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**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 54/2020**  
Date heard: **03 November 2020**  
Date delivered: **11 November 2020**

In the matter between:

**C[....] M[....]**

Applicant

and

**A[... ] O[....] M[....]**

Respondent

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**JUDGMENT**

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**LOWE, J:**

**INTRODUCTION**

[1] This matter came before me as a Rule 43 Application. Applicant seeks maintenance *pendite lite* of R10,000.00 per month with medical aid and a cost contribution of R15,000.00.

- [2] The matter was opposed and three points *in limine* raised:
1. The issue of the applicability of Rule 43 to this matter;
  2. The prolixity of Applicant's papers; and
  3. The alleged failure to disclose assets.
- [3] I heard argument on points 1 and 2 above and undertook to give a ruling with reasons.
- [4] The matter is then to proceed (before me) on the merits, should I consider that it is correctly before me in terms of Rule 43.

## **BACKGROUND**

- [5] This matter has an unusual origin which can be set out briefly.
- [6] Applicant alleges that she is an unemployed female who (in January 2020) sued Respondent (as Defendant) claiming a decree of divorce, monthly maintenance of R5,000.00 and half of the net value of certain farming properties.
- [7] The parties were married out of community of property, excluding accrual sharing, on 25 September 2004. No children were born of the marriage.
- [8] Respondent gave his Attorneys instructions to oppose the divorce proceedings, but through the said attorney's oversight this did not eventuate.

[9] The matter thus proceeded unopposed and on 10 March 2020, this Court dissolved the marriage (paragraph 1 of the order) awarding Applicant R5,000.00 per month maintenance (paragraph 2) and costs.

[10] In due course Respondent sought a rescission of that entire judgment which was partially granted by Roberson J as follows:

“BEFORE THE HONOURABLE MADAM JUSTICE ROBERSON

On the 14<sup>th</sup> day of August 2020

IN THE MATTER BETWEEN:

**A[...] O[...] M[...]**

**APPLICANT**

**AND**

**C[...] M[...]**

**RESPONDENT**

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Having heard Adv. Miller, Counsel for the Applicant and having read the Notice of Motion and other documents filed of record:

**IT IS ORDERED THAT:**

1. Paragraph 2 of the default judgment granted against the Applicant on 10<sup>th</sup> March 2020 in the divorce proceedings under case number 54/2020 be and is hereby rescinded.
2. The Applicant be and is hereby granted leave to defend the issues of maintenance, the proprietary consequences of the marriage, and any other ancillary issues in the action for divorce instituted by the Respondent on 17<sup>th</sup> January 2020 under case number 54/2020.”

[11] As will be appreciated, from the above, that the divorce order dissolving the marriage remained in place whilst the proprietary consequences and maintenance were set aside, Defendant (Respondent) being given leave to defend same.

[12] It is this situation upon which Respondent seeks to rely on resisting the Rule 43 proceedings claiming, in summary, that once the divorce dissolving the marriage was pronounced Applicant was no longer a “*spouse*” as envisaged in Rule 43 and cannot therefor rely on same.

[13] This is contested and is the issue before me.

### **RULE 43**

[14] Rule 43(1) reads as follows:

#### **“43 Interim relief in matrimonial matters**

(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.”

[15] The object of the Rules is to secure inexpensive and expeditious litigation. They are not an end in themselves. They must be interpreted such as to facilitate the Court’s work and the resolution of disputes inexpensively and

efficiently. Formalism in the Rules application is not encouraged. The Rules are for the Court, not the Court for the Rules<sup>1</sup>.

[16] The rule provides the procedure to be followed when seeking ancillary relief of an interim nature in matrimonial matters.

[17] The object is to deal with such matters expeditiously and inexpensively.

[18] Prolixity is to be avoided.

[19] It is usually sufficient to say that this applies to matters, pending divorce proceedings<sup>2</sup>, the rule referring to “*spouse*”.

[20] It is well known that Rule 43 governs procedure and does not affect the substantive law.

[21] The Rule even applies where the allegation that Applicant is a spouse is denied, that is, where the very validity of the marriage is disputed<sup>3</sup>.

[22] By way of common law, spouses owe each other a reciprocal duty of support. This endures *stante matrimonio*, and may in certain circumstances continue post divorce.

