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

CASE NUMBER: 2558/2016

5 **DATE:** 26 AUGUST 2016

In the matter between:

L S APPLICANT

and

G A S RESPONDENT

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J U D G M E N T

DAVIS, J:

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This matter concerns important questions with regard to an application in terms of rule 43 of the Uniform Rules of the High Court.

20 These questions are triggered by the present application in which the applicant *inter alia* seeks orders regulating interim care contact arrangements in respect to the parties' minor child ("G") as well as maintenance *pendente lite* for herself and G as from 1 March 2016, together with an initial
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contribution towards legal costs in the amount of R50 000 and costs of the application on a punitive scale.

The respondent has raised a point *in limine* in that this application was launched prior to any institution of a divorce action. According to respondent it falls to be dismissed with
5 costs on this basis alone.

Counsel for both parties were requested by the Court to furnish heads of argument in relation to this point, which has implications which range far wider than merely the vindication
10 of the interests of the two parties. Accordingly, I am indebted to both Mr Steenkamp, on behalf of the applicant, and Mr Newton, on behalf of the respondent, for carefully considered heads of argument which have proved invaluable to me in the disposition of this case.

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RULE 43:

Rule 43 provides *inter alia* as follows:

20 This rule should 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
- 25 (c) Interim custody of any child

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(d) Interim access to any child.

In their commentary on this rule, Herbstein & Van Winsen Civil Practice of the High Courts and Supreme Court of Appeal of
5 South Africa (5th ed) at 1532 say:

“The means as provided by rule 43 for an expeditious, and it is to be hoped, inexpensive method, of deciding a number of interlocutory matters arising out of matrimonial proceedings
10 such as those relating to interim custody of children, interim access to them, interim maintenance of spouses and children and contributions towards costs. The rule refers only to pending matrimonial disputes and has no application to any matrimonial dispute that has come to an end by a final divorce
15 or to any other type of action between spouses. “

In similar fashion, the authors of Erasmus Superior Court Practice Vol 2 at D1-579 state:

“Rule 43 deals only with pending matrimonial disputes and has
20 no application to any matrimonial dispute which has come to an end by a final divorce.”

Mr Newton submitted that the following features of Rule 43 can be identified:

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1. The rule which is headed “Matrimonial Matters” only applies to matrimonial disputes and not to any other type of action between spouses.
2. The rule is intended to regulate certain interlocutory matters arising out of matrimonial proceedings. Orders made in terms of the Rule are therefore of an interlocutory nature.
3. The Rule only applies to a pending matrimonial dispute and it automatically ceases to apply once that matrimonial dispute comes to an end, whether by a final decree of divorce or as a result of the withdrawal of the relevant action.

A “PENDING” DISPUTE

Erasmus at D1-578 suggests that:

“A matrimonial action may be ‘pending’ even though summons has not yet been issued.”

We have arrived at the critical question in the present case as it is common cause that no divorce action has yet been instituted by either party.

As authority for his proposition, Erasmus relies on three cases

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Bienenstein v Bienenstein 1965(4) SA 449(T) at 451, Varkel v Varkel 1967(4) SA 129(C) at 131 and Noah v Union National South British Insurance Company Limited 1979(1) SA 330(T) at 332.

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Turning to these three cases, in Bienenstein, supra, De Villiers, AJ with regard to Rule 43(1)(b) said:

“That has been interpreted to mean not only after summons is
10 issued but also in respect of a proposed matrimonial action.”

No authority was cited for this proposition in this judgment. It was merely a statement by the learned Judge without more.

15 In Varkel, supra, Van Winsen, J in dealing with a review of taxation stated:

“Rule 43 was devised and promulgated with the object of providing an expeditious and inexpensive procedure for
20 obtaining interim relief in matters relating to matrimonial disputes pending or about to be instituted...” This much is I think clear from the tenor of the Rule read as a whole.

As authority for this proposition, the learned Judge referred to
25 two cases, namely Colman v Colman 1967(1) SA 291(C) and
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Zaphiriou v Zaphiriou 1967(1) SA 342(W). In Colman, *supra*, summons was issued on the 3rd August 1966 and it appears that the application in terms of Rule 43 was heard before the Court on the 7th September 1966; hence the case holds no application for the present dispute. In short summons was issued in this case before the Rule 43 application was heard, which is the converse of the present situation.

Although the Court in Zaphiriou, *supra*, dealt with a Rule 43 application, which was launched prior to the issue of a divorce summons, the issue in dispute was whether the rule could apply where validity or existence of the marriage itself was in dispute. The Court held that it so applied.

