COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON UNIFORM RULE 43 (7) & (8) AND MAGISTRATES' COURTS RULE 58 (7) & (8): TARIFF PROVISIONS

The Law Society of South Africa (LSSA) considered the proposed amendments to the above rules and, after having consulted with its constituents, herewith submits its comments. We are also attaching comments received from the Cape Law Society, Advocate J Anderson and a number of Counsel from the Cape Bar to the General Council of the Bar's Rule Committee, in respect of Uniform Rule 43(7).

1. GENERAL COMMENT

1.1 The LSSA is of the firm view that Uniform Rule 43 and Magistrates' Court Rule 58 (collectively referred to as 'the Rules') should be reviewed in their totality as there are a number of important considerations that are impacting on access to justice in their current and proposed format.

1.2 It is apparent that the rationale for the limitation of fees pursuant to the Rules is to ensure access to justice, especially for indigent persons, and to ensure that those who are dependent upon litigants in matrimonial and maintenance matters can have interim aspects resolved speedily.

1.3 In a 2015 judgement of the Free State High Court, it was for example stated that: '*It is trite that an application in terms of Rule 43 must be short and to the point. The purpose of the rule is to deal with applications of this nature as inexpensively and expeditiously as possible.*'

1.4 Although such matters should be inexpensively and expeditiously there is also a need to set out briefly, the dispute between the parties. This, according to the Gauteng High Court[1], '*can only be achieved through succinct reference to the pleadings*'. The Court further stated that; '*despite the desirability of keeping the costs of Rule 43 applications as low as possible, I am of the view that the Court should not be required to search for and peruse another file of papers.*'

1.5 Given the contentious nature of such applications, the actual costs incurred by practitioners in opposed applications will predictably exceed the allowable fees.

[1] MCE v JE (13495/2011) [2011] ZAGPPHC 193 (14 September 2011)

1.6 It is also a common practice that practitioners put significant energy into the Rule 43 and 58 applications because such applications often have the potential to settle the entire divorce, and often do so. This means speedier resolution of the entire dispute which means faster access to true justice.

2. NATURE OF APPLICATIONS

2.1 Applications made pursuant to the Rules are often contentious and complex and, although interim in nature, can impact on the outcome of final proceedings.

2.2 Legal practitioners involved in applications made pursuant to the Rules:

2.2.1 have to ensure that there is a succinct reference to the pleadings;

2.2.2 may have to consult various legislation, including the Children's Act, Maintenance Act and recent Court Judgements and international laws and protocols;

2.2.3 often have to deal with diverse factual allegations and complex questions of law, finances and the bests interest of children; and

2.2.4 have to ensure that appropriate facts are presented to Court.

2.3 Applications made pursuant to the Rules are often fraught with factual disputes which cannot be adequately addressed within the limits reflected in the Rules. Parties are not afforded the opportunity to reply and the Courts are faced with the unenviable task of having to deal with factual disputes arising from the papers. The situation may be further escalated through the creation of artificial factual disputes by the Parties. This may then result in injustices to the parties on crucial matters pertaining to maintenance, custody, etc.

2.4 Applications are often inherently complex and urgent in nature.

2.5 Rule 43 proceedings are not appealable and the outcome of the interim proceedings is generally final pending the finalisation of the divorce proceedings.

2.6 Applications of this nature should not be voluminous, but the parties should, in our view, be offered an opportunity to reply. Such opportunity is generally also afforded in urgent matters.

2.7 The LSSA agrees with the Cape Law Society to the extent that:

2.7.1 A Rule 43 application should be brought and an opposing affidavit should be filed within 10 days of services of such application. A replying affidavit to the opposing affidavit should be filed within 5 days after receipt of the opposing affidavit. The parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party thereafter;

2.7.2 Other than in paragraph 2.7.1, the existing rules and case law (which generally apply to opposed applications, except for the time period limitations) should apply to the scope and the format of these applications; and

2.7.3 The Court should have the ability to, in its discretion, request further documentary information and/or affidavits to clarify issues, should it wish to do so.

