REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/30298

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

24 APRIL 2018

MODIBA J

In the matter between:

SJ Applicant

and

SE Respondent

EAF *Amicus Curiae*

J U D G M E N T

MODIBA, J:

[1] The respondent ("SE") seeks an order declaring that Rule 43 of the Uniform Rules of Court does not apply to parties married in terms of Islamic Law and in circumstances where a *Talaq*[1] has been issued.

[2] SE raised this issue as a point *in limine* when an application in terms of Rule 43, brought by the applicant ("SJ"), served before Carelse J in February 2017. Carelse J postponed the application *sine die,* to allow the *amicus curiae* ("*the amicus*"), whom she had admitted by agreement between the parties, to file a notice in terms of Uniform Rule 16A and a supplementary affidavit, and to allow the parties to file further affidavits.

[3] The facts between the parties are largely common cause. They were married to each other under Islamic Law on 6 April 2002. Two children were born from the marriage in 2004 and 2006. On 27 April 2014, SE entered into a polygamous marriage with another woman ("CB"). The latter marriage was also concluded under Islamic Law. On 5 January 2015, a child was born between SE and CB. SJ and CB maintained separate matrimonial homes. SE resided interchangeably between these homes. On 24 June 2016, SJ vacated her matrimonial home. The circumstances under which she did so are in dispute**.** However, that dispute is of no consequence to the issue under consideration.

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[1] A *Talaq* is a unilateral divorce process available to a man wishing to terminate his Islamic marriage. He does so fundamentally by pronouncing *Talaq* thrice either verbally, in writing or in recent times even electronically by SMS, WhatsApp or social media platforms. See AM v RM 2010 (2) SA 223 (ECP) at paragraph 2. See also https://en.oxforddictionaries.com/definition/talaq and https://en.wikipedia.org/wiki/Divorce_in_Islam.

[4] SJ alleges that since she left her matrimonial home in June 2016, she has been without maintenance. She was hitherto partially dependant on SE. She only holds a matric and has no formal qualifications. She worked as a nursery school teacher at a school across the street from her matrimonial home, half a day for five days per week, earning R5, 000 per month. When she left her matrimonial home, SE ordered her to leave her car behind. She has not worked since because she cannot get to work. These are the circumstances that impelled her to launch the Rule 43 application.

[5] On 1 September 2016, SJ initiated the Rule 43 application. SE subsequently filed opposing papers. On 16 November 2016, SJ initiated divorce proceedings against SE in terms of the Divorce Act 70 of 1979. On 22 February 2017 just under a week before the Rule 43 application was heard, SE issued a *Talaq* against SJ.

PRELIMINARY POINTS

[6] At the commencement of the present hearing, counsel for SJ requested that two preliminary points raised by SJ be dealt with upfront. These are:

6.1 the referral of the point *in limine* to the full court of this division;

6.2 the stay of the current proceedings pending the handing down of the judgment in a class action that was heard by the full court in the Western Cape division of the High Court in August 2017 where the applicants seek an order directing the Parliament of

the Republic of South Africa ("Parliament") to expedite the processing of the Islamic Marriages Bill[2].

[7] Approximately a week before I heard argument, SJ's attorneys of record addressed a letter to the Judge President of this division, Judge President Mlambo, with the attorneys of record for SE and the *amicus* on copy, requesting him to refer this matter for determination before the full court. SE's attorneys of record addressed a reply to Judge President Mlambo opposing the request and setting forth reasons for their opposition. In a letter dated 14 March 2018, Judge President Mlambo informed the parties that it was too late to consider SJ's request.

