Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

CASE NO: 2023 - 014603

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

DATE
SIGNATURE

In the application by

B, R	Applicant
and	
R, S A E	Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Muslim marriage – Pending new legislation or amendments to the Divorce Act, 70 of 1979 certain provisions of the Act apply to Muslim marriages subsisting at 15 December 2014

Muslim marriage – common law definition of 'marriage' that excluded Muslim marriage declared by Constitutional Court to be inconsistent with the Constitution and invalid to the extent that it excluded Muslim marriages

Talaaq - unilateral pronouncement of divorce by husband - Rule 43 not intended to enquire into the validity and effect of a Talaaq

Rule 43 – inter alia gives effect to husband's duty of support

Order

[1] In this matter I make the following order:

1. *The respondent is ordered, pendente lite, to –*
    a. *retain the applicant on her current medical aid scheme;*
    b. *pay the applicant's car insurance and tracker in respect of her Hyundai vehicle;*
    c. *pay R10,000 per month to the applicant from 15 October 2023 onwards.*
2. *The costs of the application shall be costs in the cause of the action.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application in terms of Rule 43 of the Uniform Rules.

[4] The parties entered into a Muslim marriage on 20 December 2016. Section 3(1) of the Marriage Act, 25 of 1961 allowed for the appointment of marriage officers for the purpose of solemnising Muslim marriages but it is common cause that the Muslim marriage between the parties was not so solemnised.[1] No children were born of the marriage but both parties have adult children born from their respective previous marriages.

[5] They separated on 25 July 2022 and on 17 October 2022 the respondent pronounced One Talaaq-E-Baain,[2] thereby (in his view) terminating the marriage. The respondent was then obliged to maintain the applicant for three months in accordance with Islamic law.

[6] In February 2023 the applicant instituted an action for divorce claiming a decree of divorce and ancillary relief, including maintenance. The applicant alleges that the marriage was one in community of property in terms of an oral agreement, and in the alternative should it be found that she was married out of community of property that she be entitled to claim an order for redistribution in terms of section 7(3) of the Divorce Act, 70 of 1979.

The applicant relies on the decision in *GKR v Minister of Home Affairs and Others*[3] where Van der Schyff J declared section 7(3)(a) of the Divorce Act to be inconsistent with the Constitution and invalid to the extent that the provision limits the operation of section 7(3) of the Divorce Act to marriages out of community of property entered into *before* the commencement of the Matrimonial Property Act, 88 of 1984. The judgement is still to serve before the Constitutional Court in terms of section 172 of the Constitution, 1996.

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1 See also the remarks by Sachs J in *Daniels v Campbell* 2004 (5) SA 331 (CC) para 25.
2 Caselines 001-22.
3 *GKR v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP).

[7] The applicant alleges in her papers that the action for divorce in terms of the Divorce Act is *"in accordance with"* the judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others,* [4] dealt with in more detail below.

[8] Rule 43 applies to *'matrimonial matters'* and is not limited to divorce litigation in terms of the Divorce Act, and the Rule governs procedure and does not affect the substantive law. It is settled law that the Rule applies to litigation between spouses in a Muslim marriage.[5]

[9] It was held in *AM v RM*[6] that pronouncing a Talaaq to effect a divorce according to Muslim law was no obstacle to relief under Rule 43 where the legality of marriage and the legality of the Talaaq were challenged in a pending divorce action. Revelas J said:

> *"[10] ……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,*[7] *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."*

[10] In *TM v ZJ*[8] Mokgohloa J held that it was not necessary for the applicant in a Rule 43 application to present *prima facie* proof of the validity of the marriage and that the

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4 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) ("the WLCT case").

5 Van Loggerenberg *Erasmus: Superior Court Practice* D1-578A, referring to *AM v RM* 2010 (2) SA 223 (ECP).

6 *AM v RM* 2010 (2) SA 223 (ECP).

7 The Muslim marriage.

8 *TM v ZJ* 2016 (1) SA 71 (KZD).

entitlement to maintenance *pendente lite* arises from a general duty of a husband to support his wife and children.[9] An applicant is not precluded from obtaining Rule 43 relief by the fact that a Talaaq was pronounced. The validity of the Talaaq would be determined at trial.

