

SOUTH AFRICA / JUDGMENT

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

[2018] ZAGPPHC 543**COURT**

North Gauteng High Court, Pretoria

BEFORE

Maakane

CASE / FILE NUMBER

31091/18

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

**personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII**

Policy

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

(1)**NOT****REPORTABLE****(2)****REVISED****CASE NO:**

31091/18
25/7/2018
In

the matter between:

D
J
D
Applicant
(Identity
Number: [...])
and
P A G
L
Respondent
(Identity Number: [...])

JUDGMENT

MAAKANE AJ

INTRODUCTION:

[1] This is one of those unusual applications that involves the real meaning or interpretation of the phrase "pendente lite" or pending litigation as provided for in Rule 43 of the Uniform Rules of this Court. The main unusual feature of the application is that at the time of launching thereof on 3 May 2018, divorce summons had not been issued and or served on the Respondent.

[2] The relief sought by the Applicant pendent lite is set out in her prayers as follows:

[2.1] That Respondent is ordered to pay maintenance to the Applicant in the amount of R12,400.00 (Twelve Thousand Four Hundred Rand) per month. The payment to be made on or before the 1st day of each and every month.

[2.2] That the Respondent contributes towards Applicant's legal fees in the amount of R20,000.00 (Twenty Thousand Rand), payable in instalments of R5,00 0.00 (Five Thousand Rand) per month.

[2.3] That the Respondent return Applicant's personal belonging and assets as set out in Annexure "E".

[2.4] Cost of this application.

[3] Respondent opposes the application and has raised one point in limine as one of his grounds of opposition. The point in limine is to the effect that summons commencing divorce action, had not been issued and or served on him at the time of the launching of this application. This being so, there is no pending divorce action and or litigation between the parties, as required by Rule 43.

The application is therefore premature.

BACKGROUND:

[4]

[4.1] The parties were married out of community of property on 16 July 2011 .

[4.2] There are no minor children born between the parties.

[4.3] It is common cause that the marriage relationship between the parties is broken down irretrievably and has reached such a state of disintegration that there are no reasonable prospects of having it restored.

[4.4] As a result, Applicant left the parties' common home on or about 26 December 2017. It appears from her affidavit that she apparently did so with the intention of instituting divorce proceedings against Respondent.

[4.5] It is also common cause that at the time Applicant launched this application on 3 May 2018, no divorce summons had been issued and or served on Respondent.

[4.6] At the time of the hearing of this matter on 16 July 2018, counsel for Respondent informed the Court. that summons commencing divorce proceedings were issued some time during May 2018 but have not yet been served on Respondent. Be that as it may, this summons is not before me.

PARTIES'

SUBMISSIONS:

[5] Ms Coetzee for the Applicant, submitted that the issuing of summons is not a pre-requisite before a party may approach a Court by way of a Rule 43 application.

[6] In this regard, she referred me, to the author Harms, Civil Procedure Part 8 , at 843.3 where the learned author states the following

regarding Rule 43:

" It applies solely to matrimonial actions that are pending or about to be instituted."

[7] She submitted that it is common cause between the parties that the marriage is irretrievably broken down and that therefore, a divorce

action is about to be instituted. That being the case, so she contends, Applicant is entitled to launch this application.

[8] Mr Arcangeli on the other hand argued that before a Rule 43 application can be launched, there must at least be a pending divorce action between the parties. At the time of launching of this application, summons commencing divorce action had not been issued and or served on Respondent. For that reason he argued, the launching of this application was done prematurely.

[9] With regard to prayer 3 relating to the handing over of clothes and other personal items, he submitted that Rule 43 does not provide for this type of relief. In any event, Ms Coetzee has correctly in my view, conceded that this is indeed so. I therefore do not find it necessary to deal with this aspect any further.

LEGAL POSITION AND ANALYSIS:

[10] In order to fully consider the point in limine as well as parties submissions, it is important to try and closely interpret Rule 43. The rule provides as far as is necessary as follows:

"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.

[11] Flowing from that, the important question to be considered and then answered is what exactly is meant by the words "pendente lite" or "pending litigation". In other words therefore, the issue is exactly when, is litigation pending for the purpose of Rule 43.

[12] In *Van Tonder v Van Tonder* 2000

- (1) SA 529 (GNP) the Court accepted that for the purpose of pending litigation, it was enough if summons were already issued. This is so even if same had not yet been served on the Respondent. In this regard Hattingh J expressed himself as follows:

"In my oordeel beteken 'hangendegeding' enige aksie waarin die geskilpunte tussen die partye nog nie finaal oor besleg is nie. Die feit dat besonderehede 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 app/ikante se enigste voorneme is om met die egskeidingsgeding voort te gaan, vandaar die uitreiking van die dagvaardiging. Die blote feit dat dit nog nie op respondent beteken is nie kan nie haar voornemens ongedaan maak nie."