[8] During preliminary discussions with counsel in chambers prior to the present hearing, counsel for SJ informed me that she is persisting with the request to have the matter heard by the full court in due course, contending that Judge President Mlambo has not declined SJ's request. She enjoined me to exercise a discretion which I singularly enjoy as the presiding judge, by referring the matter to the full court. This prompted me to consult with Judge President Mlambo prior to hearing argument in court, as I ought to in terms of section 14 of the Superior Courts Act.[3]

[9] The reasons advanced for SJ for this request are as follows:

9.1 the issue for determination in these proceedings is being considered for the first time in this division;

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[2] The Bill was published for public comment under Notice No 37 of 2011 in Government Gazette No 33964 on 21 January 2011.
[3] Act 10 of 2013.

9.2 the issue is of great importance to the Islamic community;

9.3 several decisions on the same issue have been handed down by single judges in other divisions of the High Court;

9.4 given the judgment reserved by the full court in the Western Cape division, it will be undesirable for this court to hand down a decision that conflicts with that decision when it is ultimately handed down;

9.5 having the issue determined by the full court in this division will yield greater legal certainty.

[10] A vigorous opposition to the request was persisted with on behalf of SE citing:

10.1 the delay in bringing the request;

10.2 prejudice to SE should the request be granted;

10.3 that the decision of this court by a single judge will not disturb the doctrine of *stare decisis;* and

10.4 that the link between the Western Cape matter and this application has not been established.

[11] The proposition that as the presiding judge I have the discretion to refer the matter to the full court is incorrect. This was the position in terms the Supreme Court Act,[4] the precursor to the current Superior Courts Act. In terms of section 13 (1) (b) of the Supreme Court Act, a single judge presiding over a matter could at any time discontinue the hearing of a matter and refer it

[4] Act No. 59 of 1959.

for hearing before a full court of the relevant division. This has since changed by the unambiguous wording of section 14 of the Superior Courts Act.[5] It follows that judgments delivered prior to the enactment of the Superior Courts Act as well as the relevant commentary no longer hold authority on this subject.[6]

[12] Section 14 envisages two scenarios in which the full court is constituted. The Judge President, in his absence the Deputy Judge President or in their absence the most senior judge in the division may singularly constitute the full court or the presiding judge in a matter may do so. In the latter case, the presiding judge makes the decision in consultation with the Judge President, in his absence the Deputy Judge President or in their absence the most senior judge in the division. The words 'in consultation with' require a decision referring a matter to the full court to be taken by the presiding judge with the concurrence of the aforesaid functionaries in the stated ranking order. [7] (Emphasis added)

[13] The formulation in section 14 is one that promotes effective justice administration. While a presiding judge may believe that a matter ought to be

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[5] I interpreted this section guided by the trite principles set out in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2014] 1 All SA 517 (SCA) at para 12 taking into account the language used by the legislature, the context and purpose of this legislation.

[6] See Erasmus, Superior Court Practice, Original Service 2015 Commentary in respect of Subsection (1) (a):'Constituted before a single judge' A2-16 as well as *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T), specifically 279C.

[7] In *McDonald v Minister of Mineral & Energy* 2007 (5) SA 642 (C) at para 18, the court held that where the law requires a functionary to act '***in consultation with'*** another functionary, that means *there must be concurrence between the functionaries*. The court distinguished this phase with the phrase '***after consultation with***' which requires no more than that the ultimate decision be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.

heard by the full court, it is not desirable for him or her to impose such a decision on the Judge President because it is beyond the powers of the presiding judge to designate judges to preside in the full court. This power lies with the Judge President who normally designates judges by publishing a duty roster before the commencement of a new term. It would not assist the presiding judge to hold a discretion to refer a matter to the full court when he or she lacks the powers to constitute one.

[14] I am therefore required to make such a decision in concurrence with any of the aforesaid functionaries.

[15] Unlike its predecessor, the Superior Courts Act is silent on who initiates the request for the referral of a matter to the full court. The legislature probably omitted this because it considered it immaterial who initiates the request. There is no statutory preclusion to a request being made by any of the parties as happened in *casu*. Section 14 applies whether the referral is initiated *mero motu* by any of the aforesaid functionaries or the presiding judge in consultation with any of the aforesaid functionaries or on request by any of the parties.

