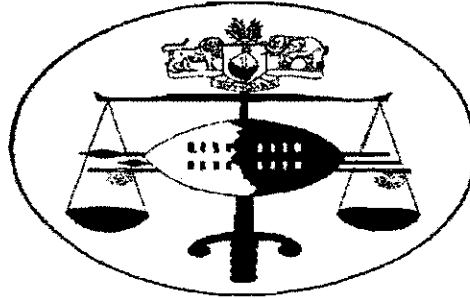


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**HIGH COURT OF SWAZILAND**

**CIVIL CASE NO.370/03**

**In the matter between:**

<b>JACQUELINE TAFT (BORN GRAY)</b>	<b>APPLICANT</b>
<b>AND</b>	
<b>NIGEL ALFRED TAFT</b>	<b>RESPONDENT</b>
<b>IN RE:</b>	
<b>NIGEL ALFRED TAFT</b>	<b>PLAINTIFF</b>
<b>AND</b>	
<b>JACQUELINE TAFT (born Gray)</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>COLIN KEEL</b>	<b>2<sup>ND</sup> DEFENDANT</b>

<b>CORAM</b>	<b>SHABANGU AJ</b>
<b>FOR THE APPLICANT</b>	<b>MS. VAN DER WALT</b>
<b>FOR THE RESPONDENT</b>	<b>MR. FLYNN</b>

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**RULING ON RULE 43 APPLICATION**

**22<sup>nd</sup> August 2003**

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In this application which is brought in terms of Rule 43 of the Rules of this Court the applicant, one Jacqueline Taft (born Gray) (hereinafter referred to as the applicant) claims the following, pending the finalisation of divorce proceedings which her husband has instituted against her. She claims -

1. That custody of the minor child be awarded to the applicant subject to the Respondent's rights of reasonable access.

2. That the Respondent be directed to contribute to the maintenance of the applicant and the minor child in the amount of E12,500.00 on a monthly basis.
3. That the Respondent be directed to pay all school expenses relating to the minor child.
4. That the Respondent be directed, in the event of the Land Rover, being taken away from the applicant, to forthwith provide the applicant with an equivalent four wheel drive vehicle, alternatively to pay forthwith to the applicant an additional E7,000-00 per month for the payments on the purchase of an equivalent vehicle.
5. That the Respondent be directed to retain the applicant and the minor child on his United Kingdom medical plan.
6. That the Respondent be directed to contribute to the applicant's legal costs in the amount of E25,000.00.
7. That the respondent be ordered to pay the costs of this application, including the costs of counsel as certified in terms of the High Court Rule 68(2).
8. Such further and/or relief as the court may deem fit.

The principles which govern the courts approach in relation to Rule 43 applications are well set out by applicant's counsel in her heads of argument and they are largely not dispute. In fact such principles are fairly trite.

This Rule allows for allegations to be made in an affidavit, which is in the nature of a declaration. The respondent is also required to file within the time prescribed in the Rule, a reply in the nature of a plea. Nevertheless it has been said in the case of **TAUTE V. TAUTE 1974(2) SA 675 (E)** that,

*"a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortinate demands. Similarly more weight will be attended to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than that of one who is seeking to evade them."*

It has also been said sufficient details should be given to enable the court to deal with the matter, if possible, without recourse to *viva voce* evidence. See **NATHAN, BARNETT AND BRINK, UNIFORM RULES OF COURT 3<sup>RD</sup> EDITION** at 272. Furthermore, as Ludorf J., observed in the case of **LEVIN V LEVIN & ANOTHER, 1962(3) SA 330 [W]** page 331D, the court is entitled and obliged to draw inferences and to look to the probabilities as they emerge from the papers;

"To decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously my findings are in no way binding on the trial court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong."

The nature of the maintenance being interim and temporary cannot be determined with the degree of precision and closer exactitude which is afforded by detailed evidence. (See **TAUTE V. TAUTE** supra at 676.) wherein Hart AJ described the principles which should guide the court regarding maintenance *pendete lite* as follows:

"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 meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. I have found nothing however in the decisions to which I have been referred which justify in such maintenance the inclusion of extraordinary or luxurious expenditure even in the case, for example, of **GLAZER V GLAZER 1959(3) SA 928 (W)**, where the husband is described by Williamson J. (as he then was), as being "very wealthy" or "very rich." The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits as indeed is contemplated and intended by Rule 43. It is also in my view helpful to take cognizance of the approach made in the affidavits by the applicant and the respondent respectively, bearing in mind that it is not the practice in these matters (although permissible) to test the evidence *viva voce*."

