states:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide—
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> . . .
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[21] *TS v TS* 2018 (3) SA 572 (GJ) at para 2.

Best interests of the child

[29] According to Mr S, first and foremost, the rights of the child are adversely affected. His views find support in the arguments of the CCL who contend that there can be no debate that an order granted in terms of rule 43 implicates a number of a child's constitutional rights. These include the right to family care or parental care; to be protected from maltreatment, neglect or abuse; to dignity and privacy to the extent that it protects the right to family life; and the right to have her best interests considered as of paramount importance. Accordingly, so states the amicus curiae, the impugned provision is plainly unconstitutional as it does not protect the best interests of children involved in rule 43 proceedings.

[30] It is undeniable that an appeal process would significantly delay the finalisation of rule 43 proceedings. Several applications could potentially be heard before the final order. These include: an application for leave to appeal; an application in terms of section 18 of the Act for the suspension of the order;[22] an urgent appeal in terms of section 18; an application for leave to appeal to the Supreme Court of Appeal; an

[22] Section 18 of the Act states:

> "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) If a court orders otherwise, as contemplated in subsection (1)-
>
> (i) the court must immediately record its reasons for doing so;
>
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
>
> (iv) such order will be automatically suspended, pending the outcome of such appeal.

application for reconsideration by its President;[23] an application for leave to appeal to the Constitutional Court; and finally a hearing in this Court.

[31] It goes without saying that the expense would be immense. An added financial impediment is that since 1 November 2017 there are no longer fee restrictions on rule 43 applications. This means that an appeal procedure would have enormous cost ramifications for an impecunious spouse. It is the more financially vulnerable spouses, usually the wives, who disproportionately bear the brunt of all this. Generally, they are the ones who launch rule 43 applications. This is so because it is women, who more often than not, are the primary care-givers. Recalcitrant spouses could use the appeal process to generate a plethora of unmeritorious applications.

[32] Inextricably linked to this are the significant delays occasioned by an appeal process. This would be the inevitable result, even with the truncated timelines suggested by the applicant and the amicus.[24] In the interim the aggrieved party could frustrate the payment of maintenance by applying for the suspension of the order pending the finalisation of all avenues of appeal. Any attempts at execution would be pointless.[25]

[33] While it is conceded that rule 43 provides expeditious and inexpensive relief, it is argued by the applicant that this can never trump the right to appeal in matters involving children. These submissions ignore the detrimental impact that delayed

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[23] See above n 18.

[24] The applicant in oral argument suggested that the best solution is an expedited appeal process. In his written submissions he proposes the following timelines:

> "21.1.1 an application for leave to appeal within ten days; and
>
> 21.1.2 if leave to appeal is granted, a Full Court should be constituted within 60 days;
>
> 21.1.3 in cases where leave is granted, the Court should make an appropriate interim enforcement order pending the hearing of the appeal, including [a] further order as to a contribution to costs."

The CCL suggested that if litigants are of the view that the matter is urgent, they should approach a court on truncated timelines in terms of that Court's Practice Directives.

[25] See 18 of the Uniform Rules of Court above n 22.

maintenance payments may have on children. This far outweighs the danger of an erroneous interim order. Almost invariably orders relating to the care and contact of children are granted pending an investigation by the Family Advocate or other experts. Generally, it is only on receipt of such a report that an order is made pending the finalisation of the divorce.

[34] In any event, should any rule 43 order be contrary to the best interests of a child, this can be immediately rectified. The High Court regularly hears, on an urgent basis, applications where it is alleged that the best interests of the child are under threat.[26] Such a matter will be treated with the urgency it deserves, irrespective of any previous orders made in terms of rule 43.

[35] An appeal process that is subject to endless delays and protracted litigation will inevitably play into the hands of the litigant who is better resourced. It is therefore inconceivable that it can ever be in the best interest of the most vulnerable members of our society, the children.

Equality before the law

[36] The next question to be determined is whether there is a violation of the applicant's constitutional right to equality before the law. Section 9(1) of the Constitution reads: "Everyone is equal before the law and has the right to equal protection and benefit of the law".

[37] Mr S argues that the non-appealability of a rule 43 order is an infringement of his right to equality before the law. And that by prohibiting appeals, there is a clear and distinct differentiation between litigants in rule 43 proceedings and all other litigants who are afforded the right of appeal. However, as pointed out by Albertyn and

[26] See *NS v Presiding Officer of the Children's Court* [2018] ZAGPJHC 59; *S v L*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 72839/2016 (30 September 2016) and *Chief Family Advocate v G* 2003 (2) SA 599 (W).