[11] In *SJ v SE* [10] the Court rejected an *in limine* argument that the Muslim marriage had been terminated by a Talaaq and that as a result there was no '*matrimonial matter*' before the Court and therefore Rule 43 relief was not competent. The legal effect of the Talaaq was in dispute and was an issue for determination in the pending trial. Rule 43 was aimed at relief *pendente lite* and the Court was indeed able to grant such relief and leave the legal effect of the Talaaq for determination by the trial court.

The Talaaq was issued *after* the matrimonial action was instituted. The fact that the respondent sought to oust the jurisdiction of the Court by issuing a Talaaq weighed heavily with Modiba J in *SJ v SE.*[11]

[12] The recognition of Muslim marriages, and the need to protect women and children[12] and to promote gender equality – all Constitutional[13] imperatives - have been topics of litigation and debate particularly since the advent of Constitutional supremacy and the adoption of the 1993 and the 1996 Constitutions.[14]

[13] In 2018 the Western Cape Division of the High Court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* issued a declarator that the State was obligated by section 7(2) of the Constitution to adopt legislation recognising and regulating the consequences of marriages solemnised under Muslim

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9 *Ibid* paras 17 and 18.

10 *SJ v SE* 2021 (1) SA 563 (GJ)

11 *Ibid* para 44.

12 See the remarks by Tlaletsi AJ in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) paras 39, 47 to 49.

13 See Chapter 2 of the Constitution, 1996 and in particular sections 9, 10, 11, 12, and 28.

14 See *Kalla and Another v the Master and Others* 1995 (1) SA 261 (T), *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* [1997] 4 All SA 421 (SCA), 1999 (4) SA 319 (SCA), *Daniels v Campbell* [2003] All SA 139 (C), *Daniels v Campbell* 2004 (5) SA 331 (CC), *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC), as well as Moosa "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Women" (1998) 9 *Stellenbosch Law Review* 196, Goldblatt "Case Comment: Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 319 (SCA)" (2000) 16 *South African Journal on Human Rights* 138 and the SA Law Commission's *Report on Islamic Marriages and Related Matters* initiated in 1994 and published in 2003.

law.[15] When the matter came before the Supreme Court of Appeal,[16] the Court declared the Marriage Act and the Divorce Act to be inconsistent with the Constitution[17] in their failure to recognise and regulate the consequences of marriages under Sharia law. The Supreme Court of Appeal also declared the Divorce Act to be inconsistent with the Constitution in failing to provide -

13.1 protection for minor and dependent children upon the dissolution of Sharia law marriages,[18]

13.2 for the redistribution of assets on dissolution when it would be just to do so,

13.3 and in its omission of measures for forfeiture of patrimonial benefits under appropriate circumstances.[19]

[14] The common-law definition of marriage was declared to be inconsistent with the Constitution and invalid to the extent that it excluded Muslim marriages.[20]

[15] An order of Constitutional invalidity does not have any force unless confirmed by the Constitutional Court.[21] The Constitutional Court upheld the order of constitutional invalidity in *Women's Legal Centre Trust v President of the Republic of South Africa and Others.*[22] The declarations of invalidity[23] were suspended[24] for 24 months to enable the President, the Cabinet and Parliament to remedy the defects by passing legislation to ensure the recognition of Muslim marriages. The period of 24 months will expire on 27 June 2024.

[16] Pending the coming into force of new or amending legislation, the Constitutional

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15 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC), [2018] 4 All SA 551 (WCC).

16 *President, RSA v Women's Legal Centre Trust and Others* 2021 (2) SA 381 (SCA). Judgment was given on 18 December 2020.

17 See sections 9, 10, 28, and 34 of the Constitution.

18 Sections 9, 10, 28(2) and 34 of the Constitution.

19 Section 9, 10 and 34 of the Constitution.

20 Para 1.5 of the order.

21 Section 172(2) of the Constitution, 1996. See *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) para 28.

22 *Ibid*.

23 Paras 1.1 to 1.5 of the order.

24 Para 1.6 of the order.

Court granted the following relief:

1.7 Pending the coming into force of legislation or amendments to existing legislation referred to in para 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of Sharia law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable, save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary; and

(b) the provisions of s 7(3) of the Divorce Act shall apply to such a union regardless of when it was concluded.