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<sup>1</sup> **Centre of Child Law v Hoërskool Fochville and Another** 2016 (2) SA 121 (SCA) 131G; **Uranim (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie** 2017 (1) SA 236 (GJ) at 241G and **Eke v Parsons** 2016 (3) SA 37 (CC) at 53A-D.

<sup>2</sup> **AM v RM** 2010 (2) SA 223 (ECD)

<sup>3</sup> **Zaphiriou v Zaphiriou** 1967 (1) SA 342 (W)

- [23] The Divorce Act 70 of 1979 Section 7(2) provides that a Court granting decree of divorce may, in the absence of agreement between the spouses, order the payment of maintenance of one spouse by another.
- [24] The issue of post-divorce maintenance in terms of Section 7(2) rests *inter alia* on the need for maintenance and the ability to pay same<sup>4</sup>.
- [25] It is thus clear that, in a marriage, the original duty to support and the reason therefor, may extend the entitlement to maintenance, if there is the need therefor post divorce, this to be determined in the matrimonial proceedings. Absent an order therefor, no claim can be made at a later date.
- [26] Such a maintenance order may be rescinded, varied or suspended by any competent Court if there is good reason to do so.
- [27] Rule 43 Applications are mostly brought by women who are often in a less favourable position than their husbands<sup>5</sup>.
- [28] Rule 43 does not resolve issues between divorcing litigants for an extended period but rather as an interim measure, until all the issues are properly ventilated at trial<sup>6</sup>.

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<sup>4</sup> **Grasso v Grasso** 1987 (1) SA 48 (C)

<sup>5</sup> **S v S and Another** CCT147/18 27 June 2019 [2019] ZACC 22 (CC)

<sup>6</sup> **S v S supra** [54]

[29] Importantly the Constitutional Court has held that there is no reason why Rule 43 “*should not be expansively interpreted as some Courts have already done*”<sup>7</sup> as follows:

“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.

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.”

[30] The Court in those matters referred to above adopted a flexible approach to Rule 43 and I can see no reason as to why I too should not do so in respect of Rule 43(1).

[31] It is also clear that 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<sup>8</sup>.

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<sup>7</sup> *S v S* [56] – Footnote 41

<sup>8</sup> *S v S supra* [58]

[32] In *NK v KM*<sup>9</sup> and in a different context, the Application being mainly one seeking a separation of the dissolution of the marriage from the proprietary consequence thereof, in a divorce matter, the learned Judge considered whether the pending Rule 43 Application would sustain if a separation were granted. The Court held that:

“[38] In *Beckley*, the court in dealing with the facts of that case found that there was no matrimonial *lis* pending, as the parties were granted a divorce on 19 August 2014 and the application in terms of rule 43 application was launched five months after the divorce was granted.”

[33] The Courts reasoning in this regard was as follows:

“[30] The [applicant] contends that the [respondent] would still in law be able to pursue her rule 43 claim despite the decree of divorce. In this respect Counsel for the applicant relied on the cases of *CC v CM supra* and *KO v MO supra*.

[31] The case of *CC v CM* is distinguishable from the present matter in that it dealt only with the provisions of rule 33(4) and not rule 43 of the Rules.

[32] In relation to *KO v MO*, counsel argued that the court should follow that dictum and not that of *Beckley supra*. It was submitted that the *Beckley* is not binding on this court because it is clearly wrong.

[33] In *KO v MO*,<sup>10</sup> Loots AJ held that:

“[60] It cannot be the correct position that, in a pending divorce action, following a granting of the decree of divorce, the fact that the parties are no longer married, would disentitle a

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<sup>9</sup> 2019 (3) SA 571 (GJ)

<sup>10</sup> [2017] ZAWCHC 136



person who, until the decree of divorce (which is one of the part of the divorce action), was entitled to the relief set out in Rule 43, *pendente lite*, would no longer be entitled thereto due to the unnecessarily strict interpretation of the with "spouse" for the purposes of the Rule.

[61] Accordingly, I find that, pending the finalization of the divorce action, and extant order in terms of Rule 43 survives a decree of divorce to the extent the issues of regulated thereby remain unresolved.

[62] The finding that an existing order in terms of uniform Rule 43 does not lapse when the content of a decree divorce in circumstances where the remaining issues in the divorce action remain pending in terms of uniform Rule 33 (4) follows ineluctably."

