

REPORTABLE

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 36397/2007

JUDGMENT DELIVERED: 15 NOVEMBER 2007

IN THE MATTER BETWEEN:

**MARLI MOOLMAN
AND
COEN JULES MOOLMAN**

**APPLICANT

RESPONDENT**

JUDGMENT

SERITI, J

[1] This matter came to court in terms of rule 43 of the Uniform Rules of Court.

The applicant is resident in Pretoria and the respondent at Krugersdorp.

The rule 43 application was issued on 2 August 2007 and it was served on the respondent at Krugersdorp on 15 August 2007.

On 3 September 2007 notice of intention to defend and answering affidavit were served with applicant's attorneys and filed with the registrar of this court on 4 September 2007.

[2] On 7 September 2007, the respondent issued summons out of the Witwatersrand Local Division of the High Court claiming a decree of divorce. On 11 October 2007, the rule 43 application was set down for hearing on 31 October 2007.

[3] The parties are married to each other out of community of property and no children were born out of their marriage. The parties were staying together as husband and wife, and after an altercation between them, the respondent left the common home on 4 March 2007 and went to stay somewhere else and the applicant remained in the common home.

[4] The applicant is employed and alleges that she earns R15 471-00 per month and her expenses are R22 930-00 per month.

The respondent alleges that his nett income per month is R45 000-00 and his monthly expenses per month are R45 220-00.

Applicant alleges that she requires contribution towards her maintenance and legal costs from the respondent.

[5] Applicant states that she did not institute divorce proceedings as instituting divorce proceedings is against her religious beliefs and convictions.

[6] In the answering affidavit the respondent raised a point *in limine*, namely that the applicant is not entitled to approach this court in terms of rule 43 of the Uniform Rules of Court as there was no pending matrimonial dispute when this application was launched.

[7] In her prayers as contained in the rule 43 application, the applicant is claiming the following:

7.1 Maintenance in the amount of R9 000-00 per months *pendente lite*.

7.2 That the respondent should pay for the household or house contents insurance,

DSTV subscription fee and water and electricity account of the common home
pendente lite.

7.3 Contribution towards her legal costs in the amount of R5 000-00, which amount must be paid within 7 days from the date on which the respondent institutes an action for divorce.

[8] In the answering affidavit, the respondent states that he pays the instalments and insurance premiums of the Polo Volkswagen which the applicant is using, together with the DSTV subscription, and water and lights account of the common home.

He further alleges that from May 2007 he is paying the applicant an amount of R2 500-00 per month, simply because the applicant requested him to assist her.

[8] During oral argument and in the Heads of Argument, the applicant's counsel submitted that prior to the launching of this application there was a pending matrimonial dispute as the parties did not live together as husband and wife since

March 2007 and the respondent informed the applicant that he wanted to get divorced from her. She further stated that in fact on 7 September 2007 the respondent instituted divorce proceedings.

[9] Rule 43 of the Uniform Rules of Court reads as follows:

“Matrimonial matters -

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.”

[10] In support of her submission that an action was pending between the parties even if no summons were issued, the applicant’s counsel relied on *Bienenstein v Bienenstein* 1965 (4) 447 TPD. At page 451 De Villiers AJ when dealing with rule 43(1)(b) said that same “has been interpreted to mean not only after summons

is issued but also in respect of a proposed matrimonial action.”

The learned judge gave no authority for the above mentioned statement.

In *Marine and Trade Insurance Co Ltd v Reddinger* 1996 (2) SA 407 AD at 413 D, Wessels JA said: “Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him.” See also *Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 584B-D. *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms)* 972 (1) SA 773 AD at 780E-G; *Mills v Slarwell Finance (Pty) Ltd* 1981 (3) SA 85 NPD at 86E-H.

In *Nxumalo v Minister of Justice and Others* 1961 (3) SA 663 WLD at 668D-E Kuper J said:

“I would only add that, if it could be contended that the ordinary meaning of the words “the commencement of the proceedings” could be either the date of the

issue of summons or equally the date of service of the summons, the former view would have to prevail;” – See also *Glen v Glen* 1971 (3) SA 238 (R) at 241E.

In *Van Tonder v Van Tonder* 2000 (1) SA 529, the court dealt with the question of custody of a minor child who was removed by the father from the custody of the mother. When the mother issued papers for the relief, no divorce summons was issued, but same were issued shortly before the hearing. At p532 Hattingh J 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 uitgeriek 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 applikate se ernstige voorneme is om met die egskeidingsgeding voort te gaan, vandaar die uitreiking van die dagvaarding. Die blote feit dat dit nog nie op respondent beteken is nie kan nie haar voornemens ongedaan maak nie.”

In *Mahlangu and Another v Van Eeden and Another* 2000 (3) All SA 321 (LCC) at page 334 paragraph 25, the court said:

“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 pendes* 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.’ ”

Rule 1 of the Uniform Rules of Court defines civil summons as any summons whereby civil proceedings are commenced.

[11] 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.

[12] In *Varkel v Varkel* 1967 (4) SA 129 (CPD) Van Winsen J at p1319 said the following:

“Rule 43 was devised and promulgated 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 (See *Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W)).”

In *Colman v Colman supra*, the summons for divorce were issued prior to the launching of the rule 43 application, and as a result, the case cannot be authority for the above quoted statement by Van Winsen J.

In *Zaphiriou v Zaphiriou supra*, the court dealt with a rule 43 application which was launched prior to the issuing of divorce summons. The court dealt with the application without citing any authority which entitled the court to deal with the rule 43 application prior to the party issuing divorce summons. If an action commences at least with the issuing of summons, there can be no pending action prior to the issuing of summons.

- [13] The proper reading of rule 43 and the purpose thereof supports the view that there must be a pending action between the parties prior to the launching of the rule 43 application. A pending action, in my view means that at least divorce summons must have been issued.
- [14] For an applicant to launch an application in terms of rule 43 of the Uniform Rules of Court divorce summons must at least have been issued. In this case, at the time of the launching of the rule 43 application there was no divorce summons which had been issued, and consequently the applicant was not entitled to approach the court by way of a rule 43 application.
- [15] The fact that summons were later issued out of the Witwatersrand Local Division, does not assist the applicant. When the rule 43 application was launched, there was no pending action between the parties.
- [16] The point *in limine* raised by the respondent is upheld. The court therefore makes the following order.

16.1 The application is dismissed.

16.2 The applicant is ordered to pay the respondent's costs on a party and party scale.

W L SERITI
JUDGE OF THE HIGH COURT

HEARD ON: 31 OCTOBER 2007
FOR THE APPLICANT: K ALLERS
INSTRUCTED BY: GAVIN JOYNT ATTORNEYS
FOR THE RESPONDENT: M VAN ZYL
INSTRUCTED BY: IVANDA VENTER ATTORNEYS