(At page 532 H -1)

[13] In coming to this conclusion, Hattingh J referred to among others, *Nxumalo v Minister of Justice and Others* 1961 (3) SA 663 (W) where the following was said:

"It is quite clear in my view that, once a summons has been issued, i.e. once it has been signed by the Registrar of this Court and handed to the plaintiff's attorney to enable him to have the matter served, the litigation has commenced and that such a summons has certain consequences. It cannot, for example, be amended by the plaintiff's attorney without obtaining the Registrar's signature to the amendment, and if a summons is so amended the summons itself has no longer any force or effect. That being so, it seems to me to be clear that an action is commenced by the issue of summons. It is taken a stage further when summons is served."

[14] In *Mahlangu & Another v Van Eeden & Another* 2000 (3) ALL SA 321 (LCC) the Land Claims Court held that pending proceedings mean the issue of summons and, service thereof on a Defendant. The court said the following:

"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 ?1 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 of law, since such a thing bring 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 and the cause or matter is different".

[15] In the unreported case of *Moolman v Moolman* 2007 ZS GPH 273 (15 November 2007), the Court in considering what exactly "pending litigation" means, held that an action can be said to be pending only when summons have been issued. The Court further concluded that even if summons were to be issued subsequent to the launching of the Rule 43 application, this will not cure the defect. The Court said the following:

"From the above authorities, it is clear to me that an action can only pend, once at least summons as 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 the summons is irrelevant. The authority relied upon by the applicants counsel for the submission that there was a pending action as the patties 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).

[16] In her founding affidavit, Applicant states the following:

"4.2 The marriage relationship between the Respondent and myself has irretrievably broken down. I have instructed my attorney of record to institute a divorce action against the Respondent for a decree of divorce and ancillary relief."

6.14 The Respondent chased me away from the former common home on 25 December 2017 and packed some of my clothes in black plastic bags and demanded that I leave the common home. I left the common home on 26 December 2017 and moved into the house of the trust of which I am a beneficiary."

[17] It is clear from the above that Applicant left the matrimonial home on 26 December 2017. She apparently did so with the intention of instituting divorce proceedings against Respondent. This application was launched on 3 May 2018. At that time divorce summons had not been issued. The matter served before me on 16 July 2018. Still, there was nothing before me to show that summons were in fact issued, let alone served, on Respondent.

[18] I mention this because in her founding affidavit, Applicant does not explain this lengthy period of delay in instituting divorce

proceedings if she in fact intends doing so. She does not make mention of any specific reason for such a lengthy period of delay.

The delay extends over a period of approximately five (5) months. This is calculated from the time she left the common home in December 2017 to May 2018 when this application was launched. Over and above that, there is a further delay extending well over two (2) months. This is the period between the launching of the application in May 2018, to 16 July 2018 when the matter served before me.

[19] Quite recently, in *AD v ZD* (unreported: case no. 23031 / 2017 'GDP) the same issue served before Tolmay J for adjudication . After careful and detailed analysis and consideration of authorities, she concluded that an action can be said to be pending only if summons have been issued and served on a Defendant. She expressed herself as follows:

"11. The Court in *Moo/man* 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."

[20] The requirement that there has to be pending litigation before the launching of a Rule 43 application cannot be overemphasized. The requirement is mainly intended to prevent abuse. There is a real possibility that some litigants will resort to this type of relief without any actual intention of instituting and then prosecuting the divorce action to finality. As I have pointed, in this case for example notwithstanding a period extending over a period of many months, divorce summons have not been issued and or served on the Respondent.

[21] This real possibility and danger was recognised by Tolmay J who in this regard expressed herself as follows:

"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."

[22] Tolmay's approach in *A D v Z D* (supra) was referred to with approval and followed by Phathudi J in the unreported case of *RO v MO* (Case No. 5834/2017 Limpopo Division, Polokwane. The Learned Judge expressed himself as follows:

"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 pendente 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.

[23] As I have pointed out, there has been unreasonable and unexplained delay on the part of the Applicant. This delay extends well over a period of six (6) months. In *R O v M O* supra, Phathudi J held that an unexplained delay of one (1) months and three (3) weeks was unreasonably too long. In this regard, he said the following:

" Nothing in the founding affidavit has been proffered in the form of evidence as to why after effluxion of roughly 1 month and three weeks that divorce summons has not bee issued, even though not yet served, to demonstrate that a /is has been initiated alternatively, that it is about to be instituted."