3. COSTS

3.1 We are of the view that:

3.1.1 Practitioners who assist clients in lodging applications in terms of the Rules have to pursue the best interests of their clients and the minor children involved. This may involve more than one consultation, a full understanding of a range of matters, including: the bests interest of minor children, financial needs and abilities of the parties, research of relevant legislation, court decisions and international protocols;

3.1.2 Practitioners also have to balance the need to be short and to the point with the capturing of factual allegations on a wide array of matters that may impact on maintenance *pendente lite*, interim custody and interim access. This will take a number of hours to do so; and

3.1.3 Practitioners have to peruse and analyse court documents in order to present their client's argument to court in an effective and persuasive manner. An interim order will have a significant impact on the parties pending the finalisation of the matter.

3.2 The cost structure, as reflected in the Rules, is regrettably out of sync with the practical realities of such applications.

3.3 The tariffs in the Rules, with the recommended increase, amount to less than an hour's time of a legal practitioner. It is virtually impossible for a legal practitioner to take proper instructions and to adequately prepare for applications of this nature based upon such tariffs.

3.4 It is not difficult to envisage that advocates may, as submitted on behalf of a number of counsel from the Cape Bar, simply avoid accepting briefs in Rule 43 applications. This will not be in the best interest of justice and will defeat the noble objectives associated with Rule 43 applications.

4. LSSA RECOMMENDATION

4.1 The LSSA strongly supports the recommendation of the Cape Law Society that:

4.1.1 The ordinary tariff should apply to these applications and the costs should not be limited;

and

4.1.2 The procedure should be amended to cater for the ordinary fast-paced procedure of filing papers in opposed applications.

4.2 The LSSA is of the view that our recommendations and those of the Cape Law Society and Advocate Anderson are aimed at promoting the public interest and ensuring that complex and delicate family-related matters are dealt with expeditiously whilst affording parties the opportunity to adequately present their positions to the court.

THE CAPE LAW SOCIETY
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Ms Kris Devan
Law Society of South Africa
P O Box 36626
MENLO PARK, 0102

Our Reference: Prof Affairs/AH/cm/Mag Court2015
Your Reference:
Date: 13 November 2015

Dear Ms Devan

RE: UNIFORM RULE 43 (7) AND (8) AND MAGISTRATES' COURTS RULE 58 (7) AND (8): TARIFF PROVISIONS

We refer to the above matter.

We confirm that the Society's Magistrates Court Committee considered the matter and comment as follows:

1. The opportunity to make comments on the tariffs is appreciated. It is however, submitted that this opportunity should also be used to address the current format of the application which presently does not provide with applicant the right of reply to the respondents opposing affidavit, thus the applicant is prejudice by the current format of the application. The injustices of the costs and format of the application are intertwined and prevent proper access to justice.

2. The tariff should be unlocked in order for practitioners not only be able to tax their party and party costs on the normal tariff like any other application but to enable the practitioners to also charge their own clients on an attorney and own client scale as agreed with the client. The reason to allow the entire divorce to be dealt with and charged for at an attorneys tariff with the exception of Rule 43 applications it does not make sense for practitioners to be able to charge their own clients on their on an attorney and own client scale with the exception of Rule 43 applications. Often the estates involved exceeds R1 000 000.

3. There are sufficient alternatives to promote and facilitate access to justice through pro bono, *in forma pauperis* and legal aid to litigants who cannot afford to pay the fees of the practitioners.

4. The applications in terms of Uniform Rule 43 of the High Court and Magistrates' Court Rule 58 have become complex with the introduction of additional legislation such as the Children's Act which should be taken into consideration and determination of this matter.

5. The courts are often asked by the practitioners for deviation orders from the tariff and such orders are rarely refused by the courts.

6. The applications in terms of Rule 43 and Rule 58, respectively, for interim relief pending the final outcome of the divorce proceedings, can determine the final outcome of the proceedings at an early stage.

We trust that you find the above in order.