[16] Further, the Superior Courts Act does not prescribe the criteria for the allocation of a matter before the full court. Erasmus suggests that cue may be taken from section 13 which prescribes the number of appeal judges who preside in a matter in the Supreme Court of Appeal (“the SCA”). In terms of section 13, SCA proceedings are ordinarily heard by five judges of appeal.

However, the President of the SCA may direct that a matter be heard by 3 judges of appeal or by a larger number of judges of appeal where the importance of a matter so requires. (*Emphasis added*).

[17] The term 'importance' is not defined in the Act. Erasmus further suggests that the term includes cases where the issue to be determined is *res nova*, where it is of great significance to a particular group, such as the members of a profession or a sector of the commercial community, or where there are conflicting decisions of the different divisions of the High Court or of the SCA.[8] (*Emphasis added*).

[18] For the reasons set out below, Judge President Mlambo and I unanimously rejected the request:

18.1 The request is made late. No cogent reason for its lateness has been advanced. SE's attorneys of record wrote to the Deputy Judge President on 9 October 2017, requesting a special allocation of the matter in terms of Directive 26.2 of the Practice Directives. SJ's attorneys were copied in the letter. The letter contained no request that the matter be heard by the full court. The attorneys for the parties complied with the requirements of the Practice Directives in respect of special allocations. On 19 October 2017, the Deputy Judge President informed the attorneys that the matter has been specially allocated for hearing on 19 March 2018. That letter makes no reference to a

[8] Erasmus, A2-16.

full court. A single set of papers was prepared for the presiding judge as opposed to three set of papers for the full court. In the circumstances, the contention by SJ's counsel that she only became aware that the matter has been allocated before a single judge a week before the matter served before me does not justify the late request. For reasons stated above, it does not make sense that SJ's legal team only became aware a week before the hearing that the matter will be heard before a single judge.

18.2 There is no doubt about the importance of the point *in limine* for the Islamic community. However, the issue under consideration is not *res nova*. As I demonstrate below, related issues in respect of Islamic Marriages have been considered by the Constitutional Court, the SCA and other divisions of the High Court. Further, the point *in limine* has been considered by other divisions of the High Court.

18.3 Judgments on this issue by other divisions of the High Court are not conflicting.

18.4 Concerns raised on behalf of SJ regarding the need for authority in this division on the issue under consideration are addressed

by the *stare decisis* doctrine.[9] This doctrine has numerous nuanced permutations which are not necessary to consider for the purpose of this judgment. Generally, judgments handed down in the Constitutional Court and the Supreme Court of appeal are binding on this division while judgments of other divisions are only persuasive. A judgment by a single judge of this division will become authority in this division and may be departed from by another single judge where the facts are distinguishable or where he or she is of the view that the previous judge has erred. I therefore disagree that having the point in limine heard by a single judge will disturb the *stare decisis* doctrine.

18.5 The link between this matter and the matter in which judgment is reserved in the Western Cape division has not been established. It is unclear what the issues for determination in that matter are. Based on submissions by SJ, the order sought in that matter has no direct bearing on this matter. That matter, if decided in favour of the class will yield a directive to Parliament to expedite the processing of the Islamic Marriages Bill. This does not justify referral to the full court in this division or even a stay of these proceedings until the Western Cape judgment is handed down.

[9] This is a common law legal principle in terms of which a rule or principle established in a previous legal case is either binding or persuasive for a court in subsequent cases dealing with similar issues or fact. Moseneke DCJ (as he then was), discusses this principle in *Daniels v Campbell NO and Others* 2004 (5) SA 331 from paragraph 94. See also LAWSA 2nd Ed Vol 5 paragraph 170 as well as du Bois, Wille's Principles of South African Law, 9th Ed (2007) pages 70-92.

