



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No. 2060/10

In the matter between

ROSEMARY M. CARMICHAEL

Applicant

And

RAYMOND E. CARMICHAEL

1st Respondent

**STANDARD BANK SWAZILAND
LIMITED**

2nd Respondent

Neutral Citation: Rosemary M. Carmichael And Raymond Carmichael & Another(2060/2010) [2012] SZHC 41 (10th April 2012)

CORAM: SEY J.

Heard: 9, 14 and 23 March 2012

Delivered: 10 April 2012

J U D G M E N T

SEY J.

[1] This is an application made by a wife against her husband under the provisions of Rule 43 (1) of the High Court Rules for the following orders:

- (a) Payment of the sum of E120 000-00 being arrear maintenance *pendite lite*.
- (b) Payment of the sum of E10 000-00 per month as maintenance *pendite lite* from the 1st of March 2011 until issues are resolved.
- (c) Costs of suit on the Attorney and own client scale.
- (d) Further and/or alternative relief.

[2] Rule 43 (1) 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 *pendente 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] There are certain basic principles which govern an application of this type and I am alive to the fact that this is an application for maintenance *pendente lite* and not for maintenance on dissolution of marriage. As **Hart AJ** aptly put it in the case of **Taute v Taute 1974 (2) SA 675 (E) at Page 676 D-H:**

“The applicant spouse (who is normally the wife) is entitled to reasonable maintenance *pendente lite*

dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified"

- [4] With these guidelines, I shall now turn to consider the detailed information gleaned from the affidavit evidence as well as the *viva voce* evidence adduced by the parties.
- [5] The Applicant and the 1st Respondent were married for 35 years by ante nuptial contract on the 7th February 1975 and 3 children were born of the said marriage which still subsists. The parties are estranged and have been since the 11th of February 2010. The Applicant stated that she was forced to leave the matrimonial home at Nhlngano because she was scared that the 1st Respondent would harm her and she currently resides with relatives being her sisters (Joy DaCunta, alternatively Sylvia). The Applicant went on to state that, ever since she was forced to leave the matrimonial home, the 1st Respondent has steadfastly refused to support her in any way and that she has been living off her siblings during this time. She told the Court that she is 60 years old and unemployed and that she needs maintenance of E10,000 monthly which she is

sure her husband can afford.

- [6] The evidence of the Applicant was that the 1st Respondent has the financial ability to support her, as she has no means of support. She stated that the 1st Respondent has a call account of E1,700,000, a current account with E100,000 in a South African bank, E3,000,000.00 in a 32 day investment account in a South African bank, up to E3,800,000.00 in cash relatively and that he had E725,000.00 in a local account in Swaziland which would bring the 1st Respondent's total cash assets close to E5.6 million.
- [7] During both the examination in chief and cross examination, the Applicant referred the Court to annexure "A" and "B" of her Sworn Statement in terms of Rule 43. Annexure "A" contains a list of what she maintains are her basic monthly requirements and Annexure "B" contains a list of what she maintains are her normal expenses. She has stipulated that she requires E 10,000.00 (Ten Thousand Emalangeni) per month as maintenance in line with her basic requirements as per annexure "A" for Rent E3,000, Food E2,000, Electricity E500, Water E250, Travel expenses E1,500, Medical Expenses E1,500, Cosmetics E250, Entertainment E500, Cell E250 and Telephone E250. In support of these expenses, the Applicant produced a number of documents and receipts to which I need not

refer in any detail as they speak for themselves.

- [8] Conversely, the 1st Respondent contends that he cannot afford to maintain the Applicant at all as his disposable income monthly is E1,000.00 (One Thousand Emalangi). He further denies the Applicant's allegation that he earns more than E40,000.00 per month from the country club he runs at Nhlangano and that he has cash assets to the value of E5.6 Million. Rather, the 1st Respondent maintains that he has cash reserves totalling only E600,000.00 (Six Hundred Thousand Emalangi). The 1st Respondent further contends that, since the Applicant is married subject to an ante nuptial contract, the circumstances in the present application do not justify an order for maintenance which would make inroads into his capital.
- [9] Furthermore, it is the 1st Respondent's contention that the Applicant has alternative means by which she can maintain herself. In support of this contention, the 1st Respondent made reference to the Applicant's bank statement dated 31 March 2010 showing a balance of E234,000.00. The 1st Respondent also produced and tendered two cheques which are payments that the Applicant receives annually as a shareholder of the company Carmichael Investments. For her part, the Applicant testified that her husband knows that the

sum of E234,000.00 was money that was put in trust for their children and that she has now given the money to one of her daughters.

[10] In his closing arguments, the 1st Respondent's counsel cited two authorities, namely, **Oberholzer v Oberholzer 1947 (3) SA 294 (O) at 298** and **Africa v Africa 1985 (1) SA 792 (SWA) at 794 C-E** and he submitted that as far as an applicant's claim for arrear maintenance is concerned, an applicant is barred by the principle in *praeteritum non vivitur* unless an applicant can show that she had incurred debts to keep or maintain herself. Counsel further argued that the Applicant herein has not deduced sufficient facts to prove, on a balance of probabilities, that she has incurred any debts to her sister which was necessary for her maintenance.

[11] The other principle the 1st Respondent's counsel referred to is that a person seeking a maintenance order, or a variation thereof for an increase or for a reduction or for a suspension of payments, should do so expeditiously in order to avoid the accumulation of arrears of maintenance that the spouse liable to pay may be burdened with, a substantial liability which he can ill-afford to pay. See **DODO v DODO 1990 (2) SA 77 (W) A at 95 A-B**. See also **Strauss v Strauss and Another 1962 (3) SA 639 (O) at 641 C - 642 A**.

