



IN THE HIGH COURT OF SWAZILAND

Civil case No: 610/2013

In the matter between:

DIANA BARBARA McCONVILLE

APPLICANT

AND

WILLIAM LANCASTER McCONVILLE

RESPONDENT

Neutral citation: *Diana Barbara McConville v. William Lancaster McConville*
(610/2013) [2014] SZHC180 (22nd September 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – maintenance *pendete lite* in terms of Rule 43 of the High Court Rules –
Legal principles governing the remedy considered – application succeeds in part – no costs of
suit.

JUDGMENT
22nd SEPTEMBER 2014

- [1] The applicant seeks an order directing the respondent to pay an amount of E26 000.00 (twenty six thousand emalangeneni) per month in respect of maintenance *pendete lite* for herself and the minor daughter Emily, such payment to be effected on or before 7th September 2013 and subsequent months thereafter on the same date.
- [2] The applicant further seeks an order directing the respondent to pay the following expenses: firstly, the monthly bond repayments in respect of the property situated at 21 Springbuck, 10 Channing Cross, White River in Mpumalanga Province, and the monthly levy in respect of the bond repayments; secondly, Emily's school fees at Uplands College; thirdly, Emily's extramural activities , school uniforms, books and stationery, extra Afrikaans lessons and any other expenses directly related to her scholastic activities; fourthly, a contribution to the applicant's legal costs in the amount of E50 000.00 (fifty thousand emalangeneni); fifthly, the costs of this application, and, that the limitation of costs as provided for in Rule 43 be dispensed with.
- [3] The applicant also seeks an order allowing her to retain possession of the Nissan Motor Vehicle in her possession and the respondent to pay monthly instalments with regard thereto, keep the motor vehicle comprehensively insured and to pay all maintenance expenses reasonably incurred with regard thereto.

[4] It is common cause that this application is ancillary to a divorce action pending before this court as between the parties. The parties were married to each other by civil rites out of community of property in March 1984 at Mbabane, and, the said marriage still subsists. There is one minor child born of the marriage between the parties, Emily McConville born on the 5th August 1996.

[5] The basis of the divorce action as filed by the respondent is that the applicant has committed the following unlawful conduct. Firstly, she has failed to show respect to the respondent as husband and man of the house; secondly, that he has constantly fought with the respondent. It is accordingly argued that in the circumstances the marriage relationship between the parties has broken down. The respondent further contended that in April 2012, the applicant deserted the marital home and relocated to White River in South Africa. He seeks an order for the applicant to restore conjugal rights failing which a final decree of divorce to be granted. Furthermore, he seeks custody of the minor child Emily McConville to be awarded to the applicant subject to his rights of reasonable access to her.

In addition he seeks an order that he pays maintenance for the minor child at the rate of E5 000.00 (five thousand emalangen) per month inclusive of school fees and education expenses. It is prudent to mention that the applicant doesn't oppose the divorce proceedings; however, she has filed a counterclaim on the basis of the respondent's adultery. She contends that cohabitation with

the applicant has become intolerable. She contends that the respondent bought a house in White River and forced them to reside there with the minor child. She concedes that the marriage between the parties has irretrievably broken down and that there are no prospects of a normal marital relationship between them.

- [6] She contends that the respondent should contribute to their monthly maintenance pending finalisation of the divorce proceedings. She concedes that the respondent does contribute to their monthly maintenance; however, she contends that such contribution is wholly inadequate. The applicant concedes that the respondent makes the following contribution: Firstly, that he pays E5 000.00 (five thousand emalangeni) for her upkeep and E2 500.00 (two thousand five hundred emalangeni) to the minor child. Secondly, that he pays the bond instalment of the house that he purchased in White River where she resides with the minor child as well as the monthly levies with regard thereto inclusive of security costs on the basis that the house is situated in a security complex. Thirdly, he pays the minor child's school fees at the Uplands College in White River, her extramural activities, school uniforms, books and stationery as well as extra Afrikaans lessons. Fourthly, he placed a Nissan Duke Motor vehicle at her disposal, and, he pays the monthly instalments together with the comprehensive insurance and maintenance thereon.

