IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 18141/09

In the matter between:

I B "H" ("H") Applicant

and

R A A "D" Respondent

JUDGMENT DELIVERED ON 18 NOVEMBER 2009

YEKiSO, J

[1] This is an application for maintenance, *pendete lite,* contribution towards costs of a pending matrimonial action and other ancillary relief. The application is brought in terms of Rule 43 of the Uniform Rules of Court. In this application, the applicant claims an amount of R23.900.00 in respect of maintenance, *pendete lite,* and a further amount of R40,000.00 in respect of contribution towards costs. Other forms of ancillary relief claimed, which I do not propose to repeat in this judgment, are set out in the applicant's Notice in terms of Rule 43.

[2] The application is a sequel to an action instituted by the applicant out of this

Court against the respondent, as the first defendant in the action, and the Minister of Justice and Constitutional Development, as the second defendant, the latter party having been joined in the action by virtue of it having a substantial interest in the form of relief sought in the action instituted. In that action, the applicant seeks various forms of declaratory relief which include a declarator to the effect that the marriage relationship concluded between the applicant and the respondent, according to the tenets of Islamic personal law, is a valid marriage in terms of South African law for the duration of such marriage and that the termination thereof ought to and should be governed by the provisions of tne Divorce Act, 70 of 1970; a further declaratory relief to the effect that the omission of a *de facto* monogamous marriage of a husband and wife, married in accordance with the tenets of islamic personal Saw, from the provisions of the Divorce Act is invalid and, accordingly, unconstitutional; and otner ancillary relief directing that the Divorce Act be read as though marriages concluded in accordance with the tenets of islamic personal law fall within the scope of the provisions of the Divorce Act which regulates the termination of marriages and the patrimonial consequences flowing therefrom.

[3] The respondent opposes the relief sought and, in so doing, has raised two points *in limine* to the effect that this Court does not have jurisdiction to hear this application in view of the fact that the applicant was neither domiciled in the area of jurisdiction of this Court nor was the applicant ordinarily resident within the area of jurisdiction of this Court when the purported action for a divorce was instituted

and when, subsequent thereto, this application was launched; that the action instituted by the applicant, to which this application is a sequel, is not a 'matrimonial action" as contemplated in Rule 43 o~ the Uniform Rules of Court and that, in view of thereof, the word "spouse" referred to in Rule 43 of the Uniform Rules of Court does not cover parties married to each other in accordance with the tenets of islamic personal law. i shall deal with the points *in limine* raised in the papers, in turn.

ABSENCE OF JURISDICTION

[4] The opposition based on the absence of jurisdiction on the part of this Court is premised on an averment in the applicant's affidavit where the applicant states, in paragraph (1) thereof, that she currently resides at the address where she resides presently and, ostensibly, where she resided when this application was launched and the parallel action instituted, namely, Capri 10, The Island Club, Canal Walk, Century City, Cape Town. It would appear that the property the applicant currently occupies belongs to the respondent and that the applicant has been resident thereat since she left the then common home, situate in Kierksdorp, during March 2009. In paragraph 15 of her affidavit the applicant states that when she left the common home, the respondent indicated to her that he would follow suit but that did no materialise. In paragraph 16 the applicant states that she could not leave the common home with her motor vehicle as the respondent blocked the driveway. It would appear that despite this hindrance by the respondent, the

applicant did ultimately manage to leave the common home but left the motor vehicle behind. Once in Cape Town, and on 20 August 2009 to be exact, the applicant instituted an action referred to in paragraph [2] of this judgment simultaneously launching this application, in terms of Rule 43 of the Uniform Rules, for the relief set out in the applicant's Notice in terms of Rule 43.

