

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024/148225

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
28/07/2025	
DATE	SIGNATURE

In the matter between:

AC

Applicant

and

HC

Respondent

This judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 28 July 2025.

JUDGMENT

ABRO, AJ

Summary – Rule 43 – whether the rule may be utilised prior to the issue of summons – in other words where there is no pending divorce action between the parties – or whether the issuing of a divorce summons is a prerequisite in order to institute proceedings utilising the rule – whether the amendment to rule 43(1)(b) and the inclusion of the words ‘or about to be instituted’ therein provides a blanket exemption for parties to ignore the rule and the established principles in circumstances where the application is not simply one for a contribution towards the costs of a matrimonial action which is required to institute divorce proceedings

Introduction

- [1] This matter concerns an important question which arises with regard to applications in terms of rule 43 of the Uniform Rules of the High Court.
- [2] In the present application the applicant launched an application in terms of rule 43 wherein she sought orders *pendente lite inter alia* in respect of the primary place of residence of the four minor children born of her marriage to the respondent, the children’s defined contact with the respondent, the payment of cash maintenance by the respondent for herself and the children and a contribution towards her legal costs in the sum of R100 000.00. Costs of the application were sought on the scale as between attorney and client.
- [3] The founding affidavit was commissioned on 16 December 2014 and the Notice in terms of the rule was signed by the applicant’s attorneys on said date. That the application was then issued is evident from the 2024 case number assigned to it.

- [4] The application was served on the respondent on 6 January 2025 in terms of the rules of court.
- [5] The respondent opposes the relief sought and delivered a sworn reply thereto together with a conditional counterclaim.
- [6] The respondent, in his sworn reply, raised a point *in limine* that the application was launched prior to the institution of a divorce action. He thus sought an order dismissing the application together with an order that the applicant make payment of the wasted costs occasioned by the application on the scale as between attorney and client. His conditional counterclaim is in the alternative.
- [7] On receipt of the respondent's sworn reply, the applicant filed a replying affidavit which consists of some 305 pages with annexures.
- [8] The matter came before me on Wednesday morning 23 July 2025 and I directed the parties to address me on the point *in limine*.
- [9] I informed the parties that the matter was not properly before me as a consequence of the fact that at the time of launching the application and at best for the applicant on 6 January 2025 when the application was served summons had not been issued. This was the position up until Thursday 17 July 2025 being 3 court days before the allocated date and time of the hearing at which time I was informed from the bar, by Mr Kloek for the applicant, that summons had been issued on said date. Ms van Antwerpen for the respondent informed me that summons was to be served that day as the respondent had made arrangements to attend at the sheriff's office later in the day to accept service thereof.
- [10] I was informed further that the summons was issued under a different case number to that of the rule 43 application. I was not provided with a copy of the summons and particulars of claim or an explanation for the lengthy delay in issuing summons or as to why the applicant had sprung into action at the eleventh hour.

- [11] In the circumstances and having regard to various prior judgments on the point, I did not deal with the merits of the application and only dealt with whether the rule 43 application was properly before me. I reserved judgment.
- [12] At the outset Mr Kloek wanted me to adjudicate the respondent's application for condonation arising out of the fact that his sworn reply was filed, according to the applicant, 12 court days out of time. In that the application was premature and not properly before me, I declined to hear argument on the condonation point.
- [13] In supplementary heads of argument dated 24 July 2025, filed subsequent to the hearing, Mr Kloek submitted that without hearing the condonation application the respondent's point *in limine* was not before me and as such, and without hearing the condonation application, I was not in a position to deal with the point *in limine*.
- [14] He contended further that even if the point *in limine* could be raised without condonation for the late filing of the sworn reply, the point *in limine* was '*bad in law and opportunistic*' and as such stood to be dismissed with costs on a party and party scale B.
- [15] I do not agree with these submission as the rule 43 application was not properly before me to begin with as a consequence of the fact that at the time of service of the application and for some 6 ½ months thereafter there was no divorce action pending. Moreover, I could have raised the issue as most, if not all, founding affidavits in rule 43 proceedings contain an allegation as to when summons was issued and what relief is being sought in the divorce action. Further, the respondent could have raised the point *in limine* from the bar or elected not to file an affidavit and noted his objection in terms of rule 30.
- [16] As above, the applicant has in any event delivered a substantial replying affidavit to the respondent's sworn reply wherein she responds to the point *in limine*.
- [17] The condonation application and the applicant's replying affidavit, and the admission thereof, will be dealt with by the court hearing the rule 43 application.

