REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 21530/2009
DATE: 28 FEBRUARY 2014
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M[…], B[…] A[…] Applicant

And

M[…], A[…] Respondent

J U D G M E N T

MAKGOKA. J:

[1] This is an application in terms of rule 43(6) of the uniform rules of court 9 (the uniform rules). On 4 March 2011, this court, in terms of rule 43, ordered the respondent to pay maintenance in respect of the applicant, in the amount of R6000 per month, pending the

finalisation of a divorce action between the parties.

[2] On 28 November 2012 the divorce action was finalised, and a decree of divorce was granted, together with ancillary orders concerning the division of the parties' joint estate. The parties could, however, not reach agreement on the applicant's entitlement to maintenance, post the divorce. As a result, the court (Molefe AJ) made made an order extending the rule 43 order referred to in para [1] above, beyond the divorce action. The relevant part of the order reads:

> '2.2 The issue of the defendant's entitlement to maintenance and the calculation thereof, if applicable, was postponed *sine die*;
>
> 2.3 The applicant was to deliver a rule 43(6) application within three *calendar* months of the granting of order, provided that:
>
> 2.3.1 Should the defendant not deliver such application within the stipulated period, the current Rule 43 order would lapse;
>
> 2.3.2 by postponing the issue of maintenance, the plaintiff, despite the fact that he will continue making payments to the defendant in respect of the current rule 43 order, does not conceive that the defendant.'

[3] It is common cause that the rule 43(6) application was not brought within three calendar months of the granting of the order, but served only on 6 March 2013. The respondent did not file an answering affidavit, but has instead, filed two notices in terms of rule 6(5)(d)(iii) of the uniform rules, which provides:

> '(d) Any person opposing the grant of an order sought in the notice of motion shall
>
> ...
>
> (iii) if he intends to raise any question of law only, he shall deliver notice of his intention to do so within the time stated in the proceedings sub-paragraph setting forth such question'.

[4] The first of the notices was delivered on 18 March 2013, in which the respondent gave his intention to argue a preliminary point and the dismissal of the application on the basis that the applicant's entitlement to maintenance had lapsed in terms of me court order as the rule 43(6) had not been served within the time stipulated in the court order of 28 November 2012.

[5] On 9 May 2013, the respondent delivered another notice in terms of rule 6(5) which reads:

> "The affidavit deposed to by the applicant in support of the rule 43(6) application does not comply with the requirements of a sworn affidavit in terms of the Commissioners of Oath's Act, Act 16 of 1963, in that:
>
> 1. The purported affidavit was not deposed to by the applicant; and
> 2. The purported affidavit was not commissioned in front of a Commissioner of Oaths; and
> 3. The last page of the purported affidavit has been tampered with, and is merely an altered duplication of a previous affidavit deposed to by the applicant. A copy of the previous affidavit is attached hereto as annexure 'A'.

[6] On 5 April 2013 the respondent set the rule 46(3) application down for 10 May 2013, on which occasion the matter was postponed *sine die.* On 1 October 2013, the respondent again set the matter down for hearing on 8 November 2013. This is how the matter came before me.

[7] In his heads of argument, counsel for the respondent argued, with reference to the point raised in the second notice in terms of rule 6(5), that the contention (that the applicant could not have deposed to the founding affidavit) is supported by an expert report by a handwriting expert, who had concluded that it is impossible that the

appoint could have deposed to the said affidavit. The contention therefore is that in view of the findings of the handwriting expert, there was no proper affidavit before the court and the respondent was entitled to a dismissal of the application.

[8]This point can summarily be disposed of on two simple bases. First, and primarily, the question whether the founding affidavit was signed by the applicant or not, or whether such affidavit was properly commissioned or not, is not 'a question of law' as envisaged in rule 6(5)(d). It is a factual one on which evidence has to led to prove it. It can therefore not be raised under the guise of that sub-rule. Second, the expert report which the respondent relies on, is not before court. The respondent elected not to file an answering affidavit. Had he done so, it would have been competent for him to attach that report, together with an affidavit by the expert confirming its correctness.

