



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

Case No: 21412/17

In the matter between:

Y. O.

APPLICANT

and

Z. W.

RESPONDENT

JUDGMENT: 25 MAY 2018

HENNEY J

Introduction:

[1] The applicant and the respondent, on 23 April 2009, married to each other according to Muslim rites in accordance with Islamic law. The applicant at that stage was 19 years old and the respondent was 37 years old. Two children were born from the marriage. The marriage between the applicant and the respondent has broken down irretrievably. On 30 January 2016, the respondent terminated their marriage in

terms of Islamic law by the issue of a *Talaq*. This was confirmed by the Muslim Judicial Council, by means of a divorce certificate issued on 22 August 2017.

[2] On 1 November 2017, the applicant issued a summons out of this court under case number 19955/17 in which she inter alia seeks declaratory relief in the following terms: that until legislation providing for the recognition of Muslim marriages and regulating the consequences of such recognition is enacted and comes into force, the de facto monogamous marriage concluded between the parties in terms of Muslim rites shall be regarded as valid for the following purposes:

- a) The Matrimonial Property Act 88 of 1984, and such a marriage shall be regarded as being one in community of property;
- b) the common law duty of support with spouses owe of each other upon divorce; and
- c) sections 7(7) and 7(8) of the Divorce Act 70 of 1979, except that the, issuance of a *Talaq* by the defendant shall be considered a decree of divorce for the purposes of the application of those sections.

[3] Pending the determination of this action, the applicant has instituted an application for relief in terms of Rule 43 of the Uniform Rules of Court. The relief the applicant is seeking pending the outcome of the above-mentioned dispute was broadly speaking for an order regulating the care, contact and custody arrangements of the minor children; an order for maintenance in respect of herself and the minor children and an order directing the respondent to contribute an amount of R90 000 towards the applicant's costs in the pending matrimonial action, which amount shall be paid within 10 calendar days of the granting of the order.

[4] It would be appropriate to once again have regard to the provisions of rule 43 which states that:

“(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 ”.*

[5] At issue in these proceedings is whether the applicant in the circumstances of this case can rely on the provisions of rule 43, especially due to the fact that the parties in terms of Islamic law on the pronouncement of the talaq and the subsequent certificate issued by the Muslim Judicial Council are considered to be divorced. It was agreed that the court as the upper guardian of all children in this division has inherent jurisdiction to deal with any matter involving children, especially with regards to the custody and access of any child. Similarly, that in terms of the Children’s Act 38 of 2005, this court has powers to deal with such matters, without having to resort to the provisions of rule 43. It was therefore agreed that the court without the application of rule 43 can also deal with any maintenance issue, in respect of the applicant as well as the minor children.

[6] As a result of this, the parties agreed to an order given by this court on 15 May 2018, that the respondent pay maintenance in respect of the applicant and the minor children. This order also regulates the interim access and custody

arrangements of the children, pending the finalisation of an investigation by the family advocate.

[7] After the matter has been largely settled, pertaining to the question of maintenance and interim access and custody of the children, by not having resort of the provisions of rule 43, the only issue for adjudication would be whether it would be competent in these proceedings in terms of the provisions of rule 43, for this court to make an order that the respondent make a contribution towards the applicant's costs, pending the matrimonial action.

Given the findings and conclusions which I will come to later in this judgment, it would have been permissible for this court also to have made an order relating to the maintenance in respect of the applicant and the minor children, as well as an order for the interim access and custody arrangements of the children, in terms of the provisions of rule 43.

[8] It is well established that, the current law as it stands, presently does not recognise the rights of parties to marriages contracted in terms of Islamic law. The applicant submits that, notwithstanding the fact that in terms of Islamic law, a marriage had been terminated by means of a talaq, there still exists a pending patrimonial dispute between her and the respondent on the basis of the summons she issued under case 19955/17 and the relief that she seeking as referred to above.

[9] It is common cause that the respondent raised an exception to the applicant's particulars of claim and to overcome this exception, the applicant will have to amend her particulars of claim to properly plead the constitutional challenge to the non-recognition of Muslim marriages. The applicant will also have to join the President of

the Republic of South Africa, the Cabinet and relevant ministers to the pending proceedings. It is also well-known fact that such a constitutional challenge to the non-recognition of Muslim marriages is the subject of a pending action in this division before *Desai J, Boqwana J and Salie- Hlophe J* in the matter *Women's Legal Centre v President of the RSA*, case number 22841/2014; *Faro v Bingham* case number 4466/2013; *Esau v Esau* case number 13877/2013.

[10] According to the applicant, it has been made clear to her that the respondent intends to pursue the litigation and that she will be obliged to effect the amendments to join the above parties to the action. It is for this reason that she requests a contribution towards her legal costs. She cannot afford to do so and to litigate, on the same scale as the respondent. In this regard, Ms Venter who appeared for the applicant referred this court to the case of *AM v RM 2010 (2) SA 223 ECP* as well as the decision of *TM v ZJ 2016 (1) 71 (KZD)*. The court will refer to these cases later on in this judgment.

