

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: 1252/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

M[....]2, W[....] L[....]2

Applicant

and

D[....], R[....] J[....]2

Respondent

HEARD ON: 11 AUGUST 2022

CORAM: AFRICA AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on 24 August 2022.

POINT IN LIMINE: RULING

INTRODUCTION

[1] This is an application in terms of Rule 43, for an order *pendente file* in the following terms:

1. The respondent to pay the applicant an amount of R9000.00 (nine thousand rand) per month in respect of each of the following children: M[....], J[....] and L[....], payable on the 27th day of the month in which this order is granted and every succeeding month thereafter, to ensure that the funds are cleared in the applicant's South African bank account by the 1st of each and every month;
2. The respondent to make payment of the school fees and all other related expenses, including but not limited to text books, stationery and exam fees for the following children: M[....], J[....] and L[....], directly to the private school at which the children are currently attending;
3. In the event of the divorce not being finalised by the time any of the minor children complete their secondary education, the respondent is to pay fees for the child/ren to undertake tertiary education direct to the educational institution;
4. Payment of each of the children's medical aid directly to the service provider, until the children become self-supporting.
5. Payment of all medical expenses incurred on behalf of the minor children not covered by medical aid, until they become self-supporting.

6. The respondent shall pay the applicant's medical aid directly to the service provider and make payment of all medical expenses incurred on behalf of the applicant not covered by medical aid.
7. The respondent is to pay the applicant the sum of R20 000.00 (twenty thousand rand) per month in her South African bank account.
8. The respondent is to pay the applicant the sum of P25, 308 (being R32, 900) in respect of relocation costs.
9. The respondent is ordered to make an initial contribution towards legal costs in the amount of R150 000,00 (one hundred and fifty thousand rand) payable directly to the applicant's attorneys trust account.
10. The respondent be ordered to pay the costs of this application, alternatively the costs to be costs in the cause.
11. Further and /or alternative relief.

[2] It is common cause that the parties were married to each other on the 6th of May 2000, in Krugersdorp, Gauteng, which marriage still subsists. The parties relocated to Francistown, Botswana in 2001 and later moved to S[....] P[....], Botswana, where the respondent is still residing at present.

[3] It is common cause that the three children born of the marriage resides with the applicant and that the respondent has always provided for the children and applicant.

[4] The respondent in opposing this application, raises the *Point in Limine*, requesting this court to struck the matter from the roll for noncompliance with a court order or stay the proceedings (being */is pendens*), pending the final decision of the action between the parties under case number NLHGB-000182-22, in the High Court in the Republic of Botswana, Gaborone.

[5] The respondent further submits that the aforementioned litigation is still

pending in Botswana between the parties and has progressed to the point where the applicant has entered an appearance to defend and filed a plea. The Botswana court ordered the parties to prepare a pre-trial minute. A case management meeting was held on the 28th of July 2022 and a court date for hearing has been set for September 2022.

[6] The respondent submits that the aforementioned proceedings are based on the same cause of action and is in respect of the same subject matter.

[7] It is common cause that while the applicant and minor children still resided in Francistown, Botswana, the applicant approached the High Court in Botswana with an application for interim maintenance and the payment of legal costs, which order was granted on the 12th of November 2020. A copy of the said order is attached marked "**A**". However, as was submitted, the Lephalale Regional Court matter with case number LP/LEP/RC/99/2019, which served as the jurisdictional factor for the interim maintenance order in Botswana, was withdrawn on the 3rd of March 2022.

[8] It is argued that the applicant was not disallowed to proceed with a divorce action in this court and the applicant is therefore entitled to approach this court with an application in terms of Rule 43.

[9] In rebuttal hereof it was argued by the respondent that, where there are similar actions pending in two different divisions, this court should accept that the second proceedings will be presumed vexatious resulting in the abuse of the process of court.

[10] It is evident from Annexure "01" that on the 24th of March 2022, under case number 1252/2022, the applicant obtained an order from this honourable court, granting her, as plaintiff, leave to institute proceedings by way of edictal citation and amongst others directing that the summons be served on the respondent personally in Botswana by way of the following:

1. Via email at his known address: being

[....]

