

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES: **A M v R E M**

2. Case Number:	2154/08
3. High Court:	Eastern Cape – Port Elizabeth
4. Date Heard:	26 May 2009
Date Delivered:	29 May 2009

JUDGE(S): REVELAS J

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s):	Adv P Scott
2. for the Respondent(s):	Adv A Beyleveld

Instructing attorneys:

2. Applicant(s):	CR Knoesen Attorneys
3. Respondent(s):	Jozelle Attorneys

CASE INFORMATION –

1. <i>Nature of proceedings:</i>	Motion Court
2. <i>Topic :</i>	Opposed Application (Rule 43)
3. <i>Key Words:</i>	

Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 2154/08
Date Heard: 26/05/09
Date Delivered 29/05/09

In the matter between

A M Applicant

and

R A M Respondent

J U D G M E N T

REVELAS J

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court. The applicant seeks maintenance for herself and her minor daughter, *pendente lite* and a contribution towards her legal costs in the divorce action she has instituted against the respondent. The applicant married the respondent on 16 July 1998 in Durban in accordance with the Islamic Law and Sunni custom. Their daughter was born in 1999.

[2] *In limine*, the respondent argued that no marriage existed between the parties, and accordingly, that Rule 43 which pertains to *matrimonial matters*, had no application. The respondent's challenge to the existence of the marriage is twofold. Firstly he contends that the parties were already divorced in terms of Muslim Law. The applicant disputes this. A divorce, in terms of Muslim Law, comes into effect after the notification by the husband to the wife of the divorce (*talaq*) three times. Islamic scholars disagree about whether three *talaqs* uttered in one sitting is equal to one *talaq* or

three separate ones. Fortunately (and I believe no doubt to the great relief of Muslim scholars), I am not required to solve the issue. For reasons that will appear in this judgment, I also do not find it necessary to determine the factual correctness of the assertion by the respondent that he and the applicant are divorced in terms of Muslim Law. The respondent's second contention is that a marriage according to Islamic Law is not a marriage in terms of the Marriage Act 25 of 1961 (the Marriage Act). The respondent also submitted that this matter is to be distinguished from situations where, for instance, a spouse who is married in terms of customary law before the commencement of the Recognition of Customary Marriages Act, Act 12 of 1998 (the Marriages Act), and whose marriage is registered with a registering officer, is entitled to interim relief in terms of Rule 43, pending the action for a dissolution of such marriage.

[3] In the divorce action pending between the parties apart from a decree of divorce and certain ancillary relief relating thereto (which includes two maintenance orders), the applicant further seeks a declarator to the effect that on an interpretation in the light of the Constitution, the provisions of the Marriage Act countenance and recognize the solemnisation and legal validity of marriages concluded under the tenets of religion or, alternatively, do not preclude the recognition of the solemnisation and legal validity of such marriages. In the alternative, she seeks an order declaring that Section 11 (3) of the Marriages Act is unconstitutional, and an order declaring the marriage concluded and solemnized between the parties, according to the tenets of the Islamic religion, to be a legally valid marriage in law. Further, alternatively, the applicant seeks an order declaring that, on a constitutional interpretation of the Divorce Act, No 70 of 1979 (the Divorce Act), the word *marriage* as it is used in that Act, includes marriages concluded and solemnized in accordance with the tenets of a religion, and an order

declaring the marriage concluded and solemnized between the parties, according to the tenets of the Islam religion, to be a marriage for purposes of the Divorce Act.

[4] Rule 43 (1) provides that Rule 43 shall apply to whenever a spouse seeks relief from the court in respect of maintenance *pendente lite*, a contribution towards the costs of a *pending matrimonial action*, and interim custody of or access to any child. The issue for determination in this matter is whether the present proceedings constitute a *pending matrimonial action*.

[5] At first blush, the obvious answer seems to be, that before the trial court decides the issue whether the marriage between the parties is valid and the Divorce Act is applicable, there can be no relief under Rule 43 because the marriage is illegal. However, in our courts an increasing tendency has developed to enforce maintenance and other rights to spouses married in terms of Islamic Law, even though both the courts and the legislature do not legally recognize an Islamic marriage (nikkah) as a *marriage* in terms of the Marriage Act. The draft Muslim Marriage Bill, published by the South African Law Reform Commission in Project 59 Islamic Marriages and Related Matters Report (July 2003), aimed at legal recognition of Islamic marriages and other general regulation of Muslim marital issues, is currently serving before the Constitutional Court which may result in its expedited promulgation, which hopefully will create certainty as to the position of Muslim spouses.

[6] In *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) a claim for loss of support against the Fund was recognized where the appellant (plaintiff) was a Muslim widow. The decision was based on the legal duty of the (deceased) husband to maintain his wife during their marriage in terms of Islamic Law. In

Khan v Khan 2005 (2) SA 272 (T) the court held that a wife married in accordance with Muslim rites, whether monogamous or polygamous, was entitled to maintenance during their marriage and as such it fell within the ambit of the Maintenance Act. It is significant that the enforcement of maintenance rights was in terms of the provisions of a statute. In *Daniels v Campbell* (2004 (7) BCLR 735 (CC)), the Constitutional Court interpreted the concept *spouse* and *survivor* in the Intestate Succession Act, 1987 and the Maintenance of Surviving Spouses Act, 1990 to include spouses married in terms of Islamic Law (see also Rautenbach and Goolam: *The Legal Status of a Muslim Wife Under the Law of Succession: Is She Still a Whore in Terms of the South African Law?* (2004 15 (2) *Stell LR* 369)).