[11] The respondent in opposing the application submitted that on the applicant's own version she failed to prove that there is a valid subsisting marriage. In this regard, Mr De Villiers – Jansen relied on the case of *Zaphiriou v Zaphiriou 1967(1) 342 (W)* at 344 para D-T where *Trollip J* held ... "*One of these issues might well be whether they contracted a valid marriage, or, if they had, whether it still subsists, and there seems in principle to be no reason why, if the applicant shows on the papers with the requisite degree of proof that there was a valid marriage and that it still subsists, he or she should not be afforded the appropriate interim relief notwithstanding the fact that the marriage or its subsistence is being disputed.*"

[12] Furthermore, he argues the applicant, proceeds from the premises that there is no legislation which recognises Muslim marriages, but has failed to join the relevant Minister and compel the Minister to pass the necessary legislation. In this regard, he argued that the cases of *TM v ZJ* and *AM v RM* (supra) on which the applicant relies is distinguishable from the present one, in that the constitutional validity of the non-recognition of Muslim marriages is specifically pleaded.

[13] He also argued that inasmuch as the Matrimonial Property Act and the Divorce Act, do not recognise Muslim marriages, the applicant does not challenge the constitutionality of any of the provisions of either of these acts, nor does she contend that either of these laws can be construed in a manner which recognises a former Muslim marriage to the respondent.

[14] According to the respondent, if the applicant recognises that the talaq issued by him should be considered a decree of divorce, there can be no subsisting marriage in the circumstances.

Evaluation:

[15] I do not agree with any of the submissions of the respondent for the following reasons: firstly, it is irrelevant for a dispute to be regarded as a pending matrimonial dispute, as required in terms of rule 43, for an applicant in rule 43 proceedings to show that he or she would be successful in the main action against the respondent. It is and remains a matrimonial dispute. It is a well-known fact that even after a bitterly contested rule 43 application, parties more often than not, settle the main dispute. The mere fact that an exception was raised to the applicant's particulars of claim in the main action does not disqualify it from being regarded as a matrimonial

dispute. The exception that was raised is merely interlocutory in nature and may not be upheld by the court that will deal with such an application.

[16] Secondly, it has always been recognised in our law, that the mere fact that the validity of a marriage is disputed, that, that cannot be a bar for a party to rely on the provisions rule 43. In *Zaphiriou v Zaphiriou* (supra), the court after having regard to the common-law at page 345 para E-H held that *“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 preliminary application proceedings to maintenance and a contribution towards costs pending an action to determine the 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 unavailable, 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 a 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.”*

[17] Finally, this court is in respectful agreement with *Revelas J* in *AM v RM*, where she held on page 227 at para [10] *“The fact of a pending divorce action brings the situation within the ambit of ‘matrimonial matters ‘and a ‘matrimonial action ‘as envisaged in rule 43. The fact that a Muslim divorce has been concluded is no obstacle for the divorce trial, and the constitutional challenge raised therein, to proceed. Once there is a constitutional challenge in the context of relief sought under*

the Divorce Act, not only the status and effect of the nikkah, but also that the status and effect of the talaq, will be under scrutiny. The constitutional challenge pending in the trial court, clearly encompasses a challenge to the legal effect of a talaq. By virtue of the main action for divorce, its effect is suspended for all practical purposes. Therefore, when a court has to decide whether or not to grant maintenance pending the outcome of the divorce action, where there is a constitutional challenge to the status of the marriage, it does not matter whether or not the parties were divorced in accordance with Muslim rites or not."

[18] The court in the matter of *TM v ZJ* (supra) in dealing with a similar case where a muslim woman had been divorced in terms of muslim law and made a claim for a contribution to her legal costs said the following at p77 para 17: *"Therefore, I find it to be unnecessary for the applicant in a rule 43 application to prove prima facie the validity of the marriage. In my view the entitlement to maintenance pendente lite arises from a general duty of a husband to support his wife and children. If the enforcement of these rights entails pursuing them in court, then the same considerations that applied in Zaphiriou should apply to whether the court can make an order for an interim contribution towards costs."*

I also respectfully agree with the sentiments, and endorse what the learned judges in these two matters said and find that it is no different to what the Applicant is requesting in this case.

[19] It is well established that muslim marriages had been recognised for purposes of a muslim widow's claim for loss of support following the death of her husband, where such duty arose from a solemn marriage in accordance with the tenets of a recognised and accepted faith, such as Islam. See *Amod v Multilateral Motor*

Vehicle Accidents Fund (Commission of Gender Equality Intervening) 1999 (4) SA 1319 (SCA) [1999] 4 All SA 421.

[20] In my view, if there was a *de facto* marriage where the parties and the outside world regard it as such, the validity of which is still to be determined in the main action, the provisions of rule 43 in my view, finds application and can be relied upon by a party to such *de facto* marriage.

[21] Coming back to this matter, where the applicant intends and is in the process of launching a constitutional challenge to the status of the marriage as well as the legal effect of the talaq, she is therefore perfectly entitled to rely on the provisions of rule 43 in as far as it seeks an order that the respondent make a contribution to her costs.

[22] Therefore, in addition to the order that this court made on 16 May 2018, I make the following order:

22.1 That the respondent is directed to contribute an amount of R90 000 towards the applicant's costs in the pending matrimonial action, which amount shall be paid within 10 calendar days of the granting of this order.

22.2 That the respondent is to pay the cost of this application.

HENNEY, J

Judge of the High Court