2. Via email to his Botswana Attorney, Rita Keevil, address:

[....]

3. Personally, on the Respondent by the sheriff of the court in S[....] P[....], Botswana.

[11] Respondent argues that until now, the applicant has not properly instituted the action, as there has not been compliance with the order dated 24 March 2022, in that the applicant has failed to serve the summons on the respondent, personally by the sheriff.

[12] On the 21st of March 2022, the respondent obtained an order under case number MLHGB-000182/22, to institute proceedings by way of edictal citation directing that the summons be served on the applicant:

1. Personally at J[....]Avenue, [....]H[....], L[....], Bloemfontein, South Africa;
2. In the event that the respondent is unable to effect personal service as set out above, then service shall be effect by email on the applicant to [....] by an attorney in South Africa who is duly admitted to practice;

[13] On 1st of April 2022 at 12:07, the divorce summons under case number MLHGB-000182/22 was served on the applicant by Peter Dominic Yazbek as per Annexure "03".

[14] At paragraph 3-4 of the service affidavit, Peter Yazbek states that "The deputy Sheriff attended to the defendant's property on numerous occasions and she did not answer her telephone to assist in locating her". Hence we were instructed to serve by the alternative means as set out in the Botswana High Court of 21st March 2022.

I have 1st day of April 2022 at approximately 12h07 hours, served a copy of the writ of Summons for Divorce, together with the plaintiffs declaration, Power of Attorney and

Draft Order by email to the defendant's address being W[....]m.M[....]2@gmail.com in terms of the Botswana High Court."

[15] Also on the 5th of April 2022, the summons issued by the respondent in Botswana, was served on the applicant personally by the sheriff of Bloemfontein West, as evident from Annexure "04".

[16] According to the respondent both instances of service on the applicant happened before the summons was served on his niece and before the summons has been served on him, personally¹ as per the court order, which at the present stage, still has not been complied with.

[17] It is not in dispute that the summons so issued by the applicant was served on the respondent on the 1st of April 2022 at 12h49 via email. The respondent contends that the applicant is not complying with the court, has not properly instituted the action.

[18] This reasoning is supported by this court. The issue of a summons is the initiation process of an action and has certain specific consequences, one of which is that it must be served. The methods of service are prescribed in the Rules or in the present matter it was prescribed in the court order obtained on the 24th of March 2022.

[19] This court is unable to *mero moto* condone that because the respondent acquired knowledge of the summons, by way of email and *via* service on his niece, or the fact that he entered an appearance to defend, that the applicant is automatically absolved or relieved from her obligation to comply with the court order, which specified the manner of service.

[20] It is trite that Rule 43 proceedings are invoked whenever a spouse desires relief in respect of one or more of the enumerated instances in it. It applies exclusively to pending matrimonial disputes that are pending or instituted. Rule 43(1)(b) in

¹ Section 17 Divorce Act 70 of 1979: Service of process, notices, etc.(1)(a) Service of any process through which an action claiming a divorce is instituted shall be effected by the sheriff at the request of the plaintiff or the applicant, on the defendant or the respondent personally

particular refers to contribution towards costs of a "pending matrimonial action". Likewise, in the present application such an order is sought for the respondent to make an initial contribution towards legal costs on the amount of R150 000,00 payable directly to the applicant's attorneys trust account, which order can only be granted where there is a pending matrimonial action.

[21] It is the considered view of this court, that the summons in the present case was not properly served on the respondent. The logic behind this reasoning is the inherent danger of a litigant obtaining interim relief in any of the listed jurisdictional matters in Rule 43 and taking no steps towards its conclusion or may have no *bona fide* intention to even commence divorce action.

[22] It is my considered view that the instance where a summons is issued and "properly" served later, cannot avail an applicant seeking relief. On this ground alone the application falls to be dismissed.

[22] I make an order in the following terms.

[1.1] The *Point in Limine* is upheld;

[1.2] The application is dismissed with costs.

AFRICA, AJ

Appearances:

COUNSEL FOR THE APPLICANT:

Instructed by:

Ad. Eis

Fox & Barratt Attorneys

COUNSEL FOR THE RESPONDENT:

Instructed by:

Adv. Reinders

Phatshoane Henney Inc