[5] The respondent contends that the averment contained in paragraph 1 of the applicant's affidavit that she "currently resides" at the address at which she resides presently is insufficient to establish jurisdiction on the part of this Court for want of an averment, in the applicant's affidavit, that at the time she instituted her action and subsequently launched this application, she was "ordinarily resident" at the address where she resides presently. The courts' jurisdiction to hear actions in matrimonial matters is provided for in section 2(1) of the Divorce Act. Section 2(1) of the Divorce Act, where appropriate, provides:

> "(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is -
>
> a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
>
> b) ordinarily resident in the area of jurisdiction of the court on the said date or have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date"

[6] In amplification of the contention that this Court does not have jurisdiction to hear this application the respondent states in his affidavit that neither the applicant nor he (the respondent) is permanently resident within the ares of jurisdiction of

this Court and that neither of them regard Western Cape as their domicile. The respondent finally states in his affidavit that both he and the applicant are in fact domiciled within the area of jurisdiction of the Gauteng North Division of the High Court, Pretoria and that the action, 'which forms the basis of this application, ought to have been instituted in that court. 1 do not propose to deai with the respondent's contention based on domicile as it is clear, on basis of the papers, that the applicant relies on residence, as opposed to domicile, to found jurisdiction.

[7] The concept "residence" has been considered in a number of court decisions in the past, notably *Ex parte Minister of Native Affairs* 1941 AD 53; *Cohen v Commissioner for Inland Revenue* 1946 AD 174 to name but few such decisions. In *Robinson v Commissioner of Taxes* 1917 TPD 542 at 547-8 Bristow J observed that perhaps the best general description of what is imported by the term "residence" is that it means a man's home or one of his homes for the time being, though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Physical presence at a place for a prolonged period would constitute residence. Bristow J further observed that when the intention is to prolong one s presence beyond the possible limits of a casual visit, and that intention is not abandoned, it would seem that the intention to prolong one's presence beyond the possible limits of a casual visit, that intention would constitute residence, the intention of course being gleaned from ail the circumstances of the case. A person's intention is not

necessarily conclusive, t he objective facts must be looked at to decide the question of factual evidence.

[8] The applicant states in her affidavit that she has been resident at the dwelling she currently occupies since she left the common home during March 2009. In paragraph 19 of her affidavit she further states that the respondent has threatened to evict her from the Century City property. It would thus appear that the threat to have the applicant evicted from the Century City property constitutes the basis for the relief she seeks in terms of prayer 1.3 of her Notice in terms of Rule 43. In prayer 1.3 of her Notice the applicant seeks an order to restrain the respondent from having her evicted and to allow her to remain at Capri 10, The Island. Canal Walk, Century City, Cape Town, free of charge and that the respondent be ordered to pay the monthly bond instalments in respect thereof, as well as the water, electricity and rates in respect thereof.

[9] When paragraph 1 of the applicant's affidavit, where she states that she "currently resides" at the relevant property, is read with paragraph 19 of her affidavit which contemplates an order in terms of prayer 1.3 of her Notice in terms of Rule 43, namely, an order allowing her to remain at the relevant property coupled with an order that the applicant pays the bond instalments in regard thereto, it is ciear that in terms of that ieg of the relief sought, the applicant's residence at the Century City property is not of a casual nature and that her intention is to remain there for a prolonged period. There is normally no difficulty

in determining where a natural person resides. It is a factual question, little helped by what a definition of the concept "residence" ought to be. All that can be said about "ordinarily resident" is that it denotes a residence that is not casual or occasional. (See *Bisonboard Ltd v K Braun Woodworking Machinery Ltd* 1991 (1) SA 482(A) at 504A).

[10] The circumstances surrounding the applicant leaving the common home in Klerksdorp during March 2009 to relocate to Cape Town, and the fact of taking up residence at the Century City property, coupled with a court order allowing her to remain there, clearly shows that the applicant left the common home in Kierksdorp with a ciear *animus non revertendi.* in my view, it has clearly been established, as a matter of fact, that the applicant left the common home in Klerksdorp to take up residence at the Century City property; thai she has been resident at the Century City property for the wnoie period preceding the launch of this application; that her presence thereat is neither casual or occasionai and that, therefore, as a matter of fact, she is ordinarily resident thereat. [turn now to deal with the question as to whether the applicant is a spouse as contemplated in Rule 41 (1) of the Uniform Rules of Court.

