



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 788/2008**

In the matter between:

**MILLICENT NOMALUNGELO FAKUDZE      Applicant**  
(NEE NGWEKAZI)

And

**MVUSELELO FAKUDZE**

**Respondent**

In re:

**MILLICENT NOMALUNGELO FAKUDZE      Plaintiff**  
(NEE NGWEKAZI)

And

**MVUSELELO FAKUDZE**

**Defendant**

Neutral Citation; Millicent Nomalungelo Fakudze v Mvuselelo Fakudze  
(788/2008) [2011] SZHC 22 (19<sup>th</sup> December  
2011)

**CORAM:**  
**FOR THE APPLICANT**  
**FOR THE RESPONDENT**

**SEY J.**  
**MR. MAGAGULA**  
**MR. MASUKU**

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**JUDGMENT**

**19<sup>th</sup> DECEMBER 2011**

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**SEY J.**

[1] This matter has a chequered history. I therefore deem it apposite at the outset to chronicle the background facts in order to place the reader in a position to understand the substratum of this application.

[2] On the 4<sup>th</sup> day of March 2008, the Applicant herein, **Millicent Nomalungelo Fakudze (Nee Ngwekazi)**, brought an application under Civil Case No. 788/08 in terms of **Rule 43 (1) of the High Court Rules** which provides as follows:

“This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) maintenance *pendent lite*
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim custody of any child;
- (d) interim access to any child.”

[3] The Applicant sought an order in the following terms:

- “1. The Respondent be directed to pay E1,500.00 (One Thousand Five Hundred Emalangi) per month in respect of maintenance of the Applicant pending finalisation of the main action.
2. The Respondent be directed to pay E5,000.00 (Five Thousand Emalangi) in respect of maintenance of his two (2) children.
3. The Applicant be granted custody of two (2) minor children namely Bonginkhosi Fakudze and Siphesihle Fakudze.
4. Further and/or alternative relief.”

[4] The aforesaid application was heard by **Mabuza J** and determined in her judgment dated 6<sup>th</sup> August 2010. However, the Respondent herein, being dissatisfied with the said judgment lodged an Appeal in the Supreme Court of Swaziland.

[5] It is by virtue of the directive of the Supreme Court of Swaziland that this matter is now before this Honourable Court. For ease of clarity, I shall reproduce hereunder paragraphs [13] to [15] of the Supreme Court decision in Civil Appeal Case No. 37/2010 delivered on 31<sup>st</sup> May 2011 as follows:

*“[13] Faced with this difficulty, and the need for a “just and expeditious decision” [Rule 43(6)] to be reached, counsel for the parties before us agreed that the matter should be referred back to the High Court for an urgent proper determination of the amounts of interim maintenance to be paid to the respondent in her personal capacity pending final determination of her action against the appellant, and the amount to be paid as maintenance by the appellant for the minor children of the parties pending the final determination of their mother’s action against their father. If she succeeds in showing that the marriage subsists, she will obviously continue to receive maintenance from the appellant on behalf of the children. If she fails, the maintenance situation for the children can be determined for the future by the Court hearing the action.*”

[14] Counsel for the appellant also conveyed his client's agreement to pay, in addition to his present E10 000 monthly payment, a further sum in respect of the children of the parties of E1000 in total per month for three months. This is the period which the High Court will be given to finalise the Rule 43 application.

[15] Accordingly,

- (i) The appeal succeeds to the extent that the order of the Court a quo is set aside, and the Rule 43 application is referred back to the Judge a quo, or whichever other Judge may be required hear it, for the proper determination of interim maintenance for the respondent personally, and the minor children of the parties.
- (ii) The Court a quo is to finalise this application as a matter of urgency, and in any event, no later than the 31<sup>st</sup> August, 2011;
- (iii) Seven days notice to the parties of this summary hearing shall be given by the Registrar of the High Court.
- (iv) Pending the determination of this application, the appellant is to pay for the months of June, July and August 2011 to the respondent, the sum of E1000.00 per month, in addition to present

