

SOUTH AFRICA / JUDGMENT

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

[2020] ZAGPPHC 109

COURT

North Gauteng High Court, Pretoria

BEFORE

Rabie

CASE / FILE NUMBER

10554/20

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HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED. YES

Case

no. 10554/20

6/4/2020

In

the matter between:

T.

H[...] Applicant

and

L.

A.

H[...] Respondent

JUDGMENT

RABIE J

1. This application was brought in terms of Rule 43 of the Uniform Rules of Court and was set down in the urgent court. The applicant claimed relief pendente lite which relief related, inter alia, to parental responsibilities and rights in respect of the minor child and an unborn child of the parties, primary care and rights of access in respect of the children, maintenance in respect of the children and the applicant, a contribution towards the applicant's costs of suit, certain other payments and costs of the application.
2. No opposing affidavit was filed on behalf of the respondent. On the day of the hearing advocate de Leeuw appeared on behalf of the respondent to oppose the application. He indicated that he would argue the matter on the applicant's papers.
3. On behalf of the respondent it was submitted, in limine, that the applicant was not entitled to approach the court in terms of Rule 43 as there was no pending matrimonial action between the parties. It was submitted that a divorce summons had not been issued.
4. On behalf of the applicant advocate Manganye could not dispute the fact that a divorce summons had not yet been issued but submitted that the divorce action was about to be instituted. I was referred to the applicant's affidavit where the applicant, in paragraph 24 thereof, stated that on the 2 February 2020 the respondent told her that he "had filed for divorce". Further, in paragraph 40 of her affidavit, the applicant stated "The respondent has indicated his intention to obtain a divorce and has in fact indicated that he has filed same. I am not yet in possession of same."
5. Reference may also be made to a supporting affidavit of attorney M. J. Maleté, who supported the applicant's claim for a contribution towards costs. In the last paragraph of this affidavit Me Maleté stated, inter alia, the following: "I must indicate to the Court that I have not seen the alleged divorce papers by the respondent...".
6. It was common cause between the parties at the hearing of this application that a divorce summons had not been issued.
7. On behalf of the parties submissions were also made during the hearing in respect of the claims by the applicant. In respect of most of the issues it does not appear that the parties are far apart and in respect of some of the claims they were in fact ad idem. I shall refer to the point in limine first.
8. In quite a number of cases the court entertained an application in terms of Rule 43 where a matrimonial action was not pending but about to be instituted. The matters of *Bienenstein v Bienenstein* 1965(4) SA 449 (T), *Varkel v Varkel* 1967(4) SA 129 (C) may be referred to in this regard.

9. I was, however, also referred to the more recent judgments in *Moolman v Moolman* 2007 ZSGPH 273, dated 15 November 2007 by Seriti J, and *AD v ZD* (unreported) Case Number 23031/2017 GDP dated 29 June 2017 by Tolmay J. In both of these matters previous decisions were discussed and in both matters the court came to the conclusion that a pending matrimonial dispute does not suffice and that there must be a pending divorce action before a litigant may resort to Rule 43 proceedings. Seriti J found that a divorce summons must at least have been issued while Tolmay J, in her judgement, found that an action can only be pending if the summons had been issued and served.
10. I have considered the aforesaid to judgements, the cases referred to therein and the principles applied. I respectfully agree with those judgements insofar as it was found that a pending action is a necessary requirement before Rule 43 proceedings may be instituted. In the present matter the summons had not yet been issued and I consequently do not have to consider whether service of the summons would also be required.
11. Consequently, the respondent's point in limine was well taken and the applicant's application was thus prematurely instituted and cannot succeed.
12. I have considered whether, in the light of this decision, certain orders may not be made by this court as the upper Guardian of all minors. In my view it should not. The respondent has not pleaded over and his version of the facts was not before this court. Secondly, the issues on which the parties agreed cannot be decided individually but only in conjunction with a finding on all the relevant issues.
13. The correct view would be to leave it to any of the parties to institute and serve a divorce action and then to approach this court again in terms of Rule 43, even on an urgent basis if that is still necessary.
14. As far as costs are concerned I am of the view that costs should not follow the event. On the evidence before me it appears that the respondent had brought the applicant under the impression that a divorce action had in fact been instituted. This prompted the applicant to launch the application in terms of Rule 43. Furthermore, it has been the practice in our courts for many years to allow a Rule 43 application if the institution of the divorce action is imminent. In light of the fact that there are conflicting decisions in this division and that the recent ones to which I have referred, are clearly not yet well known and, as far as I can establish, not reported in the South African Law Reports, it would in my view be fair and just to order that each party pays his/her own costs of the application.
15. In the result, the following order is made:
 1. The application is dismissed.
 2. Each party shall pay his/her own costs of the application.

(signed by Rabie J)

C.P. RABIE

JUDGE OF THE HIGH COURT

6 April 2020

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