[7] The duty of a husband to support and maintain his wife appears to be recognised in Rule 43 applications where in the pending a divorce action, the legality of the marriage is challenged. There are two unreported decisions on this issue: *Cassim v Cassim (Part A) (TPD)* (Unreported 2006-12-15; Case Number 3954/06) and *Jamalodeen v Moola (NPD)* (Unreported in Case Number 1835/06). As in the present matter, both these cases were decided in the face of constitutional challenges that were pending (See: *Enforcement of the Maintenance Rights of a Spouse, Married in Terms of Islamic Law, in the South African Courts, OBITER* 2007 28 (2) 340).

[8] In *Cassim v Cassim* it was held that there was a duty on the husband to maintain his spouse, to whom he is married in terms of Muslim Law, in accordance with a general standard of living by providing for her reasonable needs in terms of the Maintenance Act, and on that basis the relief in terms of Rule 43 was granted.

[9] In *Jamalodeen v Moola* the question for decision was whether a woman who had been married in terms of Islamic Law, but also divorced in accordance with Muslim rites (as alleged by the respondent, *in casu*) was entitled to maintenance in terms of Rule 43, pending the final determination of her constitutional challenge and divorce action. Levinson J ordered *pendente lite* maintenance in terms of Rule 43, but made it subject to the following two conditions:

1. *In the event of the trial court finding that the ex-husband was not obliged to pay her maintenance, she would be obliged to repay her husband all the amounts paid to her.*
2. *She had to enter into good and sufficient security de restituendo, to the satisfaction of the Registrar of the Court.*

A further provision was added to the effect that the failure to provide security would result in the automatic lapse of the obligation to pay maintenance. The more significant part of this order was that the maintenance ordered was payable for a period beyond the *iddah*, which is the period of three months after a Muslim divorce, during which the husband remains obliged to pay maintenance in terms of Islamic or *Shari-ah* Law.

[10] By imposing restitutionary conditions as was done in *Jamalodeen*, relief granted in terms of Rule 43 would be of no value to a wife who has approached the court precisely because of her inability to maintain herself and children, pending the divorce action. In my view, the consideration of the trial court eventually deciding the constitutional challenge in favour of a Muslim husband in Rule 43 proceedings does not require the *pendente lite* maintenance order to be made subject to restitutionary provisions. In ordinary divorce proceedings, an applicant granted maintenance in terms of Rule 43 (1), is never required to make repayment thereof if she ultimately is unsuccessful in obtaining a final order of divorce. The fact of a pending divorce action brings the situation within the ambit of *matrimonial matters* and a *matrimonial action* as

envisaged in Rule 43. The fact that a Muslim divorce has been concluded, is no obstacle for the divorce trial, and the constitutional challenge raised therein, to proceed. Once there is a constitutional challenge in the context of relief sought under the Divorce Act, not only the status and effect of the *nikkah* but also the status and effect of the *talaq*, will be under scrutiny. The constitutional challenge pending in the trial court, clearly encompasses a challenge to the legal effect of a *talaq*. By virtue of the main action for divorce, its effect is suspended for all practical purposes. Therefore, when a court has to decide whether or not to grant maintenance pending the outcome of the divorce action, where there is a constitutional challenge to the status of the marriage, it does not matter whether or not the parties were divorced in accordance with Muslim rites or not.

[11] In *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) it was reiterated that Rule 43 was designed to provide a streamlined and inexpensive procedure for procuring the same *interim* relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs. The purpose of such relief was to regulate the position between the parties until the court finally determined all the issues between them, one of which might well be whether the parties had contracted a valid marriage or not, or if they had, whether it still subsisted (344 D-E). It was held that Rule 43 was to be interpreted accordingly, and *spouse* in Rule 43 (1) was held to be interpreted as including not only a person who is admitted to be a spouse, but also a person who alleges that he or she is a spouse, and that allegation is denied (345 F-H).

[12] The entitlement to maintenance *pendente lite* arises from a general duty of a husband to support his wife and children. If the enforcement of these rights entails pursuing them in a court, then the same considerations applied above in *Zaphiriou* should apply to

whether the court can make an order for an interim contribution towards costs.

[13] Accordingly, I find that the applicant is not precluded from obtaining relief in terms of Rule 43 (1) by virtue of her Muslim marriage, irrespective of whether the respondent uttered three *talaqs* or not.

[14] The point in *limine* is accordingly dismissed with costs.

[15] In respect of the Rule 43 application I make the following order, *pendente lite*:

4. The respondent is ordered to pay maintenance to the applicant in the amount of R2500.00 per month.
5. The respondent is ordered to pay to the applicant maintenance for their minor daughter Aaliyah in the amount of R3000.00 per month.
6. The respondent is ordered to pay a contribution of R15 000.00 towards the applicant's legal costs.
7. The costs of this application are to be costs in the Divorce action.

E REVELAS
JUDGE OF THE HIGH COURT