Trollip, J (as he then was) said at 345:

“There is therefore good authority that in the common law even though the validity of the marriage was being disputed nevertheless the Court had jurisdiction in the preliminary application proceedings to award maintenance and the contribution towards costs pending an action to determine that fundamental dispute. And I have no doubt that that applies equally, if not *a fortiori*, where, although the validity of the marriage is admitted its continued subsistence is disputed, as in the present case.

Rule 43 was merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs, and I think therefore, that Rule 43 must be construed accordingly; in other words that 'spouse' in sub rule (1) must be interpreted as including not only a person admitted to be spouse but also one who alleges that he or she is a spouse and that allegation is denied. In other words the Rule also applies where the validity of the marriage or its subsistence is disputed."

For this reason, Trollip, J was not specifically required to address the question of whether a Rule 43 application may be instituted prior to the issuing of a divorce summons. Again the authority cited in Varkel, for support of its conclusion being Zaphiriou, is hardly authority for the proposition which was advanced.

In Noah v Union National South British Insurance Company Limited *supra* Eloff, J was called upon to decide the meaning of the word 'pending' as used within the context of an insurance policy which provided that an insurance liability would cease after expiry of 12 months from the happening of the loss... unless the claim is a subject of pending action or

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arbitration.”

After referring to the Shorter Oxford English Dictionary’s definition of pending as “remaining undecided, awaiting
5 settlement” and also including “impending” as a possible meaning of the word which is defined as *inter alia* “to be able to happen, to be imminent”, Eloff, J said:

“There are decisions indicating that the word ‘pending’ is
10 capable of the meaning of something which has not yet started.” 332 B-F.

As an example, Eloff, J referred to the statement in Bienenstein at 451 E and went on to say:

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“[I]t was the context of the Rule which dictated the extended use of the word ‘pending’. Whenever reference is made in procedural matters to something which has to be done or omitted ‘pending the decision action’ it is, I think, implicit that
20 that action either has been or will be instituted. The same applies to the use of the phrase ‘pending action’, which is usually employed in relation to the G. of interim interdicts: it frequently refers to an action which has not been instituted but which is about to be instituted; if it is not instituted in a period
25 which is usually fixed the interim relief ‘*pendente lite*’ normally
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falls away. In that setting the somewhat loose and possibly extended use of the word 'pending' is understandable." (My emphasis) 332H-333A

5 The issue whether the Rule 43 may be invoked prior to the issue of summons has most recently been dealt with by Sereti, J (as he then was) in Moolman v Moolman (unreported decision 2007 ZAGPHC 273: 15 November 2007). After reviewing the authorities in question Sereti, J concluded at
10 paras 11 to 15 as follows:

"From the above authorities (*inter alia* Mahlangu & Another v Van Eerden & Another 2000(3) All SA 321(LCC); Van Tonder v Van Tonder 2000(1) SA 529(O)) it is clear to me that an action
15 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 included a proposed matrimonial action ... if an action
20 commences at least with the issuing of summons there can be no pending action prior to the issue of summons.... 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 pending action in my view
25 means at least a divorce summons must be issued."

For this reason, Sereti, J concluded that an applicant is not entitled to approach the Court by way of a Rule 43 application prior to divorce summons having been issued.

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Mr Steenkamp, on behalf of the applicant in his attempt to argue to the contrary, referred to a passage from the judgment in Van Tonder *supra* at 532:

10 “In my oordeel beteken hangende geding enige aksie waarin die geskilspunte tussen die partye nog nie finaal oor besleg is nie. Die feit dat die besonderhede van vordering vir ’n
egskeiding en gepaardgaande regshulp wel al uitgereik is maar
nog nie aan die respondent beteken is nie doen geen afbreek
15 aan die omskrywing wat aan die begrip ‘hangende geding’
gegee is nie. Dit is, op die stukke voor my, duidelik dat
applikante se ernstige voorneme is om met die egскеiding
geding voort te gaan, vandaar die uitreiking van die
dagvaarding. Die blote feit dat dit nog nie op respondent
20 beteken is nie kan nie haar voornemens ongedaan maak nie.”

Thus, Mr Steenkamp submitted that the intention to proceed with a divorce action would suffice for a triggering of Rule 43. Furthermore Mr Steenkamp submitted that Moolman, *supra*,
25 was incorrectly decided, as the authorities referred to therein
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had little bearing on Rule 43 proceedings.

Mr Steenkamp referred to three key cases upon which Sereti, J had relied, namely Marine & Trade Insurance Company Limited v Reddinger 1966(2) SA 407(A), Nxumalo v Minister of Justice 1961(3) SA 663(W) and Mahlangu supra. In his view, the first related to an insurance claim, the second to the question of prescription in the context of a damages claim against the police and the third to eviction proceedings. None of these judgments, in his view, had any bearing on Rule 43 proceedings.

