IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 284/2013

In the matter between

GLENDA STEPHENS **Applicant**

and

JOHN WOOLCOTT STEPHENS **Respondent**

Neutral citation: *Glenda Stephens v John Woolcott Stephens* (284/2013) [2013] SZHC 122 (17 June 2013)

Coram: **Mamba J**

Heard: **10 June, 2013**

Delivered: **17 June, 2013**

[1] Civil law and Procedure – Pending Matrimonial action – application for maintenance of wife and contribution towards costs of action – per rule 43 of rules of court.

[2] Civil law and Procedure – application for MPL – rule 43 of rules of court – nature thereof – to be determined in expeditious and inexpensive manner and therefore, as a rule not necessary to hear viva voce evidence. Court has discretion in appropriate case to allow leading of viva voce evidence per subrule (6) of the rule.

[3] Civil law and Procedure – application to lead evidence per rule 43 (6) – where material before court is sufficient to make such determination and award, application refused.

[1] Following an action for divorce between the parties, which is still pending before this Court under case number 2038/12, the applicant filed an application in terms of rule 43 (2) of the rules of this court wherein she seeks against the respondent; *inter alia*:

> '(a) payment of the sum of E30,000.00 per month as maintenance *pendente lite* and
>
> (b) payment of the sum of E40,000.00 being a contribution towards costs of the pending action …'

This application is accompanied by a declaration by her stating why she thinks she is entitled to the above prayers and why she thinks that the respondent is in a position to meet them.

[2] This application was filed with the Registrar of this court on 26th February 2013 and set down for hearing on 8th March 2013.

[3] On 27th February 2013 the respondent filed his notice of intention to oppose this application. It would appear that counsel for the respondent indicated to the applicant's counsel that the contents of the applicant's declaration accompanying the application were insufficient to justify the application and this was duly accepted by the

applicant's counsel who then filed an affidavit by the applicant wherein the latter sought to supplement her declaration by "particularizing", so she said, her expenses.

[4] The respondent, whilst stating that Applicant's supplementary affidavit was irregular, did not oppose or object to its filing. The respondent filed his affidavit opposing the application and the matter was set-down for hearing on 7th instant but the application could not be heard on that day as the learned judge before whom it was set-down recused himself from hearing it. It was subsequently set down for 10th June 2013 before me.

[5] By notice filed and served on 7th June, 2013, applicant's attorneys gave notice that they would on 10th June, 2013 apply to court to lead oral evidence to justify its application *pendente lite*. Rule 43 (6) was cited for this application.

[6] In argument before me, Counsel for the applicant submitted that respondent's partial offer to meet applicant's maintenance and costs of suit was insufficient and the opposition to the application was not

justified and the applicant needed to lead *viva voce* evidence to demonstrate this.

[7] This application is opposed by the respondent who argues that the applicant's own declaration is unsubstantiated and inadequate and that the respondent has given a comprehensive account of his financial position and his ability or lack thereof to meet the applicant's application or demands. Further, the respondent has submitted that, by its very nature, an application *pendente lite*, should be decided on the papers filed rather than the court resorting to hearing oral evidence; unless of course the particular circumstances of the case warrants such a move.

[8] Rule 43 provides as follows:

> '(1) 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 pending matrimonial action; …
> (2) The applicant shall deliver a sworn statement in the nature of a declaration setting out the relief claim and the grounds therefor, together with a notice to the respondent, the statement and notice to be served on the attorney of record of the respondent or on the respondent personally, unless the court for good course shown grants leave for such statement and

> notice to be served in some other specified manner, and such notice is to be a near as may be with accordance with form 18 of the first schedule.
> (3) The statement and notice referred to in subrule (2):
> (a) Shall be signed by the applicant or his attorney;
> (b) Shall give an address for service within 5 kilometres of the court, and
> (c) Shall unless delivered, be served by the sheriff. …
> (6) The court may hear such evidence, (documentary or oral or both) as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.' (Emphasis added).

Our subrule (6) above is similar to subrule (5) of the corresponding rule in South Africa.

