



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 141/2017

In the matter between:

GCINAPHI SUSAN NXUMALO

Applicant

And

FORTUNE NXUMALO (PTY) LTD

Respondent

In re:

FORTUNE NXUMALO

Applicant

And

GCINAPHI S. NXUMALO

1st Respondent

**THE REGISTRAR OF BIRTHS, MARRIAGES
AND DEATHS**

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

**Neutral citation: *Fortune c and 2 Others (141/2017) [2017] SZHC 69 (21st
April 2017)***

Coram: M. Dlamini J.

Heard: 10th April 2017

Delivered: 21st April 2017

- **husband and wife - application for maintenance *pendent lite* - husband alleging that marriage terminated at both parties' families meeting in terms of Swazi law and custom procedure for dissolution of marriage – wife highly contesting any meeting ever taking place - court's hands are tight – to refuse to grant orders sought would be tantamount to pre-judging a highly contested matter which is the subject of the main application –**

- **it would be folly of me to decide the issue under interlocutory as it forms the basis of the main application, that is, whether a meeting did take place between Gcinaphi and Fortune's next of kin. To do so would render the main divorce proceedings nugatory as I would have pre-judged the matter.**

- **alternative prayers – applicant must show that new prayers are not inconsistent with main prayer and its case is made in the pleadings.**

Summary: In an interlocutory application pending divorce proceedings, the applicant, Gcinaphi Susan Nxumalo (Gcinaphi) seeks for a restraint order in respect of assaults or harassment against her person and eviction conduct perpetrated by the applicant, Fortune Nxumalo, (Fortune). Fortune has ferociously opposed the application.

Synopsis

- [1] It is common cause among the parties that on 19th April, 2008, they both contracted a marriage in terms of Swazi law and custom. Within two years of the marriage, their respective families had to converge following turbulences in the marriage. The two love birds reconciled, with Gcinaphi's adulterous affair having been condoned by Fortune. However, this state of affairs was short lived as around the eve of 2016, Gcinaphi was confronted with the same or similar allegations. In her founding affidavit before me, she deposed:

“6.2 I however admitted to the Respondent that his abusive conduct towards me and his failure to show affection towards me as his wife resulted in myself being tempted which lead to in me having kissed with another man.”

Fortune has since instituted divorce proceedings.

Gcinaphi's averments

- [2] Gcinaphi asserts that when Fortune lodged the divorce proceedings, she instructed her attorney to oppose it. Her attorney addressed a correspondence to Fortune's attorney which reflected:¹

“20th March 2017

*Mngomezulu Attorneys
Libandla Street, Mbandzeni House
4th Floor Suite 45
MBABANE.*

Dear Sir,

Re: FORTUNE NXUMALO / GCINAPHI NXUMALO & 2 OTHERS

- 1. Reference is made to the above matter.*

¹ See page 11 of the book of pleadings

2. *Our client has instructed us to advise you that she will not sign the amended agreement.*
3. *We have also been instructed to prepare and file the opposing affidavit so that the matter should now be resolved by the Court.*
4. *We therefore request that we be allowed to file our answering affidavit by Friday 31st March 2017. We will therefore advise the Court this Friday that the settlement negotiations have failed and the 1st Respondent will be filing her answering affidavit by the 31st March 2017.*

Your faithfully,

C. J. Littler & Co.

[3] It appears that this correspondence reached the hands of Fortune as Gcinaphi attests that Fortune brandished the said correspondence before her and enquired whether she was aware of its contents. Upon hearing that she was, all hell broke loose. She was assaulted by Fortune. Fortune further threatened to take away from her the motor vehicle she was using, their child and further throw her out of their matrimonial flat. She decided to approach the court for a speedy remedy against the threats. She brought the application *ex parte* and was granted an interim order returnable finally on 10th April 2017.

Fortune's *contra*

[4] In his answer, he objected to the manner in which Gcinaphi obtained the interim orders. However this was not argued as a point *in limine*. It was, however, taken up in the question of costs.

[5] On the merits, Fortune attested that Gcinaphi has been engaged in a continuous adulterous relationship. It was his deposition that

although he condoned the previous adultery, he did not in respect of the one in 2015. Further, following Gcinaphi's admission of the latter adultery, a meeting of the two respective families took place where it was finally resolved that the marriage between himself and Gcinaphi be dissolved. He then asserts:²

“5.1 I submit that the customary marriage between me and the applicant lawfully terminated by agreement of our respective families.”

[6] On the above averment, learned Counsel on behalf of Fortune submitted that as the marriage was dissolved when the two families met, Fortune was not obliged in law to render any shelter over the head of Gcinaphi, let alone provide her with a motor vehicle.

Issue

[7] Fortune resists the orders to provide shelter and a mode of transport to Gcinaphi on the basis that the Swazi law and custom's marriage was dissolved. The question for determination is whether *ex facie* there is a duty upon Fortune to maintain Gcinaphi *pendete lite* as provision for shelter and transport form part of maintenance.