Yours sincerely

ALFRED HONA (MR)
HEAD OF DEPARTMENT
PROFESSIONAL AFFAIRS

THE CAPE LAW SOCIETY

THE STATUTORY BODY WITH JURISDICTION TO ADMINISTER THE ATTORNEYS' ACT IN THE NORTHERN, WESTERN & EASTERN CAPE PROVINCES

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Ms Kris Devan
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Our Reference: Prof Affairs/AH/cm/Fam Law/2015
Your Reference:
Date: 13 November 2015

Dear Ms Devan

RE: UNIFORM RULE 43 (7) AND (8) AND MAGISTRATES' COURTS RULE 58 (7) AND (8): TARIFF PROVISIONS

We refer to the above matter.

We confirm that the Society's Family Law & Gender Committee considered the matter and comment as follows:

1. Although it is true that Rule 43 of the Uniform Rules of Court provides for interim relief in divorce matters, it has become one of the most important applications pending the outcome of divorce proceedings.

2. In opposed matters (in the Western Cape High Court for example) a trial date is allocated approximately two years after the date of close of pleadings. Often matters of principle remain in dispute despite every attempt to settle the matter such as eg. maintenance for a while until her death or remarriage, whether a trust should be set aside; complex financial questions; issues relating to the best interests of the children. Divorces frequently now deal with the international law and international children. Divorces frequently now deal with international law and international questions due to the worldwide migration of people. Attorneys often have to grapple with complex questions of international law and commercial law relating to family law matters.

3. The outcome of a Rule 43 application in these matters, has in practice often determined the eventual outcome of the case. This is so by reason of the ability of the respective spouses to function financially in the interim pending the outcome of

divorce proceedings and to litigate at the same level as the other spouse during the process. A party's constitutional right to litigate at similar levels is established.

4. An appropriate Rule 43 order or a too onerus one or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable matter, often puts an end to the matter of affects the matter inequitably with the result that settlements are reached or orders are granted which do not serve equity not justice. This has often caused parties to question the fairness of the process and the Rules and procedures available to them. Furthermore, it is difficult to meet the requirements of an application for a variation of a Rule 43 Court Order.

5. Unfortunately often Judges are simply put in an impossible situation as they are unable to judge factual disputes which arise from the papers. Often factual versions or financial versions are diametrically opposed. In terms of the current procedure these disputes remain untested as there is no right to reply nor the automatic right to lead oral evidence nor a right to subpoena.

6. It is often impossible for the presiding Judge to make a balanced and informed judgment and to have a proper insight into the factual situation. Parties abuse the system sometimes by creating artificial factual disputes on the papers which may in the long term affect their credibility but in the short term give them results and affect the other party detrimentally. A balance has to be achieved.

7. We would not wish to burden the court with a prolixity of papers, however, and are supportive of the fact that these applications should not be voluminous. However, in view of our experience that injustice does frequently result in the finalisation of the matter due to these orders we are strongly of the opinion that the Rules should be amended to accommodate a process for reply.

8. In view of the long delays before trial dates are allocated injustice may result, and often does, particularly in view of the fact that no automatic Headline inflation increases are linked to the cash orders. The onus would be on a party wishing to amend the order to base this on a substantial change in circumstances.

9. There should therefore be scope within these orders to grant automatic inflation linked increases which would apply on the anniversary date of the Rule 43 order, without parties having to approach a court in this regard. Of course it would always be open to other party to approach a court for reduction or to prevent the application of the inflation linked increase in view of his or her changed circumstances.

10. We therefore recommend:-

10.1 A Rule 43 application should be brought and an opposing affidavit should be filed within 10 days of services of such application. A replying affidavit to the opposing affidavit should be filed within 5 days after receipt of the opposing affidavit. The parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party thereafter.

10.2 Other than in paragraph 10.1, the existing rules and case law (which generally apply to opposed applications, except for the time period limitations) should apply to the scope and the format of these applications.

10.3 The court should have the ability to in its discretion request further documentary information and/or affidavits to clarify issues, should it so wish.

