

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 42158/2010

DATE:12/08/2011

REPORTABLE

In the matter between:

CAVALEROS COSMAS

Applicant

and

CAVALEROS VANA MAGDALENA

Respondent

J U D G M E N T

MOKGOATLHENG J

- (1) The applicant has launched this application pursuant to *Rule 30 (1)* to set aside a *Rule 43* application instituted by the respondent. The application is premised on the basis that the *Rule 43 (2)* application is in its entirety an irregular proceeding, as envisaged by *Rule 30 (1)*.

- (2) The gravamen of the applicant's objection is that the *Rule 43 (2)* application is inordinately prolix in that it spans forty-three pages comprising of a twenty-one page founding affidavit, irrelevant lengthy correspondence, superfluous and vexatious material which renders it irregular and consequently, an abuse of the process of Court.

- (3) The applicant surmises that should he respond to each and every allegation contained in the *Rule 43* application, he would be constraint to be succinct, because his answering affidavit would also be prolix, thus making it susceptible to defeating the purpose and objective of *Rule 43 (2)*, and consequently, subjecting him to censure by the Court.

- (4) The applicant's opines that since the dispute strictly relates to the parties patrimonial claim and does not concern itself with minor children's issues, the Court has no discretion to condone the irregular nature of the respondent's *Rule 43* application, as there are no

exceptional circumstances justifying a deviation from the prescripts of *Rule 43*.

- (5) The applicant surmises that the *Rule 43* application contains a plethora of irrelevant, argumentative and unnecessary evidential material relating to his alleged extravagant luxurious lifestyle, extramarital relationship and business interests which render the application nugatory.

THE NATURE AND AMBIT OF RULE 43 (2)

- (6) ***Rule 43 (2)*** provides:

“The applicant shall deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds therefore.” In ***Colman v Colman 1967 (1) SA 291 (C) at 292A*** Theron J remarked: *“The whole spirit of Rule 43 seems to me to demand that there is to be only a very brief succinct statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent and that the Court is then to do its best to arrive expeditiously at a decision as to what order should be made pendente lite.”* ***Zaphiriou v Zaphiriou 1967 (1) SA 342 (W) at 345F-G; Varkel v Varkel 1967 (4) SA 129 (C) at 131G; Zoutendijk v Zoutendijk 1975 (3) SA 490 (t) at 492A-D.***

- (7) Although the object of *Rule 43 (2)* is to condense the founding affidavit, Courts have held that to expect a sworn statement in the nature of a declaration is somewhat unrealistic having regard to the complexities inherent in *Rule 43 (2)* applications, consequently, a deviation from the strict formal requirements of the rule is permissible in exceptional circumstances.
- (8) *Rule 43 (2)* does not prescribe the length of the founding affidavit. The only requirement is that the founding affidavit must be in the nature of a declaration. The applicant is not required to deliver an affidavit which is in fact a declaration, but is enjoined to deliver one which is merely in the nature of a declaration. Documents relevant to the averments in the founding affidavit may be annexed. *Rule 43 (2)* does not proscribe the annexing of a necessary confirmatory affidavit.

THE EXCEPTIONAL CIRCUMSTANCES

- (9) The respondent contends that her *Rule 43 (2)* founding affidavit conforms to the requirements of *Rule 43 (2)*, and argues that the

factual matrix underpinning the application are exceptional, in that her claim for maintenance *pendente lite* is in respect of a substantial sum of R 151 911.67 per month, and an equally substantial contribution of the amount of R 150 000.00 to costs.

(10) The respondent contends further that the luxurious and lavish standard of living she enjoyed with the applicant, the vast assets constituting the applicant's expansive R5 billion financial empire, the applicant's remissness in not contributing to her maintenance, and the applicant's extravagant standard of living with his alleged mistress had to be disclosed and are relevant, because the respondent is, in a *Rule 43 (2)* enjoins her to establish a *prime facie* case to succeed with her claim for the maintenance *pendente lite* and contribution to costs.