Such a stay would not benefit the parties in this matter. Effectively, SJ seeks a stay of this matter until the law on Islamic marriages is reformed. On that argument, this court would not consider any similar cases until the Bill is enacted. That would lead to an untenable situation. The process for getting the Islamic Marriages Bill took almost two decades.[10] It is unclear how long it will take before the Bill is enacted into law if it ever will be. This matter as well as any other similar matter that is enrolled for hearing prior to the enactment of the Bill stand to be determined on the law as it is.

THE PROCEEDINGS BEFORE CARELSE J

[19] When the matter served before Carelse J, she granted the following order by agreement between the parties:

> "*1. The point in limine as to whether it is competent for the above Honourable Court to award maintenance pendente lite to the applicant in terms of the provisions of Rule 43(1) of the Uniform Rules of Court ("the rules"), is postponed sine die.*
>
> *...*
>
> *4. Ahmed Fazel Ebrahim is admitted as amicus curiae to the proceedings in terms of the provisions Rule 16A* (sic) *of the rules ("the amicus").*
>
> *5. The amicus shall deliver:*

[10] The Bill emanated from an investigation conducted by the South African Law Reform Commission (SALRC). The investigation led to the publishing of the Issue Paper for public comment in May 2000 styled: *Islamic Marriages and Related Matters, Issue Paper 15* under ISBN: 0-621-30089-6. The investigation culminated in the publication of the Bill under Notice No 37 of 2011. The closing date for comments was 31 July 2000. The Bill was only published almost a decade after the Issue Paper was published.

5.1 Notice of the constitutional issue raised by him in terms of Rule 16(1) (a); and

5.2 File his supplementary affidavit by no later than 15 March 2017.

6. …"

THE *AMICUS*

[20] The *amicus* is a Moulana. He describes himself as an Islamic Scholar. As already alluded to and as apparent from the above order, he was admitted into these proceedings as an *amicus* by agreement between the parties. As it has turned out, his role as well as the value he stands to add in these proceedings is questionable.

[21] He sought to be admitted as an *amicus* in order to raise a constitutional issue**.** The issue he sought to raise was yet to be articulated as he was yet to file his notice in terms of Uniform Rule 16A. In his application for admission filed on 24 February 2017, he set out the following reasons for seeking admission:

21.1 the marriage between the parties has been terminated by the issuing of a *Talaq*;

21.2 the issues that arise between the parties in the Rule 43 application have a bearing on the exercise by the parties of their religious and cultural rights in terms of sections 14 and 31 of the Constitution. If granted, the Rule 43 order will violate the aforesaid rights of the parties';

21.3 this court no longer has jurisdiction in respect of the Rule 43 application as the marriage between the parties has been dissolved;

21.4 patrimonial consequences of the parties' marriage are determined in terms of Islamic Law.

[22] The *amicus* filed the said notice on 15 March 2017. There he articulates the issue he seeks to raise as follows:

> "*Whether the application of the provisions of Rule 43 as between the parties, who were previously married to each other accordingly (sic) to Islamic rites and whose marriage has been dissolved by the issue of a Talaq by the Respondent to the Applicant, amounts to a violation of the parties' alternatively, the Respondent's rights in terms of Section 14 and Section 31 of Chapter 3 of the Constitution of the Republic of South Africa Act No. 108 of 1996 (as amended) (sic) and is unconstitutional*."

[23] Rule 16A regulates the admission of *amici* in the High Court. It provides for two grounds for admission. An *amicus* is admitted by agreement between the parties, or where an application for admission as an *amicus* is opposed, by order of court. I quote the rule below:

> "*16A Submissions by an amicus curiae*
>
> *...*
>
> *(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.* (*Emphasis added*).
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> *…*
> *(9) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.*"

[24] Although the *amicus'*s admission was achieved by agreement between the parties, it fails to accord with Rule 16A in several respects. Firstly, neither of the parties has raised a constitutional issue in which the *amicus* has an interest. The *amicus* has raised the constitutional issue *mero motu*. This is contrary to the unambiguous language used in Rule 16A.