The parties' submissions in respect of the issue of summons

- [18] The applicant avers at paragraph 11 of her founding affidavit dated 16 December 2024 that she has not 'as yet' instituted an action for divorce against the respondent '*however she will do so in the above Honourable Court*'.
- [19] The applicant, in her founding affidavit, states that that the parties finally separated from one another on 6 September 2024 when the respondent vacated the erstwhile matrimonial home. She further states that whilst she has attempted to save the marriage relationship it became clear to her on 4 November 2024 that reconciliation was not possible.
- [20] Nothing more is said in the founding affidavit as to why she had not 'yet' issued summons at the time of launching this application or when she intended to do so.
- [21] The respondent raised the point *in limine* in his sworn reply dated 4 February 2025 at which stage as recorded therein by the respondent, it was '*some 8 weeks after the Applicant deposed to her Sworn Statement*' and summons was yet to be issued.
- [22] The applicant in her replying affidavit dated 28 February 2025 said the following in response to the point *in limine* at paragraph 20.1:
- "It cannot be disputed by the Respondent that a divorce will be instituted and that fact cannot be denied by the Respondent. What the Rule envisages is that there is a dispute and that it is envisaged that a divorce summons will be instituted."*
- [23] The last sentence is incorrect and not in accordance with the provisions of rule 43.
- [24] This was the high-water mark of the applicant's response to the point *in limine* and no explanation for the applicant's failure to institute divorce proceedings was forthcoming.
- [25] It must be mentioned that the applicant and the respondent are both attorneys who are both represented by attorneys and counsel.

- [26] In the circumstances, it was in my view correct for the respondent to have raised the *in limine* objection to the application.

Consideration of the facts and submissions made and the application of the law thereto

- [27] Whilst Mr Kloek and Ms van Antwerpen both filed heads of argument they both made very limited submissions on the point *in limine* therein.
- [28] Mr Kloek referred to 4 authorities in his heads of argument, none of which were recent and as dealt with hereunder, relied in argument on the 1904 judgment of *Levy v Levy*¹. Ms van Antwerpen dealt with the respondent's point *in limine* in 3 short paragraphs and referred to no authorities in her heads of argument. Ms van Antwerpen referred to one authority during the hearing when I raised my frustration with both counsel for what appeared to me to be a lack of research into the matter.
- [29] Mr Kloek addressed the point *in limine* in 4 short paragraphs in his heads of argument and referred me to *Bienenstein v Bienenstein*² which judgment was handed down on 14 September 1965 being 8 months after the promulgation of the Rules of Court and wherein De Villiers AJ with regard to rule 43(1)(b) said '*that has been interpreted to mean not only after summons is issued but also in respect of a proposed matrimonial action.*' Having had regard to later and more recent judgements on the point, referred hereunder, the judgment was criticised as it is evident therefrom that '*no authority was cited for this proposition in this judgment. It was merely a statement by the learned Judge without more.*'³
- [30] Mr Kloek also referred to *Varkel v Varkel*⁴, a 1967 decision in the Cape, where van Winsen J stated that '*Rule 43 was devised and promulgated with the object of providing and expeditious and inexpensive procedure for obtaining interim relief in matters relating to matrimonial disputes pending or about to be instituted.*'

¹ (1904) 18 EDC 113

² 1965 (4) SA 449 T at 451E

³ *D v D* (23031/2017) [2017] ZAGPPHC 293 (29 June 2017) para [6] and *L.S v G.A.S* (2558/2016) [2016] ZAWCHC 154 (26 August 2016)

