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**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**CASE NO.: 144907/2024**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 13 February 2025

E van der Schyff

In the matter between:

H[...] A[...]

Applicant

and

N[...] A[...]

Respondent

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**JUDGMENT**

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Van der Schyff J

**Introduction**

[1] The applicant approached the court for interim relief in terms of Rule 43 of the Uniform Rules of Court, pending the finalisation of divorce proceedings instituted by her.

[2] It is common cause that the parties were married in terms of Islamic Law on 25 February 2012. Three minor children were born from the marriage. The marriage relationship between the parties broke down. The applicant, with the minor children, left the matrimonial home in September 2023. On 18 May 2024, the

respondent issued the applicant with *Talaaq*. The applicant subsequently instituted divorce proceedings.

### **Legal issue for determination**

- [3] The crisp and only issue to be dealt with in this judgment is whether this court has the jurisdiction to hear a Rule 43 application in circumstances where a marriage concluded in terms of Muslim Law was unilaterally terminated by the respondent when he issued the applicant with *Talaaq* before any divorce proceedings were instituted.
- [4] The respondent raised a point *in limine* that the application does not fall within the ambit of Rule 43 since, according to the respondent, the parties' marriage was already dissolved when *Talaaq* was issued. As a result, the respondent contends, there is no pending divorce, and the applicant is not a 'spouse' as provided in Rule 43.

### **The parties' respective submissions**

#### *The applicant's submissions*

- [5] The applicant proffered two main arguments in support of the contention that the court indeed has jurisdiction to hear this Rule 43 application. The first is that the respondent has not yet filed a plea, challenging the existence of the marriage and the applicant's entitlement to proceed with an action for a decree of divorce. Counsel highlighted with reference to *Zaphiriou v Zaphiriou*<sup>1</sup> that it is trite that Rule 43 finds application where the validity of a marriage or its subsistence is disputed. The second is that the recent amendments to the Divorce Act 70 of 1979 ('the Divorce Act') place this application squarely within the ambit of Rule 43.

#### *The respondent's submissions*

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<sup>1</sup> 1967 (1) SA 342 (W). Also see *AM v RM* 2010 (2) SA 223 (ECP) where the court held that pronouncing a *Talaaq* to effect a divorce according to Muslim law was no obstacle to relief under Rule 43 where the legality of the marriage and the legality of the *Talaaq* were challenged in a pending divorce action.

- [6] The respondent contends that the applicant does not fall within the ambit of the definition of the term 'spouse' as it is used in Rule 43. The respondent contends that the effect of the amendment of the Divorce Act is that a recognised marriage comes about when it is created in terms of Islamic law, and it terminates when it is ended in accordance with Islamic tenets. Counsel submitted that it could not be argued that a marriage that comes about in terms of recognised Islamic rites can only be ended with an order of court in terms of secular law. Rather, the position is that an Islamic marriage ends when *Talaaq* is given. This process, counsel contends, is recognised by legislation. Because the *Talaaq* was issued before the divorce proceedings were instituted, the respondent's view is that the marriage was terminated on 18 May 2024, and the applicant cannot rely on the Divorce Act to dissolve a non-existent marriage.
- [7] Counsel emphasised that the applicant, in the current matter, does not dispute the validity of the *Talaaq*. This, she submits, distinguishes the current application from cases like *SJ v SE*<sup>2</sup> and *AM v RM*.<sup>3</sup> Counsel referred the court to *Essop v Haffejee*.<sup>4</sup> In this matter, a person in the same circumstances as the applicant was held not to be a 'spouse' for the purposes of Rule 43. Unfortunately, the judgment was handed down *ex tempore*, and no typed record is available. Counsel submitted that the consequence of the amendment of the Divorce Act and the recognition of Muslim marriages is merely that women can now approach the court for the termination of a marriage, while it could only be terminated by a husband in terms of Muslim law. In conclusion, it was submitted that because the applicant is not a spouse for purposes of Rule 43, the court does not have the jurisdiction to adjudicate the matter.

