Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 6384/2019

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 19 June 2019
Judgment: 21 June 2019

In the matter between:

H V (born V) Applicant

and

C V Respondent

JUDGMENT

BINNS-WARD J:

[1] This matter is an application in terms of Uniform Rule 43 for interim relief pending the determination of proceedings in the principal case concerning the dissolution of the parties' marriage and the matters consequential thereto. The parties are married in community of property and therefore, until the bonds of marriage between them are dissolved, their financial obligations fall to be met out of a notional common pot.

[2] The parties are currently separated. The applicant, who is the wife, has moved from what used to be the common home in KwaZulu-Natal ('KZN') to the Western Cape. The parties' minor daughter, who is six years old, has moved to this jurisdiction together with her mother. The respondent remains resident in KZN, where he is employed.

[3] The respondent issued summons for a divorce out of the regional magistrate's court in Glencoe on a date prior to the issue out of this court of a summons by the applicant for the same primary relief. However, the summons issued out by the applicant has been served on the respondent, whilst service of the summons issued earlier at the respondent's instance has not been effected. The respondent in his opposing papers pleaded that this court lacked jurisdiction to entertain this interlocutory application by reason his summons having been issued first in the other court's area of jurisdiction.

[4] Notwithstanding the position on the papers, the respondent's counsel's conceded at the hearing that this court did have jurisdiction to hear the rule 43 application. Well-made as that concession might have been, it was, of course, not determinative of the question. It remained for the court itself in the given circumstances to be satisfied that it was competent to decide the application. Both courts do indeed have the jurisdiction to entertain an action for the dissolution of the parties' marriage, but it would in general, for reasons of comity and practicality if nothing else, be outside the remit of the one court to entertain interlocutory proceedings in an action already pending before the other. Ordinarily, an action would be regarded as pending before a court from the moment when the process of that court in terms of which the action has been commenced has been served on the defendant. On that approach, the divorce is pending in this court, and not before the court in KZN.

[5] Counsel, however, quite properly, drew my attention to the provisions of s 1(2) of the Divorce Act 70 of 1979, which at first blush might be read to have the opposite effect. Section 1(2) provides:

> *For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.*[1]

Counsel were not able to refer me to any decided case in which the import of s 1(2) of the Divorce Act had been considered or determined, and in the limited time available to me in the context of managing the Third Division roll I have also not been able to find any.

[6] There are two striking features about the provision. The first is that it is a deeming provision and the second is that the object of the deeming function is to serve '*the purposes of th*[e] *Act*'. A deeming provision generally has the effect of causing something to be treated as if it were something that it is actually not. Actual joinder, and the attendant commencement of the action, occurs only upon service of the initiating summons. I have been unable to identify any purpose of the Act that would be served by treating the date of *issue* of an unserved summons as determinative of the question before which court the action is pending when *service* of a summons issued later in another court of competent jurisdiction had been effected. Put otherwise, it does not serve any purpose of the Act to treat the court before which the action is not actually pending as if it were the court in which the action was effectively commenced.

[7] What then are the purposes to which the deeming effect of s 1(2) might sensibly pertain? In my view, the deeming provision is germane in respect of a number of issues arising for determination under the Act, in which the effect of the decision is time-related in terms of the Act. I do not pretend to have undertaken an exhaustive consideration, but examples that leap out on a cursory examination of the statute's provisions are the time-

[1] The reason for the reference in the provision to a notice of motion and a notice is because of the wide definition of '*divorce action*' in s 1(1) so as to make it include applications that may be instituted in anticipation of the actual commencement of a divorce action in the ordinary sense of the term, such as an application for substituted service for example.

related presumption bearing on proof of the irretrievable breakdown of a marriage relationship provided in s 4(2)(a), and the calculation of the two-year period of detention in respect of mentally ill spouses for purposes of s 5(1) of the Act and the six-month period of continuous unconsciousness in s 5(2) in respect of defendant spouses who are suffering from a physical disorder. Those periods fall to be calculated from the deemed date of the institution of the divorce action irrespective of the court in which that action became pending.

[8] In the circumstances, I am satisfied that this court is the court seized of the divorce action, and that the deeming provision in s 1(2) does not detract from that fact. The rule 43 proceedings were therefore properly brought in this court.

[9] By the time the matter was argued, the applicant was willing to accept much of what the respondent had tendered in his opposing affidavit. The only issues remaining in dispute concerned (i) the claim that the respondent pay to the applicant a certain amount in respect of the minor child's schooling expenses, (ii) whether it was necessary, if the respondent's contact with the minor child were to be exercised outside the Western Cape (as will probably be the case), that a 'once off' assessment be undertaken by a social worker with 'child psychological expertise' to determine whether that would be in the child's best interest, (iii) whether the respondent should pay a contribution towards the applicant's costs in the divorce action, and (iv) the costs of the rule 43 application.

