

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 538/97

IN THE MATTER BETWEEN

DOROTHEA SUSANNA STEFFEN

APPLICANT

VS

HANS HELMUTH HERMANN STEFFEN

RESPONDENT

IN RE:

HANS HELMUTH HERMANN STEFFEN

PLAINTIFF

VS

DOROTHEA SUSANNA STEFFEN

DEFENDANT

CORAM

S.B. MAPHALALA - A J

FOR APPLICANT

MR P. FLYNN

FOR RESPONDENT

MR D. SMITH

JUDGEMENT - IN TERMS OF RULE 43

(02/09/98)

This is an application for maintenance pendente lite in terms of Rule 43 of the rules of the court. The applicant seeks for an order that the respondent pays maintenance in the sum of E15,000-00 per month. Respondent contributes the sum of E68,400-00 as preliminary contribution towards the applicant's legal costs. That the costs of this application be costs in the course of the main divorce action and further and/or alternative relief.

Rule 43 was introduced into our procedure for a method of obtaining interlocutory orders in matrimonial matters. It affords the parties a procedure intended to be quick, short and inexpensive. It relates inter alia to maintenance pendente lite and a contribution to the costs of pending matrimonial actions.

The facts can be summarized as follows:

The applicant is a woman of 53 years who married the respondent in community of property on the 20th November, 1965 at Johannesburg and their marriage still subsists. There are two children born of the marriage, both of whom are now majors and self-supporting. The respondent caused an action to be instituted against the applicant in this court under case no 538/97, based on the allegation that the applicant maliciously and without just cause deserted the common home. He claims an order that applicant restore conjugal rights to him, failing which an order for final decree of divorce and an order that she forfeit all and any benefits according to her out of the marriage in community of property. The applicant denies such allegation and avers that the respondent has constructively deserted her, inter alia, by treating her with contempt, humiliating and abusing her both in public and private, exploiting her financially, making false accusations against her, alleging that she conducted extra-marital relationships

and other acts.

It is the case for the applicant that the respondent together with her by virtue of their marriage in community of property, together with respondent's brother, his sister and his late sister's two children are the sole shareholders in 11 companies. The said companies are located both in Swaziland and the Republic of South Africa. The respondent and the applicant are the major shareholders in these companies. The largest company of the 11 is known as L.C. Von Wissel (PTY) Limited. The applicant and respondent are 75% shareholders of this company. L.C. Von Wissel (PTY) Limited is the only owner of property in the town of Matata, Swaziland. Its principle business is that of a Spar Supermarket. This supermarket is so large that it has its own bakery, deli, butchery, clothing section, hardware shop, wholesale department, farming department and arms and ammunition. Applicant avers in her papers that she had been working in this store since 1965 and she knew that the monthly turnover of this store itself is of the order of E5 million. In addition to this store, the company owns a second-hand dealership; the only airstrip in Matata on there has recently been built a control tower, which contains a small flat, an immigration officer and police station. There are two hangars on the airstrip which house a Cessna 210 and Seneca (six seater, which was purchased for E2 million) both of which are owned by the company and a huge abattoir which supplies Swaziland Sun International resort as well as various hotels in Swaziland and certain butcheries. On the remaining property in Matata the company rents out various properties to the revenue office, the Swazi Bank, the Post Office and First National Bank. The company also rents out various houses to its senior staff and the reverent of the church.

In addition there are approximately 100 smaller houses and a block of flats, which are rented out. The company has recently built a water purification plant for the town. Else where in Swaziland the company owns 6 sugar cane farms, 2 cattle ranches. Applicant was in October 1996 advised by the respondent that one cattle ranch achieved a monthly turnover in the region of E100,000-00 and a game reserve/farm which accommodates hunters from overseas. The income generated by the company from all these operations is substantial.

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The remaining 10 companies are smaller than L.C. Von Wissel (PTY) Limited but nevertheless own substantial assets. She further avers in her papers that although she did not know the exact worth of the 11 companies, or the worth of the joint estate, she knows that it is substantial. About three months ago she spoke to Mr. Marins Koning who was the accountant for the 11 companies until 1994. He advised her that at the time he had resigned from his position, the 11 companies together were worth at least E80 million.