[9] Rule 6(5)(d)(iii) envisages that a point raised in terms thereof, would be determined without reference to evidence extraneous to the founding affidavit. The alleged fraudulent signing of the founding affidavit does not appear ex *facie* the affidavit itself, which is the only document before court. I therefore agree with Mr *Cohen*, counsel for the applicant, that the respondent's reliance on rule 6(5)(d)(iii) is incompetent.

[10] Mr *Cohen* further submitted that it is unnecessary for the court to determine either the rule 43(6) application or the rule 6(5)(d) application. *Ex lege*, the rule 43(6) application has lapsed because the underlying order made in terms of rule 43 has lapsed by| virtue of the court order. The court order made provision, ex *lege*, for the lapsing of|the rule 43. The issue, argued counsel, was therefore extant prior to when the rule 6^5)(d)(iii) notice was raised. Counsel submitted that it was unnecessary for the respondent to set the matter down, which, counsel submitted, amounted to *brutum fulmen*, as there was nothing for the court to determine. He contended that

the respondent should, in the circumstances, be liable for the costs of the application.

[11] I agree in part with these submissions, in particular that in essence, the only remaining issue is costs. The applicant has not enrolled the matter within the time frame allowed in the court order, and once the date passed without such enrolment, the order lapsed. I agree with Mr *Cohen's* submission in this regard. Where I part ways with counsel, is where he submits, in essence, that the service of the application after the due date, has no effect and amounted to a *brutum fulmen.* I do not agree.

[12] The very fact of the service of the application, even out of the stipulated time period, demonstrated the applicant's intention to proceed with it. It is to be borne in mind that the lapsing of the order is not necessarily fatal. It can be revived on proper application to that effect. To my mind, the situation is analogous to the process of prosecuting an appeal in terms of rule 49(6)(b) of the uniform rules, in terms of which a superior court to which an appeal is made may, on application and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

[13] To sum up, once the application was served, albeit out of time, the respondent was entitled to assume that the applicant intended to proceed with it, somehow. If it was not the intention of the applicant to proceed with the application, why serve it in the first place? If the intention not to proceed with the application was formed after it was served, the applicant could simply have given notice of her withdrawal of the application. Ordinarily, she would have had to tender the wasted costs in that event. She did not, and as a result, the application is effectively pending. But it cannot remain pending in perpetuity. There has to be finality.

[14] It is not in the interest of justice that a matter is left to hang indeterminate. Its

finality is important, not only to the parties themselves, but for the administration of justice. By way of illustration, at a practical level, how is the registrar of this court supposed to deal with the file? Does he keep it 'alive' in the system or store it to the archives? There has to be an authoritative pronouncement on the issue, and it is only this court that can do so.

[15] I therefore conclude that in the circumstances, the respondent properly exercise his right provided in rule 6(5)(f) of the uniform rules of court, in terms of which he is entitled to apply for the enrolment of the matter, in the event the applicant fails to do so within a stated period. The applicant has to pay the costs.

[16] In the result the order that I make is the following:

1. *The* applicant's rule 43(6) order made on 4 March 2011 by this court has lapsed, in terms of paragraph 3 of the order of this court issued on 28 November 2012;
2. The applicant is ordered to pay the costs occasioned by her service of her rul^ 43(6) application.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 8 NOVEMBER 2013**
JUDGMENT DELIVERED	**: 28 FEBRUARY 2014**
FOR THE APPLICANT	**: ADV SS COHEN**
INSTRUCTED BY	**: *LOUIS WEINSTEIN ATTORNEYS,* JOHANNESBURG, and *SAVAGE JOOSTE & ADAMS INC.,* PRETORIA.**
FOR THE RESPONDENT	**: ADV A VILJOEN**
INSTRUCTED BY	**: *LINDIE LOMBAARD INC.,* JOHANNESBURG, *SURITA MARAIS ATTORNEYS,* PRETORIA.**