⁴ 1967 (4) SA 129 (C) at pg 131G

- [31] Mr Kloek, during his argument, relied only on *Levy* and submitted that because said judgement was handed down by two judges I was bound by the doctrine of precedent to follow it⁵ and the applicant was not required to first issue summons prior to bringing an application in terms of rule 43.
- [32] The applicant in *Levy*, the wife, brought an application to the Eastern Districts Court for funds with which to meet the expenses of instituting litigation against her husband for divorce and ancillary relief. The husband disputed that a valid marriage had come into being. The issue before that court was thus whether or not the parties were legally married to one another. The court held that for the purposes of the application it would assume a legal marriage and made an order for a contribution towards costs for the purposes of launching an action and *alimony pendente lite*. The order was however not granted in terms of rule 43 as the rules of court had not yet come into being. The facts are therefore clearly distinguishable.
- [33] It was pointed out to Mr Kloek that rule 43 was not in existence in 1904. As such and whilst the principle of maintenance *pendente lite*, which may include a contribution towards legal costs, has stood the test of time, the judgment could not and did not deal with procedure and the application of the rule.
- [34] The Uniform Rules of Court which govern and regulate the conduct of proceedings in the High Courts came into operation on 12 January 1965. In my view the authorities relevant to the point *in limine* in this matter which deals with the rule and the application thereof, are those handed down after the coming into operation of the rules.
- [35] Whilst the doctrine of precedent enshrines a fundamental principle of justice which promotes legal certainty : that like cases should be determined alike, in my opinion the coming into operation of the Rules of Court and the law that has developed since, and into the 21st century, dealing with rule 43 more particularly, add to the body of South African Law on the rule and its application.

⁵ *Stare decisis et non quieta movere*

[36] Chaskalson P observed in *Mistry v Interim Medical and Dental Council of South Africa*⁶ that ‘Cases fall to be decided on a principled basis. Each case that is decided adds to the body of South African constitutional law and establishes principles relevant to the decision of cases which may arise in the future. Particularly where principles have not yet been established ...’. Reiterated by Langa DP in *Christian Education South Africa*⁷.

[37] In the premises, I do not consider myself bound by the decision in *Levy* which, for the reasons set out above, is distinguishable and not applicable. I am however bound by the decisions on point handed down in the Gauteng Division, Pretoria which I would have expected both counsel to deal with in their heads of argument and to address me on.

[38] Rule 43(1) provides as follows:

43 Interim relief in matrimonial matters

(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 matrimonial action, pending or about to be instituted;

(c) Interim care of any child;

*(d) Interim contact with any child.*⁸

[39] The rule was amended in various respects by GN 42064 dated 30 November 2018. I have highlighted the amendment relevant to this matter above.

[40] Mr Kloek raised a different point after the hearing and in his supplementary heads of argument uploaded to CaseLines on 24 July 2025. He submitted therein that the judgements which I had referred to during the hearing being *Moolman* handed down on 15 November 2007⁹; *D v D* handed down on 29 June 2017¹⁰

⁶ 1998 (4) SA 1127 (CC) para [3]

⁷ *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) para [9]

⁸ *Erasmus Superior Court Practice/Volume 2: Uniform Rules and Appendices/Part D1 Uniform Rules of Court/Rules regulating the conduct of the proceedings of the several provincial and Local divisions – GN R48 of 1965/Rules of Court/43 Interim relief in matrimonial matters as amended*

⁹ *Moolman v Moolman* (36397/2007) [2007] ZAGPHC 273 (15 November 2007)

¹⁰ *D v D supra*

and *DJD v PAGL* handed down on 25 July 2018¹¹ and which judgments were all handed down in Pretoria, predated the aforesaid amendment to the rule and as such '*are clearly distinguishable upon the facts*' and do not find application.

[41] Mr Kloek, in his supplementary heads of argument, also made the submission that Rabie J in *TH v LAH*¹² handed down on 6 April 2020 '*was clearly unaware that the rule was amended by GN 42064.*' It is unclear on what basis he makes such assumption.

[42] I was, at the time of the hearing, well aware of the amendment to rule 43(1)(b), which amendment, like the recent authorities, was not raised in argument.

[43] Regardless, I disagree with Mr Kloek's belated submission that the aforesaid cases (which I deal with hereunder) do not find application. As above, only sub-rule 43(1)(b) which provides for a contribution to legal costs of a matrimonial action was amended by way of the introduction of the words '*or about to be instituted*' therein.

[44] In any event and on Mr Kloek's own version only '*part of the relief sought by the Applicant is for a contribution towards costs*'. Notably the applicant deals with this relief in only one paragraph, paragraph 59, of her founding affidavit. At least ninety percent of the relief sought by the applicant in the application is in respect of the children, residence and contact, and maintenance for herself and the children.