Throughout the course of their marriage, the respondent and applicant and their family enjoyed a very high standard of living, which can be described as luxurious. Their house is a four-bedroom semi-double storey house. It has two and a half bathroom, a separate shower and three toilets. The dining room is spacious and houses a dining room suite made to accommodate 12 people. This dining room opens into a verandah, which is closed in and has its bar. The lounge suit was purchased at a price of E22,000-00 and they recently re-curtained for a sum of E43,000-00. Recently a heated pool was built in front of the verandah. There are two kitchens, both of which are fully fitted with modern glass top stoves and double refrigerators. There are four garages, one of which she used as a pottery room when she lived with the respondent.

No member of the family was ever short of anything, and the respondent ensured that they had everything of the best. For example, she used perfume that cost E300-00 a bottle, shampoo that cost E50-00 a bottle, hair spray at E70-00 a bottle, imported Italian stockings at E50-00 a pair and facial products at E900-00 per month. She and the respondent went overseas together approximately five times. When they travelled, especially overseas they stayed in the equivalent of 5-star hotels including the Waldorf Hotel in the United States of America.

She avers further that the respondent continues to enjoy the fruits and income of the enormous joint estate and to live a luxurious life. On the other hand, she has had to severely limit her expenditure, and

had to often go without certain necessities save for the few items listed in paragraph 11. The respondent is in possession of all the assets of their joint estate including a 1996 Volvo 960 motor vehicle, a BMW motorcycle, a Toyota double cab 4x4 and a luxurious Jurgens double wheel caravan.

As she has no source of income she is unable to make provisions for her legal costs and submit that it is just and equitable that the respondent, who is well able to do so and is currently in control of their joint estate to make a contribution towards costs at this time. She is advised in this regard that it will be necessary to retain the services of a forensic accountant to investigate and value the various business operations constituting the bulk of the joint estate to obtain with certainty on the assets of the joint estate and the income derived from the assets in so far as it may be relevant to the question of maintenance. The investigation required has been estimated at three days plus a further two days of analysis thereafter, at a cost of E6000-00 per day plus VAT, making a total of E30,000-00 plus VAT under this heading. In addition counsel's charges up to and including the first day of trial will be at least E1 5,000-00 plus VAT and that she is told that attorney's charges for dealing with discovery, taking statements and preparing for trial will at least a similar figure if not more. She conservatively estimate therefore that she would require

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an amount of E60,000-00 plus VAT of E8,400-00 making a total of E68,400-00 as contribution to her costs.

She avers further that when she left the former common home, she took certain items mostly ornamental objects and personal effects. In the flat she is presently occupying she need various pieces of furniture and the like and she has enquired as to prices of various items and have ascertained the prices as outlined in her list at paragraph 12 of her affidavit, which are market related, fair and reasonable. That it is clear therefore that she require the sum of E50,000-00 to be able to establish a home of herself. If she were to pay this amount off on hire purchase basis, she would be incurring a monthly expense of at least E3,000-00 per month.

In addition she will have the following monthly expenses:

Rent	E 1,980-00
Water and light (approx.)	E 400-00
Petrol and Motor vehicle maintenance	E 400-00
Cell Phone	E 800-00
Food (including daily bread, milk, groceries & Materials)	E 2,000-00
Magazines and newspapers	E 500-00
Clothing	E 300-00
Cosmetics and skin care items	E 300-00
Entertainment	E 300-00
Mnet	E 114-00
T.V. Licence	E 19-00
Miscellaneous	E 200-00

Hire purchase	E 3,000-00
Total	E 9,663-00

She submitted further that since their separation her only source of income has been the maintenance which respondent paid to her in the sum of E6,000-00 per month. Although she is a qualified nursing sister, she had not practiced as such since she was married to the respondent in 1965. From that date, she worked for her husband in his store in Swaziland. Since she has been in Johannesburg, she has been unable to find employment as she does not have the necessary qualifications, and her age (53 years old) is an aggravating factor. However, she has for many years now enjoyed the hobby of Decompagne, and has decided to sell the items she made. In order to do so she need to purchase the materials, which are expensive as she has not had money to purchase the said materials, she has been unable to pursue this line of business.