11. These applications are urgent in its nature, because it often deals with minor children and the ability to care for minor children properly in the interim, escape from an abusive relationship or a home situation that traumatises the children pending the outcome of divorce proceedings, and interim parental rights and responsibilities in regard to the children.

12. The applications should therefore be set down as expeditiously as possible, so that these issues may be dealt with.

13. COSTS

13.1 The current recommended costs amount to an hour of an attorneys' time be charged out on tariff.

13.2 The practicality, however, in relation to these applications, is that it often takes a number of consultations with clients to complete the application fully, particularly in the more complex matters. The clients have to complete a schedule of expenses, which often they are not properly equipped to do, or in regard to which they simply do not have the knowledge and have to do some homework. They have to explain the financial position of the parties and their historical expenditure level. Documents have to be perused, analysed and schedules drafted or prepared in an effort to avoid prolixity. Consequent upon the fact that the outcome of the Rule 43 applications such as a significant impact on the parties and may often be in practice permanent of nature because they are not appealable, the drafting of the affidavits and

annexures cannot be taken lightly. The limitation on costs undermines this process, particularly in regard to vulnerable parties. It often unfortunately takes a number of hours to complete such an application. When these applications are heard, time is again spent in an effort to endeavour to settle the application before it is heard and eventually argue it. In practice it is only argued when settlement fails. This means that there are a number of attendances, consultations, drafting and re-drafting, attendances, correspondence, at least one round table discussion and so on.

13.3 Often the Rule 43 applications is utilised to not only settle the application itself, but also to endeavour to settle the matter overall (the costs relating purely to overall settlement can of course be charged separately) on the day of its hearing, but if settlement fails, the negotiations endeavouring to settle the Rule 43 application and the costs attendant thereupon cannot be charged.

13.4 Unfortunately the costs structure in regard to a Rule 43 application simply does not take into account the reality of the application, the far reaching impact it has on the lives of the parties pending the outcome of divorce proceedings in regard to all areas of their future conduct of the matter and the best interests of the children, and the parties' ability to participate in a matter on a constitutionally accepted basis with more level playing fields.

14 Our strong recommendation therefore is that:-

14.1 the ordinary tariff should apply to these applications and the costs should not be limited;

14.2 the procedure should be amended to cater for the ordinary procedure of filing papers in opposed applications, but with a fast traced timetable and hearings in third division.

We also attach hereto the submissions of the Bar Council and the proposed draft amended Rule for consideration by the Rules Board.

Yours sincerely

ALFRED HONA (MR)
HEAD OF DEPARTMENT - PROFESSIONAL AFFAIRS

BAR PROPOSAL (ADV. J. ANDERSON).

PROPOSED AMENDMENTS TO RULE 43 OF THE UNIFORM RULES OF COURT:

Introduction

1. Rule 43 provides interim relief to a spouse in divorce matters. The rule prescribes a procedure that is aimed at providing an inexpensive and expeditious hearing of typical disputes that must be resolved *pendente lite*. As such the rule directs that an applicant must file a sworn statement in the nature of a declaration and the respondent must file a sworn reply in the nature of a plea. A prolixity of papers is frowned upon and there is case law making it evident that applications can be dismissed or parties mulcted in costs where the papers are too voluminous.

2. In practise, however, this has not stopped many litigants from filing affidavits that are lengthy and filled with averments which would not be found in a declaration or plea. In addition, a practice has evolved where many annexures are used, which would not be annexed to pleadings. This is so as parties are attempting to persuade the court to make orders in his/her favour. Understandably so, as the rule 43 application has become one of the most important applications that a party in a divorce action can bring.

3. In opposed matters, particularly in the Western Cape High Court, a trial date is allocated approximately 2 years after the date of close of pleadings. Often,

matters of principle remain in dispute, despite every attempt to settle the matter, such as whether a wife is entitled to maintenance after the divorce until her death or remarriage or whether a trust should be set aside. There are often complex financial questions relating to the determination of an accrual claim and issues relating to the best interests of the children that cannot be resolved through settlement negotiations. In divorce actions our courts must also now frequently deal with international law and international questions due to the worldwide migration of people. Attorneys and advocates often have to battle with complex questions of international law and commercial law relating to family law matters.

