IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDES: ~~YES~~/NO
(3) REVISED.

DATE…14/11/2017. SIGNATURE…….

CASE NO: 5834/2017

In the matter between:

R O **APPLICANT**

and

M O **RESPONDENT**

JUDGMENT

Summary:

Civil procedure – Rule 43(1) uniform rules – whether applicant under Rule 43 entitled to obtain relief for any matrimonial cause where no divorce action instituted – purpose of – prior pending divorce action essential before launching Rule 43 application – issuing of Summons after does not avail applicant – principle the rule applies when spouse desires relief on exclusive matrimonial causes pending or instituted.

Held - When applicant launched Rule 43(1) application – no *lis* pending – application ill-conceived – falls to be dismissed with costs.

M G PHATUDI J:

[1] This application gives rise to somewhat peculiar novel issues in this Division pertaining to an application of Rule 43 of the Uniform Rules of Court. ("the rules").

[2] The Applicant seeks relief *pendente lite* for *inter-alia* primary care and residence of the two minor children born of the marriage between the parties, and that both parties to retain parental responsibilities as well as rights in terms of Sections 18,19 and 20 of the Children's Act[1], reasonable right of contact and access by the Respondent to the said

[1] Act 38 of 2005

two minor children, maintenance of an amount of R3 000-00 per child per month, payable by the Respondent, an amount of R2 700-00 maintenance per month towards the applicant pending dissolution of their marriage, and also R10 000-00 towards applicant's costs contribution, and auxiliary relief.

[3] The application is resisted by the Respondent. In doing so, the Respondent raised a *point in limine* contending that there is no *lis* pending between the parties in the form of divorce proceedings, and consequently, the applicant has no legal standing to have initiated Rule 43 proceedings against him.

[4] The facts in this application, as already indicated raise a vexed legal issue which upon a review of legal literature and authorities on the subject, project divergent legal views and somewhat conflicted positions in various divisions in our civil law. This conflict of authorities therefore creates uncertainty in law, and requires, in my view, guidance at least in a pragmatic and uniform standard.

[5] In the present case, the following factual issues are common cause:-

5.1. The parties were married to each other by civil rites in Polokwane on 17 November 2012, which marriage subsits.

5.2. Out of this wedlock, two minor children were born, both of which presently reside with the Applicant.

5.3. It is not in contestation that the parties' marriage is in turbulence, and has broken-down beyond reasonable prospects of restoration of a normal harmonious marriage relationship between them, as a result of which the Applicant on 30 June 2017, deserted the parties common home with a settled intention to institute a divorce, action against the Respondent.

5.4. No divorce action has, however, yet been instituted by the applicant when she launched the present application in this court on 18 August 2017. She cites as reason for her non-action, lack of financial means to commence suit for a divorce and no support or financial support by the Respondent both for herself and the two minor children.

[6] It is the launching by the applicant of the current Rule 43 application in the circumstances that aggrieved the Respondent contending that there is no divorce action pending between them to entitle her to have proceeded in this way.

[7] The primary issue for consideration is whether a party is entitled to seek any matrimonial relief against another in circumstances where no prior divorce action has been instituted by the applicant before launching Rule 43 application.

[8] This question calls for closer analysis for what Rule 43 provides for, and when and who may invoke the section. This is how it is couched:-

Rule 43(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 pending matrimonial action,

(c). interim custody of any child,

(d). interim access to any child

[9] The purpose of this rule primarily is to provide a mechanism which is simplified and well-oiled to enable a litigant to obtain a speedy interim relief as provided for even at common law in matrimonial causes. It concerns itself essentially on procedure than to disturb substantive law.

[10]. The procedure is invoked whenever a spouse desires relief in respect of one or more of the enumerated instances in it. It applies exclusively to matrimonial issues that are **pending or instituted.**

(own emphasis)

[11] The application is available to a "spouse" and he/she who claims or alleges to be a spouse even though the claim or allegation is disputed by the other partner. The notion "spouse" according to "The concise oxford Dictionary" 8th Edition 1990, is defined as "husband or wife". It may in modern context be extended to cover a partner in same-sex marriages or same-sex civil partnership concluded under the Civil Union Act, 2006[2].