[25] The *amicus's* interest in the outcome of the Rule 43 application is the constitutional rights of the parties. This too is contrary to the unambiguous language used in Rule 16A. The *amicus* has not expressed an interest as a Moulana in the constitutional issue he seeks determined. I would hold a different view on his involvement in these proceedings if his complaint related to how the order would impact the Islamic community. The following remarks by Ngcobo J (as he then was) in *Hoffmann v South African Airways,*[11] expressed in consideration of the *amicus's* entitlement to legal costs are worth referring to:

> "*... An* amicus curiae *assists the court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The* amicus *differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An* amicus *joins proceedings, as the name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and this compelled to incur costs. It joins the proceedings to assist the court because of its expertise or interest in the matter before the Court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An* amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs".* (At paragraph 63).

[26] More problematic is his personal involvement in this matter. He was approached by SE for assistance with issuing a *Talaq* certificate confirming the *Talaq* SE issued to SJ. SE sent the *amicus* a WhatsApp voice note,

[11] 2001 (1) SA 1 CC.

recording the issuing of the *Talaq*. The *amicus* then issued a *Talaq* certificate confirming that SE has issued a *Talaq* to SJ. Subsequently – but before he was admitted as an *amicus* in these proceedings - the *amicus* deposed to a confirmatory affidavit attesting to the truthfulness of these events, which SE narrated in a supplementary affidavit filed a few days before the Rule 43 application was heard by Carelse J. To that extent the *amicus* is SE's witness in these proceedings.

[27] Relying on *Hoffmann,* Counsel for SE submitted that there is no legal requirement that an *amicus* ought to be neutral. In *Hoffmann*, the Constitutional Court ruled that an *amicus* may align him or herself to the case of a particular party and that he may lead evidence to support the submissions he intends making. The AIDS Law Project ("*AL*P") was admitted as an *amicus* by agreement between the parties and was permitted to place before the court certain expert evidence. The evidence included the unanimous views of the parties' experts on these issues. The *amicus* in *Hoffmann* did not participate in that case as a witness. These factors render the facts in *Hoffmann* distinguishable from the facts in *casu*. Therefore Hoffman is not authority for the proposition that an *amicus* may play a dual role as an *amicus* and as a witness for one of the parties.

[28] *Amici* play a very important role in the South African judicial system and are of great assistance to the courts because they present evidence and/ or legal argument not presented by the parties, thus equipping courts to consider a different perspective on the issue under consideration not brought

by any of the parties. Allowing the *amicus* to play a dual role as an *amicus* and as a witness for one of the parties not only has the potential to muddy the important role *amici* play in our courts, there is a potential that they may present the same evidence both as an *amicus* and as a witness, rendering their role as an *amicus* redundant. In casu, apart from the constitutional argument that the *amicus* advanced – which as already stated, has no place in these proceedings as it has not been raised by any of the parties - his factual evidence overlaps with that he confirmed in a confirmatory affidavit filed on behalf of SE.

[29] Regrettably, in the present circumstances, for the reasons advanced above, I find that *amicus* dual role as a witness for SE on the one hand, and as an *amicus* on the other hand is inappropriate. I also find that the evidence advanced by the *amicus* in his capacity as an *amicus* as well as the legal submissions made on his behalf adds no value to these proceedings.

THE POINT *IN LIMINE*

[30] As already stated, the main issue for determination in these proceedings is a point *in limine* whether Rule 43 applies to parties married in terms of Islamic Law and in circumstances where a *Talaq* has been issued. SJ contends that it does. SE contends that it does not.

[31] As alluded to in *AM v RM,*[12] there are three different types of a *Talaq,* determined by the procedure followed by the husband when issuing it. It is not necessary to examine each type for the purpose of this application because SJ takes no issue with the procedure followed by SE when he issued the *Talaq*.