[7] She contends that her monthly expenses amount to E26 050.00 (twenty six thousand and fifty emalangen) which is divided as follows:

• Domestic Servant (twice a week)	E1, 300.00
• Gardener (once a week)	E400.00
• Water, lights and Electricity (average)	E2 000.00
• Full circle security	E300.00
• DSTV	E700.00
• Internet	E200.00
• Pool Maintenance and chemicals	E300.00
• Monthly medical aid premiums for self /minor child	E4 500.00
• Groceries	E3 000.00
• Fruits and vegetables	E1 000.00
• Bread and milk	E300.00
• Fish, meat and poultry	E1 000.00
• Hairdresser self	E400.00
• Hairdresser Emily	E400.00
• Cosmetics and personal care self	E700.00
• Cosmetics and personal care Emily	E700.00
• Health supplements such as proteins, vitamins, etc	E400.00
• Clothing self	E750.00
• Clothing Emily	E750.00
• Petrol	E2 000.00

• Newspapers and magazines	E150.00
• Eating out and entertainment	E2 000.00
• Cell phone self	E800.00
• Cell phone Emily	E500.00
• Provision for weekend excursions and holidays	E1 000.00
• General and other small and unforeseen expenses such as maintaining home, replacing domestic utensils	E500.00
Total	E26 050.00

[8] She contends that certain of the expenses are a necessity including a comprehensive medical cover for herself and the minor child, fuel costs to transport the minor child to school as well as when attending extramural activities, internet which assists the minor child in her studies, a maid for the general household such as cleaning up and cooking as well as a male to keep the premises neat and tidy.

She further contends that she was born in 1956, and that her age militates against obtaining employment in White River to cater for some of her expenses. She argues that she has no specific qualifications and that she was generally unemployable.

[9] The applicant concedes that she has no personal knowledge of the respondent's monthly income. Notwithstanding this, she contends that the respondent is a

wealthy man for the following reasons: firstly, that in 2007 he purchased the property where he resides at Malkerns, being portion 65, farm 21 at Malkerns for an amount of E2. 7 million and obtained a bond of approximately E1 million, and that the property is registered in the name of Sandor (Pty) Ltd where he holds 50% shareholding.

Secondly, that the respondent holds 25 shares in Mother-Truckers (Pty) Ltd, which owns approximately eighteen trucks and extremely profitable. Thirdly, that during December 2012, he flew to Cape Town with Paulinah Perreira and her two minor children where they spent a holiday at the Protea Hotel, a very exclusive and expensive hotel at the Victoria and Alfred Waterfront; and, that he supports Perreira and their two minor children and maintain a lavish lifetime. Fourthly, that the respondent purchased the property where she and the minor child resides at White River in April 2012 for approximately E1.7 million and caused a bond to be registered over the property. Fifthly, that the respondent is currently negotiating to purchase shares and to become involved in a company by the name of Capital Caterers and to take over their business in Swaziland and Mozambique.

She contends that her attorney's fees presently stand at E17 242-60 (seventeen thousand two hundred and forty two emalangenis sixty cents) and that her counsel's fees currently stand at E12 768-00 (twelve thousand seven hundred and sixty eight emalangenis). She seeks a contribution to her legal costs in the

amount of E50.000.00 (fifty thousand emalangeni). In addition she argues that out of this amount she has to pay a correspondent since she resides outside Swaziland.

- [10] In his Opposing Affidavit the respondent argues that he is currently unemployed, and that his employment with Ngwane Mills was terminated on the 31st March 2013. He contends that since then, he has been living on savings which he had accumulated over the years. He further contends that he is currently seeking alternative employment to generate an income.

He has outlined the following maintenance payments in respect of the applicant and the minor child which amount to E38 231.18 (thirty eight thousand two hundred and thirty one emalangeni eighteen cents):

Monthly Expenses relating to Diane McConville and Emily McConville

DESCRIPTION OF COST	AMOUNT
Monthly allowances – Diane	E5 000.00
Monthly allowances – Emily	E2 500.00
Subtotal	E7 500.00

PROPERTY EXPENSES

Bond payment for 10 Channing Cross	E14 842.35
General levy	350.00

Water levy	137.00
Sanitation levy (note these levies may vary)	125.00
Insurance for 10 Channing Cross	337.36
Rates to Mbombela local municipality (MLM)	724.62
Value exclusion (MLM)	49.55
Surplus on levy (MLM)	202.52
Refuse (MLM)	134.49
Subtotal	E16 398.85