[12] In other words a spouse has to demonstrate in its founding papers that it is a party entitled to bring the application in terms of the rule. In addition,

[2] Act 17 of 2006

a litigant spouse must show that the relief sought is in nature a matrimonial cause, and that such cause must be pending or imminent.

[13] In this instance, the applicant, on its papers, stated unequivocally that "the action has not yet commenced, as I do not have the financial means to institute such action…". The application as already shown, has been launched on 18 August 2017 and the applicant having left the parties' common home on 30 June 2017.

Nothing in the founding affidavit has been proferred in the form of evidence as to why after effluxion of roughly 1 month and three weeks that divorce summons has not been issued, even though not yet served, to demonstrate that a *lis* has been initiated alternatively, that it is about to be instituted.

[14] As already shown elsewhere in this judgment, (Para:4) the existing authorities present somewhat conflated view points on the matter particularly in some High Court Divisions in our judiciary. I shall in summation refer briefly to some of those decisions and the divergent approach adopted.

[15] In the case of **Moolman v Moolman**[3]**,** Seriti J, as he then was, had occasion to deal with a similar application brought under Rule 43 in which the Respondent on 07 September 2007 issued summons in the then North Gauteng Local Division of the High Court (Pretoria) seeking a decree of divorce. The legal question before Seriti J was whether Rule 43 may be invoked before issuing of summons. After reviewing the authorities at issue, the Learned Judge concluded at Paragraph II that:-

[11]

"*From the above authorities, it is clear to me that an action can only pend once at least summons has been issued. Prior to the issuing of summons there can be no talk of a pending action. The intention of the parties, prior to the issuing of summons is irrelevant …pending matrimonial action cannot include a proposed matrimonial action….*

The proper reading of Rule 43 and the purpose thereof supports the view that there must be a pending action between the parties prior to the launching of the Rule 43 and the pending action in my view means at least a divorce summons must be issued."[Para 13]

[3] [Case no: 36397/2007] [2007] ZAGPHC, 15.11.2007, marked "Reportable".

[16] Again in AD v ZD[4], Tolmay J most recently also had occasion to decide on a similar legal issue as in the Moolman's case, S*upra*. Tolmay J after reviewing the authorities on the point held at paragraph II that:-

[11]

"The court in Moolman concluded that the fact that the summons was later issued could not assist the applicant. This is in my view the correct approach, an action can only be pending if summons was issued and served. In the absence of a summons the dispute between the parties can at the very best be a matrimonial dispute, which is a far cry from actual divorce action and pending litigation."

[17] Although the Western Cape Division court in LS v GAS[5] where Davis J seems to agree with the principle established by the Moolman's case, the Learned Judge appeared to have obviated possible unprotection of the minor children by proceeding to hear the matter, in its discretion, but most importantly, upholding the court's inherent power and duty as upper guardian of the all minor children. Davis J stated at page 13 when evaluating Rule 43 that:-

[4] Case no:23031/2017 Gauteng Division, Pretoria – delivered 29.06.2017
[5] Case no.2258/2016, delivered on 26.08.2016(WCD)

" If Rule 43 was not to apply, save for pending litigation, i.e. a divorce action, the High Court would certainly remain clothed with jurisdiction in respect of minor children. It is the upper guardian of children and it is therefore their interests that are protected by the inherent jurisdiction of the court."

To that extent, it follows that the Western Cape High Court adopted a different approach contrary to the Gauteng Division's View.