Goldblatt, differentiation lies at the heart of both inequality and effective governance.[27] Mere differentiation can occur in a myriad of legitimate ways.[28] The difficulty arises when the differentiation is irrational. It is only in those circumstances that it amounts to an unconstitutional violation of equality.

[38] In *Ntuli*, this Court was confronted with a differentiation of process in criminal appeals.[29] The first category of accused persons had been convicted in a Magistrates' Court without legal representation and required a Judge's certificate before appealing. The second category of appellants did not require judicial certification. The rationale for the differentiation was to eliminate futile and unmeritorious appeals to prevent them from clogging the court roll.[30] This Court held that this differentiation was neither fair nor reasonable and the "means used to achieve the ends go beyond it".[31] Therefore, applying the rationality test under section 8(1) of the interim Constitution, it was held that this differentiation infringed equality before the law.

[39] The applicant argues that equality of legal process requires fair procedures that meet not only a standard of rationality, but also of fairness. This Court in *Rens* held that equality before the law does not require identical appeal procedures to be followed, and as long as litigants in a particular court are subject to the same procedures, the requirement of equality is met.[32]

[40] The applicant argues that the denial of an appeal process renders litigants in rule 43 proceedings unequal before the law. Without equality of arms they are denied the equal protection of the law. This argument is misplaced. Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal

[27] Albertyn and Goldblatt 'Equality' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town, 2014) (*CLOSA*) at 17.

[28] Id.

[29] *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

[30] Id at para 19.

[31] Id at para 24.

[32] *S v Rens* [1995] ZACC 15; 1996 (1) SACR 105 (CC); 1996 (2) BCLR 155 (CC) at para 29.

proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality.

[41] The equality of arms principle ensures that parties in a particular dispute receive equal opportunity. In matters concerning rule 43 proceedings, both parties are prevented from appealing in terms of section 16(3). They are therefore on an equal footing with each other. Accordingly, this principle is of no assistance to the applicant.

[42] In *Harksen*, this Court held:

> "[T]he first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section [9(1)] . . . there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section [9(1)]."[33]

[43] Bearing this in mind, the question is whether section 16(3), by denying disgruntled rule 43 litigants the right to appeal, bears a rational connection to a legitimate statutory purpose. The purpose of rule 43 is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children. The rationale for the non-appealability is to prevent delays and curtail costs. To allow an appeal process would contradict the objective of rule 43 orders. The statutory differentiation between those litigants who can appeal and those who are precluded from doing so by section 16(3) clearly bears a rational connection to a legitimate government purpose. Moreover, there is no differentiation between the individual litigants in a rule 43 dispute. They both bear the same section 16(3) encumbrance.

[33] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43.

[44] Any challenge in terms of section 9(1) must therefore fail.

Access to court

[45] Finally, Mr S contends that his inability to appeal the rule 43 order encroaches on his access to court as enshrined in section 34 of the Constitution.

[46] Not all litigants have the right to appeal. This Court has on more than one occasion stated that it is generally not in the interests of justice for leave to be granted to appeal an interim order. This would defeat the interim nature of that order. That there is no right to appeal interlocutory orders has been held to be constitutional by the courts on numerous occasions.[34]

[47] The fact that a rule 43 order may be of longer duration than initially anticipated does not in my view detract from the interim nature of the order. It is only in limited circumstances where the interests of justice dictate otherwise that appeals of interim orders have been countenanced by this Court.[35] In *Children's Institute*, because the interlocutory order was final in effect, leave to appeal was granted.[36] In *Albutt*, the interim nature of the order was found not to be the determining factor but the crucial issue was whether it was in the interests of justice to grant leave.[37] The interim nature was taken into account in determining the overall inquiry into the interests of justice.[38] This is a fact specific enquiry.[39]

[34] *Minister of Health v Treatment Action Campaign (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1033 (CC); *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A).

[35] *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC); *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC); and *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC).

[36] *Children's Institute* id at para 16.

[37] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) at para 22.

[38] Id.

[39] Id at para 23.

[48] Accordingly, it is not axiomatic that non-appealability per se amounts to an unconstitutional denial of a litigant's right of access to court. The question is whether the denial of appeal processes in terms of section 16(3) passes constitutional muster. Under these circumstances, it must be answered in the positive.

[49] In any event litigants in rule 43 applications are not unequivocally barred from approaching court again. This avenue is provided for in terms of rule 43(6), albeit with limitations. The applicant complains, with some justification, that the rule is too restrictive as it only allows for variation of an existing rule 43 order when there is a change in "material circumstances". However, it cannot be denied that litigants are afforded the opportunity to vary their court orders under certain conditions. This rule ameliorates any injustice where changed material circumstances have emerged.