The respondent pays maintenance directly into her First National Bank premier credit card account, which is the only bank account held in her name. Although she has a credit facility of E23,000-00 on this card, the current outstanding balance is approximately

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E22,000-00. When she first came out to Johannesburg, she was given E30,000-00 which was insufficient; respondent advised her that she should use her credit card to pay for expenses incurred by her. As a result, her credit card balance was utilized. She also used the credit card to her monthly commitments. Although she was staying with various people, she continued to pay her own was including purchasing her own food. When the sum of E6,000-00 is paid into the credit card, the amount so paid is first utilized to pay the minimum payment required on the card which is in the region of E5,000-00.

Accordingly, since October, 1997 she has had only the sum of approximately E1,000-00 per month to meet her monthly needs. She states that she will now proceed to open up a separate banking account into which the maintenance can be paid. However, the sum of E5,000-000 towards her credit card will be an expense and needs to be added to her monthly expenses, which will then total E14,663-00 made up as follows:

Monthly expenses	E 9,663-00
Servicing of debit in respect of Credit Card	E 5,000-00
Total	E14,663-00

She therefore requires the sum of E15,000-00 per month as maintenance pendente lite. This is the applicant's case in support of her application in terms of Rule 43.

Now I proceed to outline respondent case. Respondent filed an answering affidavit where he deposed at paragraph 2.1. that applicant has obtained employment at a private hospital and to the best of his knowledge as a nurse. Because of his present physical state, namely being paralyzed and bedridden, he has not been able to obtain further information pertaining to the exact hospital whereat the applicant is employed and what her monthly income from this source is, but he verily believe that same is not less than E2,000-00 per month. In reply to paragraph 8 of the applicant's affidavit he deposed that he denies that the applicant is bona fide in her claim that he restore conjugal rights. He stated further that it is the applicant who maliciously deserted him during September and that they have since not cohabited as husband and wife. That she has since departed from the common home resided with family members and friends and that for a certain period she resided with her parents in Rustenburg. Her father died during December, 1997. The applicant's mother still resides in the family home at Rustenburg and he accordingly denies that the applicant's mother has sold the property and/or that she has moved to the old age home. He denies that it was necessary for the applicant to find alternative accommodation. He then referred the

court to annexure "HH1" that applicant was previously represented by the attorney firm Swartberg and Partners who entered an appearance to defend his divorce action on her behalf While so being represented, their respective attorney attached to one of the letters was the list of items now attached marked annexure "HH1". The applicant through her attorneys indicated that the items so appearing on this list are items which she wished to remove from the common home in addition to the items she removed from there from at the time of her desertion. He

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consented to her removing all the items set out in annexure "HH1" and in addition thereto and during approximately May, 1997, the applicant returned to the common home and chose additional items which she wished to remove. At that time he was overseas but on his return thereto the other items chosen by her to be transported to Johannesburg at his costs. He states that he is not in a position to itemize each and every item so transported up to Johannesburg, but suffice to say that taking into account the items removed by her on her departure from the common home during September, 1996 the items contained in annexure "HH1" and the additional items removed by her are more than sufficient to set up an alternative abode. He further wished to bring to the attention of the court that at the request of the applicant he gave her an amount of E30,000-00. This amount of E30,000-00 was specifically requested by the applicant to enable her to buy certain household items, which she indicated she required. Again and by virtue of his physical condition he is not in a position to give the court exact details as to precisely when the E30,000-00 was paid to the applicant.

On paragraph 13 of the applicant's affidavit he denies that it is necessary for the applicant to incur an expense of E3,000-00 per month in respect thereof.