Adjudication

[8] It is apposite to commence the determination of this matter by referring to the legal maxim: “*consensus, non concubitus, facit nuptias vel matrimonium,*” (it is the consent of the parties, not their

² at page 18 of *fn*¹

concubinage which constitutes a valid marriage).³ *In casu*, that consent which is an essential element in the contract of marriage is said to have been revoked in 2016 when the two families met. Gcinaphi however refutes such contention. She insist on the legal rights and obligations flowing from the *consensus* which was expressed in 2008.

[9] No doubt, our law is littered with a plethora of authorities to the effect that a wife, involved in divorce proceedings, may at anytime before finality of the divorce proceedings approach the court for maintenance *pendete lite*. Expressing this position of the law **Goldstein J** stated:⁴

“As soon as he divorces her, according to Jewish law, his obligation to maintain her will terminate but whilst he refuses or fails to do so it will be fully operative. His salvation lies in his own hands.”

[10] In the present case, Fortune asserted:

“14.1 I deny that the Applicant is my wife.

14.2 The Applicant’s perpetual adultery led to the termination of our marriage and I do not have any intention to reconcile with her whatsoever.”

[11] Gcinaphi disputed the above assertion in her reply. She contended:

*“31. AD PARAGRAPH 14
Contents therein are denied. I am still lawfully married to the Respondent and as such he has a legal obligation to provide me and his child, especially because I have custody of our child.”*

³ J.G. Plase et al “Brooms legal maxims” 8th ed at page 386

⁴ In *Amar v Amar* 1999 (3) SA 604 at 607

- [12] I must state from the onset that it would be grossly erroneous on my part to attempt to determine whether Fortune is a husband to Gcinaphi or rather whether the marriage between the parties was dissolved or subsist. It is trite that Fortune has instituted divorce proceedings seeking among others, a declaratory order for the dissolution of the marriage and expulsion of their marriage certificate from the records maintained by the Registrar of Births, Marriages and Deaths Registry. His ground for the declaration order is that his marriage to Gcinaphi was dissolved at the two families' meeting pursuant to the adultery allegations.
- [13] It is also common cause that Gcinaphi is highly contesting the divorce proceedings against her on the basis, *inter alia*, that there was never such a meeting of the two families. At the commencement of my judgment, I indicated that this is an interlocutory application in terms of Rule 43(1)(a).
- [14] From the above, it would be folly of me to decide the issue under interlocutory as it forms the basis of the main application, that is, whether a meeting did take place between Gcinaphi and Fortune's next of kin. To do so would render the main divorce proceedings nugatory as I would have pre-judged the matter.
- [15] That as it may, I am duty bound to decide on what should happen to Gcinaphi. Should I discharge the *rule nisi* for the reason that her ties with the Nxumalo family are under contestation? Should I confirm the *rule nisi*? Whether I discharge or confirm the rule, the question still remains, on what basis? Should I order that the divorce proceedings be heard as a matter of expediency? This is beyond my ability and capacity.

[16] Learned Counsel for Fortune urged the court to view Gcinaphi's application as one for a *mendumus van spoile*. From the pleadings before me it is clear that the matter falls under Rule 43(1)(a) which reads:

“Matrimonial Matters

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”

[17] It would be a dereliction of duty therefore to consider the application as one of spoliation.

[18] I consider that it is common cause that the parties entered into a valid marriage in 2008. They lived as husband and wife until the recent allegation of adultery. I appreciate that Fortune asserts that the marriage terminated sometime after 2015 when the two families met. I, however note that such averments are highly contested and therefore my hands in determining such an issue are tight. It is however my considered view that confirming the *rule nisi* would not prejudice Fortune in the same way as it would Gcinaphi if the rule is discharged. I say so because Gcinaphi, has the custody of the minor child who, besides Gcinaphi, is entitled to be provided with shelter. The interdict against assault and harassment was not contested.

[19] It was brought to the attention of this court by learned Counsel for Fortune, Mr. Sabelo Mngometulu that the motor vehicle and the flat occupied by Gcinaphi are both in the name of a third party namely Fortune Nxumalo (Pty) Ltd. This submission does not excuse Fortune from his obligation to provide accommodation and transport to his wife and child. I say this much alive to his defence that

Gcinaphi is no longer his wife. If this assertion is later found to be correct in the main application, his remedy for compensation or recovery of his financial losses lies elsewhere as he would duly be advised by his Counsel.

Further and alternative prayers

[20] Learned Counsel for Gcinaphi urged this court to grant two further prayers which were not expressed in the notice of motion. He pleaded with the court to order Fortune to return a motor vehicle or provide Gcinaphi with a motor vehicle.