[50] In light of the above, the applicant's argument that he is denied his constitutional right of access to court cannot be sustained.

[51] In the circumstances, Mr S does not succeed with any of his challenges to the constitutionality of section 16(3).

Conclusion

[52] Although the maintenance order does not infringe any of Mr S's constitutional rights, it is manifestly unjust. There is no basis for the amount ordered. The Court below only had Mr S's affidavit before it. Having disallowed Mrs S's affidavit, the Court had no basis to determine the maintenance in the manner that it did. This much was conceded by Mrs S herself. But the answer to Mr S's problem does not lie in a declaration of invalidity of section 16(3) of the Act.

[53] The root of Mr S problem lies in rule 43 rather than section 16(3). The constitutionality of rule 43 was not in issue before this Court and counsel for the applicant made it clear that his argument was confined to the unconstitutionality of

section 16(3). Rule 43 may be wanting in certain respects and there may well be grounds for a review of rule 43(6) in the future to include not only changed circumstances but also "exceptional circumstances".[40] However, this is not a decision this Court is called upon to make.

Remedy

[54] Any injustices, real or perceived, can be ameliorated in a number of ways. Rule 43 was not designed to resolve issues between divorce litigants for an extended period, but rather as an interim measure until all issues are properly ventilated at trial. The fact that rule 43 orders may be enforceable for longer periods than was initially anticipated, is the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself.

[55] The obvious solution is to ensure that divorces are given preferential dates so as to minimise the duration of any order made *pendente lite*. This is already the case in some High Court divisions and those where it is not, are encouraged to adopt practice directives implementing this approach. Active case management of complex divorce matters is another means to prevent the delayed finalisation of divorce matters.

[56] In addition, there is no reason why rule 43 should not be expansively interpreted as some courts have already done.[41] Rule 43(6) provides litigants with an avenue to

[40] *TS* above n 21 at para 37. The Court stated:

> "Insofar as financial matters are concerned it appears that, even without a revision of the rule as proposed by the Law Society of South Africa, rule 43(5) is sufficiently elastic to allow a procedure that can reconcile the application of the other provisions of rule 43 with both section 28 of the Constitution and the relevant sections of the Children's Act. In relation to financial issues an upfront proper disclosure of each party's financial affairs coupled with the existing sanctions that apply on breach of a court order may be adequate."

[41] In a recent judgment of the Full Bench of the High Court in *E v E*; *R v R*; *M v M* unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 12583/17; 20739/18; 5954/18 (12 June 2019) at paras 55 and 58-9, the Court adopted a flexible approach to rule 43(2) and 43(3). The Court proposed an amendment to the Practice Directives; first, to provide for mandatory financial disclosures in opposed divorce matters; and second, for an applicant to have an automatic right to file a replying affidavit in rule 43 proceedings.

approach a court for a variation of its decision, on the same procedure, when there is "material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate". As already indicated, it is incumbent on High Courts to hear on the urgent roll any matter adversely affecting the best interests of the child.[42] Accordingly, any other injustices occasioned will relate purely to monetary matters. Past financial injustices can often be righted when the final reckoning is done at the divorce.

[57] Importantly, in the majority of cases a patently incorrect maintenance order can be rectified by a rule 43(6) application. To take the case in point, there is nothing to prevent Mr S from utilising rule 43(6). He has discovered that his wife has found employment and no longer lives in the accommodation which he rented for her, but lives instead with her new partner.

[58] There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.[43] Fortunately for Mr S, rule 43(6) is an avenue open to him.

[59] As regards costs, although the order granted against Mr S was *per incuriam*, his obvious avenue was an application in terms of rule 43(6). This was pointed out to him in the first High Court judgment. In the intervening period he has not complied with

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In *Dodo v Dodo* 1990 (2) SA 77 (W) at 79B-D, the Court, while acknowledging that rule 43 applications were intended to afford the parties a quick, short and inexpensive procedure, held that there was no reason why special circumstances should not justify a deviation from the norm where the complexities are unusual.

[42] See above n 26.

[43] Section 173 of the Constitution states:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

the court order and only paid the R12 000 per month, which he initially tendered. In these circumstances, there is no compelling reason why he should not bear the costs.

Order

[60] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay the costs of the first respondent.

For the Applicant:	S Davies and I Vermaak-Hay instructed by J W Wessels & Partners Inc
For the First Respondent:	N van Niekerk instructed by Shapiro & Ledwaba Inc
For the Second Respondent:	H Kooverjie SC, J Motepe SC, R Naidoo and M S Nanganye instructed by the State Attorney, Johannesburg
For the Amicus Curiae:	R Courtenay instructed by the Centre for Child Law