APPLICANT **NOT** A SPOUSE CONTEMPLATED **IN RULE 43**

[11] The applicant's claim for the relief sought in her Notice in terms of Rule 43 is premised on a contention that she is entitled to the kind of relief provided for in Ruie 43 of the Uniform Rules of Court on the basis that she is a spouse by virtue

of her marriage to the respondent in accordance with the tenets of Islamic personal law. The respondent, on the other hand, resists the relief sought on the basis that the parties entered into a union in accordance with Islamic law; that the union entered into between the applicant and the respondent is not recognised as a valid marriage in South African law; that the action instituted by the applicant against the respondent is thus not a "matrimonial action" as contemplated in Rule 43 and that, in view thereof, the applicant is not a spouse contemplated in Ruie 43 who otnerwise would be entitled to the relief provided for in that Rule. The respondent's further contention amounts tnereto that whatever contribution towards costs he may be required to make will no: be a contribution towards costs of a pending matrimonial action as the action instituted by the appiicant is not a matrimonial action as contemplated in Ruie 41(1)(b) of the Uniform Rules of Court.

[12] Rule 43(1) of the Uniform Rules of Court, under the heading "matrimonial affairs" provides:

> "(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 *pendete lite:*
>
> b) a contribution towards the costs of a pending matrimonial action;
>
> c) interim custody of any child;
>
> d) interim access to any child."

As already stated, the respondent contends that the action instituted against him

by the applicant is not a matrimonial action contemplated in Rule 43(1)(b) and. consequently, the applicant is not entitled to any form of relief envisaged in tnat rule.

RECOGNITION OF MUSLIM MARRIAGES

[13] There are various religious legal systems which apply in South Africa that were hitherto not officially recognised as part of South African law. The islamic personal law was one of such religious lega. systems that suffered the fate of non-recognitior.. The Muslim community in South Africa has suffered a long history of non-recognition because of what was perceived a conflict between the values which underlie islamic law and the Western common law values, particularly in such sensitive areas as marriage and succession. The statement by Trengove JA in *Ismail v Ismail* 1983(1) SA 1006 (AD) at 1024 D to the effect that the courts in this country have consistently refused, on the grounds of public policy, to recognise, or to give effect to the consequences of potentially polygamous unions, was confirmation of an authoritative statement of the law underlying such non-recognition.

[14] However, after the advent of democracy in 1994, the courts started changing their approach to Muslim marriages. The change in attitude and approach manifested in such decisions as *Rylands v Edros* 1997(2) SA 690 (C) where the Cape Hign Court expressly departed from the authoritative statement of the law as enunciated in *Ismail, supra,* on the basis that such an approach is outdated in

the light of the advent of constitutional democracy in South Africa and *Amod v The Multilateral Motor Vehicle Accident Fund* 1999(4) SA 1319 (SCA) where the Supreme Court of Appeal recognised the Muslim widow's claim for loss of support following the death of her husband as a result of a motor vehicle accident.

[15] The approach adopted in *Rylands* and *Amod, supra,* would not have been possible had it not been the constitutional framework provided for in section 9 (equality), section 10 (human dignity), section 15 (religion, belief and opinion) and section 31 (cultural, religious and linguistic communities) of the Constitution of the Republic of South Africa, 1996. It has often been stated that prior to the advent of democracy in 1994, Christianity was South Africa's unofficial state religion at the expense of a multiplicity of religious systems, including Islam, as such religious systems were, to a considerable extent, regarded as being repugnant to public policy. (See, for an example Paul Farlam: *Freedom of Religion. Belief & Opinion:* Constitutional Law of South Africa, 2nd Edition 41-1)

[16] It is, however, important to note that the courts in *Rylands and Amod,* did not mean that Muslim marriages were recognised for all purposes. In the case of *Amod.* the court merely concluded that the *boni mores* of our society require that the contractual duty of support wnich results from a Muslim marriage should be recognised and enforceable at common law whereas in *Rylands* the court merely extended the dependant's action to the surviving party to a marriage concluded n accordance with the tenets of Islamic persona! law.