[10] As to the first of the aforementioned issues, it is not in contention that state afforded education would not be adequate having regard to the parents' means. There is no suggestion that the child is being excluded from a state school on account of non-payment of fees. The child's school enjoys a claim against the community estate in respect unpaid fees at the time of the divorce, and there is no reason why the parties' liability *inter se* for the settlement of that claim cannot be determined in the principal proceedings. I do consider, however, that it would be reasonable for the respondent, who has always been the principal breadwinner in

the marriage, to make a monthly payment to the applicant that would assist the latter to pay incidental schooling-related expenses that have to be met on an ongoing basis over and above school fees, such as for the child's extramural activities. I shall fix an amount of R1000 per month in this regard, but provide that the first charge on that amount shall be half the amount outstanding at any time in respect of the child's school fees.

[11] Whilst I readily appreciate that the minor child has been unsettled by her parents' separation and her removal from the environment in KZN with which she was familiar to new surroundings in the Western Cape, nothing in the evidence leads me to believe that she would be in any way prejudiced by spending time with the respondent outside the Western Cape; and, in particular, in KZN. On the contrary, the evidence suggests that the child's wellbeing would be well served if she were able to be reunited, even if only for relatively short periods with her paternal grandparents in KZN with whom she was used to spending a material portion of her waking hours while both her parents went out to work. I have little doubt that her sense of insecurity would be assuaged by the restoration of some contact with family members in KZN with whom she has been familiar as significant caregivers. Having regard to the parties' apparent means I think it would be a luxurious indulgence in the circumstances to have the minor child subjected to an assessment of the sort proposed by the applicant. I am certainly not persuaded as to the reasonable necessity therefor.

[12] The parties would be well advised to focus on the expeditious conclusion of the pending divorce action. The evidence in the rule 43 application does not identify any matters that should especially complicate the achievement of that end. The joint estate is a relatively small one, and it is not evident that this is a case in which forensic investigation or expert evidence of any kind would be required. The parties' capital appears to be tied up in the single immovable property owned by them in KZN, which the respondent has undertaken to maintain and pay the mortgage until the divorce proceedings are determined. I am not

persuaded that a contribution to costs is required to avoid the unfairness that can arise in some cases in this type of litigation between parties with a notable disparity of available resources.

[13] I intend to stand the matter of liability for the costs of the rule 43 proceedings over for determination by the trial court.

[14] The following order will issue:

1.

1.1 The Applicant shall be the child's primary care giver and the child shall have her primary residence with the applicant;

1.2 The Respondent shall be entitled, on reasonable notice to the Applicant, to have contact with the minor child as follows:

1.2.1 Every alternative weekend;

1.2.2 For up to two weeks during the June/July school holiday;

1.2.3 For up to two weeks during the December/January school holiday;

1.2.4 During the entire April/October school holidays, to be rotated between the parties, commencing with the respondent to have contact in the October 2019 holiday.

2. That Respondent shall contribute to the maintenance of the parties' minor child, S, as follows *pendente lite*:

2.1 by paying to Applicant the sum of R 3000.00 per month towards the child's maintenance on or before the first day of the month following the granting of an order herein, and thereafter, on or before the first day of each succeeding month into an account nominated by Applicant, without deduction or set off;

2.2 by retaining the child as dependant on his current medical aid, failing which, a medical aid scheme with analogous benefits and by paying the premiums as well as any escalations thereon in respect of their cover on the scheme;

2.3 by payment to the Respondent of the sum of R1000 per month *pendent lite* by way of a contribution towards the educational costs in respect of the minor child; which shall be applied by the applicant firstly in reduction of half of the amount of any outstanding school fees, and thereafter to any other schooling-related expenditure.

3. That Respondent shall contribute to the personal maintenance of Applicant *pendente lite* as follows:

3.1 by paying the Applicant the sum of R 2000.00 per month on or before the first day of the month following the granting of this order, and thereafter, on or before the first day of each succeeding month into an account nominated by Applicant, without deduction or set off.

3.2 by retaining the Applicant and her son, A ("A",) as dependants on his current medical aid, failing which, a medical aid scheme with analogous benefits and by paying the premiums as well as any escalations thereon in respect of their cover on the scheme.

3.3 by retaining the Applicant and her son, A, on their current cellular phone contracts.

4. Respondent shall continue to maintain the immovable property situated at […], Kwazulu-Natal, and shall continue to make monthly payments of the following expenses in respect of the aforesaid immovable property *pendente lite*:

4.1 the monthly mortgage bond instalment;

4.2 the rates and taxes in respect of the property;

4.3 the monthly water and electricity charges in respect of the property;

5. Respondent shall be responsible for the payment of any/or all reasonable expenses and/or costs involved in, and in relation to, the maintenance of the aforesaid immovable property *pendente lite*.

6. Save as aforesaid, the further relief sought by the applicant in the rule 43 application is refused.

7. The costs of the rule 43 application shall stand over for determination in the divorce proceedings.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicant's counsel:	**C. Tait**
Applicant's attorneys:	**Visser & Partners**
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