

SOUTH AFRICA / JUDGMENT

Dawood v Rahman (6578/2019)

[2019] ZAKZPHC 68 (28 October 2019)

[2019] ZAKZPHC 68**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout

CASE / FILE NUMBER

6578/2019

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No. 6578/2019

In the matter between

AMINA DAWOOD

Applicant

and

SULEMAN RAHAMAN

Respondent

JUDGMENT

BEZUIDENHOUT J

[1] Applicant in terms of Rule 43 of the Rules of this court brought an application against respondent claiming pendente lite maintenance for herself, maintenance for two minor children, a contribution to costs and that the primary residence of the minor

children be with her and access. She sets out in paragraph 6 of the founding affidavit:

“I have issued, alternatively am in the process of issuing, divorce summons against the respondent. A copy of such summons shall be available at the hearing of this application.”

- [2] Respondent in his opposing affidavit raised a point in limine that Rule 43 applications are pending relief claimed between the parties. It contends that the issue of maintenance between the parties had been resolved during October 2018 after the parties were divorced during August 2018 in terms of Islamic Law. As applicant abandoned the matrimonial home she was not entitled to any further maintenance.
- [3] A second point in limine was raised that it is stated in the founding affidavit that the marriage was not registered in terms of any statutory provisions. It was submitted as there was no recognised marriage that there was thus no legal proceedings pending and accordingly that Rule 43 does not apply. The issues raised in limine were dealt with firstly on its own. Mr Vawda appearing on behalf of applicant submitted that similar orders have been granted in other divisions where the parties had been married by Islamic Rights. He referred me to the decision in *Tasneem Mahomed v Zaki Jasat* 2195/2015 a KZN Durban decision by Mokgohloa J wherein such relief was granted, even though the parties were married in terms of Islamic Rights and divorced in terms thereof. I was also referred to the case of *AM v REM* 2154/08 ZA CPEHC 31 where similar relief was granted in terms of Rule 43 and also *YO v ZW* (2018) ZAWCHC 61, which was decided on 25 May 2018. In all of these cases that I have been referred to the parties sought a declarator that the marriage be declared to be valid or that subject to a constitutional challenge of the validity of Islamic marriages the relief in terms of Rule 43 be granted. Especially in the case of *YO v ZW* the relief sought was a declarator until legislation provided for recognition of Islamic marriages. In all of these cases, there was relief sought by way of a declarator of some sort and the relief in terms of Rule 43 pending finalisation of such litigation. It was thus *pendente lite*.
- [4] In *Woman's Legal Centre Trust v The president of the Republic of South Africa* 2018 (6) SA 598 (WCHC). The court refused to grant any interim relief. It ordered that the legislature be granted twenty-four months to legislate as to the recognition of marriages in accordance with the tenants of Shanya Law (Islamic Marriages) as valid marriages. In *Khan v Khan* 2005 (2) SA 272 (TPD) it was held that parties, married in accordance with Islamic Rights were entitled to maintenance and therefore it fell within the ambit of the Maintenance Act 99 of 1998. The particulars of claim were not provided to me at the hearing by applicant but respondents' counsel handed in a copy of the particulars of claim which indicate that applicant in paragraph 4 thereof avers that she and respondent were married to each other on the 7 June 2001 by Islamic Rights that was not registered in terms of the marriage Act.
- [5] In the order of the particulars of claim she seeks a decree of divorce. It is apparent from what I have set out above that due to the legislative process not having been finalised, Islamic Marriages are presently not yet recognised as valid marriages in terms of the Marriage Act and that a decree of divorce can therefore not be granted.
- [6] The provisions of Rule 43 have to be *pendente lite* thus pending the hearing or finalisation of some matter. As was correctly pointed out by Mr Moosa there is no such in this case. It cannot be pending the divorce as there cannot be a divorce in the present circumstances. The only option would therefore be for applicant to seek declaratory relief pending the

recognition of Islamic Marriages. Applicant can proceed with a claim for maintenance in the maintenance court and in respect of arrears or primary residence of the minor children in the Children's Court.

- [7] If applicant's papers are amended as set out above, applicant can seek relief pendente lite, but not as the papers stand at present.

Order:

The application is adjourned sine die and applicant is granted leave to amend her papers and file a supplementary affidavit. Costs are reserved.

BEZUIDENHOUT J

DATE OF HEARING : 16 October 2019

DATE OF JUDGMENT : 28 October 2019

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