*monthly payments which he makes, for the interim maintenance of the two minor children of the parties.*

(v) *Costs of this appeal will stand over for later determination by the Court finally determining the action brought under Civil Case No. 3312/07."*

- [6] However, the deadline of 31<sup>st</sup> August, 2011 could not be met as a result of the Law Society Resolution to boycott all Courts. The Rule 43 application finally came up for hearing before this Court on the 6<sup>th</sup> day of December 2011 and 12<sup>th</sup> day of December 2011 respectively.
- [7] The issue thrown up for the proper determination by this Court is that of interim maintenance *pendent lite* for the Applicant personally, and the two minor children of the parties. It needs to be mentioned that even though a lot was said with regards to the validity or otherwise of the marriage, I do not wish to dabble in that issue. Suffice it to say that the parties' Marriage Certificate (Exhibit "**A**") has not been nullified by the Court. It has also been brought to my attention that there is a pending application, as appears in Civil Case No. 3312/07, wherein a summons was issued on 13<sup>th</sup> September 2007 by the Applicant against the Respondent seeking an order declaring that the marriage between her and the Respondent still subsists. Presently, the said Civil Case No. 3312/07

is pending in the High Court Registry and awaiting allocation of a hearing date by the Registrar of the High Court.

[8] When this matter came up for hearing, the Applicant filed from the bar a notice to amend her prayers in the initial Notice of Motion in terms of Rule 43 (1) as follows:

- “1. That the amount prayed for in prayer 1 be increased and amended to the amount of E10,000 (Ten Thousand Emalangeni) per month.
2. That the E10,000 (Ten Thousand Emalangeni) excludes school fees.
3. That the Defendant be ordered to pay all medical related custody expenses in respect of the minor children as well as medical expenses in respect of Plaintiff.
4. That the Respondent be directed to contribute towards the legal fees of the Applicant in the amount of E95,000 (Ninety Five Thousand Emalangeni)
5. Further and/or alternative relief.”

[9] It is worthy of note that, even though the Applicant has asked for the amount prayed for in prayer 1 to be amended and increased to E10,000.00, during the course of the trial before this Court, the Applicant made a compromise and intimated to the Court that she would willingly accept an amount of E5,000.00 (Five Thousand Emalangeni) for herself instead of the E10,000.00 (Ten Thousand Emalangeni) she has prayed for.

[10] In respect of prayer 2 of the Applicant’s Notice to Amend dated 6<sup>th</sup> day of December 2011, the Respondent contends that granting the Applicant a sum of E10,000.00 (Ten Thousand Emalangeni), excluding school fees, would in effect mean that he must add an extra E10,000.00 to the current amount of E11,050.00 (Eleven Thousand and Fifty Emalangeni) being paid by him as maintenance. In this regard the Respondent produced and tendered a maintenance schedule which was admitted in evidence and marked as Exhibit “K3.”

[11] At this juncture, I shall only examine the maintenance schedule for the period 2011 and 2012 which have been reflected as follows:

	2012		2011			Bongi	
	Lesi E	Total E	E	Bongi E	Lesi E	Total E	E
Medical Aid	1,000	1,000	1,000	2,000			1,000
	1,000	2,000					
School Fees	2,125	850	2,975				2,212
	2,627	4,839					
School Transport	550	225	775				550
	1,100						550
Uniform	500	-	500				500
	1,000						
Clothing	1,250	1,250	2,500				1,300
	1,300	2,600					
Contribution to food	1,000	1,000	2,000				1,100
	1,100	2,200					
Miscellaneous	150	150	300				150
	150	300					
Monthly Total	<b>6,575</b>	<b>4,475</b>	<b>11,050</b>				
	<b>6,812</b>	<b>7,227</b>	<b>14,039</b>				

Annual Totals	78,900	53,700	132,600	81,744
86,724	168,468			
Annual Growth				27%
18%				