[17] Section 15(1) of the Constitution of the Republic of South Africa, under the heading "Freedom of religion, belief and opinion" provides:

> "15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

Section 15(3)(a) goes on further to provide:

> "3(a) This section does not prevent legislation recognising -
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
>
> (c) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[18] What the provisions of section 15(1) of the Constitution in effect do is to entrench one's freedom of conscience, religion, thought, belief and opinion as a fundamental right in the Bill of Rights. When the drafters of the Constitution, in their wisdom, thought fit to include freedom of religion as a fundamental right in the Bill of Rights tney ought to have been aware of the multiplicity of various religious legal systems which apply in South Africa and that, included in such religious belief systems, are such institutions as marriage and succession. But the fact of bringing about express recognition of marriage and other institutions as currently exists in such religious lega, and belief systems was best left to Parliament, obviously in consultation with the affected communities, to enact into law as as and when circumstances would warrant such an enactment. The

legislation envisaged in section 15(3)(a) of the Constitution was intended to bring about express recognition of such belief systems, traditions, personal or family law provided that such recognition would not be inconsistent with the provisions of section 15 and other provisions of the Constitution. The enactment and the ultimate promulgation of the Recognition of Customary Marriages Act, 120 of 1998, which came into operation during November 2000, was to achieve the objective contemplated in section 15(3)(a) of the Constitution. The latter piece of legislation brought about the recognition of customary marriages and the consequence flowing from such an institution. Such legislation does not yet exist in respect of Islamic marriages. Hence, the legal position currently in South Africa only affords limited recognition to Muslim marriages because of what is perceived to be their polygamous nature and not solemnised in accordance with the Marriage Act, 25 of 196'.. The consequence of this omission is that, up to now. it has been left to the courts in this country, relying on the provisions of the Constitution, to extend piecemeai recognition to Muslim marriages.

[19] As pointed out in the preceding paragraph the courts, relying on the provisions of the Constitution, have been able to ameliorate the onerous consequences resulting from non-recognition of Musiim marriages by extending piecemeal recognition to such marriages as has happened in *Rylands* and *Amod, supra,* and, until fairly recently, *Anisa Mohamed v Rehaan Abrahim Mohamed, (an* as yet unreported judgment of the Eastern Cape High Court: Port Elizabeth, under case no: 2154/2008) delivered on 29 May 2009. In that case, Ravelas J, in

an application for relief in terms of Rule 43 of the Uniform Rules, concluded that the applicant was not precluded from obtaining the relief sought in terms of Rule 43(1) by virtue of her Muslim marriage, irrespective of whether the marriage had been ended by way of *talaq* or not.

[20] In *Daniels v Campbell N.O. & Others* 2004(5) SA 331 (CC) the issue before the Constitutional Court was confirmation of declaration of invalidity of certain provisions of the intestate Succession Act, 81 of 1987 and the Maintenance of the Surviving Spouse Act, 27 of 1990, declared invalid for failing to include persons married according to the tenets of Islamic law as beneficiaries in terms of the provisions of the aforementioned pieces of legislation, in that case the Constitutional Court, per Sach J, held that a surviving soouse in a monogamous Muslim marriage qualifies as a "spouse" and "survive' in terms of the intestate Succession Act and Maintenance of Surviving Spouses Act, respectively, the Court holding that the ordinary meaning of the word "spouse" encompasses a party to a

Muslim marriage. The court further held that the old interpretation of the word "spouse", which excluded a party to a Muslim marriage, did not flow from the courts giving the word its ordinary grammatical meaning but that that interpretation "emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it".

[21] Thus, the Constitutional Court held in *Daniels, supra,* that any interpretation

of the word "spouse" so as to exclude parties to a Muslim marriage, resulted in unfair discrimination on the grounds of marital status, religious practices and culture and violated the applicant's rights to dignity. The aforementioned pieces of legislation, so the Constitutional Court held, fall to be interpreted so as to include a party to a monogamous Muslim marriage as a spouse without the need to declare the offending provisions invalid.

