

(Reportable

)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**RULE 43 CASE NUMBER: 6170/2023
DIVORCE CASE NUMBER: 3345/2022
EDICTAL CITATION: 7662/2022**

In the matter between:

S.H-K

Applicant

And

R.K
Respondent

Date heard: 06 September 2023
Date judgment delivered: 06 May 2024

JUDGMENT

Wathen-Falken, AJ

1. This is a rule 43 Application in which the Applicant seeks maintenance pendente lite, interim payment of her rental accommodation and a contribution toward her legal costs.

2. The application is opposed by the respondent who seeks a dismissal of the application. The respondent raised four points in limine which this court directed to be argued before progressing to the merits of the matter.
3. The points in limine raised :
 - 3.1 That the applicant failed to comply with the mediation procedures of Rule 41A;
 - 3.2 That this matter is lis pendens and serving before the Singapore Syariah Court;
 - 3.3 That this court does not has the necessary jurisdiction to adjudicate the matter based on the premise that both the applicant and respondent is not domiciled in South Africa; and
 - 3.4 That the applicants founding papers do not comply with the provisions of rule 43 due to its prolixity.

Background to the Rule 43 application

4. The applicant was granted leave on 23 March 2022 to institute action against the respondent by way of edictal citation in terms whereof she sought a decree of divorce and ancillary relief. It was directed that the

service of the edictal citation together with the applicant's intendit be effected on the respondent personally at his residential address in Singapore that it also be served on him via email by the applicant's attorney in Cape Town, South Africa.

5. The applicant averred that the Western Cape High Court had the necessary jurisdiction to entertain the divorce proceedings because she is domiciled within the court's jurisdiction.

6. In support of this averment she detailed her position as follows:

She was born in Scotland in 1983 to parents who are both South African citizens and who resided in Scotland temporarily due to her father's work obligations. She, together with her family emigrated to Cape Town when she was 8 years old in 1991 and they considered it to be their permanent home. She acquired a domicile of choice in South Africa.

7. Both applicant and respondent qualified as medical doctors in South Africa.

8. In 2008 the applicant and respondent were married to each other by Islamic law in Stellenbosch and in 2010 and at Worcester the marriage was solemnized by civil law in community of property.

9. The parties established a family trust which holds South African banking account and owns 6 properties and other monetary assets cumulatively valued around R10 million in the Western Cape.
10. The applicants confirmed that she holds a British and South African passport.
11. In 2010 the respondent was offered an opportunity to work in Indonesia for three months which was eventually extended and the applicant joined her husband in Indonesia in 2011. The respondents work there was considered to be temporary and the applicant did not intend to relinquish her domicile of choice.
12. The applicant services a pension fund and life policies in South Africa. The applicant does not own assets outside of South Africa save for her personal items.
13. The applicant returned to Cape Town in 2012 to give birth to their son where she enjoyed the support of her family. Both their parents reside in the Western Cape.

She returned to Indonesia when their son was 7 weeks old.
14. In 2014, the respondent took up a medical position in Singapore and they relocated there as a family. The respondent operated (and still

does so) on a Singapore employment pass (work visa) and the applicant and minor child was issued with a dependent passes which are valid for 2 to 3 years at a time.

15. The applicant has not been able to secure employment for herself in Singapore since her work permits have been consistently denied. She confirms that she worked in Indonesia, Hong Kong and Kazakhstan periodically.
16. As recently as 2017, they purchased immovable property in Strand, Western Cape which is bonded in their names jointly.
17. The marriage started breaking down between 2018 and 2019 at which time the applicant was working in Kazakhstan.
18. The applicant confirms the advice of her attorneys in Singapore that given that she and her husband are muslim, that their divorce must be conducted in the Singapore Syariah Court. She was further advised that their assets in South Africa would not form part of those proceedings.
19. As at 22 March 2022, no divorce summons was issued out of the Singapore Court or the Syariah Court however it is not in dispute that the respondent has instituted divorce proceedings in Singapore.

20. The applicant returned to South Africa in August 2021 to visit with family and to obtain Covid 19 vaccinations.
21. The applicant is presently unemployed and reliant on the respondent for financial support. She and the minor child are in Singapore on dependant passes which is linked to the respondents work visa. Once the divorce is finalised she would not be entitled to the dependent pass.
22. She maintains that South Africa is her domicile of choice and that she considers Cape Town to be her permanent residence and that her temporary residence in Singapore is purely as a result of the respondent's international employment which is in dispute.
23. It is common cause that the divorce proceedings are progressing in this court and that special pleas were raised on similar premises ie. Jurisdiction and lis pendens.

The points in limine considered

Lis pendens

24. The Respondent raised a special plea of lis pendens in the action proceedings for divorce, still to be determined. It is raised again in these proceedings based on the following submissions:

24.1 That divorce proceedings are pending in Singapore at the Syariah Court¹;

24.2 That one of the disputes in those proceedings is a claim for maintenance which predates these proceedings;

25. That an order in this court in these proceedings may lead to conflicting orders relating to the same parties.

26. These submissions are made even though the Respondent acknowledges and accepts that the proceedings in Singapore has been successfully stayed upon application by the Applicant.

27. It is common cause that the summons in this matter was served on the Respondent on or about 13 April 2022 ie before the Respondent commenced with divorce proceedings in Singapore which was served on the Applicant on 28 April 2022.²

¹ Case number SYC\1853\2021

² Page 13 of the founding affidavit at paragraph 25 and page 94 of the answering affidavit at paragraph 33.