- [12] It is clear from the above tabulation that the Respondent views his monthly total contribution for 2011 as **E11,050** and he has offered to add a cash amount of E2 000.00 to take this amount up to E13,050.00 per month for both the Applicant and the children. The Respondent further testified that as a matter of fact, when schools open in the year 2012, the children’s school fees will go up to about E14,039.00 which would mean that his contribution with the E2,000.00 offered would stand at roughly E16,039.00 and that whatever order the Court will issue will be affected by the increase in the next year.
- [13] For her part, the Applicant maintained that the only amount that goes to her monthly from the Respondent is **E2,000.00** in respect of maintenance for the two children. She further testified to the effect that the Respondent makes the medical aid payment of E2,000.00 directly and that he also pays the E2,975.00 for school fees directly to the school and that the amounts of E775 for school transport plus E500 for uniforms are also paid directly. To buttress her point she referred the Court to Exhibits “**G1 - G22**” which are notice of internet payments showing the amounts she had received from the Respondent as maintenance for the period 28 March 2010 to 23 November 2011.



[14] This is a convenient stage at which to deal with the question of affordability and how much of the available income of the Respondent must go to the Applicant for her maintenance and that of the children. The principle of our common law, which has been embedded in the South African legislation cited in some of the South African persuasive cases in this jurisdiction, involves a balanced assessment of maintenance needs and ability to pay. The underlying consideration is fairness to both parties and the Court has a discretion to award maintenance in an amount which is just.

[15] The Respondent is the Chief Financial Officer in ABSA as shown in Exhibit **"H2"**. He placed before the Court Exhibit **"K1"** being his salary slip for 20<sup>th</sup> October 2011 which reflects a gross income of E94,183.80 with deductions totalling an amount of E45,861.49 which leaves him with a net income of E48,322.31.

[16] The Respondent then produced Exhibit **"K2"** to show how he currently spends his net income with a projection for the year 2012 as follows:

	<b>2011</b>	<b>2012</b>
Net salary		48000
50400		
8500	Rent	
2000	9350	Insurance Householders
	2200	
Life policies		2800
3000		
School fees (Thami)		2800
3000		
Maintenance (Bongi and Lesi)	11050	14039
Parents Maintenance	2500	3000

Maid	1500	1800	
Gardening service		450	500
Multichoice		625	650
Groceries		3500	3500
Credit Card			8000
8000			
Mobile Phones	1500	1500	
Electricity	1200		1300
<b>Total Monthly Expenses</b>		<b>46425</b>	
<b>51839</b>			
<b>Balance</b>	<b>1575</b>		<b>-1439</b>

[17] What appears from the above spreadsheet which the Respondent has projected is that he has a disposable income of E1,575.00 for 2011 projected to a negative E1,439.00 for E2012. It needs to be mentioned, however, that even though the Respondent has outlined the amount of E8000 as monthly payments towards his credit cards, this is not borne out in some of his credit card statements which he produced to the Court. For instance, for the period 17 April 2011 to 19 May 2011 only E500 was credited for payments/credits; for 20 May to 18 June 2011 an amount of E4500 was credited; 19 June to 19 July 2011 the sum of E2000 was credited and for the period 24 April 2011 to 25 May 2011 only E1000 was credited on Account number:4787-6900-6893-9015. Again, in respect of the Respondent's rent, Exhibit "K2" reflects a figure of E8500 as rent with a projection of E9350 for the year 2012. However, the Lease Agreement between the Respondent and Joan Knight Realty CC expressly states that the rent for the fixed period of twelve months reckoned from the 1<sup>st</sup> August 2011 is

R7500.