[32] SE contends that the parties' marriage has been dissolved – by the issuing of the *Talaq* - and that the Rule 43 procedure is incompetent because the parties are no longer married. SE further contends that once divorced, in terms of Islamic Law, SJ is only entitled to maintenance from him for a period equivalent to three menstrual cycles, primarily because during this period, SJ may not enter into another marriage. On the authority in *Khan v Khan*, it was also contended on behalf of SE that SJ may pursue the latter claim in the maintenance court. SJ questions SE's *bona fides* for issuing the *Talaq* on the eve of the hearing of the Rule 43 application.

[33] It is a settled rule in our law that Islamic marriages lack legal recognition. As a result, legal consequences do not flow from Islamic marriages. This has presented various difficulties for parties in these marriages. Firstly, the position of parties in these marriages is different to that of parties whose marriages are legally recognised, religion being the only differentiating factor. Secondly, third parties would refuse to give effect to the wishes of parties to an Islamic marriage, denying them legal protection. Thirdly, in the event of a dispute between the parties, as is the case in *casu*,

[12] See citation in foot note 1. At paragraph 2 of the judgment.

one party to the marriage would seek resolution in terms of Islamic Law and another would contend for a remedy generally available to parties married in terms of civil law where the latter provides better legal protection party.

[34] Even before the advent of constitutional democracy in South Africa, from time to time courts have attached some legal consequence to Islamic Marriages were they met the requirements of a putative marriage.[13] The rational for this approach was to extend legal consequences to Islamic marriages to give effect to their *de facto* existence. Since the enactment of the 1996 Constitution, courts have also extended legal consequences to Islamic marriages to give effect to constitutional rights.

[35] In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening*),[14] on the basis of the husband's legal duty to maintain his wife in terms of Islamic Law, the court recognised a widow's claim for loss of support against the Multilateral Motor Vehicle Accidents Fund following a fatal motor vehicle accident involving her husband.

[36] In *Ryland v Edros,*[15] the Constitutional Court held that an Islamic marriage is a contract from which certain proprietary obligations flow. This provides an adequate reason to impose some of the consequences of a civil marriage on an Islamic marriage, chiefly, the obligation of maintenance. In

[13] *Moola and Others v Aulsebrook NO and Others 1983 (*1) SA 687 (N) at 690A-B. See also *Hoossain v Dangor* [2009] JOL 24617 WCC.
[14] 1999 (4) SA 1319 (SCA).
[15] 1997 (2) SA 690 (CC).

Daniels v Campbell NO and Others,[16] the Constitutional Court held that an Islamic spouse in a monogamous Islamic marriage had the right to inherit and to claim maintenance from their deceased spouse in terms of the Intestate Succession Act,[17] and in terms of the Maintenance of Surviving Spouses Act.[18]

[37] In *Khan v Kahn*[19] it was held that partners in Islamic marriages owe each other the duty of support, just as in civil marriages and therefore, have the right to claim maintenance from one another in terms of the Maintenance Act.[20]

[38] In *Hassam v Jacobs NO and Others*,[21] the Constitutional Court extended the right to maintenance of a woman married under Islamic Law to a woman who is party to a polygamous Islamic marriage. In *AM v RM,*[22] a woman married in terms of Islamic Law successfully claimed interim maintenance from her husband for herself and her minor daughter pending a divorce action that she instituted in terms of the Divorce Act,[23] and in circumstances were a *Talaq* has been issued.

[39] The above account is by no means exhaustive. Notably, different courts have been consistent in extending legal consequences to women and

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[16] 2004 (5) SA 331 (CC).
[17] Act No. 81 of 1987.
[18] Act No. 27 of 1990.
[19] 2005 (2) SA 272 (T).
[20] Act No. 99 of 1998.
[21] 2009 (5) SA 572 (CC).
[22] 2010 (2) SA 223 (ECP).
[23] Act No. 70 of 1970.

children subject to Islamic marriages, despite the continued lack of recognition of these marriages. In particular courts have been consistent in giving effect to parties' reciprocal duty of support in different contexts where they sought to enforce this duty, including in a Rule 43 application.