[45] In my opinion the authorities on the point which all prescribe that the issue of a divorce summons, either prior to or simultaneously with the launch of a rule 43 application, are relevant to the matter at hand and constitute good law.

[46] If the intention of the Rules Board was to also amend subrules 43(1)(a), (c) and (d) this would have been done, and the rule would have been amended in a manner which provided that a party could utilise the rule in circumstances where a divorce action was pending or '*about to be instituted*' across the board. This

¹¹ *D.J.D v P.A.G.L* (31091/18) [2018] ZAGPPHC 543 (25 July 2018)

¹² *T.H v L.A.H* (10554/20) [2020] ZAGPPHC 109 (6 February 2020)

was clearly not the intention. Only sub-rule 43(1)(b) relating to a contribution towards the costs of a matrimonial action was amended to include the words 'or about to be instituted'. The purpose of the amendment was clearly to bring the rule in line with Constitutional principles and in order to address the gender imbalance and the vulnerable position many women find themselves in when faced with a breakdown in their marriage relationships.

[47] This was recognised by the apex court in *S v S*¹³ where it was held that"

'Applicants in rule 43 applications are almost invariably women who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. Black women in South Africa historically have been doubly oppressed by both their race and gender. The inferior economic position of women is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts. This is particularly apparent in applications for maintenance where systemic failures to enforce maintenance orders have negatively impacted the rule of law. It is women who are primarily left to nurture their children and shoulder the related financial burden. To alleviate this burden our courts must ensure that the existing legal framework, to protect the most vulnerable groups in society, operates effectively.'

[48] In *H v H*¹⁴ which judgment related specifically to rule 43(1)(b) and contributions towards legal costs, Victor J held that *'often one party, usually the wife, will not be in a position to institute or defend a divorce due to a lack of financial means'*.

[49] The amendment to the sub-rule is thus clear and unambiguous and applies only to applications where a contribution towards the costs of a matrimonial action is sought. The Rules Board clearly sought, by way of the amendment, to come to the assistance of parties, more often than not women, who require funds to institute proceedings and who may otherwise be precluded from utilising the rule all together.

¹³ *S v S and Another* 2019 (6) SA 1 (CC) para [3] – this judgment was handed down after the amendment to the rule

¹⁴ 2023 JDR 3899 (GJ) para [71]

[50] As above, this was not in any event the applicant's case *in casu*. Notably, she did not provide an explanation in her affidavits as to why she had not issued summons. Further, no explanation was provided at the hearing when I was informed from the bar that summons had been issued on the Thursday preceding the hearing. Rather, Mr Kloek's argument, based on *Levy*, was that the issuing of summons was not a prerequisite for launching an application in terms of rule 43.

[51] Notably, the commentary in *Erasmus* post the amendment to the rule continues to refer to the rule applying to 'a pending divorce action between the spouses'¹⁵ and records further that 'Rule 43 deals only with pending matrimonial disputes'¹⁶ albeit with the qualification in the footnotes that rule 43(1)(b) in respect of a contribution towards legal fees now also applies to matrimonial actions about to be instituted.

The Authorities

[52] Seriti J in *Moolman* held that from the old authorities it was clear to him that 'an action can only pend, once at least summons has been issued. Prior to the issuing of summons there can be no talk of pending action. The intention of the parties, prior to the issuing of summons is irrelevant. The learned Judge also found that the court in an earlier judgment in the matter of *Van Tonder*¹⁷ handed down in 2000 was 'incorrect in suggesting that a subsequent issuing of divorce summons cures the fatal defect of launching a rule 43 application prior to the issuing of summons.' The learned Judge upheld the very same point *in limine* raised in this application and the rule 43 application was dismissed with costs.

[53] Davis J in the judgment of *LS v GAS*¹⁸ in the Western Cape held that the very same point *in limine* was well taken but in the face of a summons issued shortly before the hearing with an explanatory affidavit from the applicant coupled with

¹⁵ *Erasmus supra* at D1 Rule 43-4

¹⁶ *Supra* at D1 Rule 43-6

¹⁷ *Van Tonder v Van Tonder* 2000 (1) SA 529 (O)

¹⁸ *LS v GAS supra*

the very narrow differences between the parties, elected to deal with the application and make an order *pendente lite* which order was to be of no force and effect if summons was not issued within 7 days of the order. The learned Judge did however state the following:

"In this case, the Rule 43 application was launched in February 2016 and some six months later no summons had been issued. Very belatedly I should add, shortly before the hearing, which was conducted on the 24th of August 2016, an explanatory affidavit from applicant was tendered, that is on the 24th of August 2016 ...