28. Mr Embden argues on behalf of the Applicant that there are no pending maintenance proceedings or any similar (application for interim relief) in the Syrian Court.
29. He further argues that at 'lis pendens' is best raised and dealt with during trial proceedings given the standard of proof required in its determination.
30. I am persuaded that the trial court (divorce proceedings) would be best suited to adjudicate the issue of 'lis pendens' within the current context. It was raised and together with several other aspects pertaining to the divorce action remains to be determined there.
31. At this stage it is established that the parties are engaged in divorce proceedings before this court which entitles the Applicant in this matter to bring this application and the point of lis pendens stands to be dismissed.

Lack of jurisdiction/ Domicile

32. This too is raised by the Respondent in the divorce proceedings and remains as an issue for determination there. As it stands, the divorce action before the Singapore courts has been stayed. The only 'live'

divorce proceedings are pending before this court.³ The fact that leave was granted to the applicant to institute divorce action by way of edictal citation could reasonably be construed as indicative that the court is prima facie satisfied that it has jurisdiction over the matter.

33. Counsel for the Respondent, Ms Heese argues that the applicant has grounded her allegation of jurisdiction exclusively on the basis of her alleged domicile in South Africa under section 2(1) of the Divorce Act and that the averment is relied on in these proceedings; when the factual matrix does not support the basis. She further argues that it would naturally follow that if this court does not have the jurisdiction to adjudicate the divorce action then it would not have be competent to adjudicate the Rule 43 proceedings.
34. Similarly, to the point of lis pendens raised hereinbefore, the issue of jurisdiction stands to be determined by the trial court which is best suited to ventilate it.
35. The question here is whether the challenge placed on jurisdiction in the divorce proceedings disqualifies this court from adjudicating Rule 43 application (and any other preliminary applications in matrimonial actions).

³ Divorce Case number 7662/2022

36. In the matter of Glen v Glen⁴ Beck J held that, for purposes of Rule 43, the mere fact that jurisdiction in the divorce cation is disputed, does not suffice to defeat the jurisdiction of the Court to entertain the Rule 43 application. In his judgement he further concluded that jurisdiction was established by reason of a concession that *“respondent, whatever his domicile, is resident in Rhodesia and that his residence in this country is of sufficient degree of permanence to found a basis for a judgment sounding in money.”*
37. The reasoning explored in the Glen (supra) judgment can certainly be expounded in the present case particularly in light of the fact that it predates the Divorce Act 70 of 1979. It is not in dispute that the parties own several immovable properties in the Western Cape and that they operate a family trust within South Africa. This I would propose is a compelling factor in the determination of this court’s jurisdiction over the divorce proceedings and other subsidiary matters.
38. I venture to add that post the Covid 19 pandemic which caused a global shift in thinking and approaches to work and what is considered residence may require reconsideration insofar as it relates to the Divorce Act.⁵

⁴ 1971(3)SA 238(R)

⁵ In particular, section 2 of Act 70 of 1079

“A hundred years ago an intention to reside indefinitely in a place was regarded as an intention to reside there permanently, notwithstanding that it was contingent upon an uncertain event. Nowadays an intention of indefinite residence is not equivalent to an intention of permanent residence, if it is contingent upon an uncertain event.”⁶

39. I however for purposes of this judgment confine myself to the requirements for launching an application in terms of Rule 43.
40. The applicant founded her application as one in terms of Rule 43 given that matrimonial proceedings are pending before this court.
41. In the matter of S.W v S.W and another⁷ van Staden J considered the issue of a court’s jurisdiction for matters pendente lite. He writes:

“A court is defined in the Rules to mean a court constituted in terms of section 13 of the Supreme Court Act 59 of 1959. Although the rules have not been amended the definition must be read to refer to the equivalent section in the Superior Courts Act 10 of 2013, namely section 14, which is to all intents and purposes identical in its terms to the erstwhile section 13, save that it used/utilises the changed names of the courts and refers to the

⁶ Cheshire Private International Law 5TH edition at page 164

⁷ (2875)/2015[ZAECPHC 70; 2015(6) SA300(ECP)] reportable

High Court. A reading of Rule 43 in the light of the relevant provisions of the Superior Courts Act, indicates that the procedure provided by the rule may only be invoked before the court in which the main lis in the divorce action is pending.”

42. In casu, this is the only court which the Applicant is entitled to approach for the relief sought at this point in time. Along similar reasoning the Massey⁸ case expresses the view that in appropriate circumstances a court may exercise jurisdiction in preliminary matters though the main action may be pending elsewhere.
43. I am of the considered view that this court is entitled to adjudicate on the merits of the Rule 43 application and the point stands to be dismissed.

Non-compliance with Rule 41A

44. Mr Embden makes the point that the respondent's averments in this regard is without foundation for the following reasons (which are not in dispute).

⁸ 1969(2)SA 1999 (T)

45. The Rule 41A notice was delivered on 28 April 2022 in terms of which the parties engaged one another; and

The Rule 43 application had previously been postponed on two occasions to allow parties to explore settlement (without success).

46. Both parties during argument alluded to the fact that they actively attempted to settle the issues and that they would continue to do so.

47. The respondent therefor cannot rely on non-compliance with Rule 41A and stands to be dismissed.

Non-Compliance with Rule 43 provisions

48. The Applicant is challenged on the prolixity of its papers. This particular matter is not without complexity and essentially required a greater amount of detail which is conceded by the respondent and it ought not to disentitle the applicant to relief.

49. The condonation of the voluminous exchange I deem to be necessary in the present matter.

50. For all the reasons set out herein above the points in limine raised by the respondent is dismissed.

The delay in the transmission of this judgment is regretted.

ORDER

1. All the points in limine are dismissed with costs.
2. The Rule 43 application is capable of adjudication before this Court.

R. Wathen-Falken

Acting Judge of the High Court

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