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## **DIVORCE AND MAINTENANCE ARRANGEMENTS - S AND S AND ANOTHER**

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On 27 June 2019, the Constitutional Court declared section 16(3) of the *Superior Courts Act 10* of 2013 (the Act) constitutional. Section 16(3) of the Act states that spouses cannot appeal maintenance pending litigation, costs of pending matrimonial actions, interim custody of a child, or interim access to a child. Further, the Constitutional Court held that Rule 43 of the *Uniform Rules of Court* - regarding spousal relief for maintenance pending litigation, costs of matrimonial action, interim custody of child, and interim access to child - can be read expansively in light of section 16(3) of the Act.

According to Statistics South Africa - as cited by Nicholls AJ in the present case - 25 326 divorce orders were granted in 2016, 55% of which involved children. Applicants in Rule 43 cases most often involve low-income women. Nicholls AJ notes that gender imbalances at home are often exacerbated by courtrooms, when institutional failures prevent the enforcement of maintenance orders. This lack of enforcement has a very negative impact upon the health and financial wellbeing of women and children. The Constitutional Court proceeded with the present case with an awareness of the infringement of women and children's rights, to protect and uphold the interests of vulnerable sectors of society.

The facts of the case are that Mr and Mrs S commenced divorce proceedings in September 2016. The couple's three children remained in the care and custody of their father. Mr S initiated an application under Rule 43, to be awarded interim relief for care and custody of his children. He also proposed to provide interim maintenance of R12 000 per month to his spouse. Mr S sought to confirm interim maintenance arrangements through Rule 43 proceedings at the Gauteng High Court.

Mrs S filed an opposing affidavit and stipulated that her spouse's founding affidavit did not accurately depict his considerable wealth. She was previously employed by her husband's company and paid R64 000 per month. She was also registered on his medical aid until January 2017. Mrs S claimed maintenance of R60 353 and payment for legal costs of R20 000. She also sought medical coverage for herself and her children under her husband's plan.

Mrs S' opposing affidavit was filed several weeks late. Mr S subsequently applied for a postponement, in order to reply to his wife's affidavit, noting her current employment and spousal support from her current partner. The High Court dismissed both Mrs S' opposing affidavit and Mr S' postponement application due to late submission. The Court ruled that Mr S provide R40 000 as maintenance to his spouse, maintain his children, and cover their medical and scholastic costs.

Mr S considered the ruling to be financially unsustainable and sought further reasons for the Rule 43 order. However, the High Court noted that under section 16(3) of the Act, Rule 43 orders are interlocutory, not appealable, and do not require reasons to be provided. In a supplemental notice of appeal, Mr S raised the constitutionality of section 16(3) of the Act for



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the first time. The High Court concluded that Rule 43 protects the best interests of the child, because an appeal resulting in suspension of orders would run counter to these interests.

The Constitutional Court granted leave to appeal due to the broad impact of Rule 43 applications on litigants in divorce proceedings. The Constitutional Court considered whether section 16(3) infringes on the constitutional rights of a party wishing to appeal a Rule 43 order. Mr S argued that section 16(3) of the Act is unconstitutional because it creates a blanket rule, in which Rule 43 orders can never be appealed. Mr S further submitted that this rule created an infringement of the best interests of the child, the right to equality for litigants, and right to access to courts.

In a unanimous judgment, the Constitutional Court held that the appeal process is expensive and would disproportionately impact financially-vulnerable spouses, oftentimes women acting as the primary caregiver. Furthermore, the appeal process leads to delays in justice and suspension of orders, which infringe upon the best interests of the child. Ultimately, an appeal process would unduly advantage the more financially-resourced spouse, and disadvantage vulnerable spouses and children.

Regarding litigant right to equality - and the fact that litigants in Rule 43 proceedings are differentiated from litigants with the right to appeal - the Court held that distinction and differentiation are necessary to effective governance. Of issue is whether the distinction is rational or irrational. The Constitutional Court found that a rational connection exists between section 16(3) and governmental interests in preventing delays to justice and additional incurrence of costs.

Finally, regarding the constitutional right of access to Court, not all litigants have the right to appeal. The absence of a right to appeal interlocutory orders has long been held constitutional. Furthermore, litigants in Rule 43 applications can approach the court in terms of Rule 43(6). If a change in material circumstance exists, litigants can vary their court orders. As such, litigants maintain access to courts and their constitutional rights have not been denied.

Thus, the Constitutional Court denied each of Mr S' claims regarding the unconstitutionality of section 16(3) and dismissed the appeal with costs. The Court noted that the majority of incorrect maintenance orders can be rectified by Rule 43(6) applications. The unconstitutionality of section 16(3) had not been established, and in exceptional cases, courts can exercise their inherent power in terms of section 173 of the Constitution. Ultimately, High Courts should interpret Rule 43 expansively in light of section 16(3) of the Act.

This case revolved around the core issue of how to uphold the best interests of a child. Mr S and the Centre for Child Law held that procedural advantages and the right to expeditious relief should never trump the right to appeal in matters involving children. However, the Constitutional Court states that any infringement upon the best interests of a child related to Rule 43 can be immediately rectified via urgent application. The Court further held that the



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damage of delayed maintenance payments far outweighs the impact of erroneous court orders. Ultimately, the Constitutional Court situates the Centre for Child Law's concerns in a broader context. Through an emphasis on expeditious and inexpensive justice, Nicholls AJ looks beyond the immediate context of spousal relief in affluent households to potential impacts upon low-income women, vulnerable children, and the legal system as whole.