In the **DODO** case (supra), it was noted that this principle was of little importance in that particular application before the Court owing to the wealth of the respondent.

[12] It needs to be mentioned that the common law maxim, *non quisquam in praeteritum vivitur aut alendus est* (a person does not live, nor has to be maintained in arrear) is based on the assumption that the claimant has somehow managed to subsist, though a different approach may conceivably apply if she has incurred debts in order to subsist, which debts are as yet unpaid. I find that the Applicant has so averred here in this present application. Paragraph 7 of the Applicant's Statement, filed in support of the Rule 43 application, is to the effect that the Applicant, during the period 1st March 2010 to date, has not had any form of maintenance and "has incurred various obligations to relatives and others for want of funds" and that "she owes Joy Da Cuhna her sister expenses as more fully appears in annexure "A" hereto."

[13] Furthermore, in paragraph 36.3 of the Applicant's Founding Affidavit sworn to on the 28th day of May, 2010, the Applicant deposed to the following facts:

"As matters stand, for the last three (3) months I have not had a cent in maintenance from my husband and I consequently have accumulated certain debts and

obligations. I have had to borrow funds from relatives who can ill-afford to advance me. As such I require that the 1st Respondent pay me arrear maintenance in order for me to fulfil my obligations as aforesaid.”

[14] In urging the Court to grant the order prayed for in terms of the Rule 43 application, the Applicant’s counsel submitted that it is trite that the 1st Respondent has a legal duty to maintain his wife. He referred the Court to **The South African Law of Husband and Wife, 4th Edition** by **H.R. Hahlo, 1975 Juta & Company at Pages 112 - 113**, where the learned author states as follows:

“Whether in any given case the husband must support the wife, or the wife the husband, must naturally depend on the circumstances of the spouses, but in most cases the duty of support is on the husband, not only because he is traditionally the provider, but also because he is traditionally the main earner. Accordingly, the duty to maintain his wife, children and household normally falls on him. If the marriage is in community, he is obliged, both in his personal capacity and in his capacity as administrator of the joint estate, to use the income and, if need be, capital assets. Unless he happens to be one of the fortunate few who can support their families adequately out of capital income, he has to do his best to earn a living for himself and his family.”

[15] Also at page 113 of **The South African Law of Husband and Wife, (op.cit) H.R. Hahlo** states the law succinctly as follows:

“By reason of his duty of support, the husband has to provide his wife with accommodation, food, clothes, medical and dental attention, and whatever else she reasonably requires. Support includes the cost of legal proceedings by or against the wife. The scale of which support must be rendered depends upon the social position, financial means and style of living of the spouses. It is not limited to necessities in the strict sense of the word”

*“The husband’s duty to support his wife does not come to an end if the joint household breaks up. On the principle that no one can escape his legal obligations by his own wrongdoing, it continues if the separation was due to his fault - he deserted his wife without just cause or drove her away by his misconduct.” See **H.R. Hahlo (op.cit)** at page 114.*

[16] The evidence in this case is clear. Even though the 1st Respondent maintains that he cannot support his wife now that they are separated, the position is that he did maintain her whilst they were living together. What makes the 1st Respondent even more obligated is the fact that he has no intention of reviving the marriage. The Applicant testified that they had a lucrative lifestyle and they had five motor vehicles and that they were relatively wealthy. It is also quite clear that the Applicant is an elderly lady who has been forced out of home by the 1st Respondent. Furthermore, she has no means of support apart from the annual Director’s fee of E25, 000 from Carmichael Investments. These facts were not refuted by the

Respondent who only stated that Applicant has a sum of E234, 000.00 in her bank account. However the 1st Respondent could not refute the evidence of the Applicant that these funds were for the parties' children and that it had been used to purchase a flat in Cape Town.

[17] It appears from all the evidence before this Court that the Applicant has made out a case to justify an order for arrear maintenance as well as an order for maintenance *pendente lite* under Rule 43 (1). 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. See this Court's decision in the Swaziland case of **Fakudze v Fakudze Case No. 788/2008** delivered on 19 December 2011.

[18] In this present case, the 1st Respondent has maintained that he has cash amounting to E600, 000.00 (Six Hundred Thousand Emalangeni) in his bank accounts. It seems to me that this amount of money is sufficient for the maintenance of his wife in terms of her request that she be maintained at E10, 000.00 per month.

[19] It is also submitted by counsel for the Applicant that the 1st Respondent is also obliged to contribute towards the legal costs of the Applicant's maintenance action. Be that as it may, 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. Regrettably, the Applicant herein has not sought to do so.

[20] In the circumstances, I make the following orders:

(a) That the 1st Respondent is ordered to make payment to the Applicant of arrear maintenance *pendite lite* in the sum of E10 000-00 per month backdated to 1st September, 2010.

(b) That the 1st Respondent is ordered to make payment of the sum of E10 000- 00 per month to the Applicant as maintenance *pendite lite* from the 1st of March 2011 until issues are resolved.

(c) That the costs of this application be costs in the cause of the pending main matrimonial action.

**For the Applicant
NKOSI**

MR. S.

**For the Respondent
CARMICHAEL**

MR. I.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE.....DAY OF APRIL 2012.**

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M. M. SEY (MRS)

JUDGE OF THE HIGH COURT