Bearing in mind that the applicant lives on her own, it was most certainly not necessary for the applicant to rent a place costing E1,980-00 per month under the circumstances, where in Pretoria more than adequate and comfortable accommodation can be obtained at E1,000-00 per month. In any event he submits that there was no reason for the applicant to move to Pretoria bearing in mind that free and comfortable accommodation was available to her in Rustenburg, namely the home of her parents.

The respondent submitted that the following expenses would be reasonable.

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| 1. | Water and lights not more than | E200-00 per month |
| 2. | Petrol and Motor vehicle maintenance | E200-00 per month |
| 3. | Cell phone (no need for a cellphone but a home telephone) | E 75-00 |
| 4. | Food, groceries and cleaning materials | E 1000-00 |
| 5. | Clothing, cosmetics and skin care | E 400-00 |

The respondent submits that an amount of E3,458-00 is more than sufficient to cover the expenses of the applicant.

In reply to paragraph 15 of the applicant's founding affidavit he admits that he has been paying the applicant an amount of E6,000-00 per month since her departure from the common home. He has also placed a brand new 1600 Toyota motor vehicle fully paid for

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at the disposal of the applicant, which motor vehicle is still in her possession and which is used by her on a daily basis. Up and until the 16th January, 1997 the applicant had the use of his American express card, which he paid in full. The use of the American express card was in addition to her own credit card. Again and at the special instance and request of the applicant he gave her a further E10,000-00 in order for her to pay off an overdraft which she had incurred since departing from the common home. Once again and by virtue of his present physical state, he is unable to give the court the precise date on which the E10,000-00 was so said over to the applicant.

In addition to the contributions aforesaid, the applicant remains on his medical aid scheme and he accepts responsibility for all medical expenses reasonably incurred for and on behalf of the applicant.

He further said an amount of E5,000-00 to the applicant's estwhile attorneys or record to provide for her legal expenses to defend the divorce action. With reference to the above respondent avers that it is blatantly untrue to state those save for the E6,000-00 per month which she has been receiving since her departure from the common home and which she still pay on monthly basis, she has had no other source of income. Applicant is a qualified nursing sister and submits that the applicant has now obtained employment as such. Applicant participates in the bobby of Decompagne. He denies that it is necessary for her to sell the items so made and/or to conduct such business.

In reply to paragraph 15.2 of the applicant's affidavit he admits that an amount of E30,000-00 was given to the applicant, but strenuously deny that same was to assist their daughter in setting up her new home.

On paragraph 17 of the applicant's affidavit the respondent submits that his annual drawing from Matata Store together with his Christmas bonus amounts to E125,840-00 per annum, which gives a monthly average of E10,486-66. In addition to his monthly drawing aforesaid, he has the free use of a company vehicle and enjoy full medical cover supplied by the business. With reference to the above he denies that he can easily afford to pay to the applicant an amount of E1 5,000-00 per month.

In reply to paragraph 18 of the applicant's affidavit the respondent avers that he equally does not know what the value of the joint estate is, but it is most certainly nothing near E80,000,000-00 contended for by the applicant.

The composition of the joint estate is a complex one, in that it owns shares in various companies some of which are merely trading companies, and it is difficult to ascertain what the value of the joint estates shares in these trading companies are. In its simplest form the joint estate has shares in 15 companies, 11 of which are in Swaziland and of which 1 is dormant. The joint estate also owns shares in 4 South African companies of which 1 is also dormant. L.C. Von Wissel (PTY) Limited which is the biggest company in terms of turnover which in turn is the majority shareholder in various companies which forms part of its turnover such as Mr. Matata (PTY) Ltd [The Clothing Shop], Matata Garage (PTY) Ltd and so on. L.C. Von Wissel (PTY) Ltd does not own any property and

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lease all its property from another company by the name of Steffen Holdings (PTY) Ltd. It is correct that the shareholding of the companies referred to above is divided, inter alia, between the joint estate, various family members and other third parties. Respondent denies that the joint estate is the major shareholder in these companies.