This is a skeletal application at the very best and provides scant reasons as to why summons was not issued or even, is 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 without any further explanation."

- [54] In *D v D* a point *in limine* was similarly raised that the applicant had not issued summons prior to launching an application in terms of rule 43 and merely stated in her affidavit that she '*intends*' issuing divorce summons against the Respondent. Tolmay J pointed out that without a pending matrimonial action the rule was clearly open to abuse. She stated at paragraph 12 of her judgment that:

*'There exists a very real danger that someone, could institute Rule 43 proceedings, without having any bona fide intention to institute divorce proceedings, and proceed to obtain relief without proceeding with divorce proceedings. The possibility of abuse is self-evident.'*¹⁹

- [55] The learned Judge upheld the point *in limine* and the application was dismissed with the proviso that '*after summons under this case number is issued and served the parties should be allowed to proceed with the Rule 43 application on the same papers, supplemented if necessary. Any prejudice to the minor children can be limited by enrolling the matter after this is done.*'²⁰

¹⁹ *D v D supra* para [12]

²⁰ *Supra* para [14]

[56] Phatudi J, in *RO v MO*²¹, a decision of the Polokwane High Court, similarly dealt with the inherent danger of a party pursuing relief in terms of rule 43 in the absence of summons having been issued. In this matter there was a delay of 1 month and 3 weeks and summons had yet to be issued which the court found was unreasonably too long. Whilst this judgement is pre the amendment to sub-rule 43(1)(b), the learned Judge also held that *'the issue and service of summons after the fact cannot avail an applicant seeking relief.'* I wholeheartedly agree with the following paragraph therefrom:

'The inherent danger of a litigant obtaining interim relief in any of the listed jurisdictional matters in Rule 43 and just like in instances where a party obtaining a Rule nisi in any application, and takes no further steps towards its logical conclusion, cannot be over emphasised. In some instances a party could for whatever ill-conceived motive with no settled bona fide intention to commence divorce action, obtain provisional relief without finalizing the matrimonial cause initiated. The rule could also be open to abuse by a capricious litigant. The rule is therefore designed as a mechanism for a spouse who seeks relief pendent lite in respect of one or more of the listed matters therein. The issuing of a divorce summons is thus a prerequisite. Rule 43 I can re-affirm clearly refers only to pending matrimonial causes.'

[57] It is thus for good reason that the amendment did not include the balance of the provisions which comprise rule 43(1).

[58] Maakane AJ in *DD v AL*²² was similarly faced with a rule 43 application in circumstances where summons commencing a divorce action had not been issued or served at the time that the rule 43 was launched. In this matter the applicant and the respondent had separated from one another during December 2017. The rule 43 application was launched on 3 May 2018 (some 4 ½ months later) at which time a divorce summons had not yet been issued. The lengthy period of delay in instituting divorce proceedings was not explained in the founding affidavit. The learned Judge found the delay in issuing and serving

²¹ *R.O v M.O* (5834/2017) [2017] ZALMPPHC 38 (14 November 2017) para [18]

²² 2018 JDR 1225 (GP)

summons was *'unreasonably too long'*. The point *in limine* was upheld and the application was dismissed with the same proviso as contained in *D v D* above.

[59] During the hearing Ms van Antwerpen referred me to the matter of *TH v LAH*²³ a judgment of Rabie J in Pretoria handed down on 6 April 2020. In other words, post the amendment to the sub-rule. The applicant in this matter similarly sought relief in respect of primary residence, contact, maintenance for the applicant and the minor children and a contribution towards her costs. Summons was not yet issued, and no opposing affidavit was filed by the respondent in the rule 43 application. On the day of the hearing counsel, briefed by the respondent, arrived to argue the matter on the applicant's papers and a point *in limine* was raised being that a divorce summons had not been issued. It was common cause, as *in casu*, that a divorce summons had not been issued although the applicant had indicated in her founding affidavit that the respondent had told her on 2 February 2020 that he had filed for divorce.