VEHICLE EXPENSES

Payment to Stanlib	E4 390.21
Insurance (E6505 for 2013 = E542.08 per month)	542.08
Subtotal	E4 932.99
Other expenses	
For monthly security response	262.00
Mobile phone for Diane (this varies monthly)	E1 000.00
Medical Aid (E3000 per month to Swazimed for 2 adults and 2 children Up to March 2013; reduced by 60%)	E1 200.00
Mobile phone for Emily (Minimum of 405.50 per month; average cost)	500.00
Subtotal	E2 965.00

School expenses for Emily

School fees (E14 573 per term, there are 4 terms = E4857.67 per month)	E4 857.67
Extra Afrikaans lessons (E120 per lesson for 8 months of the year)	320.00
Emergency medical (E240 per term)	240.00
School uniform (this is an estimate, E3000 annum)	250.00
Annual camp (2013 cost)	100.00
Books (estimate of E5000 per annum)	416.67
Various other (e.g. career counselling in 2013 estimate at E3000 per annum)	250.00
(Emily went on school study trip to Turkey and Italy in 2013 estimate cost E40 000.00, this has been excluded from this summary)	
Subtotal	E6 434.34

[11] The respondent contends that the payments aforesaid made in respect of the applicant and the minor child are in addition to his personal expenses in respect of his maintenance, accommodation and mortgage bonds payments at the Malkerns property where he resides.

[12] He denies forcing the applicant to relocate to South Africa. He contends that the decision to relocate was made following years of her insistence that she was not happy living in Swaziland and wanted to return to South Africa. After a

discussion between the parties, it was agreed that it would be in the interest of the parties and the minor child's education to relocate; hence, he purchased the property in White River for their residence. He paid all the requisite expenses for relocation, and, she took all the furniture with her from the marital home to White River.

[13] He concedes that at the time of relocation, cohabitation between the parties had become intolerable. He contends that since June 2006, they had been sleeping in separate bed-rooms and no longer living as husband and wife. He reiterates that the applicant has for many years been desirous of residing in South Africa with the minor child, and, that she was happy to relocate to White River. To that extent the respondent denies that he forced her to relocate to South Africa.

[14] He denies that the support given to the applicant and the minor child is inadequate particularly because he is no longer employed. He accuses the applicant of living a lavish lifestyle beyond her means. He argues that in addition to the monthly expenses listed above, he has paid E40 000.00 (forty thousand emalangeni) for the minor child's trip to Turkey and Italy. He pays a mortgage bond of the marital home in Malkerns at E15 000.00 (fifteen thousand emalangeni) per month, as well as his monthly personal maintenance of E5 000.00 (five thousand emalangeni).

[15] The respondent accuses the applicant of refusing to work and argue that the further maintenance sought by the applicant is totally unwarranted. He contends that the applicant is unemployed and that she could take care of the gardening and domestic work required with the assistance of the minor child. He further contends that the claim for water, lights and electricity are exorbitant and that a borehole is provided by the Housing Estate.

He contends that the house in White River is in a security estate of about thirteen dwelling units; and, that he installed a maxi door security and alarm system at an estimate costs of E15 000.00 (fifteen thousand emalangeni) at the instance of the applicant. To that extent he argues that the additional call-out security should not be necessary. He feels that the DSTV is an unnecessary luxury and that there were cheaper options available such as SABC, free to air channels or even Top TV which are much cheaper than the amount claimed for DSTV.

[16] The respondent concedes that the applicant has no computer at home; however, he contends that the minor child has access to the internet at school, and, that there is no need to claim in respect of the internet. He argues that the claim for pool maintenance and chemicals is exorbitant and that the plunge pool could be maintained at a cost of E150.00 (one hundred and fifty emalangeni) per month. He contends that the Discovery Medical Aid which the applicant wishes to join

is amongst the most expensive medical aid schemes in South Africa, and, that she should look out for a cheaper option and pay with the money given to her.

He contends that he cannot afford the amount claimed for a hairdresser, cosmetics and supplements for herself and the minor child let alone that the amount is exorbitant. Furthermore, he argues that he cannot afford the amount claimed for petrol, eating out and entertainment, cellphone for herself and the minor child, weekend excursions as well as the general and other unforeseen expenses such as replacing domestic utensils; to that end, he contends that such an amount is not only exorbitant but unnecessary and unaffordable on the basis that he is presently unemployed.