Turning to the forms of relief claimed by the applicant I deal first with the first prayer of the notice of motion, namely, the custody of the minor child. In respect of this prayer the parties agree that the interim custody of the minor child be awarded to the applicant, subject to the Respondent's right of reasonable access. The Respondent states that such reasonable access should be as follows:

- (a) every second weekend, commencing at 18.00hrs on the Friday and terminating at 18.00hrs on the Sunday following:

- (b) Half of each school holidays, the commencement of which shall alternate from one holiday to the next, between each of the parties equally;

The applicant submits these to be reasonable except that the applicant further submits that it is extremely undesirable that the minor child should overnight with Respondent, regard had *inter alia* to the factors set out in paragraphs 12.1 to 12.5 of the applicant's founding affidavit, which includes alcohol abuse, violent disposition, suicidal tendencies some of which have been threatened in the presence of the child, the keeping of irregular hours by the respondent sometimes not returning home.

I am not satisfied that it would be in the interests of the minor child to allow the Respondent, who has not denied the aforementioned allegations against him overnight access to the minor child.

In so far as prayer three the applicant claims that the Respondent be directed to pay all school expenses relating to the minor child. This the Respondent does not oppose, except that the Respondent submits that he should be ordered to pay such expenses to the school directly and indeed with all expenses that such be paid directly to the provider of the service.

Turning to prayer four, the Respondent has undertaken that the Landrover the applicant is currently driving will not be taken away from her and that she "may continue to have use of the vehicle pending the divorce action." In this regard I refer to paragraph 23.2 of the Respondent's answering affidavit.

In so far as prayer five of the notice of motion, the claim, as already observed is that Respondent be directed to retain the applicant and the minor child on his United Kingdom medical plan. Nothing at all is said in the body of the applicant's affidavit regarding this prayer. It is

not clear, how if at all, such claim is related to the claim for medical aid and medical expenses amounting to E500.00 forming part of E12,350.00 claimed as monthly maintenance. In the circumstances I am unable to make any order in respect of the said claim.

In so far as prayer two of the notice of motion is concerned the applicant claims that the Respondent be directed to contribute to the maintenance of the applicant and the minor child in the amount of E12,500.00 on a monthly basis. The claim is quantified and details given in paragraph 20 of the applicant's affidavit as follows:

ITEM CLAIMED	AMOUNT CLAIMED TO RESPONDENT	REASONABLY ACCORDING TO RESPONDENT
"20.1 Monthly rental	E 2,500.00	E3,000.00
20.2 Water & Electricity	300.00	600.00
20.3 Telephone & Cellphone	600.00	300.00
20.4 Petrol	2,000.00	-
20.5 Groceries	1,000.00	835.00
20.6 Fruit & vegetables	200.00	NIL
20.7 Milk & bread	200.00	NIL
20.8 Meat, fish & poultry	500.00	NIL
20.9 Magazines, books, newspapers	100.00	NIL
20.10 Clothing for self & child	1,500.00	1,000.00
20.11 Haircuts, personal Hygiene & health care	250.00	
20.12 Entertainment including Weekend excursions	1,500.00	
20.13 Domestic servant	400.00	200.00
20.14 Medical aid & medical Expenses	500.00	500.00
20.15 Flowers, gifts & general Miscellaneous expenses	500.00	NIL"

It appears to be common cause that the applicant who is employed by the company in which the Respondent is a Director and manages, earns a monthly salary of E1,610.00. She says this amount together with an additional amount of E1,600.00 which the Respondent has been paying to her since the separation is not sufficient, due regard being had the standard of living the minor child and herself had grown accustomed to during the subsistence of the marriage. She states that the Respondent is financially able to pay the amount she requires and claims as maintenance. She says she has no personal knowledge of the Respondent's monthly income which she has always been kept in ignorance by the Respondent. She says that most of the family expenses were financed through the company Conway Nyman which she states is a very successful business in the country. The family lifestyle was such that the family enjoyed at least one annual holiday of four weeks during December and has during each of these holidays gone to Namibia, United States of America, Botswana, Mozambique and various other places in Southern Africa. It is also common cause that the family generally spent a weekend in Johannesburg, approximately once every month. The family dined out just about every night in what both parties describe to be expensive restaurants with friends and relatives, and that on each of those occasions the Respondent paid for everybody.