[60] Rabie J agreed with the judgments referred to above and the principles applied. He thus held that *'the respondent's point in limine was well taken and the applicant's application was thus prematurely instituted and cannot succeed.'* The learned Judge considered whether as the minor children's upper guardian certain orders may be made. He elected not to do so and dismissed the rule 43 application. The learned Judge also held the view that there were conflicting decisions in his division and that the recent decisions (above referred) are clearly not yet well known and possibly not reported. In the circumstances the court did not make a costs order and ordered that each party was to pay his/her own costs

Conclusion

[61] As above, and having regard to the judgments above referred, I did not hear the merits of the application as in my view the matter was premature and not properly before me as summons was not yet issued when the matter was launched at the beginning of January 2025. There was thus no matrimonial action pending.

²³ *TH v LAH supra*

- [62] That I was informed at the hearing on Wednesday 23 July 2025 that summons had been issued on Thursday 17 July under a different case number does not assist the applicant. I was not provided with a copy of the summons nor was any explanation therefore provided in either of the affidavits filed by the applicant or in a supplementary affidavit. I am of the view that in light of the unreasonably long delay (the notice of motion and founding affidavit having been signed and commissioned during December 2024 and served at the beginning of January 2025) the application fell foul of the rule and the decisions above.
- [63] Moreover, the applicant's application is not a concise application as envisaged by the rule. The application comprises some 464 pages in total excluding the financial disclosure forms ("FDF") and heads of argument.
- [64] Notwithstanding the applicant's non-compliance of the rule, she complains of the respondent's failure to comply with the rules in that he delivered his sworn reply 12 days late and apparently his FDF 5 days late too. This all appears to be dealt with extensively in the papers and it is apparent that the applicant wishes to pursue the condonation point which Mr Kloek referred to and persisted with in his supplementary heads of argument.
- [65] In this regard the old adage "*people in glass houses shouldn't throw stones*" finds application.
- [66] Moreover, the applicant is an attorney who is represented by an attorney and a very senior counsel. As indicated by Phatudi J in *RO*, "*the position would be somewhat different if the applicant was legally unrepresented*"²⁴ which was not the case in that matter either.
- [67] As stated above, I am aware of the amendment to rule 43(1)(b) but the applicant did not approach the court simply for a contribution towards her legal costs. The relief sought by her is extensive and is sought in terms sub-rules 43(1)(a), (b), (c) and (d). The amendment only applies to (b).
- [68] No submissions in this regard were made by Mr Kloek in his heads of argument or at the hearing where the applicant relied solely on *Levy* which I was informed

²⁴ *RO v MO supra* para [19]

this court was bound by, notwithstanding the fact that the rules of court were not in existence in 1904.

[69] I have had regard to the submissions of both counsel in their supplementary heads of argument and as set out hereinabove, I am not in agreement with Mr Kloek in respect of his new submissions.

[70] Ms van Antwerpen, in her supplementary heads of argument, referred me to Mahomed AJ's judgment of *Barakat*²⁵ handed down in this division on 3 May 2022 where there was similarly no divorce action pending as summons had not yet been issued. Mahomed AJ took a different approach and heard the application and granted an order for interim relief. He however ordered the applicant to issue a divorce within 20 days of his order and suspended the operation of the order pending the issue of the divorce action.

[71] The learned Judge however said the following:

"I noted that, no divorce action has been instituted to date. Rule 43 applications are brought in relation to a divorce action. This is relevant particularly when the applicant seeks a contribution toward costs. Although the respondent's attorneys have mentioned the issue and service of the divorce papers in their correspondence referred to above, I have not found any papers on file.

If a contribution is to be awarded it presupposes that an action is underway. In this regard the authorities are divided as to whether a divorce action should be pending. See MOOLMAN v MOOLMAN and AD v ZD.

Furthermore, a party seeking a contribution to costs is obliged to set out details of its bill of costs. See GLAZER v GLAZER and SENIOR v SENIOR."

[72] In light of the facts, circumstances and timeline in this application – being 7 months from date of signature of the notice and the issue of the application – which was not explained, I remain of the view that the rule 43 application was not properly before me and that the point *in limine* was well taken.