- [17] He argues that the applicant does not disclose that whilst he was employed, he supported the applicant and their two children including her own son which she brought into the marriage adequately. He states that the rented cottage at the marital home is merely E4 000.00 (four thousand emalangeni) per month, that the main house which was thatched was burnt in a fire, and, that the income from the cottages has not been earned for at least a year.

He denies that he is still a shareholder in Mother Truckers (Pty) Ltd or that the business is profitable. He concedes that he is staying with Paulinah Kayat but argues that she is employed and has her own income; and, that she contributes to her living expenses and takes care of her minor children. He further

concedes that he travelled to Cape Town on a holiday with her and her two minor children; however, he argued that the expenses were shared at the Protea Hotel and not at the Victoria and Alfred Waterfront as alleged.

- [18] He concedes negotiating with the major shareholder of Capital Caterers with a view of gaining employment with that company and for a profit share of the business; however, these negotiations fell through. He contends that the discussions for a franchise with Debonairs and Fish Away have not been concluded. He further contends that he was able to purchase the house in White River for E1 650 000.00 (one million six hundred and fifty thousand emalangeni) and further obtained a bond over the property because he was in gainful employment at Ngwane Mills as the Managing Director.

He also contends that his monthly income consists of the E4 000.00 (four thousand emalangeni) rental received as well as E8 900.00 (eight thousand nine hundred emalangeni) for Mother Truckers until the disinvestment has been concluded. He calls upon the applicant to either adjust her standard of living or find employment if the personal allowances given are inadequate.

- [19] He accuses the applicant of litigating in luxury by having two attorneys in Swaziland and White River as well as engaging counsel. According to him there is no need for the attorney in White River or counsel to be briefed in the matter on the basis that both parties concede that the marriage is irretrievably

broken down; and, the divorce is not being contested save for the proprietary consequences of marriage. He contends that engaging the said attorneys as well as counsel will only serve to escalate unnecessary legal costs.

[20] This application is in terms of Rule 43 of the High Court Rules directing the respondent to pay E26 000.00 (twenty six thousand emalangeni) per month to the applicant in respect of maintenance *pendete lite* for the applicant and the minor child Emily. The applicant further seeks an order for a contribution towards the costs of this matter. Rule 43 provides the following:

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

(2) The applicant shall deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds therefore, 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 cause shown grants leave for such statement and notice to be served in some other specified manner, and such notice is to be as near as may be in accordance with Form 18 of the First Schedule.

(3) The statement and notice referred to in sub-rule (2) —

- (a) shall be signed by the applicant or his attorney;**

- (b) shall give an address for service within five kilometres of the court; and**
 - (c) shall unless delivered, be served by the Sheriff.**
- (4) The respondent shall, within seven days of receiving the statement, deliver a sworn reply in the nature of a plea, signed and giving an address for service as required under sub-rule (3), and in default of which he shall be *ipso facto* barred.**
- (5) Unless the respondent is in default in terms of sub-rule (4), the Registrar shall as soon as reasonably possible after the reply, bring the matter before the court for summary hearing on giving seven days' notice to the parties.**
- (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.**
- (7) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.”**

[21] It is well-settled that maintenance *pendete lite* is intended to afford temporary relief, and, that the court makes a value judgment based on the income of the parties. The purpose of maintenance *pendete lite* is not to afford a lavish and spendrift lifestyle to the wife but it is intended to maintain the standard of living to which she was accustomed. Similarly, the purpose of a contribution to costs is intended to enable her adequately to place her matter before the court and not to reimburse her fully of the costs of litigation. The court has a discretion in the determination of applications in terms of Rule 43 of the High Court Rules.

See: *Mvuselelo Fakudze v. Millicent Nomalungelo Fakudze (Nee Ngwekazi)*
Civil Appeal No. 55/2011; para 68-71, 73 (2012) SZSC (31 May 2012)

[22] In determining maintenance *pendete lite* as well as the contribution to costs, the court has regard to the circumstances of the case, the financial position of the parties, as well as the issues involved in the litigation. The main action in this matter relates to the pending divorce proceedings as between the parties which are not opposed. The parties concede that the marriage between them has irretrievably broken down such that there is no prospect of reconciliation which could result in a normal marital relationship between them. The only issue in dispute relates to the proprietary consequences of the marriage. However, even this issue is capable of an amicable resolution when regard being to paragraphs 45.3 and 49 of the Answering Affidavit where the respondent states the following:

“45.3 The applicant’s attorneys in Swaziland are well capable to deal with the matter particularly in the light of the fact that both parties agree that the marriage is irretrievably broken down, the divorce is not being contested and the bone of contention really revolves around the proprietary consequences of the marriage.