(c) In the case of a husband who is a spouse in more than one Muslim marriage, the court:

(i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, and must make any equitable order that it deems just; and

(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings."

[17] The reference to the application of section 7(3) of the Divorce Act *"regardless of when [the Muslim marriage] was concluded"* does not mean that section 7(3) applies even when the marriage was solemnized after 15 December 2014, but rather than section 7(3) of the Divorce Act applies irrespective of whether the Muslim marriage was solemnised before or after the commencement of the legislation referred to in section 7(3)(a), (b) or (c) of the Divorce Act.

[18] The date in the order by the Supreme Court of Appeal that corresponds with the date of 15 December 2014 stipulated by the Constitutional Court, was 18 December 2020; the day that the Supreme Court of Appeal gave its judgment. Had this date been adopted by the Constitutional Court in its subsequent judgment the applicant would have been able to rely on the judgment and the provisions of the Divorce Act as the marriage did subsist on 18 December 2020.

[19] Tjaletsi AJ, writing for the Constitutional Court dealt with the question of retrospectivity[25] and concluded:

> *"[78] However, given that the rights of third parties could be implicated by the relief, I deem it necessary to strike a balance. That balance is this: the order ought to apply to all unions validly concluded as a marriage in terms of Sharia law and subsisting at the date when the WLCT instituted its application in the High Court (15 December 2014). It will also apply in respect of marriages that are no longer in existence, but in respect of which proceedings had (i) been instituted and which had (ii) not been finally determined as at the date of this court's order. The interests of women who prompted and supported this litigation but whose marriages terminated before the order of this court will therefore be catered for. However, this approach will also ensure that third parties will have effectively been placed on notice that relief was being sought on behalf of the class of persons to whom relief will be made available."*

[20] The Constitutional Court therefore excluded Muslim marriages concluded after 15 December 2014 from the operation of the order. The marriage between the parties did not subsist at 15 December 2014. It was only entered into on 20 December 2016. The applicant does not fall within the protection afforded by paragraph 1.7 of the order of the Constitutional Court and in terms of the order the Divorce Act does not apply to the marriage. The applicant's cannot rely on section 7(3) of the Divorce Act on the basis that the Act is applicable because of the *WLCT* judgment.

[21] The judgment of the Constitutional Court in the *WLCT* case clarified some of the Constitutional issues foreseen in *AM v RM* and the Divorce Act presently applies to Muslim marriages subsisting at 15 December 2014. What remains is the legal effect of the Talaaq[26] and the reciprocal duty of support under circumstances where the common law definition of 'marriage' was declared invalid to the extent that it excludes Muslim marriages. If it were accepted, as it must in my view be, that

21.1 entitlement to maintenance *pendente lite* arises from a general duty of a

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[25] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) paras 71 to 78.

[26] It is conceded in paragraph 10.10 of the particulars of claim that a Talaaq was delivered in October 2022 but reading the pleadings as a whole this concession does not amount to acceptance of the fact of a completed divorce. Implicit in the pleadings is the allegation that the marriage still subsists.

one spouse to support the other spouse, and one of the claims in the pending trial is a claim for maintenance, and

21.2 the common law definition of ‘marriage’ now includes a Muslim marriage, and

21.3 Rule 43 provides for interim relief *pendente lite* and the hearing of an application in terms of the Rule is not a suitable forum to finally decide the effect of a unilateral termination of the marriage,

it follows that an applicant may be entitled to maintenance *pendente lite* in terms of Rule 43 pending the outcome of the trial in which the validity and effect of the Talaaq and the maintenance obligation of the spouses will be considered. This is so even when the Divorce Act does not apply to the pending action.

[22] Having considered the contents of the affidavits I am of the view that the respondent’s tender, made in the alternative to his prayer for the dismissal of the application, is a reasonable one.

[23] For the reasons set out above I make the order in paragraph 1.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **18 SEPTEMBER 2023**.

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INSTRUCTED BY:	MOSS, MARSH & GOERGIEV
DATE OF ARGUMENT:	14 AUGUST 2023
DATE OF JUDGMENT:	18 SEPTEMBER 2023