## Discussion

- [8] The amendments to the Divorce Act pertaining to the recognition of Muslim marriages stand central to the main dispute between the parties. The preamble to

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<sup>2</sup> 2021 (1) SA 563 (GJ).

<sup>3</sup> 2010 (2) SA 223 (ECP).

<sup>4</sup> (2023/06743) unreported 16 October 2024.

the Divorce Amendment Act 1 of 2024 clearly states that purpose of the amendments, namely to amend the Divorce Act, 1979, so as to insert a definition for a Muslim marriage, to provide for the protection and to safeguard the interests of dependent and minor children of a Muslim marriage, to provide for the redistribution of assets on the dissolution of a Muslim marriage, to provide for the forfeiture of patrimonial benefits of a Muslim marriage and to provide for matters connected therewith.

[9] Section 6 of The Divorce Amendment Act provides as follows:

‘This Act applies to all subsisting Muslim marriages, including a Muslim marriage -

- (a) Which was terminated or dissolved in accordance with the tenets of Islam and where legal proceedings for the dissolution of the said Muslim marriage in terms of the Divorce Act, 1979 (Act. No. 70 of 1979) have been instituted but not yet finalised, and
- (b) which subsisted as at 15 December 2014.’

[10] I am of the view that it is essentially section 6 of the Divorce Amendment Act that requires interpretation. Should the section be interpreted to mean that where a *Talaaq* was issued prior to divorce proceedings being instituted, there is no marriage that stands to be dissolved in terms of the Divorce Act, or should the section be interpreted that irrespective of the issue of a *Talaaq*, there is still a marriage that stands to be dissolved in terms of the Divorce Act.

[11] After careful consideration, I am of the view that it is not necessary, and indeed undesirable, to delve into a complex legal question that lies at the heart of the litigation between the parties, when the court is called upon to determine interlocutory proceedings in a Rule 43 application. To determine the interpretational dispute that exists and the ambit of the amendments of the Divorce Act as far as it relates to Muslim marriages requires an extensive and in-depth interpretation of the Divorce Act and the Divorce Amendment Act 1 of 2024. A

court may even feel inclined to request the appointment of an *amicus curiae* like the *Centre for Women's Law*. It would not do justice to the issue to determine it at this stage of the proceedings where the respondent, who is the defendant in the divorce action, seemingly has not yet filed a plea wherein he disputes the existence of the alleged marriage. It is also, for the reason set out below, unnecessary to determine the issue at this point in time, and any remarks made by me concerning the validity of the marriage would be *obiter*.

[12] I disagree with the respondent's counsel's submission that the applicant does not meet the definition of the term 'spouse' in Rule 43 and that this court subsequently does not have the necessary jurisdiction to hear the application. I am in full agreement with the view expressed by Trolip J in *Zaphiriou v Zaphiriou*.<sup>5</sup> He explained that 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. Trolip J held that the word 'spouse' in sub-rule (1) includes not only a person admitted to be a spouse but also one who alleges that he or she is a spouse even where the allegation is denied. The rule applies whether the validity of the marriage or its subsistence is disputed.

[13] *In casu*, the applicant clearly regards herself as a spouse. There is a pending matrimonial action, and the court deciding on the matrimonial action will be the correct court to pronounce on the validity of the marriage or its subsistence at that point.

[14] In light of the context of this application, it is fair and just to both parties that costs are costs in the cause.

## **ORDER**

**In the result, the following order is granted:**

- 1. The point *in limine* is dismissed.**

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<sup>5</sup> 1967 (1) SA 342 (W).

2. The Draft Order, marked 'X' dated and signed by me on 12 February 2025, is made an Order of Court.
3. The costs of this application are costs in the cause.

**E van der Schyff**  
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

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|----------------------|---------------------------|
| For the applicant:   | Adv. E. De Lange          |
| Instructed by:       | Sharief & Associates Inc. |
| For the respondent:  | Adv. L. De Wet            |
| Instructed by:       | Farhana Ismail Attorneys  |
| <br>                 |                           |
| Date of the hearing: | 11 February 2025          |
| Date of judgment:    | 13 February 2025          |