46. In circumstances of this case, there is absolutely no need for counsel to have been briefed let alone an attorney in the Republic of South Africa, who is not even admitted in Swaziland and all that will do, is to increase the legal fees unnecessary.”

[23] The circumstances of the case are such that the parties live in separation, the respondent at the matrimonial home at Malkerns and the applicant in a house purchased by the respondent in White River for her occupation and that of the minor child. It is not very clear how the parties came to live in separation; the applicant claims that the respondent insisted that she vacates the marital home as life had become unbearable and intolerable which led to the purchase of the house in White River for this purpose. On the contrary the respondent disputes the underlying reason for the applicant's relocation, and, he argues that the applicant had for a long time expressed a desire to return to South Africa.

[24] It is not in dispute that the respondent had allowed the applicant to collect all the required furniture from the marital home when he relocated to White River in May 2012. It is further not in dispute that since June 2006 the parties have not been sleeping together as husband and wife. The applicant concedes that the respondent does make a contribution to her maintenance and that of the minor child as reflected in the preceding paragraphs; however, she contends that such a contribution is inadequate.

[25] It is common cause that the applicant is unemployed and that she has no source of income other than the monthly personal allowances received from the respondent. Similarly, it is not in dispute that the respondent has lost his job as the Managing Director of Ngwane Mills (Pty) Ltd. To that extent he contends

that his income consists of E4 000.00 (four thousand emalangeni) rental income as well as E8 900.00 (eight thousand nine hundred emalangeni) for Mother Truckers (Pty) Ltd until disinvestment has been concluded. The applicant has not disputed this contention and others made in the opposing affidavit. She has not deposed to a replying affidavit disputing these allegations.

[26] The applicant concedes in her founding affidavit that she has no personal knowledge of the monthly income and/or the financial affairs of the respondent. Notwithstanding this concession, she contends that the respondent is a wealthy man on the basis that he had purchased the marital homes at Malkerns as well as in White River where she resides with the minor child. She further contends that the respondent has a 25% shareholding in Mother-Truckers (Pty) Ltd. In addition she contends that he lives with Paulinah Perreira and her two minor children on a lavish lifestyle; the respondent contends that Paulinah Perreira is gainfully employed and earns her own income from which she contributes to the household expenses, holiday travelling as well as supporting herself and her minor children.

[27] It is apparent from the evidence that the respondent has no other source of income other than that which he has disclosed. Furthermore, there is no evidence that the respondent is a wealthy man as alleged by the applicant. However, I am inclined to make minor adjustments where necessary.

[28] Accordingly the following order is made:

(a) The respondent is directed to make the following payment *pendete lite*:

- (i) A monthly personal allowance of E10 000.00 (ten thousand emalangeni) to the applicant with effect from the 28th October 2014 and every subsequent month thereafter.
- (ii) A personal allowance of E2 500.00 (two thousand five hundred emalangeni) to the minor child Emily with effect from the 28th October 2014 and every subsequent month thereafter.
- (iii) A monthly bond repayment in respect of the property situated at 21 Springbuck, 10 Channing Cross, White River, Mpumalanga in South Africa, inclusive insurance in respect of the property as well as municipality rates.
- (iv) School fees for the minor child at the Uplands College in White River, extramural activities as well as school uniforms, books, stationery and extra Afrikaans lessons.
- (v) Monthly instalments on the Nissan Duke motor vehicle, comprehensive insurance and reasonable maintenance. To that extent it is hereby ordered that the applicant shall keep the motor

vehicle in her possession pending finalisation of the divorce proceedings.

- (vi) A contribution to the applicant's legal costs in the amount of E15 000.00 (fifteen thousand emalangeni).
- (vii) No order as to costs of suit.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For First Respondent

Attorney Marisa Boxshall-Smith
Attorney John Henwood