[9] I have not been able to find a local decision on the point under consideration herein; ie rule 43 (6) and none was quoted to me by Counsel. (*Dube v Dube, 1982-1986 (1) SLR 165 and Van Winsen v Van Winsen 1979-1981 SLR 230* govern applications *pendente lite* in general and do not deal with the issue as to when a court may receive *viva voce* evidence under subrule 6). However, in South Africa, it is said that :

> 'Within the limits imposed by subrule (2), the applicant should give sufficient details to enable the court to deal with the matter, if possible, without recourse to further evidence.
> The further evidence which the court may receive in terms of this rule may be either viva voce or adduced on affidavit. In either case such evidence

> should be received only as a result of a deliberate decision of the court – no party can adduce such evidence as of right.
>
> The court should be wary of hearing evidence and giving rulings on credibility and probabilities which may lead to the prejudging of issues more properly left to the trial court.'

(Footnotes omitted) – **Erasmus HJ, Superior Court Practice (1994 ed)** at B1- 317.

[10] It is common cause that an application *pendente lite* is an interim temporary measure to take care of the situation pending finalization of the matrimonial action. Because of this, it has to be determined and finalized expeditiously and in the most inexpensive way the circumstances may allow. Each case of course would depend on its own peculiar circumstances. Again, because it is temporary in nature, it "cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced' (**Erasmus (ibid)** at B1-314). At the end of the day, the court has to decide on whether or not, on the material before it, it can make a just and fair assessment of what the respondent should make as contribution towards the applicant's interim needs.

[11] The leading of oral evidence will inevitably delay the expeditious determination of this application. It will constitute a mini trial of some sort with its attendant costs. Such an exercise will further suffer from the inherent weaknesses stated above; the court having to decide the matter on the credibility of the parties and probabilities of the case in general. These are matters for the trial court.

[12] In the Zimbabwean case of LINDSAY V LINDSAY, 1993 (1) ZLR 195 (5), KORSAH JA stated as follows:

> 'I entertain no doubt that the quantum of maintenance, pendente lite, or otherwise, which a court may order a husband to pay to a wife … is at the discretion of the court. In order to ensure the proper exercise of that discretion, the court requires that every party to an application for maintenance shall deal with the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, which will enable the court to make a fair and just assessment'.

And Dumbutshena J in TANEKA v TANEKA, 1993 (2) ZLR 9 (H) at 12 put the position as follows:

> 'I hold the view that where parties are applying for maintenance for themselves or for the children of the marriage and contribution to costs or opposing the same, they should at least produce documentary evidence of their incomes. Such documentary evidence can be in the form of salary slips or commission payments and or any other payments made to the parties. To be of assistance to the court, payslips for the last three

> consecutive months would be most helpful. The mere assertion that a party is in receipt of x dollars per month is, in my opinion, not enough. There is always the temptation to reduce one's actual income in order to qualify for a bigger award or to pay less to the applicant, just as there is a tendency to exaggerate estimates of expenditure in order to gain more or pay less maintenance. Parties should be encouraged to prove their income by the production of documentary evidence in order that the courts may be better able to determine as early as is humanly possible an award or contribution which falls reasonably within the income bracket of the respondent.'

With respect, I entirely accept these remarks as espousing the law in this jurisdiction as well.

[13] In the instant case, the respondent has, within the permissible limits of this application, filed what appears to be a comprehensive and or detailed affidavit relating to his finances. Both parties have given detailed information on their financial arrangements since their separation in June, 2012 when the applicant left the respondent in Swaziland and went to stay or settle in Mocambique.

[14] In view of the above facts; i.e, the respective financial positions of the parties and their needs, and the nature of the application herein – (*pendente lite*) – I hold that, without going into the merits of this application at this stage – the material or evidence before this court is

sufficient for the court to properly exercise its discretion in determining what award to make herein. For that reason, the application to lead viva voce evidence is hereby refused. The costs of this application are to be the costs in the main application (should there be such an order made).

MAMBA J

For the Applicant:	**Mr L.R. Mamba**
For the Respondent:	**Adv. P. Flynn (instructed by Currie Boxshall-Smith Associates)**