IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 2195/2015

In the matter between

TASNEEM MAHOMED **APPLICANT**

and

ZAKI JASAT **RESPONDENT**

REASONS

Date delivered: 2 September 2015

MOKGOHLOA J

[1] 'The fundamental shift that occurred when South Africa became a constitutional democracy in 1994 heralded changes in all areas of the law. Significant changes were made, and continue to be made in family law….The recognition of Customary Marriages Act 120 of 1998 gave legal recognition to marriages contracted in terms of African Customary laws, thereby protecting the spouses of these potentially polygamous unions.

…

Where South African statutory law is still fundamentally lacking is in the recognition of the rights of and protection of parties to marriages contracted in terms of Muslim law. For couples married in accordance with civil law, marriages and divorces are dealt with under the relevant statutes, namely the Marriage Act 25 of 1961, the Civil Union Act and the Divorce Act 70 of 1979. No provision is, however, made in statutory law for the recognition of marriages concluded in terms of Muslim Shariah law…

…The status of Muslim marriages has, since 1990, been the subject of continuing investigation by the South African Law Reform Commission (SALRC). Despite the efforts of the SALRC, as well as the draft Muslim Marriages Bill, which was published as long ago as 2000, there has been no change to statutory law as its stands.'[1]

[2] With this prelude, I proceed to deal with the material terms.

[3] The applicant brought an application in terms of rule 43 of the Uniform Rules of Court. She sought an order pendente lite granting her (a) primary residence of her two minor children, *(b)*maintenance for herself and her minor children in the amount of R43 000, and (c) contribution of R25 000 towards her legal costs in the divorce action she has instituted against the respondent. The applicant married the respondent on 16 September 2000 in Pietermaritzburg in accordance with Islamic law. Their marriage was not registered according to the provisions of the Marriage Act.[2]

[4] The respondent opposed the application and raised a point in *limine*. Having heard argument from both counsel and having read the papers, I made an order granting the applicant maintenance *pendent lite*.

[5] The parties have requested that I furnish reasons for my ruling on the point in *limine* raised by the respondent. These are my reasons.

[6] *In limine*, the respondent argued that no marriage existed between the parties, and, accordingly, rule 43, which pertains to matrimonial matters, had no application. He based his argument on the fact that (i) he terminated the marriage during November 2014 when he pronounced a single talaq (divorce) at the request of the applicant, and (ii) a marriage according to Islamic law is not a marriage in terms of the Marriage Act.

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[1] Sheri Breslaw 'Muslim spouses - Are they 'equally' married?' *De Rebus* (December 2013) 30 at 30-31.
[2] 25 of 1961.

[7] In the divorce action pending between the parties, the applicant seeks amongst others relief, a declarator to the effect that, on a constitutional interpretation, the provisions of the Marriage Act countenance and recognise the solemnisation and legal validity of marriages concluded under the tenets of religion or, alternatively, do not preclude the recognition of the solemnisation and the legal validity of such marriages. In the alternative, she seeks an order declaring that s 11(3) of the Marriage Act is unconstitutional, and an order declaring the marriage concluded and solemnised between the parties, according to the tenets of Islamic law, to be a valid marriage in law. Further, alternatively, the applicant seeks an order declaring that, on a constitutional interpretation of the Divorce Act,[3] the word "marriage", as it is used in that Act, includes marriages concluded and solemnised in accordance with the tenets of a religion, and that therefore the marriage concluded and solemnised between the parties, according to the tenets of the Islamic religion, to be a marriage for purposes of the Divorce Act.

[8] According to Muslim law, a divorce comes into effect after the notification by the husband to the wife of the divorce three times. The question is how the divorce or talaq is pronounced. Some Muslim scholars believe that the pronouncement of a talaq three times at one occasion is valid, whilst others believe that there shall be an interval of one month between each talaq pronouncement. For the purpose of this application I am not required to determine the issue of whether the parties are divorced or not as this will be determined by the court hearing the divorce action.

[9] The issue for determination in this matter is whether the present proceedings constitute "matrimonial action" as contemplated in rule 43(1). Rule 43(1) under the heading "Matrimonial Affairs" provides:

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[3] 70 of 1979.

'(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;

(c) interim custody of any child;

(d) interim access to any child.'

[10]. Previously, Islamic personal law and other religious legal systems were not officially recognised as part of South African law. Neither was a provision made in statutory law for the recognition of marriages concluded in terms of Muslim law. This was due to the potentially polygamous nature of Muslim marriages. In fact the court in *Ismail v Ismail*[4] held that a potentially polygamous marriage is inconsistent with South African law since it is *contra bonos mores*.