²⁵ *Barakat v Barakat* 2022 JDR 1178 (GJ) para [68] to [70]

[73] The amendment to sub-rule 43(1)(b) is only in respect of applications for a contribution towards costs of a pending, or about to be instituted matrimonial action, and as such it does not provide a blanket exemption to parties seeking to utilise rule 43. Summons must have been issued prior to, or simultaneously with, an application in terms of the rule.

[74] The question that remained was whether I ought to remove or dismiss the application.

[75] Mr Kloek contended that were I to uphold the point *in limine*, I could not dismiss the application and ought rather to remove it.

[76] I am in agreement with Mr Kloek that the correct order would be to remove the matter from the roll.

[77] The only question that thus remains is the question of costs and the scale thereof.

Costs

[78] It is trite that the award of costs is discretionary. It is further trite that costs normally follow the result.

[79] The costs to be awarded at this stage are only the wasted costs incurred in respect of the hearing on 23 July 2025 and the appearances on said day.

[80] Ms van Antwerpen sought punitive costs.

[81] Mr Kloek contended that costs should be reserved alternatively that party and party costs could be awarded. He objected to punitive costs.

[82] I am not inclined to reserve the question of costs for another court to have to adjudicate and make a finding on whether or not the point *in limine* ought to be upheld when I have heard argument on the point and noted the submissions made by counsel in their respective heads of argument thereon.

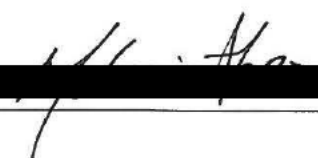
[83] I pointed out to him that the applicant in her notice seeks costs of the rule 43 application on the scale as between attorney and client notwithstanding that no case seems to be made out therefore in the founding affidavit.

- [84] Mr Kloek submitted that a punitive costs order was sought because the respondent failed to comply with the rules of court in that his sworn reply in respect of which he is afforded 10 days from receipt of the application within which to file his response (43(3)(a)) was filed 12 days late whilst his FDF was filed 5 days late. This makes no sense. The notice was signed on 16 December 2024 and served on 6 January 2025 at which point in time the respondent had not yet failed to comply with any rules of court. These issues cannot be dealt with at this stage, and I obviously cannot order costs against the respondent for any of these alleged transgressions as the applicant's failure to issue summons prior to or simultaneously with the launch of her rule 43 application renders the entire application to be premature and not properly before me.
- [85] The respondent raised the point *in limine* regarding the fact that summons had not yet been issued in his sworn reply, which was served on 4 February 2025.
- [86] The applicant then delivered a voluminous replying affidavit on or about 28 February 2025. She responded briefly to the complaint, as above, and yet took no steps to rectify the situation.
- [87] Mr Kloek recorded in his practice note dated 5 May 2025 that the applicant had not yet issued summons.
- [88] The final notice of set down for the week of 21 July 2025 is dated 26 May 2025. Summons was still not issued.
- [89] In a joint practice note uploaded to CaseLines during or about the middle of July 2025, it is recorded, albeit in passing, that '*as yet the Applicant has not instituted an action for divorce.*'
- [90] The applicant thus had ample time within which to issue summons in the divorce action. She did not do so and her supine attitude towards the proceedings, for which no explanation is given, cannot be condoned.
- [91] Ms van Antwerpen indicated in her practice note and heads of argument dated 17 July 2025 that she would be pursuing the point *in limine* at the hearing.

[92] As above I was only informed by Mr Kloek from the bar at the hearing that summons had been issued 3 court days prior thereto on 17 July 2025. No explanation was provided as to why the summons was suddenly issued at the 11th hour. The fact that summons was issued under a different case number may in any event prove to be problematic for the applicant down the line as an application in terms of rule 43 is ancillary to a divorce action and there will now be two separate files created on Court Online and CaseLines.

[93] In the circumstances I make the following order:

- a. The point *in limine* is upheld.
- b. The application is removed.
- c. The applicant is permitted to enrol the rule 43 application on the same papers, after service of the summons on the respondent. The applicant is to provide the rule 43 court with a copy of the summons and proof of service.
- d. The applicant is ordered to make payment of the wasted costs incurred by the respondent in respect of the hearing on 23 July 2025 and the appearances on said day.


[REDACTED]
ABRO AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: JW Kloek instructed by DM Bakker, DMB Attorneys

For the Respondent: AR van Antwerpen instructed by Jonathan van Druten Attorneys