[22] *Ms Rabkin-Naicker.* who appeared for the respondent, makes a point in her submissions, which she foiiowed in her oral argument, that the applicant's remedy lies in section 2(1) of the Maintenance Act, 98 of 1998 relying heavily on the authority of *Khan v Khan* 2005(2) SA 272 (T) where the court held that partners in a Muslim marriage, married in accordance with Islamic personal law, wnether such marriage is monogamous or not, are entitled to maintenance and thus entitled to maintenance in terms of the Maintenance Act. She concludes her submission on the maintenance aspect of the matter by contending that the relief sought by the applicant in terms of Rule 43 is misplaced and that her remedy lies in the maintenance court.

[23] in *Moseneke & Others v The Master of the High Court* 2001(2) BCLR 103 (CC) the applicants challenged the validity of regulation 3(1) of the regulations promulgated in terms of section 23(7) of the Black Administration Act, 38 of 1927 which provided:

> "Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in

connection with, the administration and distribution -(a) the estate of any black who died leaving no will."

Regulation 3(1) in turn provided as follows:

"All the [designated] property in any estate [of a black person who dies leaving no valid will] ... shall be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions the Act and of these regulations are complied with."

[24] The effect of the aforementioned provisions was that the Master, in as far as estates of black Africans are concerned, only had jurisdiction to administer estates in those instances where the deceased died leaving a will. In all other instances where a deceased person died without leaving a will, such estates had to be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided during his lifetime. Thus, in terms of the aforementioned provisions the Master only had competence to administer those estates in which a black person died leaving a will. As regards other racial groups no law precluded the Master from administering such estates irrespective of whether the deceased died testate or not. As for those estates in which a black (African) person died intestate, resort was had to the magistrate in whose area of jurisdiction the deceased ordinarily resided under whose supervision and directions such estates had to be wound up. The *Moseneke* family cried foui, hence the challenge referred to in paragraph [23] above.

[25] In declaring both sections 27(3)(a) of the Black Administration Act and regulation 3(1) promulgated thereunder, Sachs J observed:

> "Given our history of racial discrimination, [find that the indignity occasioned by treating peopie as 'blacks' as both section 23(7)(a) and regulation 3(1) do, is not rendered fair by the factors identified by the Minister and the Master."

Sachs J concluded that both provisions created unfair discrimination within the meaning of section 9(3) of the Constitution and also constituted a limitation of the right to dignity entrenched in section 10 of the Constitution. Thus, following the approach adopted by Sachs J in *Moseneke, supra,* the fact that a spouse married in accordance with the tenets of Islamic personal law has a right of recourse to the maintenance court in terms of the Maintenance Act does not render as fair any discrimination, based on a marriage concluded in accordance with the islamic personal law, from accessing relief provided for in Ruie 43 as *Ms Raibkin-Naicker* would seek to suggest.

[26] A right of access to courts is a fundamental right in the Bill of Rights. A rignt of access to courts invariably encompasses a right to nave one's
dispute adjudicated in a court of law and, in the instance of this matter, a right to claim maintenance *pendete lite* and a contribution towards costs of a pending action. Any law, rule or regulation wnich regulates such access,
in the instance of this matter Rule 43 of the Uniform Rules of Court, ought to bs interpreted in a manner which protects and promotes a right in the Bill of Rights.

[27] And then, of course, there also is the aspect of a ciaim for contribution towards costs. The respondent resists this aspect of a claim on the basis that the action instituted by the applicant is not a "matrimonial action" envisaged in Rule 43 of the Uniform Ruies. The issue of the validity of "the marriage" concluded between the applicant and the respondent, within the context of the current constitutional dispensation, is a matter to be determined at trial. All that I can say, and on the basis of authority in *Zaphiriou v Zaphiriou* 1967(1) SA 342 (W) is that the word "spouse" in Rule 43(1) of the Uniform Rules includes not only a person admitted to be a spouse in a marriage relationship but also one who alieges that he or she is a spouse even where the allegation of a validity of the marriage, as in the instance of the matter before me, is denied. In my view, the applicant is entitled to ciaim contribution towards costs of a pending action which, *prima facie,* is of a matrimonial nature, in the event it being found, in the main action, that the union concluded between the applicant and the respondent is not a valid marriage, the respondent will always have a remedy available to him in the form of *condictio indebiti.*