- [18] For her part, the Applicant produced and tendered her current pay slip which was admitted in evidence as Exhibit **“H.”** She is employed by Swaziland Environment Authority and earns a gross salary of E10,062.50 out of which E6,897.88 represents her total deductions leaving her with a net pay of E3,164.62. The Applicant further testified that after paying her monthly rent of E2600, as reflected in Exhibit **“J”**, she is left with only E500 which is insufficient to meet her monthly expenses and that she virtually depends on the help of family, friends and colleagues. She presently does not have a vehicle and she usually spends E120 on transport for the monthly groceries. She also has to ferry the children to and from school in a taxi and she pays E150 because the school is about 25 kms away from her residence. This is undoubtedly a far cry from the comfortable lifestyle that she and the children had enjoyed whilst things between her and the Respondent were still rosy. The parties' elder son Bonginkosi is 13 years old and the younger son Siphesihle is now 5 years old.
- [19] The Applicant testified that what she would like the Respondent to contribute towards her maintenance and that of the children is in the light of the escalation of current prices. She said the children should not be subjected to a different lifestyle and that they should maintain the same life style as before. The Applicant also referred the Court to Exhibit **“C”** and she contended that in that email

which was sent to her by the Respondent on Tuesday, March 22, 2005, he had promised to look after her and give her the financial independence she had always enjoyed.

[20] The Applicant then submitted Exhibit “L” which she said was a break down of the children’s monthly expenditure and her own expenditure as follows:

**“Children’s List:**

Groceries	-	E 2300.00	(incl. weekly lunch boxes)
Taxi/Transport	-	E 120.00	(for groceries four times a month)
School Taxi Fees	-	E 1000.00	(School Activities i.e. meet the Teacher, School plays & sports)
Kid’s Day to day needs	-	E 1500.00	(photo shoots, cake sales, civvies, day, movie shows school trips etc.)
Extramural Activities	-	E 1 000.00	(i.e. bike rides, swimming classes)
Medical Expenses	-	E 1 000.00	(had to put kids on mine as I encounter problems with his)
Rent	-	E 3,600.00	
Electricity & Water	-	E 1 000.00	
Domestic Worker/helper	-	E 800.00	
Clothes	-	E 800.00	(quarterly)
DSTV-E 6 600 per yr whilst	-	E 560.00	(Full bouquet/premium together, I afford 220)
<b>Kids’ Birthdays</b>	-	<b>E 500.00</b>	<b>(E 6 000 each a year)</b>
Entertainment Fairs..	-	<u>E 1 000.00</u>	(Movies, Outings, Fun Fairs..)
		<b><u>E15,180.00”</u></b>	

**MY EXPENDITURE:**

Therapy cost	-	E 200.00	(Once-off total)
Toiletry & Cosmetics	-	E 1000.00	
Other Accounts	-	E 1000.00	
Medical Aid	-	E 1000.00	

Cell phone costs	-	E 900.00
Entertainment	-	E 1000.00
		-----
		<b>E 5,100.00"</b>
		-----

- [21] During further examination of the Applicant by the Court on Exhibit "L" and what was reflected in the Notice to Amend, the Applicant said she could now settle for **E10,000.00** (Ten Thousand Emalangeni) for the children's expenses.
- [22] The Respondent's position on both the children's list and that of the Applicant is that the Applicant has to differentiate between needs and wants. He said most of the items listed in Exhibit "L" were not maintenance necessities or needs of the children but were luxuries.
- [23] The Court has taken note of the following items that were objected to by the Respondent:
- (i) The groceries of E2,300.00 were said to have been excessive and an amount of E1,500.00 said to be appropriate.
  - (ii) E1,000.00 for School Taxi fees (for school activities - meet the teacher, school plays and sports) was said to be excessive because that happens only twice a year.
  - (iii) The E1,500.00 for the children's day to day needs such as photo shoots, cake sales, civvies day, movies and school trips was said to be too much on the basis that the activities happen once a year and thus required a significantly lesser amount. The Respondent suggested E800 instead.
  - (iv) E1,000.00 for extra mural activities (bike rides, swimming

classes) were described by the Respondent as luxuries and that in any event the children hardly do the bike and where they did the Respondent drives from South Arica to attend to them or ask a relative to attend to them.

