

SOUTH AFRICA / JUDGMENT

H.A v N.A (144907/2024) [2025] ZAGPPHC 121 (13 February 2025)

[2025] ZAGPPHC 121

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

144907/2024

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FLYNOTES:

FAMILY – Rule 43 application – Muslim marriage and Talaaq – Parties married in terms of Islamic law – Respondent issued applicant with Talaaq – Before any divorce proceedings were instituted – Point in limine on court’s jurisdiction – Meaning of “spouse” – Including person who alleges being spouse even where allegation denied – Court deciding on matrimonial action the correct court to pronounce on validity of marriage – Point in limine dismissed.

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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

JUDGMENT

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*[1] 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

- [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*[2] and *AM v RM*. [3] Counsel referred the court to *Essop v Haffjee*. [4] 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 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.

[1] 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.

[2] 2021

(1) SA 563 (GJ).

[3] 2010

(2) SA 223 (ECP).

[4] (2023/06743) unreported 16 October 2024.

[5] 1967

(1) SA 342 (W).

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