

SOUTH AFRICA / JUDGMENT

# D v D (23031/2017) [2017]

## ZAGPPHC 293 (29 June 2017)

[2017] ZAGPPHC 293

## COURT

North Gauteng High Court, Pretoria

## BEFORE

R G Tolmay

## CASE / FILE NUMBER

23031/2017

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## IN

## THE HIGH COURT OF SOUTH AFRICA

## (GAUTENG

## DIVISION, PRETORIA)

## Case

## number: 23031/2017

Date: 29/6/2017

Reportable: Yes  
Of  
interest to other judges: Yes  
Revised.  
In

the matter between: A  
D APPLICANT  
AND  
Z  
D RESPONDENT

**JUDGMENT**

TOLMAY, J:

[1] The Applicant on 30 March 2017 launched a Rule 43 application in which she requested certain interim relief pertaining to primary

care, residence and contact rights, with relation to the minor children born of the marriage between her and the Respondent, as well as maintenance for her and the two minor children and a contribution towards costs. The Respondent served his answering affidavit on 18 April 2017.

[2] In his papers Respondent raised a point in limine, he contended that, as Applicant did not issue a summons in a divorce action against him, that there is no litigation pending and

consequently Applicant was not legally empowered to institute Rule 43 proceedings. I was informed by Respondent, at the hearing that summons, albeit under a different case number, was served prior to the hearing of this application. This summons is however not before me. In her founding affidavit Applicant merely states that she "intends" issuing divorce summons against Respondent.

[3] It is important to consider what Rule 43 provides for, it reads as follows:

"(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."

[4] The only reference to "pendente lite" or "pending" is in respect of Rule 43(1)(a) and (b). There is no such reference in Rule 43 (c) and (d) of the same rule, which relate to interim custody and access to a child. However (c) and (d) refers to interim custody and maintenance, which clearly implies that such maintenance and/or custody, is for a limited duration only and clearly pending the finalisation of a divorce action. In my view pendente lite and interim could be used interchangeably as these words point to relief for a limited period only and only until the divorce action is finalised. It is clear that the purpose of Rule 43 proceedings can only be to provide for interim relief pending the finalisation of divorce proceedings. It is consequently clear that Rule 43's purpose is to provide assistance and relief pending the finalisation of a divorce action.

[5] According to Erasmus Superior Court Practice[1] the following is stated pertaining to when Rule 43 proceedings can be instituted : "A matrimonial; action must be 'pending ' even though summons has not yet been issued'. The aforesaid declaration of the learned author is based on some authorities to which I will refer in due course, where the courts

have found that a summons need not have been issued before Rule 43 proceedings are issued.[2]

[6] In the Bienenstein[3] matter the Court found that a pending matrimonial action had been interpreted to mean, not only a situation where summons has been issued, but also in respect of a proposed matrimonial action. It is notable that no authority for this statement is referred to in the decision. In the Varkel[4] matter it was stated that Rule 43 was devised with the object of providing an expeditious and inexpensive procedure for obtaining interim relief in matters relating to matrimonial disputes pending, or about to be instituted.

[7] In Van Tonder v Van Tonder[5] the following was said:

"In my oordeel beteken 'hangende geding' enige aksie waarin die geskilpunte tussen die partye nog nie finaal oor besleg is nie. Die feit dat besonderhede van vordering vir 'n egskeiding en gepaardgaande regshulp, wel al uitgereik is, maar nog nie aan die respondent beteken is nie, doen geen afbreuk aan 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 egskeidingsgeding voort te gaan, vandaar die uitreiking van die dagvaardiging. Die blote feit dat dit not nie op respondent beteken is nie kan nie haar voornemens ongedaan maak nie,"

[8] In Mahlangu & Another v Van Eeden & Another, which did not deal with a matrimonial dispute, the following was said about what should be understood with reference to pending proceedings:

"Moreover, I have little doubt that when the old authorities spoke of pending proceedings, they had in mind proceedings which had commenced by way of service of summons. This is borne out by the analysis of the old authorities in the Mills case supra. Voet specifically defines pending proceedings in the context of the defence of lis pendens as follows:

'Pending suit defined - Moreover a suit is deemed to have begun and thus be pending elsewhere not only if joinder of issue has already taken place, but also if there has been merely a citation or summoning to law, since such a thing brings on anticipation . This is so provided that the statement of claim or at least the cause for claiming has at the same time been notified to the defendant, so that it can be known whether the suit is being set in motion elsewhere on the same cause and about the same matter, or on the other hand the cause or matter is different[6]."