In spite of the assertion by the Respondent that he is not financially able to support the applicant and the minor child at the rate claimed it appears that it is at this rate that the Respondent was able to provide for the applicant and the minor child before separation. Now that the parties are living in separation however one must take into account the fact that other than providing for his wife and the minor child the Respondent still has to provide for himself. In a way he will be required to provide for two separate households, which must mean

that his ability to provide for and maintain the family at the same level might be affected.

In the circumstances, one has to attempt as best as he can on the affidavits to ensure that the applicant and her minor child are provided for at a reasonable scale due regard to the lifestyle they had grown accustomed to and the fact that the applicant still has to provide for himself.

Above I have indicated next to the amount claimed by the applicant the amounts which the respondent has stated to be the reasonable requirements of the applicant and his minor child. The respondent has agreed to pay for the minor child's school fees, educational and medical related expenses direct to the school, and proposes in relation to other expenses to the service providers.

Regarding accommodation, built into the applicant's claim, is the sum of *inter alia* E2,500.00 for the rental of the dwelling she and the minor child are currently residing in. The respondent's response to this is that he has tendered that the applicant may return to the former common dwelling and he would move out and find alternative accommodation, even though he had evicted the applicant earlier on from the common home. He states however in annexure "NT6" that E3,000-00 per month is a reasonable amount of rental, whereas the applicant is only claiming E2,500.00. This amount of E2,500.00 claimed by the applicant in respect of rental ought to be allowed.

The applicant claims E300.00 for water and electricity, and E600.00 for a phone and cellular phone, to a total of E900.00. The respondent's response thereto is, boldly, that these sums are grossly inflated. However in annexure "NT6" he avers that E600.00 for water and electricity and E300.00 for a telephone is reasonable. Applicant's

counsel submits that this total of E900 corresponds with what the applicant is claiming and should be allowed for that reason.

The applicant further claims petrol at the amount of E2000-00. However even though the respondent has tendered the vehicle what is not clear is whether the tender of the vehicle includes the tender of petrol which was supplied by Conway Nyman. Since there is no indication that the previously existing arrangement will be stopped I do not find it necessary that an order needs to be made requiring the respondent to pay the amount of E2000-00 (two thousand Emalangeni) except to order that since such petrol is supplied by Conway Nyman as a benefit of the respondent under his employment contract with the company, the respondent should not disturb this benefit accruing to the vehicle driven by his wife.

As regards to groceries, again it should be observed as submitted by applicant's counsel that the applicant's claim for E1000-00 is only E185-00 above what the respondent states to be reasonable in respect of the minor child alone. It seems to me that the applicant's claim for groceries plus E500-00 in respect of additional claims for meat, fish, poultry, milk and bread is reasonable. I will allow E800-00 in respect of clothing for applicant and minor child. The claims in respect of (1) magazines, books, newspapers etc, (2) haircuts, personal hygiene and health care, (3) entertainment including weekend excursions (4) flowers, gifts and general miscellaneous expenses are refused. The medical aid and medical expenses claim is reduced to E250-00 in accordance with the submission by applicant's counsel due regard being had to the fact that the respondent has agreed to pay all medical expenses for the minor child.

The applicant's monetary claim for a monthly contribution for maintenance is allowed as follows:

Monthly maintenance	E 2500-00
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Water & electricity	300-00
Telephone & cellphone	600-00
Groceries	1500-00
Clothing for applicant & minor	800-00
Domestic servant	400-00
Medical aid medical expenses	<u>250-00</u>
	<u>E 6350-00</u>

Finally, turning to prayer six of the notice of motion which is for an order that respondent be directed to contribute to applicant's legal costs in the amount of E25,000.00.