[34] The court further held:

"[64] Save for it being necessarily so that only a spouse can apply for a decree of divorce, the remaining relief contemplated by the definition is not dependent on a party being a spouse at the time the relief is sought; with the operative weights in this subsection (a) being open quotation *pendente lite* and in subsection [B] being "such action" and. Should the legislature have wish to limit the relief claimable in a pending divorce action to only spouses, the divorce act would have stipulated so in temps, and would not have contended itself with the manner in which it defined a divorce action."

[35] In *Beckley*<sup>11</sup> *supra* the court dealt with a situation where the application in terms of rule 43 was launched after decree of divorce was granted following the separation of issues. Following the granting of the final decree of divorce on 15 January 2015 the applicant launched a rule 43 application seeking interim spousal maintenance pending the final determination of her monthly cash maintenance payable to her until death or remarriage and the right to be retained on her husband's comprehensive medical aid.

[36] The court found that the provisions of rule 43 of the Rules were not applicable as at the time there was no pending divorce action between the

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<sup>11</sup> GJ 01098/2015

parties as provided for in this said rule. The court further found that the applicant did not have the right to claim interim maintenance where there was no matrimonial action or where none was pending or was about to be instituted. In arriving at that conclusion, the court relied on the case of *Gunston v Gunston*,<sup>12</sup> where in dealing with the same issue the court held:

"The words... in paras, (b), (c) and (d) do not appear in para (a), but there can be no doubt that the whole subsection concerns interim orders made in connection with matrimonial action which is pending or about to be instituted. "Matrimonial actions" include actions for divorce, restitution of conjugal rights, quality of marriage and judicial separations...".

[37] In considering the facts of the matter the court held that there was no matrimonial action pending between the parties or about to be instituted and that being so, there was no existence or contemplated a *lis* such as is referred to in rule 43 of the Rules.

[38] In *Beckley*, the court in dealing with the facts of that case found that there was no matrimonial *lis* pending as the parties were granted a divorce on 19 August 2014 and the application in terms of rule 43 application was launched five months after the divorce was granted."

[34] In *Beckley* the Court then held that there was no matrimonial action pending and no *lis* as referred to in Rule 43.

[35] In *KO v MO*<sup>13</sup> an order of separation was sought in a divorce matter. The Rule 43 issue was referred to in this context and the Court reached an entirely different interpretation of Rule 43.

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<sup>12</sup> 1976 (3) SA 179 [W] at 182A.

<sup>13</sup> [2017] ZAWCHC 136

[36] Loots AJ in a carefully reasoned judgment, in a separation of issues context, held as follows:

“[57] The basis of the contention that the relief in terms of Uniform Rule 43 lapses, and that once a decree of divorce is granted relief in terms of this section is not open to parties in a matrimonial action, is the appearance of the word “spouse” in sub-rule 43(1). In support of these contentions I was referred to the case of *Bienenstein v Bienenstein*<sup>14</sup> where, at 451 D, De Villiers AJ found that Uniform Rule 43 refers only to pending matrimonial disputes, adding “that is before the final order of divorce has been granted”.

[58] As was found in the matter of *Carstens v Carstens*<sup>15</sup>, to which case I shall return presently, and in contradistinction with *Bienenstein*, which concerned a Rule 43 application during the appeal stage of proceedings where the entire divorce action had been finalised, the action in the present instance will still be pending following the separation of issues the applicant prays for. In the present instance I, therefore, also find that *Bienenstein* is distinguishable on the facts that served before De Villiers AJ to the matter serving before me.

[59] In respect of the word “spouse”, as it appears in Uniform Rule 43(1), I agree with Roberson J in her analysis of the meaning of the word as contained at paragraphs [5] and [6] of the judgment in *Carstens v Carstens*, where she stated the following:

“[5] It was submitted on behalf of the respondent that the words “pendente lite” and “pending matrimonial action” contained in Rule 43, relate to an action that has not been finalised. The marriage between the parties has come to an end by divorce, therefore, so it was submitted, Rule 43 does not apply. It was further submitted that a claim for contribution towards costs is sui generis and applies to spouses: the parties are unrelated litigants and there is therefore no obligation

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<sup>14</sup> 1965 (4) SA 449 (TPD).

<sup>15</sup> (2267/2012) [2012] ZAECPHC 100 (20 December 2012), Safflii.

on the respondent to contribute towards the applicant's costs.