4. The outcome of a rule 43 application in these matters, has in practice often determined the eventual outcome of the case. This is so by reason of the ability of the respective spouses to function financially in the interim pending the outcome of divorce proceedings and to litigate at the same level as the other spouse during the process. A party's constitutional right to litigate at similar levels as his/her spouse is established in our law. In addition rule 43 orders can create a status quo in respect of children's residency, care and contact arrangements.

5. An inappropriate rule 43 order or a rule 43 order which is too onerous or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable manner, often puts an end to the matter or

affects the matter inequitably with the result that settlement cannot be reached or settlement is reached and orders granted which do not serve the principles of equity and justice. This has often caused parties to question the fairness of the process and the rules and procedures available to them and puts the administration of justice in question in the public eye.

No right to reply

6. Rule 43 does not allow a party the right of reply. Subrule (5) determines that 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. In practice our courts are loath to allow supplementary affidavits to be filed and any further affidavit containing averments in reply is not allowed. Unfortunately, in rule 43 applications judges are often put in an impossible situation as they are unable to judge factual disputes which arise from the papers. Often factual versions or financial versions are diametrically opposed. In terms of the current procedure these disputes remain untested as there is no right to reply, no automatic right to lead oral evidence and no right to subpoena. It is often impossible for the presiding judge to make a balanced and informed judgment and to have a proper insight into the factual situation. Parties sometimes abuse the system by creating artificial factual disputes on the papers, which may in the long term affect their credibility but in the short term gives them results and affects the other party detrimentally. A balance

has to be achieved.

7. Legal practitioners would not wish to burden a court with a prolixity of papers and in general are supportive of the view that the application should not be voluminous. In view, however, that injustice does frequently result in the finalisation of divorce matters due to these orders, we are strongly of the opinion that the rule should be amended to accommodate a process for reply.

8. It is thus recommended that when a rule 43 application is brought an opposing affidavit should be filed within 10 days of service of the application. A replying affidavit to the opposing affidavit should be filed within 5 days after receipt of the opposing affidavit.

9. Other than in exceptional circumstances the existing case law should apply to the scope and the format of the applications. We would suggest that the rule should reiterate that the nature of the founding application should be in the form of a sworn statement and that of the opposing affidavit should be in the nature of a plea, which must be qualified on the basis that more information may be placed before the court in exceptional circumstances. The rule should specify that any reply should only deal with new matter raised by the respondent in the opposing affidavit.

10. In addition the rule should be amended to include a mero motu right for the

court to, in its discretion, request further documentary information and/or affidavits to clarify issues, should it so wish. The rule should also allow parties to obtain information through the use of subpoenae. As rule 43 applications are often instituted and disposed of before pleadings in the divorce action are closed, parties are "blind" in that they do not have access to information they could otherwise obtain in discovery.

Set down of rule 43 applications

11. At present rule 43 applications are set down by the registrar as soon as possible after the service and filing of the sworn reply. It is done on application to the registrar by the applicant (or sometimes the respondent) and the registrar must give the parties ten days' notice, unless the respondent is in default.

12. Often the fact that the matter should be set down by the registrar causes tremendous delays in the allocation of a date and a further delay is caused as the registrar's notice of set down does not necessarily reach the parties more than 10 days before the matter has been set down. In this regard we would suggest that the rules should be amended to exclude the registrar from this process. The parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party after expiry of the period within which the last affidavit must be filed.

13. In practice it takes between six weeks and eight weeks (in the Western Cape Division) after the rule 43 application has been launched for it to be heard. Yet these applications are urgent in its nature because it often deals with minor children and the ability to care for minor children properly in the interim. Lack of financial resources or a situation which compels children to remain in an acrimonious atmosphere in their own homes are detrimental to children. These applications are often necessary as a spouse has been left without financial resources, yet despite the urgent nature of the applications, an applicant must accept a six to eight week delay.

