

SUMMARY

On 15 May 2015, a Rule 43 order in terms of the Uniform Rules of Court was granted dealing with the respondent's maintenance obligations towards the applicant. On 29 May 2015, the respondent made the first payment and continued to do so until 28 March 2018. The matter, in respect of hearing of the divorce, was set down for trial for the first time on 28 August 2015. The respondent countered the applicant's application for a postponement with an application for a separation of issues. The application for the separation of issues was granted in terms of Rule 33(4) of the Uniform Rules of Court.

The respondent's attorney contended that the divorce order, granted on 17 March 2016, extinguished the maintenance obligation even though such issue had been separated out. The applicant accordingly approached the High Court of Pretoria seeking a declaration that the Rule 43 order remains operative in respect of the separated issues, pending the final determination of such issues and that her rights to approach a Court for further relief in terms of the provisions of rule 43, remain unaffected by the granting of the divorce order. The applicant drew attention to the fact that the respondent had stated, under oath, that a separation of issues would not affect the Rule 43 order. The Court noted that the respondent was a practising attorney and was thus an officer of the Court. He was therefore aware of the legal principles regarding adherence to court orders and undertakings under oath.

Senior Counsel for the respondent, relying on *Bienenstein v Bienenstein* 1965 (4) SA (TPD), argued that a Rule 43 has no application to any matrimonial dispute which has come to an end by a final divorce. The applicant however, emphasized that *Bienenstein* dealt with a situation where there was no Rule 43 order in place at the time of the granting of the decree and no issues had been separated which were governed by a Rule 43 order.

In *Carstens BM v Carstens CL*, an unreported case relied on by the applicant *in casu*, the applicant sought a contribution towards her costs. The parties were divorced but certain issues relating to the parental rights and responsibilities in respect of the minor children as well as spousal maintenance were still to be finalised at the divorce trial. The respondent raised *in limine* that the applicant was not entitled to rely on Rule 43 as the marriage between the parties had come to an end by divorce. The court therein stated that the matrimonial action had not been finalised and was therefore of the view that the applicant was entitled to utilise Rule 43. In *Gillespie AH v Gillespie B* (unreported), the Court adjudicated an application for the separation of issues in a

divorce action. The Court therein found it to be untenable that the value of the estate should be determined by the Court together with the common cause aspects in the divorce action.

The respondent stated, on oath, that the granting of the separation order would not prejudice the applicant as the Rule 43 order was in place and would remain in place pending a decision in respect of such issue. The assurance the respondent gave the court in this case, is a factual undertaking. Since the granting of the unopposed divorce, it was never placed in dispute that the Rule 43 order is no longer in effect and that the applicant has no further rights in terms of Rule 43 to approach the Court for further relief, including a further contribution towards her legal costs. The respondent stopped making the maintenance contributions, not because he could not pay, but because, so he contended, he was advised that he had no legal obligation to do so; he simply cut the applicant off from any income and then argued that she should wait her turn for the matter to be heard.

HELD

The Court held that the Rule 43 order which was granted remained in force and effect until the final determination of the applicant's maintenance needs. The Court held further that the applicant's rights to approach the Court for a contribution towards costs as contemplated in Rule 43, pending determination of the two separated issues relating to the applicant's maintenance and the accrual sharing, were not affected. Finally, the Court also ordered the respondent to pay the costs of the application due to reneging on his undertakings to the applicant.

VALUE

This case serves to emphasise that where a matrimonial matter is pending, even if it has been separated out of the main divorce action, the Rule 43 remains applicable and binding.

Written by Michael Donno and supervised by Jennifer Stoler, 5 November 2018

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