(At paragraph 13).

[24] It follows from the above that the delay on the part of Applicant in issuing and or serving divorce summons on Respondent, is unreasonably

too long, if indeed she has any intention of doing so. What makes the situation worse is her complete failure to explain this delay.

[25] I am in agreement with Tolmay J and the authorities on which she relied in this regard. It is indeed possible for an applicant to issue summons and then launch a Rule 43 application for interim relief, without any intention of serving or pursuing divorce proceedings to finality. This will obviously have the effect of completely defeating the real purpose for which Rule 43 interim relief is meant.

[26] For this reason, I am of the view that in order to avoid such a situation, it is desirable that summons must have been issued and

also served on a Defendant before a Rule 43 application can be launched.

[27] In this regard I am in full agreement with Tolmay J when she held:

"This is in my view the correct approach, an action can only be pending if the summons was issued and served."

At paragraph 11.

[28] Tolmay J continues to repeat and emphasise this position when she further said very specifically that summons need to be issued and served. She expressed herself as follows:

" 14. I am of the view that the Moo/man approach is the correct one and that a divorce summons needs to be issued and served before one can institute Rule 43 proceedings."

(at paragraph 14)

OTHER CONSIDERATIONS:

[29] I have also had regard to the decision of the Western Cape High Court in *LS v GAS* (Case No. 2558 / 2016). I am mindful of the fact that the Court herein had put more emphasise on the interest of the minor children and the duty of the High Court as the guardian of al minors. The court held:

" 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 in 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; and is an order which is dependent on the applicant issuing summons within a clearly defined period which promotes the expeditious objective of Rule 43.

[30] It is common cause that having said that, in casu there are no minor children born between the parties. Applicant is seeking maintenance for herself as well as contribution towards legal costs.

[31] It also appears from the papers that the Respondent acknowledges his duty of maintenance towards the Applicant. The only dispute is the extent and or amount of such maintenance. It also appears to be common cause that Respondent did on previous occasions and on a monthly basis, pay to the Applicant a certain amount of money in order to assist her financially.

CONCLUSION:

[32] For this reason, I am of the view that the point in limine has to be upheld. However, for the reasons set out above, and due to narrow issues between the parties on the merits, Applicant should be allowed to proceed with the application on the same papers, supplemented by the parties if necessary. This is in the event she decides to issue and serve divorce summons on Respondent.

COSTS:

[33] In his opposing affidavit, Respondent asks that the Respondent be ordered to pay costs of this application. However, in argument, he asked that if the point in limine is upheld Applicant be ordered to pay costs hereof.

[34] The normal approach is that costs follow the outcome. However, the Court does have a wide discretion, in that regard. This discretion is to be exercised judicially taking into account the nature of the issues, as well as the conduct of the parties in a general sense.

[35] I must emphasise that the conduct of the Applicant particularly her delay in issuing and service of divorce summons is a matter of serious concern to the Court. She left the matrimonial home many months ago and yet, to date had not issued and or served divorce

summons on Respondent. There is no explanation whatsoever for this unreasonably long delay. Be that as it may it is common cause that Respondent acknowledges his duty of maintenance towards Applicant He did and has apparently been assisting her financially on a monthly basis.

[36] Under the circumstances a costs order against the Applicant will, given the general circumstances of the parties and the nature of the matter, not be in the interest of justice. In my view, it will only be fair if each party is ordered to pay own costs. I also find no reasons why I should not dispense with the limitations provided for in Rule 43(7) of the Uniform Rules of this Court.

ORDER:

[37] Consequently I make the following order:

[37.1] The point in limine is upheld;

[37.2] The application is dismissed;

[37.3] The Applicant is allowed, after issue and service of divorce summons on Respondent, to enrol the Rule 43 on the same papers, supplemented if necessary and or required to;

[37.4] Each party is to pay his or her own costs; and

[37.5] The limitations of Rule 43(7) and (8) are dispensed with.

S S MAAKANE

ACTING JUDGE OF THE

HIGH COURT

GAUTENG DIVISION

PRETORIA

APPEARANCES:

For the Applicant:

Adv. M Coetzee

Instructed by:

Ilze Eichstadt Attorneys

Pretoria

For the Respondent: Adv. R A Ariangeli

Instructed by: Hamel

Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/543.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/djd-v-pagl-unknown-topic-agpphc-2018--6a3ea5153b1caa912980c747>

Prepared on 11 October 2026 · Esheria