

THE HIGH COURT OF SWAZILAND

PIA NUNN (Born Brollo)

Applicant

And

TIMOTHY PHILLIP NUUN Respondent

Civil Case No. 707/2003

Coram S.B. MAPHALALA – J

For the Applicant Advocate J.M. Van Der Walt (Instructed by Robinson Bertram)

For the Respondent MR. L. HOWE

JUDGEMENT (06/02/2004)

This is an application in terms of Rule 43 for relief pendente lite.

The facts of the matter are that the Applicant instituted divorce proceedings against the Respondent in April 2003. The parties were married out of community of property in terms of an antenuptial contract dated 8th October 1998 and of the said marriage three children were born. The said children are minor children and paternity has never been disputed.

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Pursuant to the issuance of divorce proceedings, an application was made in terms of Rule 43 by the Applicant against the Respondent. The said application is opposed and an opposing affidavit has been filed.

The order sought by the Applicant in this matter is an order for the custody of the minor children subject to reasonable access being given to the Respondent.

That the Respondent pays maintenance in the sum of E12, 000-00 per month which amount is to be paid not later than the 25th day of each month.

An order directing the Respondent to pay all school fees, medical expenses for the minor children and medical expenses of the Applicant.

An order directing a contribution towards legal costs in an amount of E25, 000-00. An order directing the Respondent to pay costs of this application.

In respect to the issue of maintenance the financial position of the parties is that the Applicant earns a net monthly salary of E2, 803-50. She used to have signing rights on a cheque account but the Respondent unilaterally removed her as a signatory. She now has no access to the account and has to live on what the Respondent is prepared to give her. The Applicant and children live in the former common home.

On the other hand the Respondent's monthly income is that he earns a net salary of E13, 870-33 and also earns a further sum for ad hoc work of E2, 000-00. His assets include the following: share in Sibaya Provident Fund E243, 127-54 as at 30th September 2002, (current value unknown); Overseas Retirement Fund to the value of \$8. 180-90; and the Respondent is sharing a dwelling with his mistress, who herself is in receipt of maintenance. His living costs, being rental of E1, 850-00 per month plus water and electricity, are therefore shared.

The Applicant's requirements and Respondent's response thereto are conveniently tabulated in Applicant's Heads of Arguments, they are outlined as follows:

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ITEM	APPLICANT	RESPONDENT	SUGGESTED
Internet	960	Already paid for until year end	
Telephone and cell	600	Are being paid by him	600
Petrol	700	Are being paid by him	700
Groceries	4 500	Will continue to pay E5 000	5 000
DSTV	375	Will pay	375
Mags, books, papers	200	Should be added to groceries	
Clothing Applicant	300	Should be added to groceries	
Clothing children	500	Will pay	500
Haircut, hygiene, health	500	Excessive but will pay	500
Entertainment	600	Unnecessary	500

The Applicant's submissions in respect to the issues of maintenance and contribution to costs.

It was argued for the Applicant following the principles enunciated in the case of Taute vs Taute 1974 (2) S.A. 675 (E) at 676 that the issue relating to maintenance,

should be viewed against established principles, which include that an Applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite depending 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.

A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands similarly more weight will be attached to the affidavit of a Respondent who evinces a willingness to implement his

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lawful obligations than to one who obviously, albeit on paper, seeking to evade them.

In casu, it is argued for the Applicant that taking into account that the Respondent's first obligation is to his wife and children, and not his mistress and her children, and taking into account the Applicant's far smaller income, a reasonable amount of maintenance would therefore be E10, 000-00.

The Respondent's attitude is that he will pay items as the need may arise. The Applicant contends that this is clearly unacceptable, in that it would mean that the Applicant will have to constantly ask him for money, thereby placing herself and the children at his mercy and under his control.

It is contended that the Applicant's claims should succeed in view of the following; the Applicant's claims are commensurate with marital standard of living of the parties, her actual and reasonable requirements, and the apparent capacity of the Respondent to meet such requirement; the Applicant's claim supported by reasonable and moderate details, and there are no extravagant or extortionate demands, and as such must carry more weight than what is contained in the Respondent's affidavit; and the Respondent evinces a reluctance to fully implement his lawful obligations, and on paper is clearly seeking to restrict these obligation.

As regards the issue of contribution to costs, it is contended on behalf of the Applicant that the only issue is the quantum of the contribution. In this regard, the court was referred to the case of Nicholson vs Nicholson 1998 (1) S.A. 48 (W) at 50 C where it was held that an Applicant is entitled, if the Respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the Respondent is litigating and the scale which the Applicant intends litigating with due regard being had to the Respondent's financial position. That as it was held in the case of Van Rippen vs Rippen 1949 (4) S.A. 634 (C) at 638 - 9 the paramount consideration is that she should be enabled adequately to place her case before the court.