As a matter of principle where a husband and wife are married out of community of property, a wife's right to a contribution towards costs is based upon the husband's duty, where he is able to do so, to support her with the necessities of life. See **GLAZER V GLAZER 1959(3) SA 928** at 931. The applicant is entitled to litigate on a scale commensurate with the means of the parties, yet she is not obliged to realise all she possesses in order to finance her action where her husband is able to support her with a contribution towards costs. (See **Glazer's case** supra) In the Glazer's case supra the learned Judge Williamson J, as he then was, observed that the wife was entitled "to litigate upon the basis you would expect rich people to litigate". The applicant says that she has "already incurred legal expenses in the sum of E20,000.00 including consultations with my attorney, senior counsel and drafting of settling of initial Rule 43 application". The applicant goes on to present expenses which are still to be incurred by her which she places at E117,000.00. Included is an amount of E10,500.00 for the services of a clinical psychologist for purposes of examining the minor child and bringing out a report in respect thereof. A further amount of E50,000.00 for the services of a forensic auditor to investigate the financial position of respondent and reporting thereon. The amount of E10,500.00 for the services of a clinical psychologist is clearly excessive and I am not persuaded that

it is necessary in any event. Similarly the amount of E50,000.00 for engaging services of a forensic auditor seems to me to be unnecessary. The applicant seeks to justify this by arguing that the true financial position of the respondent will have a material bearing, *inter alia*, on the amount of custody (sic) to be paid in respect of the minor child". I believe that what the applicant intended to argue in this respect is that the true financial position of the respondent will have a bearing on the amount of maintenance to be paid in respect of the minor child. It does not appear to me that the true financial position of the respondent in so far as this may have a bearing on his ability to maintain the minor child requires the services of a forensic auditor. What is clear from the papers is that the respondent has always been able to maintain the applicant and the minor child at a scale at which the family was not in want for anything, to put it modestly for the respondent. It is also clear that most of these family expenses were, as the applicant put it, channelled through the company Conway Nyman.

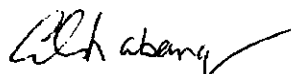
I do not propose to deal with the rest of the items of the estimated future costs to be incurred by the applicant. Suffice it to say that an amount of E25,000.00 in respect of costs incurred on a civil matter in this court is reasonable. In Glazer's case *supra* and in **SERVICE V SERVICE 1968(3) SA 538 D & CLD, VAN RIPPEN V RIPPEN 1949(4) SA 634** © at 640-1, it was laid down that the applicant should receive not all her anticipated costs but a substantial contribution towards them.

With this in mind and having regard to the means of the parties, I think an amount of E20,000.00 as a contribution towards the applicant's costs by respondent would be appropriate.

In the circumstances, I make the following order:

1. Pending the final determination of the divorce proceedings;

- (a) The interim custody of the minor child is awarded to the applicant subject to the respondent's rights of reasonable access, to be exercised as follows: between the hours of 0900hrs to 18.00hrs on the Saturday and Sunday of every second weekend.
- (b) The respondent is directed to contribute to the maintenance of the applicant and the minor child in the amount of E6,350.00 per month payable monthly in advance not later than the 7<sup>th</sup> day of each month.
- (c) The respondent is directed to pay all school expenses relating to the minor child.
- (d) The respondent is directed to ensure that the Landrover and petrol expenses in respect of the Landrover currently being used by the applicant is not disturbed, but that in the event it becomes necessary for any reason that the applicant should be deprived of the Landrover and the provision of the petrol in respect thereof, the respondent shall approach this Court before the implementation of any such new arrangement or otherwise, for variation of this aspect of the order.
- (e) The respondent is directed to contribute to the applicant's legal costs in the amount of E20,000.00 (twenty thousand Emalangeni).
- (f) The costs of this application shall be costs in the cause.

  
A.S. SHABANGU  
Acting Judge

- (a) The interim custody of the minor child is awarded to the applicant subject to the respondent's rights of reasonable access, to be exercised as follows: between the hours of 0900hrs to 18.00hrs on the Saturday and Sunday of every second weekend.
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- (c) The respondent is directed to pay all school expenses relating to the minor child.
- (d) The respondent is directed to ensure that the Landrover and petrol expenses in respect of the Landrover currently being used by the applicant is not disturbed, but that in the event it becomes necessary for any reason that the applicant should be deprived of the Landrover and the provision of the petrol in respect thereof, the respondent shall approach this Court before the implementation of any such new arrangement or otherwise, for variation of this aspect of the order.
- (e) The respondent is directed to contribute to the applicant's legal costs in the amount of E20,000.00 (twenty thousand Emalangeni).
- (f) The costs of this application shall be costs in the cause.

  
A.S. SHABANGU

Acting Judge