(11) The facts in this matter distinguish this as an exceptional *Rule 43* application, because it is not the normal run of the mill *Rule 43* application envisaged by the "*Rule Framers*" in 1965, and subsequently interpreted in a long line of decisions commencing from ***Colman v Colman 1967 (1) SA 291 (C)***. Although in this matter there were no novel legal points raised, it nevertheless an exceptional rarity for an applicant in *Rule 43* application to seek an order setting aside such application as an irregular proceeding in terms of *Rule 30 (1)*, more

especially, where it is predicated on the contention that such alleged irregular proceeding renders the entire *Rule 43 (2)* application a nullity.

- (12) This *Rule 43 (2)* application is exceptional in that it relates to a marriage spanning 45 years, involves an extraordinarily substantial maintenance claim *pendente lite* and contribution to costs predicated on the earning capacity of an admitted billionaire, who allegedly owns through Cavaleros Group Holdings (Pty) Ltd, a conglomeration of 60 business entities valued at R5 billion, and whose allegedly well-kept mistress with whom he jointly owns and controls assets valued at about R130 million, is the cause of the breakdown of the marital relationship.
- (13) The respondent is enjoined in terms of *Rule 43 (2)*, to establish a *prima facie* case to justify her claim for maintenance *pendente lite* and contribution to costs. The evidence tendered in the *Rule 43 (2)* application in the determination of the maintenance payable *pendente lite* is relevant to, and to the final determination of a final just maintenance order made by the Court adjudicating the issue of maintenance in terms of **section 7 (3) of the Divorce Act 70 of 1979** when finalising the divorce.
- (14) Nothing debars the respondent from traversing the details of the cause of the breakdown of the marriage, indeed it would be unrealistic not to expect the respondent to advert to the pertinent salient features

regarding “*the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage.....*” see also ***Rousails v Rousalis 1980 (3) SA 446 (CPD) at 450G-H.***

- (15) This application was argued over 2 hours by this Court’s most experienced silk specialists in matrimonial matters. In anticipating the exceptional nature of the *Rule 43* application, the *Rule 30 (1)* application was strenuously opposed. Counsel submitted substantial sets of heads of argument. Counsel cited 30 reported cases traversing the entire spectrum of *Rule 43* applications.

THE APPLICABLE LEGAL PRINCIPLES

- (16) The applicant in invoking the provisions of *Rule 30 (1)* is in effect submitting that the *Rule 43* application is so defective that it constitutes a nullity, and that the Court cannot condone its non-compliance with *Rule 43 (2)*. I disagree. The Court has wide powers in adjudicating a *Rule 30 (1)* application. *Rule 43(5)* vests the Court with a discretion and provides: “*The Court may hear such evidence as it considers*

necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.”

- (17) *Rule 30(1)* does not define what should be regarded as an irregular step or proceeding, but It is clear from the provisions of *Rule 43 (5)* that a Court has a wide discretion whether or not to seek further supplementary evidence or to set aside such proceeding.
- (18) In ***Gardiner v Survey Engineering (Pty) Ltd 1993 (3) SA 549*** it was held: *“Proof of prejudice is a prerequisite to the success of an application in terms of Rule 30.”*
- Cloete J (as he then was) in ***Uitenhage Municipality v Uys 1974 (3) SA 800 (E) at 805D-F***: remarked *“The principle has repeatedly been laid down in our Courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side.”*
- (19) The question whether the *Rule 43* application is a nullity or not as contended by the applicant, secondly whether it is unduly prolix or whether in addition it contains a plethora of superfluous, irrelevant and vexatious material. Addressing these exigencies Nestadt J in ***Kruger v Minister of Police 1981 (1) SA 765 (T) at 768D-E*** opined:

“The distinction between an irregular proceeding and one that is a nullity or void is one that has been recognised” (see eg ***Dalhousie v Bruwer 1970 (4) SA 566 (T) at 569*** and the cases there cited). *“I do not propose to attempt to define the standard by which a step or proceeding is to be judged as so irregular or defective that it constitutes a nullity. Perhaps it is a question of degree.”* (***Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278G-H; Rooskrans v Minister van Polisie 1973 (1) SA 273 (T) at 274.***

- (20) In the applicant’s notice in terms of *Rule 30 (2)(b)* no specific details are cited as to which allegations in the respondent’s founding affidavit are categorised as *“superfluous, irrelevant or vexatious evidential matter”* and are consequently, contrary to the provisions of *Rule 43 (2)* read with *Rules 20 (2), 8 (3) and 18 (4)*.