It is true that the turnover on the entity commonly known as Matata stores is in the vicinity of between E4,000,000-00 and E5,000,000-00 per month, but this includes the turnover of various other companies such as Mr. Matata (PTY) Ltd and Matata Garage (PTY) Ltd. It should be borne in mind that turnover is a far cry from the net profit generated by the various companies, but in any event whatever the net profit of the various companies may be, it is most certainly not in his disposal bearing in mind that the joint estate is but one of the various stake-holders in the said companies. Respondent avers that the contents of paragraph 18 of the applicant's founding affidavit is most certainly indicative of a person that has very little knowledge of the composition of the joint estate and the inter-relationship between the various companies and shareholders. In any event, he is advised that for purposes of this application, the extent and/or value of the joint estate is irrelevant. It is important to note that it does not lie within his discretion to liquidate assets and to draw money as he pleases from the various companies. The companies, like any other company, operate through their directors and he like all other shareholders, are subject to the decisions of the various directors of the various companies. The respondent further avers that the composition of the joint estate will only become relevant once the divorce action has been finalized and the court given judgement either on his claim for forfeiture or on the applicant's claim for a division.

On paragraph 19.1 of the applicant's founding affidavit the respondent deny that applicant, himself and their family enjoyed a high standard of living that can be described as luxurious. He is of the opinion that can be described as comfortable and commensurate with that enjoyed by rural town folk and farmers of the area. Respondent admit the description of the house and acknowledge that at the insistence of the applicant a lounge suite for E22,000-00 was installed. He acknowledge further the fact that the family wanted for nothing and that all the reasonable needs were catered for. He denies that applicant was in the habit of spending in excess of E1,000-00 per month on cosmetics and toiletries and in the main cosmetics and toiletries were obtained from the shop and were the normal run of the mill cosmetics generally available in all supermarkets. It is correct that applicant and he travelled overseas on approximately five occasions during their entire marriage. It should be borne in mind however, that they have been married for almost 33 years. This is hardly indicative of a family who enjoyed a luxurious existence. Two of the approximate five overseas trips, to Mauritius and the Seychelles respectively and they were accommodated in hotels used by all tourist visiting these destinations. In so far as the other trips are concerned he concede that they stayed in tourist hotels of a high standard, but he does not recall them being five stars and/or out of the ordinary.

The respondent admits paragraph 22 of the applicant's founding affidavit on paragraph 23 of applicant founding affidavit respondent avers that an amount of E5,000-00 was paid to the applicant's estwhile attorneys as a contribution towards her costs, and he is advised

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that there is no need at this stage of proceedings to make any further contribution in this regard. He denies that it is necessary for the applicant to employ the services of a forensic auditor and/or valuator. He is unable to deal with the allegation that the applicant's legal costs up to and including the first day of trial will amount E30,000-00. That the allegation is couched in very vague and general terms. In this regard it is to be noted that the pleadings in the main action are virtually closed and all that remains to be done is to him to plead to applicant's counter claim once judgement has been received with regard to the exceptions that he took hereto. He submits that the issues relating to the cause of the break down in the marriage, and most certainly these issues can never justify legal costs in the amount of E30,000-00. That accordingly deny that applicant is entitled to a contribution towards her legal costs in the amount of E68,400-00 or any other amount at this stage.

He applies that applicant's application be dismissed with costs. These are the facts in support of the respondent's opposition.

The matter came before me on the 24th July, 1998 where I heard arguments for and against the applicant. Mr. Flynn for the applicant contended that there is no duplication on the items applicant took from the matrimonial home as reflected in annexure "HH1" and the items applicant states she needs to set up a new home. He submitted that most of the items reflected in annexure "HH1" are ornamental objects. He contended further that the applicant has not overstated her expenses and that the court should find that they are reasonable. That respondent does not deny paragraph 18.3 of the applicant's founding affidavit where she averred the L.C. Von Wissel (PTY) Ltd is the only owner of property in town of Matata, Swaziland. Its principle business is that of a Spar supermarket. This supermarket is so large that it owns bakery, deli, butchery, clothing section, hardware shop, whole sale department, fanning equipment and arms and ammunition division. That she (applicant) has worked in this store since 1965 and she knows that the monthly turnover of this store is of the order of E5 million. Mr. Flynn argued further that the respondent is not candid to the court in that by any standard this is a substantial joint estate.