[9] In the matter of Noah[7], which was concerned with a contractual matter the Court found that the word "pending" is conditioned by the context in which it is used[8]. If one applies this principle it would seem that the purpose of Rule 43 will determine the meaning of the word pending. In my opinion there must not only be a pending matrimonial dispute, but also a pending divorce action before a litigant may resort to Rule 43 proceedings. After all the fact that someone may be considering a divorce does not mean that it will follow. There

is a vast difference in my view between a matrimonial dispute and a divorce action.

- [10] I align myself with what was said in *Moolman v Moolman*[9] where the learned judge dealt extensively with this whole issue and with what pending litigation implies and where it was found that an action is only pending where summons has already been issued. After referring to the authorities already mentioned the Court proceeded to state as follows:

"From the above authorities, it is clear to me 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 authority relied upon by the applicants counsel for the submission that there was a pending action as the parties were not living together, cannot be sustained. Pending matrimonial action cannot include a proposed matrimonial action. *Van Tonder v Van Tonder supra*, is 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." (Court's emphasis).

- [11] The Court in *Moolman* concluded that the fact that the summons was later issued could not assist the applicant. This is in my view the correct approach, an action can only be pending if the summons was issued and served. In the absence of a summons the dispute between the parties can at the very best be a matrimonial dispute, which is a far cry from an actual divorce action and pending litigation.

- [12] 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. In my view, the purpose of Rule 43 is to assist a party, who expeditiously require financial support and interim certainty about residential, primary care and contact rights pertaining to the minor children pending the finalisation of the divorce action.

- [13] I was also referred to *LS v GAS*[10] where the Court seems to agree with the legal conclusion in *Moolman v Moolman*, but sought to circumvent possible prejudice to the minor children by proceeding to entertain the matter in the exercise of the Court's duty as upper guardian of the children. The Court states as follows:

"In short, when a 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 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.

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 the parties insofar as the respondent offers a 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 order which is dependent on the applicant issuing summons within a clearly defined period which promotes the expeditious objective of Rule 43."

[14] I am of the view that the Moolman approach is the correct one and that a divorce summons needs to be issued and served before one can institute Rule 43 proceedings. I consider the possibility however of prejudice to the children and the parties if I should merely uphold the point in limine and dismiss the application. It is trite that the best interests of minor children is paramount in any matter concerning a child<sup>[11]</sup> and maintenance for the children could be delayed which could lead to prejudice. This aspect was not considered in the Moolman judgment. Due to the fact that a summons was issued, prior to the hearing of the Rule 43, I am of the view that, although the point in limine should be upheld, Applicant should be allowed to proceed with the Rule 43 on the same papers, supplemented by the parties if necessary. Both parties have dealt with the merits and to insist on the redrafting of a fresh application, will serve no purpose and will only result in unnecessary costs, which both parties can ill afford. Therefore I will follow a more pragmatic approach. The point in limine should be upheld, but 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.

[15] Respondent requested a punitive cost order if the point in limine is upheld. In my view there is absolutely no merit in such an order. The Applicant relied on existing authority, which supported

her entitlement to launch the Rule 43 application. It is also clear from the authorities cited that there are conflicting decisions on this point. This court has a discretion as far as costs are concerned and seeing that a cost order against the Applicant, who is at this point maintaining the minor children largely from her own resources, will only indirectly prejudice the minor children. Consequently I am of the view that each party should pay his/her own costs.

[16] I make the following order:

16.1 The point in limine is upheld;

16.2 The application is dismissed;

16.3 The Applicant is allowed to, after the filing of a divorce summons under this case number, to enrol the Rule 43 on the same papers, supplemented if required;

16.4 Each party is to pay his/her own costs; and

16.5 The limitations of Rule 43(7) and

(8) are dispensed with.

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R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 JUNE 2017

DATE OF JUDGMENT: 29 JUNE 2017

ATTORNEY FOR APPLICANT: E Y STUART INC

ADVOCATE FOR APPLICANT: T COOPER

ATTORNEY FOR RESPONDENT: A L MAREE INC

ADVOCATE FOR RESPONDENT: J RUST

[1] D1-579

[2] Bienenstein v Bienenstein 1965(4) SA 449 at 451; Varkel v Varkel 1967(4) SA 129 at 131 Noah v Union National South British Insurance

Co Ltd 1979(1) SA 330 at 332 B-D

[3] Supra 451 E

[4] Supra, 130 B-C

[5] 2000(1) SA 529 at 532 H-J

[6] 2000(3) All SA 321 (LCC) at p 334, par 25

[7] Noah v Union National South British Insurance Co Ltd 1979(1) SA 330 (T) at 332 F-G

[8] supra

[9] Unreported decision 2007 ZSGPH 273: 15 November 2007

[10] Western Cape Division, Case number 2558/2016, date of judgment 26 August 2016

[11] Sec 28(2) Constitution of the Republic of South Africa

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Prepared on 26 October 2026 · Esheria