- (21) In ***Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH 1991 (1) SA 823 (T) at 824G-H***; it was held:

“It is not all proceedings which are less than perfect in form which are open to objection in terms of Rule 30, and while the Courts frequently condemn non-compliance with the Rules, purely technical objections should also be discouraged.”

- (22) In ***Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)*** at 278 Schreiner JA stated:

“...technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

SA Metropolitan ewensverskeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O) at 334H-335E.

- (23) The only palpable prejudice alluded to by the applicant is the allegation that the founding affidavit contains a plethora of superfluous and irrelevant material which stands to be struck out if the application is not set aside, because such irregular proceeding will result in the applicant being unable to comply with the requirement of *Rule 43(2)* in that his answering affidavit might result in the *Rule 43 (2)* application spanning some eighty (80) to ninety (90) pages, thus making him susceptible to failing to comply with *Rule 43 (2)*.

- (24) A perusal and consideration of the applicant's founding affidavit indicates that although extensively detailed it is not inordinately prolix having regard to exceptional circumstances predicting applicant's claim

for personal maintenance, and contribution to costs, it consequently cannot be categorised as beyond the letter and spirit of *Rule 43 (2)* as it comprises of the material facts essential for the respondent's claim.

- (25) *Rule 43 (2)* enjoins the respondent to establish a *prima facie* case, consequently, the parties luxurious standard of living has to be factually established and elaborated upon. The same considerations apply to the vast complex assets constituting the financial empire controlled by the applicant, and the details of cause of the breakdown of the marriage.
- (26) The allegations relating to the applicant's conduct with his alleged mistress are unsavoury, but this conduct is relevant to show that the respondent is entitled to maintenance *pendente lite* on the same standard she was accustomed to, especially where such standard is prejudiced by applicant's alleged extramarital relationship.
- (27) It is true that the respondent might have over-elaborated and narrated the details pertaining to the parties lavish lifestyle and the cause of the breakdown of the marriage with venomous vainglorious particularity to the justified annoyance and discomfort of the applicant, but such defect

in the founding affidavit is plainly not such that the document can be said to be a nullity.

- (28) Although the allegations are detailed and somewhat expansive, it cannot be said they are not non-existent or that the founding affidavit is an irregular proceeding in its entirety, and consequently, that the applicant is thereby prejudiced in that he cannot in law be expected to answer or respond to the founding affidavit.
- (29) The applicant is enjoined to answer succinctly to the allegations in the *Rule 43 (2)* founding affidavit, the applicant is not obliged to deal with irrelevant superfluous vexatious allegations, save to state that such are irrelevant to the issue. Alternatively, the applicant is at liberty to bring an application to strike out irrelevant or vexatious material in the respondent's *Rule 43 (2)* founding affidavit.
- (30) A consideration and analysis of the contents of the *Rule 43 (2)* founding affidavit, although extensive and detailed, the allegations contained therein are relevant to a declaration as envisaged in *Rule 43 (2)*. Because of the exceptional circumstances predicating the application the founding affidavit is not unduly prolix, and cannot objectively be said to be nullity. In any event, even if the *Rule 43* application does not

comply in all respects with the requirements of *Rule 43 (2)* read with *Rules 20 (2), 18(3) and 18 (4)*, that cannot be a necessarily a justification for setting it aside. It is trite that a Court has the discretion in a proper case to overlook an irregularity in procedure that does not cause substantial prejudice to the party complaining of it.

THE ORDER

(30) In the premises the application is dismissed with costs.

Dated at Johannesburg on the 12th August 2011.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING: 24th MARCH 2011

DATE OF JUDGMENT: 12th AUGUST 2011

ON BEHALF OF THE APPLICANT: MRS R ROSENBERG SC

INSTRUCTED BY: ZAMIE LIKNAITZKY ATTORNEYS

C/O HARVEY NOSSEL ATTORNEYS

TELEPHONE NUMBER: (011) 783 - 0561

REF. NO.: Mr S Linknaitzky/ Mr H Nossel

ON BEHALF OF THE RESPONDENT: MRS K I FOULKES-JONES SC

INSTRUCTED BY: YAMMIN HAMMOND INC

TELEPHONE NUMBER: (011) 616 - 4314

REF. NO.: MDY/jn/M4273