- (v) With regards to clothing, the Applicant is asking for E800.00 per quarter when the Respondent currently pays E2,500.00. The Respondent asked the Court to adjust his amount of E2,500.00 to the E800.00 quarterly the Applicant has suggested.
- (vi) The children's birthday at E500.00 per month (E6000.00 each year) was considered by the Respondent as excessive. He suggested an amount between E1500.00 - E2000.00 per year. He also commented that this is a discretionary item because the children need not necessarily have to celebrate their birthdays every year.
- (vii) The Respondent also thinks that the amount of E1000.00 per month for entertainment (movies, outings, fun fair, air shows, bike rides, swimming) is a duplication.
- (viii) In respect of rent, the Respondent categorically stated that he cannot pay the amount requested by the Applicant.

[24] In his Closing submissions, the Respondent's counsel submitted that the meaning and scope of the term "*maintenance*" is a duty of support which extends to accommodation, food, clothes, medical and other necessities of life on a scale in line with the social position, lifestyle and financial resources of the parties. That whilst

food, clothing and shelter are always mentioned in any discussion of maintenance, the concept embraces much more than these necessities and that the maintenance of children includes education. For this proposition, counsel referred the Court to page 3 of the book entitled **Handbook of the South African Law of Maintenance by Lesbury Van Zyl.**

[25] As regards the maintenance of children, the Applicant's counsel submitted that it is trite law that the interests of the children are of paramount importance. Counsel further referred to the case of **B v B 2008 Volume 4 SA 535** which was in respect of an application for interim relief in terms of Rule 43 of the Rules of Court.

[26] I have given careful consideration to the testimony of both parties and, in particular, to the level at which the Applicant thinks she and the children should be maintained *pendente lite*. Maintenance is in the best interests of the child and every child has the right to basic necessities such as food, shelter, clothing, medical care and education. In the case of **Odogwu v Odogwu 1991 8 NWLR pt 208 at page 253** the Court pronounced as follows:

*"In matters such as this the paramount interests of the children constitute the golden rule. We are here not dealing with shares in a company or a piece of land dispute. We are dealing with human beings who find themselves in a situation created by the refusal of the parents to live together as husband and wife"*

See also **Williams v Williams Gambia Court of Appeal Case No. 34/2007.**

[27] In making orders for maintenance or financial provisions, some of the factors that the court must consider in the exercise of its discretion are as follows:

- (1) The income and capital belonging to the spouses.
- (2) The financial needs obligations and responsibilities of each of the parties.
- (3) The standard of living the family enjoyed before the breakdown of the marriage.
- (4) The age of each party and the duration of the marriage.

[28] The parties herein have filed documents showing their earnings and financial responsibilities. In this regard, Exhibits **"H1"** and **"K1 - K3"** are instructive. The Applicant told the Court that after all her deductions and rental payment she is left with only **E500**. I have no reason to doubt her and I accept her evidence as credible. It is beyond disputation that her financial situation is lamentable and unsatisfactory and it cannot be gainsaid that the Applicant definitely needs maintenance for herself and the two children.

[29] Now, taking into consideration the financial position of both parties and in the light of the totality of the evidence adduced before this Court, it is clear to me that the Respondent has what I would term



“financial muscle” to shoulder the financial responsibilities of the family. His Maintenance Schedule is minutely detailed and shows a monthly total payment of **E11,050**. Nonetheless, even though this figure seems impressive, only **E2,000** goes to the Applicant monthly. As reflected on Exhibit “**K3**”, an initial amount of **E2,000** is paid directly for medical aid, then the sum of **E2,975** plus **E775** and **E500** totalling **E4250** is paid directly to the school for school fees, school transport and uniforms. These direct payments are fine and they will not be varied.