[40] In *casu*, no compelling argument has been advanced why I should depart from the legal foundation laid in the above cases. Relying mainly on *AM v RM*, counsel for SJ urged me to find for SJ and dismiss the point *in limine*.

[41] Counsel for SE argued that this case is distinguishable from *AM v RM* and for that reason, I should find that the principle in that case is not applicable here and uphold the point *in limine*. He argued that in *AM v RM*, unlike in this case, the wife challenged the validity of the *Talaq*. In *casu* SJ does not challenge the validity of the *Talaq*. Therefore the *Talaq* is valid. Counsel for SE further contended that by accepting the validity of the *Talaq*, SJ accepts that she has been divorced. Therefore she is no longer a spouse as envisaged in Rule 43 and the remedy provided for in that Rule is no longer available to her. Relying on *Khan v Khan*, SE's counsel also contended that the only remedy available to SJ is spousal maintenance in terms of the Maintenance Act 99 of 1998. In his answering affidavit, SE asserts that under Islamic Law, such maintenance is only limited to three months.

[42] Counsel for SJ explained what is meant by the words used in heads of argument filed for SJ 'accepting the validity of the *Talaq* but disputing its

effect'. She explained that under Islamic Law, there are three prescribed procedures a husband ought to comply with when issuing a *Talaq.* Once a *Talaq* is issued and unless the wife takes issue with the procedure followed, the wife has no option but to accept the *Talaq*. In this instance, SJ takes no issue with the procedure followed. However, since there is a pending divorce action which was initiated before the *Talaq* was issued, whether the *Talaq* is of any effect given the circumstances under which it was issued is an issue for determination in the divorce action and not in these proceedings.

[43] The submission on behalf of SE that the applicant's reliance on *AM v RM* is misplaced because it is factually distinguishable lacks merit. In *AM v RM,* the respondent raised a point *in limine* in a Rule 43 application brought by the applicant pending the determination of a divorce action in which the applicant sought an order declaring that her Islamic marriage to the respondent is valid. The respondent objected *in limine* that no marriage exists and that Rule 43 does not apply to the parties' marriage. He relied on two reasons for this contention. Firstly, that the parties were already divorced in terms of Islamic Law. Secondly, that a marriage in terms of Islamic Law is not a marriage in terms of the Marriage Act.

[44] Although indeed in *AM v RM*, the applicant disputed the validity of the *Talaq* which is not the case in *casu*; there the court did not deem it necessary to resolve that dispute. (See para 2 of that judgment). Therefore the status of a *Talaq* - whether it is valid or effective - did not inform the court's decision. Rather there are similarities in the facts of the two cases that informed the

court's decision; namely the fact that there is a pending divorce action between the parties and that despite the pending divorce action, the respondent sought to oust the jurisdiction of the court in respect of the Rule 43 application on the basis that he has issued a *Talaq* dissolving the parties' Islamic marriage. This places this case on all fours with *AM v RM*. Therefore the contention on behalf SE that *AM v RM* finds no application in *casu* stands to be rejected.

[45] The contention by counsel for SE that SJ ought to have pleaded that the *Talaq* is of no consequence due to the pending divorce action lacks merit. There is no dispute that a divorce action in which SJ seeks her marriage dissolved in term of the Divorce Act is pending and that the divorce action pre-dates the issuing of the *Talaq*. I am persuaded by the approach adopted in *AM v RM.* I find that the dispute regarding the status of the *Talaq* is irrelevant to the question whether a woman is entitled to relief in terms of Rule 43. Treating the Islamic marriage in these proceedings as dissolved by the issuing of the *Talaq* as contended for by SE will result in a grave injustice as it will deny SJ the interim remedy that Rule 43 provides for pending the determination of the divorce action where she seeks to raise constitutional issues.