14. The rules should enable parties to finalise the matter more speedily. This would assist where the parties are able to set the matter down on 5 days' notice to the other party without recourse to the registrar. It is possible for the various High Courts to deal with the manner in which rule 43 applications should be set down through the Judge President's practice notes.

Variations of rule 43 orders

15. Rule 43(6) provides that the court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

16. In view of the long delays before trial dates are allocated an injustice may

result, and often does, as rule 43 orders can only be varied in the event of a material change in circumstances. This is particularly so in view of the fact that no automatic headline inflation increases are linked to the cash orders. The onus would be on a party wishing to amend the order to base this on a substantial change in circumstances. There should therefore be scope within these orders to grant automatic inflation linked increases which would apply on the anniversary date of the rule 43 order without parties having to approach a court in this regard. Of course it would always be open to the other party to approach a court for reduction or to prevent the application of the inflation linked increase in view of his or her changed circumstances. In addition there should be scope to allow a litigant who can establish that the other party has made material non-disclosures or misstated facts to revisit the order without there having to be a material change in either their circumstances. This is of particular importance as the order cannot be reviewed or appealed.

<u>The wording of rule 43(1)(c) and (d)</u>

17. Rule 43(1)(c) and (d) still refer to "custody" and "access", which terminology is now outdated in terms of the provisions of the Children's Act 38 of 2005. The rule should thus be amended to reflect that the disputes to be dealt with include not custody and access disputes but disputes arising from interim residency and/or interim contact disputes. As the definition of "care" in the Children's Act is very wide and the ambit of a care dispute will not necessarily

be appropriate in a rule 43 application, we suggest that the term "residency" be used.

Limitation on fees in terms of rule 43(7) and (8)

18. The current recommended costs in the tariff, even after increases, amounts to less than an hour of an attorney or counsel's time. The practicality, however, in relation to these applications are that it often takes a number of consultations with clients to complete the application, particularly in the more complex matters. In addition, the clients have to complete a schedule of expenses, which they are not equipped to do in most instances or in regard to which they simply do not have the knowledge and have to do homework. Clients must explain their financial positions as well of that of the other spouse and their historical expenditure level for applications in terms of rule 43(1)(a) and (b). Documents have to be perused and it often (unfortunately) takes a number of hours to complete such an application.

19. When these applications are heard, time is again spent in an effort to endeavour to settle the application before it is heard and eventually argued. In practice these applications are usually argued in the afternoon but may be argued as early as 11h30 (in the Western Cape Division) which may require counsel's presence in court for long periods of time, yet counsel is not able to charge for waiting time. In practice, if settlement fails, the application must be

argued. This means that there are a number of attendances, consultations, drafting and redrafting, correspondence and roundtable discussions and so on that result from a rule 43 application.

20. Often the rule 43 application is utilised to endeavour to settle the divorce action overall. Although the cost relating to overall settlement can be charged separately, if overall settlement negotiations fail and the negotiations regarding the settlement of the rule 43 application fail, then the costs attended thereupon can at present not be charged.

21. Unfortunately, the cost structure in regard to a rule 43 application simply does not take into account the reality of the situation, the far-reaching impact the application has on the lives of the parties pending the outcome of divorce proceedings. Rule 43 has an impact in regard to all areas of the parties' future conduct, the best interests of the children as well as the parties' abilities to participate in the matter on a constitutionally accepted basis.

22. In addition, litigants in the High Court are placed at a disadvantage by the rule 43 tariffs as a litigant in the Regional Court who wishes to claim interim relief is not limited as to the fees that can be charged by an attorney or counsel. Often both an attorney and counsel would be briefed in a similar application in the Regional Court. In addition it would be unfair to compel all litigants to make use of the Regional Court in circumstances where the Regional Courts do not

always have jurisdiction with regards to all the issues in the divorce action, such as whether a trust should be set aside, or is not equipped to deal with extensive litigation where trials run over many weeks in complex matters.