[6] It is so that the parties are no longer married. However the "matrimonial action" has not been finalised. The status of the applicant with regard to the remaining issues in the action, is that of a spouse. It can be nothing else. The parties themselves agreed in the Rule 37 minute that interim arrangements would continue until the action was finalised. This agreement could only mean that the respondent acknowledged that the applicant was still a spouse, or was pursuing relief to which she was allegedly entitled as a spouse, for the purpose of adjudication of the remaining issues. The situation is distinguishable from that in *Bienenstein v Bienenstein* 1965 (4) SA 449 (TPD), to which I was referred. In that matter the respondent had instituted an action against the applicant for restitution of conjugal rights and failing which, divorce. A final order of divorce was granted. The applicant noted an appeal against this order and applied in terms of Rule 43 for a contribution towards her costs of appeal. With reference to the contention of the applicant's counsel that the application fell under Rule 43, De Villiers AJ said the following at 451D:

"I cannot agree with that contention. Rule 43 to my mind clearly refers only to pending matrimonial disputes; that is before the final order of divorce has been granted."

In *Bienenstein*, unlike the present matter, no further matrimonial disputes were pending. The judgment therefore does not assist the respondent. [emphasis added]"

[60] It cannot be the correct position that, in a pending divorce action, following a granting of the decree of divorce, the fact that the parties are no longer married, would disentitle a person who, until the decree of divorce (which is but one part of the divorce action), was entitled to the relief set out in Rule 43, *pendente lite*, would no longer be entitled thereto due to an unnecessarily strict interpretation of the word "spouse" for the purpose of the Rule.

[61] Accordingly, I find that, pending the finalisation of the divorce action, an extant order in terms of Rule 43 survives a decree of

divorce to the extent the issues regulated thereby remain unresolved.

[62] The finding that an existing order in terms of Uniform Rule 43 does not lapse with the granting of a decree of divorce in circumstances where the remaining issues in the divorce action remain pending in terms of Uniform Rule 33(4), follows ineluctably. This is reinforced by the wording of Rule 43(1) itself, the relevant portion of which states that:

“This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:” [emphasis added]

There is nothing in Rule 43 which states that, once relief has been granted to a spouse in terms thereof, the order lapses following the granting of the decree of divorce; save where the matrimonial action is no longer pending. In addition to this the definition of a divorce action, as contained in section 1 of the Divorce Act<sup>16</sup>, militates against finding otherwise.

[63] Section 1 of the Divorce Act defines a divorce action as follows:

“**divorce action**’ means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.”

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<sup>16</sup> Act 70 of 1979.

[64] Save for it being necessarily so that only a spouse<sup>17</sup> can apply for a decree of divorce, the remaining relief contemplated by the definition is not dependant on a party being a spouse at the time the relief is sought; with the operative words in sub-section (a) being “*pendente lite*” and in sub-section (b) being “such action”. Should the legislator have wished to limit the relief claimable in a pending divorce action to only spouses, the Divorce Act would have stipulated so in terms, and would not have contented itself with the manner in which it defined a divorce action.

[65] I am further fortified in my view when the purposes of Rule 43 are concerned. In a nutshell Rule 43 aims (in a robust and cost effective manner) to provide interim relief on certain aspects in a divorce action pending their final determination<sup>18</sup>, and to provide a level playing field in respect of the determination of the action. It would therefore make no sense that aspects of the action the Rule intends to regulate pending their determination would lapse despite not having been finally determined.

[66] Furthermore, in the present matter the operative part of the order granted pursuant the applicant’s application in terms of Uniform Rule 43 under case number 21450/14 commences with the words “pending the determination of the divorce action”. The order will therefore, in terms, not lapse on the granting of the decree of divorce should the envisaged separation of issues be ordered, but will remain in force pending the determination of the divorce action.

[67] In my view the same principles stated above regarding the lapsing of the relief granted in terms of Rule 43 also

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<sup>17</sup> A term which is not separately defined in the Divorce Act, but which must be construed in accordance with the development of the definition thereof by both Statute and the courts.

<sup>18</sup> Du Preez v Du Preez 2009 (6) SA 28 (T).

applies to the contention that the relief becomes unavailable to an ex-spouse pending the finalisation of the divorce action the moment a decree of divorce is granted.