[18] The inherent danger of a litigant obtaining interim relief in any of the listed jurisdictional matters in Rule 43 and just like in instances where a party obtaining a Rule nisi in any application, and takes no further steps towards its logical conclusion, cannot be over emphasised. In some instances a party could for whatever ill-conceived motive with no settled *bona fide* intention to commence divorce action, obtain provisional relief without finalizing the matrimonial cause initiated. The rule could also be open to abuse by a capricious litigant. The rule is therefore designed as a mechanism for a spouse who seeks relief *pendent lite* in respect of one or more of the listed matters therein. The issuing of a divorce summons is thus a prerequisite. Rule 43 I can re-affirm clearly refers only to pending matrimonial causes.

[19] I may state that although no divorce action is proven to be pending, one of the listed claims is one involving the minor children whose rights are guaranteed under Section 28(2)[6] of the Republic of South Africa Constitution Act, 1996. Section 28(2) of the constitution protects the rights of children and guarantees the best interests of the minor children. This application is aimed at that protection. Be that as it may, our rules of court are useful guide as to how best to bring applications of this nature to court. Rule 43(1) is no exception. It has to be strictly adhered to by applicants seeking relief thereunder. The applicant was at all material times assisted by its attorneys Corrie Nel & Company when it launched the present application. The position would be somewhat different if the applicant was legally unrepresented even though the adage ignorance of the law (*ignorantia iuris non excusat*) would still be applicable.

[20] The approach adopted in **Bienestein v Bienenstein**[7] where De Villiers AJ stated when dealing with Rule 43(1)(b) at 451D-E that:-

> *" That has been interpreted to mean not only after summons is issued, but also in respect of a proposed matrimonial action" was*

[6] Act 106 of 1996
[7] 1965(4) 449[TPD]

clearly incorrect. This is particularly so that the Learned Acting Judge as he then was, provided no living authority for the proposition.

[21] Similarly, the reasoning by Hatting J in Van Tonder v Van Tonder[8], at p532 that:-

" Dit is, op die stukke voor my, duidelik dat applikante se ernstige voorneme is om met die egskeidingsgeding voort te gaan, vandaar die uitreiking van die dagvaarding. Die blote feit dat dit nog nie op respondent betek is, nie kan nie haar voornemens ongedaan maak nie."

This reasoning should with respect, not be followed. It does not accurately capture the true purport of Rule 43(1) as I entertain no doubt that when the rule was initially interpreted, the old authorities had in mind of proceedings which had commenced by way of service of summons, and not where action is merely contemplated. The fact that summons for a divorce was issued and served later cannot avail an

[8] 2000(1) SA 529(0)

applicant seeking relief. Rule 43(1)(b) in particular refers to a "contribution towards the costs of a "**pending matrimonial action**"

[22] On a conspectus of the facts in this case and the law on the subject, I am of the view that the application was ill-conceived and falls to be dismissed with costs, for the reasons set out below:-

22.1. The applicant itself in the notice of motion asked specifically for costs of the application.

22.2. On more than one occasion, the Respondent's attorneys made every effort, both in writing and telephonically, urging the applicant not to proceed with its application under Rule 43, but to no avail. One of the pleas made was for it to withdraw the intended application in a letter dated 20.09.2017, a day before this matter was heard. Again, this eleventh hour appeal was ignored.

22.3. In its response, the applicant's attorneys in an e-mail dispatched on 20.09.2017, was resolute to proceed with the matter against the Respondent.

22.4. The matter was eventually argued as set down on 21.09.2017. The Respondent had to prepare and appear in court to resist the application.

22.5. I, in the premises, see no sound reason why I should not dispense with the limitations found in Rule 43(7) of the rules of court. The costs ought to follow the application.

In consequence, I make an Order as follows:-

(a). The application is dismissed with costs.

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M.G PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

Representations

1. Attorneys for Applicant	**:**	**Mr. C. J. Nel** **C/o Corrie Nel & Co** **Polokwane**
2. Attorneys for Respondent	**:**	**Mr. J.P. Morton** **C/o Thomas Grobler Attorneys** **Polokwane**
3. Date heard	**:**	**21 September 2017**
4. Date delivered	**:**	**14 November 2017**