23. It is therefore our strong recommendation that the ordinary tariff should apply to these applications and that the costs should not be limited in terms of the rule.

SUBMISSIONS ON BEHALF OF A NUMBER OF COUNSEL FROM THE CAPE BAR TO THE GENERAL COUNCIL OF THE BAR'S RULE COMMITTEE IN RESPECT OF UNIFORM RULE 43(7)

1. In its letter dated 1 February 2010 to the Chairman of the General Council of the Bar of South Africa *("GCB")*, the Cape Bar Council recommends that the Rules Board for the Courts of Law abolish Uniform Rule 43(7) entirely, alternatively, to amend it to make provision for more realistic maxima, and to do the same to Uniform Rule 43(8) for attorneys fees for undefended and defended cases under the Rules. The letter is annexed hereto as "CB1".

2. The Chairman of the GCB thereafter advised that the Rules Board for Courts of Law *("Rules Board")* is currently considering amending Rule 43(7) pursuant to an earlier representation made by the GCB.

3. It is requested that the GCB Rules Committee have regard to these submissions in responding to the Rules Board's proposals.

4. The costs committee of the Rules Board proposes to increase the amounts in Rule 43 as follows:

"Rule 43(7) - No advocate appearing in a case under this rule shall charge a fee of more than [R~~600~~] R ~~850~~ if the claim is undefended and [R~~170~~] R ~~500~~ if it is defended, unless the court in an exceptional case otherwise directs.

Rule 43(8) - No instructing attorney in cases under this rule shall charge a fee of more than [R~~300~~] R ~~500~~ if the claim is undefended and [R~~350~~] R ~~750~~ if it is defended, unless the court in an exceptional case otherwise directs."

5. Although the purpose of Rule 43 is that applications of this kind should be dealt with inexpensively and expeditiously, the significance and importance of Rule 43 applications in the Western Cape Division of the High Court have increased significantly over time. In part, this is because delays in obtaining a trial date (of approximately 2 years from close of pleadings) result in divorce actions being determined eighteen months to two years after the Rule 43 application is determined.

6. In the majority of divorce actions the Rule 43 application has become the most significant interlocutory application. The hearing fulfils a strategic role and often sets the tone for the divorce action. It concerns matters of crucial importance to the litigants which are in dispute:

6.1. care and contact arrangements for minor children which often implicate the constitutional rights of children, and require expertise in this area;

6.2. financial issues which will impact on the lives of the litigants for a lengthy period(including the viability and profitability of family businesses or trusts) which often requires expertise in various areas of commercial and trust law;

6.3. in some matters, particularly where large estates are involved, substantial costs contributions are claimed and ordered;

7. The Court often has to grapple with complex financial structures in order to determine questions of affordability. In most Rule 43 matters in the High Court one is not dealing with salaried litigants or simple asset structures. Consequently, litigants often approach more experienced counsel to argue their matters.

8. If these issues are not properly ventilated, considered and determined, the Rule 43 order can:

8.1. unfairly hamper one of the party's ability to litigate effectively in the divorce action;

8.2. cause undue hardship to one party (and/or the children born of the marriage);

8.3. place one party in a vulnerable position vis-a-vis the other party in regard to settlement negotiations;

none of which serves the interests of justice.

9. The order in a Rule 43 is not appealable. Consequently, maintenance orders, care and contact orders in respect of children and contributions towards the costs of pending matrimonial actions are generally determined only once prior to the divorce action. In regard to maintenance and care and contact orders, Rule 43(6) only permits a further Rule 43 application in the event of a material change taking place. This rule has been strictly interpreted by our courts.

10. There is no longer any apparent basis to limit the fee in a Rule 43, application particularly in light of the following:

10.1. Rule 2(1) of the Uniform Rules of Professional Ethics provides that *"counsel is under an obligation to accept a brief in the courts in which he professes to practice, at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief."*

10.2. Other than for the most "baby" junior, a fee of R 500,00 for an opposed rule 43 hearing, as proposed by the GCB is not a professional fee as stipulated by GCB Rule 2(1). Consequently, counsel would be free to decline accepting the Rule 43 brief on the basis that the tariff does not provide for his/her proper professional fees. This deprives litigants of access to a broad spectrum of counsel.