[68] From what has been stated above regarding the definition of a divorce action in the Divorce Act; should it have been so that the relief granted in terms of Uniform Rule 43 lapses or becomes unavailable on the granting of a decree of divorce in the current circumstances, an applicant for the relief contemplated in the definition of divorce action, but regulated in terms of Rule 43, would have to launch proceedings in terms of Uniform Rule 6. In both these scenarios Rule 43 was imported to prevent the necessity of having to do so, and in the former scenario the applicant would be constrained to apply for the same relief he or she had already obtained in terms of Uniform Rule 43.

[69] For the reasons mentioned above I also find that an agreement such as was referred to in *Carstens* is not a prerequisite for Uniform Rule 43 to remain operative following the granting of a decree of divorce, but pending the finalisation of the action, the reference to which appears to have been included in the said judgment, not to serve as a sine qua non, for the Rule to remain operative, but in support of the definitional analysis undertaken by Roberson J<sup>19</sup>.”

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<sup>19</sup> In this regard, I mention in passing that paragraph 4 of the order by agreement made by Blignault J, referred to in the narrative above, it is ordered that “ Pending the determination of the divorce action between the parties, respondent shall continue to contribute to the maintenance of the minor children Hannah, Jacob, and Thomas, as follows:” [Emphasis added]. Although this order appears to have been overtaken by the order made pursuant to Rule 43, which itself, as stated in the narrative, provides that it will remain in force pending the determination of the divorce action.

[37] I am of the view that the reasoning in ***KO v MO (supra)*** is sustainable and correct and whilst not on the same facts, nevertheless, sets out the proper ambit of Rule 43, and is fully applicable in this matter in principle.

[38] Not only is the same reasoning of application in this matter but even more so having regard to the Constitutional Court's reference to a flexible approach to the interpretation of Rule 43.

[39] In my view the very purpose of Rule 43 is also such as to facilitate the provision of interim maintenance and a contribution towards costs in favour of a party involved in divorce proceedings where this is justified on the facts. This applies in my view on a flexible proper interpretation of Rule 43 as to procedure, as read with the Divorce Act and the common law, a clear entitlement existing to proceed in terms of Rule 43 notwithstanding the marriage having been dissolved in circumstances in which there are remaining issues such as maintenance, and a cost contribution outstanding, in a matrimonial action, as is the case in this matter.

[40] It simply cannot be otherwise in my view. The use of the word "*spouse*" in Rule 43 by no means in my view limits Rule 43 to only the dissolution of the marriage but to the full ambit of issues ancillary thereto.

[41] It would in my view be incorrect to hold the contrary. To do so would mean that a litigant (Applicant herein) would be disentitled from utilising the Rule 43 procedure to claim interim maintenance (which she may well be entitled to in



some sum) pending a Court's decision in the action in which she may well be awarded maintenance. This would effectively deprive her of maintenance to which she is otherwise entitled (due to the duty of support) alternatively force her to bring a long form more expensive and time consuming application therefor.

[42] This would make the interpretation of Rule 43 the very opposite of its clear intention and would be contrary to the very purpose of the Rule.

[43] In any event if I were to be incorrect in the above I would exercise my Section 173 powers referred to above, in this matter, having regard to the fact that Applicant's position is by no means of her own making. She had no role to play in the fact that only the order for maintenance was being set aside and the remainder referred to further proceedings, and not the entire order. To deprive her of maintenance (and a contribution to costs) in the interim, should she have a need therefore, would be deeply unjust.

[44] As to prolixity in the circumstances of the matter, by Applicant, it is not egregious and certainly not such as to warrant dismissal for that reason alone.

## **ORDER**

[45] In the result the following order issues:

1. The Application falls within the meaning and effect of Rule 43 and its procedure is subject thereto.
2. The issues remaining in the application are referred to further argument on a date to be arranged.
3. Costs are reserved for that hearing.

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**M.J. LOWE**  
**JUDGE OF THE HIGH COURT**

Obo Applicant: Adv M L Beard

Instructed by: Burmeister Vickers Attorneys, East London  
c/o Wheeldon Rushmere & Cole Attorneys, Grahamstown

Obo Respondent: Adv S H Cole

Instructed by: Gray Bumeister Inc.  
c/o Neville Borman & Botha Attorneys, Grahamstown