[30] However, in effect, what it means is that out of the **E11,050**, an amount of **E6,250** covers direct payments monthly leaving the Respondent with the sum of **E4,800** which covers clothing in the sum of **E2,500**, contribution to food of **E2,000** and a miscellaneous amount of **E300**. A simple arithmetical calculation demonstrates to me that if an extra amount of **E5,200** is added to the outstanding balance of **E4,800** as aforesaid, the total would be **E10,000** which would cover the monthly amount of **E10,000** prayed for by the Applicant in respect of monthly maintenance for the two children. In the circumstances therefore, the Respondent will only have to add **E5,200** to his current payments of **E11,050** in respect of maintenance for his two children Bonginkosi and Siphesihle as reflected on Exhibit “**K3**”.

[31] In respect of the Applicant, she has asked for an amount of **E5,100** as maintenance for herself in respect of the following heads:

Therapy cost	-	E 200.00 (Once-off total)
Toiletries & Cosmetics	-	E 1000.00
Other Accounts	-	E 1000.00
Medical Aid	-	E 1000.00
Cell phone costs	-	E 900.00
Entertainment	-	E 1000.00
		-----
		<b>E 5,100.00</b>
		-----

I would discountenance the E200 claim for therapy cost because no supporting documents have been produced by the Applicant to justify this amount.

[32] Be that as it may, and having regard to the Respondent' s income I find that an amount of **E4,500** as monthly maintenance *pendent lite* for the Applicant is a fair and reasonable sum which is not excessive in the circumstances.

[33] On the issue of costs, the Applicant has prayed that the Respondent be directed to contribute towards the costs and for the Court to order the Respondent to pay a whopping E95,000.00 (Ninety Five Thousand Emalangeneni) as a contribution towards her legal costs. She later produced **Exhibit N - Statement of Account** totalling E85,440.50 (Eighty Five Thousand Four Hundred and Forty Emalangeneni Fifty Cents).

[34] It is a well documented fact that an award for contribution for costs of litigation cannot be had just for the asking, but rather that such an award be based on facts and circumstances which show that it is

justifiable to grant same. In the case of **Senior v Senior 1999 (4) SA 955 (W); Greenspan v Greenspan 2000 (2) SA 283 (c)**, the applicants clearly demonstrated the justification for the awards by annexing costs of the total of the litigations to the applications. The applicant hearing has sought to do so in **Exhibit N**.

[35] As the cases of Senior and Greenspan (supra) put it “while wealthy party in divorce proceedings, who conducts litigation on luxurious scale is not to be punished for his wealth, the other party is entitled to conduct litigation on a similar basis. Wealthy party to make contribution to other party’s costs to enable latter to litigate on scale commensurate with former”

[36] Furthermore, bearing in mind that an applicant is not automatically entitled to all of his/her costs but merely a reasonable “contribution towards costs”, there is no doubt that this court has a discretionary power to grant this relief, as clearly demonstrated by Rule 43(b).

[37] In light of the foregoing, I find that Applicant is entitled to a contribution towards her costs.

[38] In the circumstances, I hereby make the following orders:

1. The Respondent, *pendente lite*, the finalization of the marriage shall continue to provide the following for the two children:
  1. School fees of **E2,975** to be paid directly to the school for the two children.
  2. The sum of **E775** in respect of school transport to be paid

directly to the school.

3. The sum of **E500** in respect of uniforms to be paid directly to the school.
4. An amount of **E2000 monthly** for the medical aid of the two children to be paid directly through his membership of Swaziland Medical Aid Fund.
5. The aforesaid medical aid should henceforth reflect the name of the Respondent's mother as the principal member.
6. The sum of **E10,000 monthly** to cover reasonable accommodation, groceries, feeding, personal wearing apparels and other school amenities for the two children.
7. In addition, a sum of **E4500** monthly maintenance for the Applicant.
8. That the Respondent pays a sum of **E50,000.00** as a contribution towards the Applicant's costs.

[39] One more thing, in view of the Supreme Court's directive I find it expedient to backdate the payments as aforesaid in Paragraphs 1-7 to the 1<sup>st</sup> day of September 2011.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE**  
**.....DAY OF ..... 2011**

.....  
**M. M. SEY (MRS)**  
**JUDGE OF THE HIGH COURT**