[11] However, after the advent of democracy in 1994, the courts started changing their approach to Muslim marriages. The change in attitude and approach manifested in cases such as *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,[5] where the Supreme Court of Appeal recognised a Muslim widow's claim for loss of support following the death of her husband as a result of a motor vehicle accident. The court held that what the dependant must show is that:

'(a) the deceased had a legally enforceable duty to support the dependant and

(b) it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith and

(c) it was a duty which deserved recognition and protection for the purposes of the dependant's action.'[6]

[12] In *Khan v Khan*[7] the court had to consider whether there was a legal duty on the husband, by virtue of provisions of s 2(1) of the Maintenance Act,[8] to

[4] 1983 (1) SA 1006 (A).
[5] 1999 (4) SA 1319 (SCA).
[6] Above para 26.

maintain his wife, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygamous one. The court held that partners in a Muslim marriage, married in accordance with Islamic rites, whether monogamous or not, were entitled to maintenance and thus entitled to maintenance in terms of the Maintenance Act.

[13] Counsel for the respondent conceded that there are cases, some unreported, where the applicant was allowed to utilise rule 43 to apply for *pendente lite* maintenance. He however argued that none of these cases are binding on this court. He referred me to an unreported Natal Provincial Division decision in the case of *Jamalodeen v Moola*[9] where a woman who had been married in terms of Islamic law, and divorced in accordance with Muslim rites was entitled to maintenance in terms of rule 43, pending the final determination of her constitutional challenge and divorce action. Levinsohn J ordered *pendente lite* maintenance in terms of rule 43, subject to three conditions:

1. The applicant would have to pay back all maintenance received should the trial court find that the ex-husband was not obliged to pay maintenance.
2. The applicant had to provide sufficient security *de restituendo* to the satisfaction of the registrar of the court.
3. Should the applicant fail to provide security the obligation to pay maintenance would lapse automatically.

[14] In criticising Levinsohn J's approach in *Jamalodeen*, Revelas J in *AM v RM* stated:[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

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[7] 2005 (2) SA 272 (T).
[8] 99 of 1998.
[9] Case number 1835/2006.
[10] 2010 (2) SA 223 (ECP) para 10.

> 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.'

[15] I share the sentiments as those expressed by Revelas J. The imposition of restitutionary conditions renders the relief granted in terms of rule 43 useless to a wife who approaches the court precisely because she is unable to maintain herself and her children pending the divorce action. In my view the restitutionary provisions are antithetical to the very purpose of an application in terms of rule 43.

[16] In Zaphiriou v Zaphiriou[11] 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 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 determines 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. The court held that rule 43 was to be interpreted accordingly, and 'spouse' in rule 43 (1) was to be interpreted as including not only a person who is admitted to be a spouse, but

[11] 1967 (1) SA 342 (W)

also a person who alleges that he or she is a spouse, and that allegation is denied. [12]

[17] Therefore, I find it to be unnecessary for the applicant in a rule 43 application to prove *prima facie* the validity of the marriage. In my view, 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 court, then the same considerations applied in Zaphiriou should apply to whether the court can make an order for an interim contribution towards costs.

[18] Accordingly, the applicant cannot be precluded from obtaining relief in terms of rule 43 (1) by virtue of her Muslim marriage, irrespective of whether the respondent pronounced a talaq or not.

[19] For the reasons given, I was satisfied that the applicant was entitled to the relief sought and made the following order:

1. The primary residence of the minor children Ziyaad, a boy born on 11 February 2002 and Naazneen, a girl, born on 11 July 2005 shall be with the applicant.
2. *Pendente lite* the respondent shall be entitled to have contact with the minor children as follows:
   2.1 During school term periods:
      2.1.1 Every alternate weekend from after school on a Friday to 17h00 on a Sunday.
      2.1.2 Every alternate public holiday.
   2.2 Every alternate short school holiday period.
   2.3 For one half of the long school holiday periods.

[12] Above at 345 F-H

2.4 For four hours on the minor's birthdays and respondent's birthday.

2.5 For Father's Day from 08h00 to 17h00 (with Mothers' day to be spent with the applicant on the same basis).

2.6 The sharing of special religious occasions, namely Eid-ul-Fit and Eid-ul-Adha, alternating from 09h00 to 14h00 and 14h00 to 18h00, save that the respondent will be entitled to have contact with the said minor children from the eve Eid in respect of which he has access in order for the said minor children to attend the Eid Salaat with him.

2.7 Telephone contact at all reasonable times.

2.8 Any further contact by agreement between the applicant and the respondent.

3. The respondent is directed to pay maintenance to the applicant for herself and the minor children in the sum of R20 000 per month.

4. *Pendente lite* the respondent is directed to pay all the reasonable costs and expenses directly relating to the education of the said minor children, including the fees of the Madressa, purchase of books and stationery, school clothing and equipment and extra-mural activities, which payment shall be limited to the sum of R5 000 per month per child.

5. *Pendente lite* the respondent is directed to retain the minor children as beneficiaries on his medical aid benefit scheme and to pay all reasonable medical, dental, ophthalmic and allied expenses in respect of the minor children which are not covered by his medical aid.

6. To contribute the amount of R15 000.00 towards the applicant's legal costs.

7. An order that the provisions of Rule 43(7) and (8) shall not apply to these proceedings and the costs of this application be reserved for determination by the court hearing the divorce action.

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MOKGOHLOA J

COUNSEL

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Date of hearing	:	14 and 16 April 2015
Date of Judgment	:	2 September 2015