Furthermore, on a reading of Rule 43 it applied to four separate scenarios, maintenance *pendent lite*, a contribution towards the cost of a pending matrimonial action, interim custody of a child and interim access to a child.

Mr Steenkamp submitted that it was noteworthy from a reading of Rule 43 that a distinction was drawn between maintenance and a contribution to costs. The former only spoke of *pendente lite* while the latter referred to costs of a pending matrimonial action. He suggested that nowhere in the rule was there any requisite that interim custody or interim access to a trial was dependent upon the issuing of summons.

He therefore submitted that given this distinction, it could be accepted, at the very least, that certain of the components of the rule, namely maintenance *pendente lite*, interim custody of a child and interim access to a child could apply, notwithstanding that summons had not been issued.

EVALUATION

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. Accordingly, the concept of *pendente lite* has to be given some meaning so as to confine the scope of the rule. Were it otherwise, Rule 43 would equate to a *rule nisi* without any return date. The problem could be, on Mr Steenkamp's argument, that the rule could apply indefinitely unless "pending" was given some clear meaning.

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On the strength of the Van Tonder judgment, at the very least, there would have to be a clear intention, based on evidence, being for example, an explanatory affidavit, showing that summons is about to be issued and providing some explanation for the delay prior to the institution of a Rule 43

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application in order to give efficacious meaning to the Rule.

In this case, the Rule 43 application was launched in February 2016 and some six months later no summons had been issued.

5 Very belatedly I should add, shortly before the hearing, which was conducted on the 24th August 2016, an explanatory affidavit from applicant was tendered, that is on the 24th August 2016, to the following effect:

10 “The Applicant is suffering financial difficulties, illustrated in Rule 43 application. The Applicant, acting on my advice, the affidavit is deposed to by Applicant’s attorney) thought it prudent to focus her limited resources on attempting to settle the divorce rather than issuing summons. The Applicant was
15 hopeful that upon settlement, summons could be issued on a unopposed basis with the financial assistance of the Respondent, whose financial position is after all substantially better than that of the Applicant’s I moreover assured the Applicant that the historic legal position (which I had
20 considered trite until a few days ago) was that one can institute Rule 43 proceedings in the absence of pending action.”

This is a skeletal application at the very best and provides
25 scant reasons as to why summons was not issued or even, is
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about to be issued in relation to these proceedings. Contemplated litigation must mean litigation about to be launched, not litigation that, at best, remains unexplained and may proceed at a glacial pace at the behest of the applicant
5 without any further explanation.

In short, when the Rule 43 is carefully examined the issue of interim custody of a child and interim access to a child is a residual jurisdictional power of the Court. Accordingly, the
10 scope of Rule 43 must be confined to at least a trigger of pending litigation, that is pending divorce action. Pending must, even on the authority cited by Mr Steenkamp, mean in the contemplation of the parties evidenced by some concrete explanation.

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For this reason, it is my view correct for respondent to have raised the *in limine* objection. It is well taken.

However, in the light of the very narrow differences between
20 the parties insofar as the respondent offers and counterproposal in respect of maintenance (custodial arrangements are not in dispute), judicial pragmatism inclines towards making an order. In this particular case it appears to me that a conditional order would be appropriate; that is an
25 order which is dependent on the applicant issuing summons

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within a clearly defined period which promotes the expeditious objectives of Rule 43.

I have followed the approach adopted by both parties in this regard and for this reason I make the following order:

1. G. S. (the minor) shall primarily reside with the applicant *pendent elite*, subject to the following contact arrangements:

10 1.1 The minor shall reside with the respondent every alternate weekend from 19h30 on a Friday to 1h30 on a Sunday.

1.2 The respondent shall have reasonable telephonic and text message contact with the minor.

15 1.3 The contact arrangements may be adapted between the parties in writing (writing to include email and/or text messaging).

2. Subject to paragraph 3 of this order the respondent is to make the following payments to the applicant *pendent elite*:

20 2.1 R6 800.00 per month in respect of maintenance for G. S. (the minor) with the first payment to be made on 1 September 2016, to be repeated monthly on the 1st day of the month into a bank account to be nominated
25 by the applicant.

2.2 Payment of the minor's school fees and extramural activities.

2.3 Maintaining the applicant and the minor on his current medical aid scheme and payment of all reasonable costs of their medical expenses not covered by the medical aid.

2.4 The insurance costs in respect of the applicant's motor vehicle.

2.5 A contribution to applicant's legal fees in the amount of R10 000.

3. The applicant is required to issue summons in the proposed divorce action within 7 (seven) days of the issuing of this order, failure of which renders her rights in terms of paragraph 2 to be of no force and effect.

4. The costs of the current application are reserved for determination at the trial.

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DAVIS, J