

THE HIGH COURT OF SWAZILAND

JACQUELENE TAFT (BORN GREY)

Applicant

And

NIGEL ALFRED TAFT

Respondent

Civil Case No. 463/2005

Coram: S.B. MAPHALALA - J

For the Applicant: ADVOCATE VAN DER

WALT (Instructed by Currie and Sibandze)

For the Respondent: MR. B. MAGAGULA

RULING

(24/03/2005)

[1] The matter has been postponed from the previous day for arguments on an application brought by the Applicant for an order committing Respondent to jail for failure to comply with an order of court in respect of payment of maintenance *pendente lite*. The parties have exchanged the required affidavits and thus joining issue in this matter. When the matter was called on the 23rd March 2005, *Mr. Magagula* who appeared for the Respondent moved a preliminary application from the bar concerning the conduct of proceedings as Respondent had filed a counter-application on Notice of Motion for an order, *inter alia* declaring that the Applicant is in contempt of the court granted by this Court Order of the 23rd August 2003; directing that the Applicant comply with the order dated the 22nd August 2003, in that **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 1800hrs on the Saturday and Sunday of every second weekend.**

[2] *Mr. Magagula* submitted that the two applications be heard together, for convenience and also because these two application are intertwined dealing with the same parties and the same subject matter.

[3] *Miss Van Der Walt* who appeared for the Applicant strenuously opposed this application and has advanced a number of arguments in this regard. Her first argument is that the Respondent is precluded in making the counter-application in view of the fact that he has not purged his contempt as directed by Shabangu AJ (as he then was) in a judgment he delivered on the 6th July 2004, where the learned Judge ruled, *inter alia*, as follows:

"In the circumstances the order I make is that the proceedings are stayed pending the purging of the contempt by the Applicant who is required to doing so to;

- a) **Provide petrol to the Respondent for the Land rover which the Respondent uses without giving her just a mere allowance.**
- b) **To refund the Applicant in full for the petrol purchases the Respondent has had to make out of her pocket since the order of 22nd August 2003, was issued.**
- c) **Comply with all the requirements of the order of the court made on the 22nd August 2003.**

[4] The order of the 22nd August 2003 directed as follows: **"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 1800hrs 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 7th 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 Land rover and petrol expenses in respect of the Land rover 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 Land rover 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."**

[5] The second submission in opposition is directed at the manner in which the counter-application has been launched that the date in the Notice of Motion does not correspond to the date in the Founding

affidavit such that it appears that the affidavit was filed way after the Notice of Motion had been filed with the Registrar.

[6] The third submission is that if the court were to accede to the application Applicant will be greatly prejudiced and will have to incur further costs in answer to the counter-application. The essence of *Miss Van Der Walt* arguments is that the issue in the main application is different from the issue in the counter-application. The former involves payment of maintenance *pendente lite* and the latter involved visitation rights. She further applied that in the event that the court rules in her favour the counter-application should be stayed pending the finalisation of the main application.

[7] I have read the affidavits filed of record and I have also read the judgements by Shabangu AJ pertaining to this matter. I have also heard the submissions made for and against the application before court. First of all I wish to express the court's concern as upper guardian of minor children at the technical approach adopted by both parties in this matter. The overriding principle in such matters is the interest of the child which should be protected at all costs. The child should not suffer through the actions of irresponsible parents and attorneys should not be used in those spousal disagreements and/or fights. The main objective in such cases is what advances the interest of the minor child.

[8] In the present case it has not been shown that the Respondent has not purged his contempt as directed by the learned Judge in his order of the 16th July 2004. I have no evidence either way in this matter. It is a fact that Respondent has filed a counter-application and it would be improper for this court to find that he has not purged his contempt in the absence of evidence in this regard. It appears to me also that these two acts of "contempt" if I may call them that viz the one averred in the main application and the one averred in the counter-application are intertwined in that it may well be that one "contempt" explains the other, I am not saying that it does, but there is that possibility. Therefore I would rule that these two matters be heard with together. The Applicant is to file her answering affidavit to the counter-application and the matter to take its normal course until the two matters are enrolled for argument on a future date.

[10] I further order that costs to be costs in the course.

S.B. MAPHALALA

JUDGE