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In a marriage in community of property it may be that a contribution is theoretically upon a different basis in that the wife may be receiving some payment out of her own share of the assets, but out of community of property, these costs must be regarded as expenses which she is going to incur in the next few months, and the Respondent is responsible for them. He cannot call upon her to realise all she has, especially where what she has is very small, and pay everything out of that and then only, if she has exhausted her assets, apply for contribution. The scale upon which she is entitled to litigation is a scale commensurate also with the means of the parties (per Glazer vs Glazer 1959 (3) S.A. 928 (W) at 932).

On the basis of the above principles it was contended for the Applicant that the rationale behind these principles is that the playing fields should be levelled, and the Applicant is asking not more than that. The Respondent has shown no cause why he cannot realise, for instance, a portion of his overseas retirement fund. Further that the contribution to costs can later be set off in the final divorce.

The Respondent's submissions.

The Respondent has filed very comprehensive Heads of Arguments where the above-mentioned issues were thoroughly canvassed. The gravamen of the Respondent defence is that he has maintained his children adequately and has no desire not to maintain his children to the best of his ability. Secondly, the Respondent contends that both parties have made submissions regarding the financial position of the Respondent but at all times hereto no mention has been made by the Applicant of her financial status in this regard.

Thirdly, the Respondent contends that he earns a net sum of E13, 870-33 after deductions yet the Applicant is asking the court to award her E12, 000-00 per month maintenance. Over and above that the Applicant is asking for a contribution of E25, 000-00 towards her legal costs which costs have not been substantiated by the Applicant as to how she has come to the said sum. The net result would be that the Respondent would not be able to live for two (2) should the court award the sum of E12, 000-00 per month it would leave the Respondent with a "handsome" sum of E1, 870-33 within which to live on.

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The Respondent contends further that previous to this matter being heard, the matter came before

Shabangu AJ, where an order was granted in favour of the Applicant for the sum of E6, 000-00. These said sums have been paid over on a monthly basis to the Applicant. Over and above the said payments all medical expenses, school fees have been paid for by the Respondent.

On the issue of the contribution towards costs it is the Respondent's submission that a fair contribution towards costs for the action would be a sum of E5, 000-00 and should they succeed and/or an order should be granted in favour of the Applicant a bill of costs should be taxed in the bill of costs and are to be served upon the Applicant and the Applicant should pay.

The Court's analysis and conclusions thereon.

It is common cause that an interim order in respect of the maintenance pendente lite was issued by Shabangu AJ where it was ordered inter alia that Respondent pays a sum of E6, 000-00 per month. It is also not in dispute that these sums have been paid over on a monthly basis to the Applicant. Over and above the said payments all medical expenses, school fees have been paid by the Respondent.

The Applicant is seeking maintenance in the sum of E12, 000-00 per month. In this regard, I agree with the submissions made on behalf of the Respondent that such an award would be like "killing the goose that lays the golden eggs". The Respondent is earning a net sum of E13, 870-33 after deductions yet the Applicant is asking the court to award her E12, 000-00 per month as maintenance pendente lite. This would leave the Respondent with a sum of E1, 870-33 within which to live on. In this regard I agree with the submissions made by Mr. Howe for the Respondent that "the purpose of Rule 43 is not in any way but to penalise the Respondent but to ensure that the Respondent and Applicant pending the finalisation of the action which was instituted as far back as April by the Applicant is maintained and the children too".

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In casu after assessing all the material facts of this case I find that a sum of E8, 000-00 per month as maintenance pendente lite to be fair and reasonable in the circumstances.

On the issue of the contribution to costs the Applicant seeks an amount of E25, 000-00. The Respondent on the other hand offers to pay a sum of E5, 000-00 towards costs. In this regard the dictum in *Nicholson vs Nicholson* (supra) is instructive. It was held in that case that an Applicant is entitled, if the Respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the Respondent is litigating and the scale on which the Applicant intends litigating with due regard being had to the Respondent's financial position.

In my considered view a fair and reasonable contribution in the circumstances would be a sum of E15, 000-00.

In the result, the following order is entered:

1. The Respondent is ordered to contribute to the maintenance of the Applicant and the minor children in the amount of E8, 000-00 on a monthly basis, payable on or before the 25th day of each month, with effect from August 2003;
2. That the Respondent be ordered to pay all the school fees, educational and medical related expenses in respect of the minor children, as well as the medical expenses of the Applicant;
3. That the Respondent be ordered to contribute to the Applicant's legal costs in the sum of E15, 000-00; and
4. That the Respondent be ordered to pay the costs of this application, including the costs of counsel as certified in terms of Rule 68 (2) of the High Court Rules.

S.BMAPHALALA