[28] In conclusion, ! hold that the word "spouse", wherever same appears in Rule 43 of the Uniform Rules, includes a spouse to a marriage concluded in accordance with the tenets of islamic personal law. On the basis of such an interpretation, it is thus competent for a spouse married according to Muslim rites, to apply for an order for maintenance, *pendete lite,* and an order directing the respondent to contribute towards the applicant's costs of a pending matrimonial

action even if the validity or lawfulness of such marriage is placed in dispute.

[29] Having thus determined that the applicant does have a right to claim maintenance, *pendete lite,* and a right to claim contribution towards costs of a pending action, what I now need to determine is, in the first instance, an appropriate amount to be awarded in respect of maintenance *pendete lite* and, in the second instance, an appropriate amount to be awarded in respect of a claim for contribution towards costs. i have carefully considered the applicant's itemised claim in support of this aspect of the relief sought as well as the respondent's response thereto. Ihave come to tne conclusion that an amount of RS.SOO.OO is fair and reasonable in the circumstances of this matter particularly in view of tne fact that, over and above tne amount awarded in respect of maintenance, the respondent will still remain liable for such costs as would include keeping the applicant on his medical aid scheme; monthly bond payments; and rates, electricity and water accounts.

[30] As for a claim for contribution towards costs, I note that this application was issued simultaneously with the summons in an action in respect of which this aspect of the relief is claimed. Costs incurred as at the date of issuing summons would encompass such costs as instructions to institute the action itself inclusive of consultation when obtaining instructions; attending on drawing brief to counsel to draw particulars of claim inclusive of delivery and collection thereof; attending on drafting summons and ultimately having same issued and forwarding same to

the sheriff for service thereof. When all other consultations, attendances, perusal of documents and payments of disbursements are taken into account, an award in respect of contribution towards costs in an amount of R15,000.00 is, in my view, fair and reasonable in the circumstances of this matter, particularly in view of the fact that the applicant can bring further applications for further contributions at a later stage if ner demand for such further contributions is not acceded to.

[31] in the result, I make the following order;

[31.1.] The Respondent is ordered to maintain the applicant on a *pendete lite* basis by:

[31.1.1.] Making payment to the applicant directly into such account as she may nominate from time to time in the amount of R9,600.00 per month, the first such payment to be paid on or before 1 December 2009 and thereafter monthly in advance on or before the 25th day of each succeeding month, free of deduction or set-off;

[31.1.2.] Making payment of applicant's reasonable medical treatment, including but not limited to all medical, dental, surgical, hospital, orthodontic and ophthalmic treatment required by the applicant, including any sums payable to a physiotherapist, psychiatrist / psychologist. Chiropractor and medicines on prescription, alternatively by retaining applicant as a dependant on a medical aid plan covering such costs and by bearing the costs in respect thereof;

[31.1.3.] Continuing to aliow the applicant to remain in Capri 104, The island Club, Century City, Canal Walk, Cape Town ("the Century City property"; free of charge,

and by paying the monthly bond instalments in respect of the Century City property, as well as the water, electricity and rates in respect of the Century City property;

[31.1.4.] Allowing the applicant to utilise the BMW 325; Coupe motor vehicle, with the number plate "iSH GP" and to continue to pay the instalments, reasonable maintenance costs, licensing fees and insurance in respect thereof.

[31.2.] The Respondent is ordered to make a contribution of R15,000.00 towards applicant's legal costs in the divorce action, to be paid within thirty (30) days of an order being granted herein;

[31.3.] There shall be no order as to costs at this stage, same being left for determination at the conclusion of trial.

N J YEKISO, J