On the other hand Mr. Smith for the respondent contended that applicant left the matrimonial home in September 1996. One wonders why the application is launched now. She comes to court 21 months later after she left the common home. From the time she left the common home the respondent has been paying her E6,000-00 per month. That at paragraph 14 of applicant's affidavit her expenses are E4,683-00 and she receives E6,000-00 from the respondent which give her an excess of E1,317-00. The E6,000-00 she receives from respondent is more than enough and there is no need for the application in terms of

Rule 43. She is coming to court to ask for E5,000-00 per month for a debt for which the respondent is not obligated to pay. Rule 43 should be strictly applied for the maintenance of the applicant. All in all Mr. Smith submitted that the tender by the respondent is reasonable.

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These are the issues before me. Before determining whether applicant's claim is reasonable or not I wish to state the law that governs such situations. The guidelines the court is to follow to untangle this maze are succinctly stated in the case of Taute vs Taute 1974 (1) SLA 675. The learned judge in that case outlined certain basic principles, which govern an application of this type. The judge observed that such maintenance cannot be determined with that degree of precision and closer exactitude, which is afforded by detailed evidence. The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependant upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to met such requirements which are normally met from income although in some circumstances inroads on capital may be justified. The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summary of facts contained in the founding and answering affidavit as indeed is contemplated and intended by Rule 43.

Having considered the guidelines in Taute (supra) I now proceed to determine the issue before me. It is clear to me that the joint estate is quite substantial when one looks at the assets of the joint estate in their shares in the various companies. Their very house is indicative of substantial wealth and also applicant is accustomed to live in such opulent circumstances. The respondent states in his papers that no member of his family was ever made to want anything. The other movable properties like cars, caravans are also indicative of substantial wealth. I agree with Mr. Flynn that the respondent has not been candid with the court. He tells the court that he get E10,000-00 salary per month from the company. He gives E6,000-00 of which to applicant as maintenance, which means that he remains with E4,000-00 for himself. I find it hard to believe that he could be able to maintain the house, which was graphically described in the papers with that kind of money. He buys applicant a brand new Toyota 1600 cash. He is able to fork out E22,000-00 for lounge suite and E43,000-00 for curtains for the house without any problem. He gives the court that he is a man of straw who lives a spartan existence. I do not agree with this in view on the totality of the facts presented before me.

In the premise I rule that a reasonable maintenance for the applicant would be the sum of E1 0,000-00 and this amount includes the E3,000-00 for the payment off hire-purchase to the item the applicant needs to set out house. I have also taken into consideration the fact that respondent has always shown a willingness to assist the applicant in her upkeep as exemplified by the E6,000-00 he pays every month, the motor vehicle he bought applicant and the fact that he allowed applicant to use his credit card at some point in their separation.

As for the amount for the payment of a forensic accountant to valuate the joint estate, with respect, I do not see the need to employ one for purposes of determining maintenance pendente lite in terms of Rule 43.

Now coming to respondent contributing towards the legal fees of the applicant it is my considered view that he must. According to established principle the sum to be contributed is determined by the court's view of the amount necessary for applicant adequately to put her case before the court (see Erasmus Superior Court Practice at

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page 315 and the cases cited thereat) It is my view that a sum of E30,000-00 would be adequate to put her case before the court.

In the result, I rule as follows:

1. That respondent pay maintenance, pendente lite, in respect of the applicant in the sum of E10,000-00 per month.

2. That respondent contribute the sum of E30,000-00 towards applicant's legal costs.

3. That the costs of this application be costs in the cause of the main divorce action.

S.B. MAPHALALA

JUDGE