10.3. Rule 43(7) is not subject to any means test. In theory, it means that an IT Billionaire in an extremely complex Rule 43 involving significant assets held in trust or in another jurisdiction, is entitled to representation from Senior Counsel for R 500,00 for an appearance, unless the tariff is waived by the Court hearing the matter, which remains unknown, of course until the matter has been determined (and only if the counsel is prepared to accept the brief at that rate).

10.4. Counsel are not limited in respect of fees in other interlocutory applications launched prior to divorce actions, for example anti-dissipation applications and applications to compel discovery, but are entitled to charge a professional fee. There is no apparent basis for the distinction that is drawn between those applications and applications under Rule 43, particularly in light of the great significance of Rule 43 orders.

10.5. The tariff was introduced at a time before the Southern Divorce Court had been established, and at the time the tariff catered for all litigants across the board. It should be emphasised that this Divorce Court (created at magistrates' court level) was created specifically provide litigants with access to a court which has a tariff (on taxation) equivalent to that of magistrates' court. The position has changed since the introduction of the Southern Divorce Court inasmuch as the divorces now heard in the High Court in general involve larger estates with more complex property and commercial structures. Notably, the equivalent application for such interim relief under Rule 32 in the Southern Divorce Court is not subject to a tariff.

10.6. In the Western Cape division, Rule 43's are not expedited or heard separately. At most 4 or 5 such applications are set down at the end of the Motion Court roll each day from Monday to Thursday. Rule 43's are not set down by the Registrar on Fridays, but a Rule 43 may be postponed for hearing on a Friday. The effect of this is that Counsel cannot take on other work, other than Motion Court appearances, on a day when they are reserved to argue a Rule 43. Very often, due to the nature of a particular Rule 43 and the work and preparation involved, it is not possible for Counsel to even take on other motion court on the day on which such Rule 43 is set down. Counsel also cannot arrange consultations, as it is impossible to anticipate

when a Rule 43 application will be heard. On some occasions, such applications are crowded out and postponed for a further day. Accordingly, at least a full day, often more than one full day can be expended on a Rule 43, for a fee of R 175, 00 at present or R 500 in terms of the proposal.

10.7. Many counsel can be briefed for 2 to 3 Rule 43 applications in a week which means their income, on the tariff, is severely limited, despite the hours spent in respect of preparation and attending court.

10.8. Although Rule 43(7) permits a court to waive the tariff, this decision is only made at the hearing of the matter, effectively requiring counsel to bring the application at the tariff unless it is waived. Judges in this division seldom exercise their discretion to waive the tariff, primarily, it would seem because such waiver is limited to "big money" matters. What constitutes a "big money" matter is not defined.

11. Although Rule 43 appears to have as its underlying rationale the aim of improving access to justice, it is only if limiting legal fees achieves this purpose that it would be upheld as a reasonable limitation of the right of access to courts.

12. The proposed tariff in regard to a Rule 43 application does not take into account the nature of the application and the significant impact it has on the lives of the parties pending the outcome of divorce proceedings in regard to all areas of their future conduct including the best interests of the children.

13. Strict enforcement of the tariff will mean that many if not all counsel, with the exception of baby juniors, would avoid accepting briefs in Rule 43 applications thereby limiting access to justice for parties. Parties will not have access to the necessary expertise, which is simply not in the interests of justice.

14. A further consideration is that the majority of counsel appearing in Rule 43's are women. For those women at the bar who primarily practise matrimonial law, the enforcement of such a tariff will significantly impact on their ability to practise as the proposed tariff simply does not even cover the most basic costs associated with arguing a rule 43.

15. Accordingly, it is proposed that the ordinary High Court tariff for opposed applications should apply to Rule 43 applications in respect of party and party costs as there is no justification for retaining a tariff in such proceedings