[46] The remedy provided for in Rule 43 plays a vital role in matrimonial proceedings. It is at the disposal of a party who seeks interim maintenance and other ancillary relief to alleviate the hardships that flow from a marriage in the process of being terminated by divorce or annulment. It is immaterial that

there is an allegation that the marriage is invalid or that the claimant is not a spouse. (See *Zaphiriou v Zaphiriou).*[24]

[47] I therefore determine the point *in limine*, guided by the following legal principles, extrapolated from the cases discussed in paragraphs 35 to 38 above:

47.1 although Islamic marriages are not legally recognised because they are not solemnized in terms of the Marriage Act and therefore not valid under South African Law, *de facto* the parties are married*;*

47.2 parties to an Islamic marriage owe each other the reciprocal legal duty of support regardless whether they are in a monogamous or polygamous marriage;

47.3 Rule 43 is a procedural mechanism to give effect to the reciprocal legal duty of support of parties to a marriage pendente lite, even where the validity of the marriage is in dispute;

[24] 1967 (1) SA 342 (W). Here the court said 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).

47.4 reference to the word ‘spouse’ in Rule 43 includes a spouse to a marriage concluded in terms of Islamic Law. Therefore Rule 43 is applicable to marriages concluded in terms of Islamic Law;

47.5 the issuing of a *Talaq* does not preclude a divorce action where a constitutional challenge regarding the legal effect of the *Talaq* is in dispute;

[48] SE and SJ owe each other the reciprocal duty of support arising from their Islamic marriage. The question regarding the legal effect of the *Talaq* is an issue in the pending divorce action and therefore stands to be determined in that action. Until that issue is determined, there is a matrimonial dispute between the parties that serves as the jurisdictional factor for the Rule 43 application. I find that despite the issuing of a *Talaq*, due to the pending divorce action, this court has jurisdiction to determine the Rule 43 application. Therefore SE’s point *in limine* stands to be dismissed.

LEGAL COSTS

[49] It is common cause that counsel for the parties are acting *pro bono*. The applicant’s counsel seeks costs against SE in the event that the point *in limine* is dismissed. SJ also seeks costs against the *amicus*. SJ’s contention for the costs of counsel as well as costs against the *amicus* is misplaced and stands to be rejected. Firstly, the request for counsel’s costs goes against the

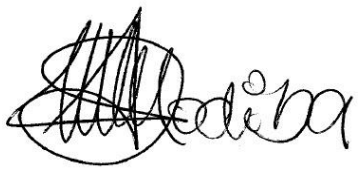
bar council rules because counsel is acting *pro bono*.[25] Secondly, the *amicus* was admitted by agreement between the parties. It is inappropriate for SJ in these circumstances to seek costs on the basis that this court found that the *amicus's* involvement was inappropriate and further that he had no value to add in these proceedings. The latter is a finding by this court after SJ consented to the admission of the *amicus*. Under these circumstances, I find no reason to depart from the principle set out in *Hoffmann* in relation to the *amicus's* lack of liability for costs.

[50] In the premises, the following order is made:

ORDER

1. The respondent's point *in limine* is dismissed with costs, which costs shall exclude the costs of counsel.

2. No cost order is made against the *amicus curiae*.



MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

[25] General Council of the Bar of South Africa Uniform Rules of Professional Conduct, Rule 7.3.1.

APPEARANCES

Applicant's Counsel:	Adv Bezuidenhout
	Adv Grobler
	Adv Tshoma
Instructed by:	Ayoob Kaka Attorneys
Respondent's Counsel:	Adv Bester
Instructed by:	ST Attorneys
For the *Amicus Curiae*:	Adv E Venter
Instructed by:	JHS Attorneys
Date heard:	19 March 2018
Date delivered:	24 April 2018