[21] In support of his prayers, learned Counsel for Gcinaphi, Mr. Nkosinathi Manzini, referred the court to the judgment by my sister **Sey J**⁵:

*“[18] It is settled law that whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the plaintiff and is consistent with the primary relief claimed. See **Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (4) SA 87 (T) 92G-93E**, citing with approval **Queenstown Insurance Co. Ltd. v Banque Commerciale Africaine 1946 SA 272, 286**. Also in **Tsosane and Others v Minister of Prisons and Others 1982 (2) SA 55 (C) at 63 E-G** the following was said on the issue:*

“In any event and in so far as the relief sought may not have been appropriate or even legally competent, I would have been prepared to grant an appropriate order directed at the decision of the second respondent (assuming the merits of the matter justified this) under the prayer for further or alternative relief. Relief may be granted under this prayer where what is sought is not inconsistent with the substantive relief claimed and whether the basis for such relief has been laid in the supporting papers and dealt with in the answer of the respondent.”

⁵ in *Levy Shabangu v Twin Engineering* – High Court Case No. 3570/08 (unreported)

[22] He further urged the court to order Fortune to contribute the sum of E100,000-00 towards litigation costs. On whether the basis for the “*relief has been laid*”, learned Counsel for Gcinaphi referred the court to the founding affidavit as follows:⁶

“10.1 *The Respondent further threatened to assault me, and said that he is going to take the car I was using and he demanded that I hand the keys to him, I refused.*”

[23] Asked on his failure to include a prayer for the return of the motor vehicle, learned Counsel pointed out that when the present application was lodged, Fortune had threatened to take the motor vehicle away. However, during the proceedings before the close of pleadings, Fortune carried out his threats. In her reply, she asserts:

“5. *The Respondent also continued to demand that I return the motor vehicle I was using for my personal use, and also used for taking our child to school.*

5.1 *The respondent came to the flat and grabbed by force the car keys and removed the key from the ignition switch whilst me and sister were about to drive in the car with child.*

5.2 *He took the car keys away with him, leaving me with the child without a mode of transport. He took the car keys without a court order authorizing him to do so.*”

[24] The above averments were not disputed on behalf of Fortune. It is my considered view that the relief for the return or provision of a motor vehicle is not substantially inconsistent with the relief claimed. It forms part of the maintenance *pendete lite* and therefore stands to be granted as it also finds support in the application proceedings.

Contribution towards litigation costs

⁶ *supra*

[25] Gcinaphi deposed in her replying affidavit:⁷

“36. I am further requesting the court to direct the respondent to pay or contribute to my attorney’s fees as I do not have the means to settle the fees on my own. The Respondent is a businessman who runs a successful business enterprise and he is financing this litigation through his business. I estimate the costs to exceed E100,000-00 (One Hundred Thousand Emalangeni), looking at the several court applications that have been launched by the respondent to frustrate me as they are all baseless. The Respondent should therefore be directed to contribute a sum of E100,000-00 towards my costs.”

[26] Obviously this is a relief standing outside maintenance *pendete lite*. Rule 43(1) makes it a distinct matter from maintenance *pendete lite*. It would be highly prejudicial to Fortune who all along came to court prepared to defend a matter on maintenance *pendete lite* and at the last stage of the closing of pleadings is slapped with a prayer for contribution towards the costs of *pendete lite* of matrimonial action. The justice of the matter calls for a decline of this prayer. The applicant has a right to lodge a similar application anytime before finality of the main application

Costs

[27] Gcinaphi has also prayed for costs of the interlocutory application. She further prays that the costs should be at a higher scale following Fortune’s unbecoming conduct of forcefully taking the motor vehicle while the present application was pending and for taking the law into his own hands by possessing the flat without a court order. Fortune on the other hand submitted that upon service upon him of the interim order, he complied by restoring occupation. There was no

⁷ see page 37 para 36 of the book of pleadings

interim order calling upon him to refrain from taking away the motor vehicle.

[28] He further argues that had Gcinaphi instructed her lawyer to first call and discussed the matter with his lawyer who was already on record following the main application, he would have simply restored shelter and prevented the present application. This submission clearly shows that on the overall, Fortune is not opposed to providing maintenance. It was pleaded on behalf of Fortune that if the court is inclined to grant Gcinaphi cost of suit, such should be at ordinary scale.

[29] Indeed the courts do discourage litigants from taking the law into their own hands by mulcting them with a high scale costs order. However, in the totality of the submissions herein, costs are granted at ordinary scale.

[30] In the result, the following orders are entered:

1. The *rule nisi* granted by this court is hereby confirmed in the following manner:
 - 1.1 Respondent is hereby interdicted and restrained from assaulting and/or harassing the applicant;
 - 1.2 Respondent is hereby interdicted from evicting applicant from the flat No. Lot 554 Ngwane Park Township, Manzini region; alternatively
 - 1.3 Respondent is hereby ordered to provide accommodation of similar equal condition to the applicant; pending matrimonial proceedings under Case No. 141/2017;

1.4 Respondent is hereby ordered to return the motor vehicle previously used by applicant; alternatively

1.5 Respondent is hereby ordered to provide applicant with transport of similar equal condition as motor vehicle under 1.4 herein; pending matrimonial proceedings in this court.

2. Respondent is ordered to pay costs at ordinary scale.

3. Applicant's prayer for contribution towards costs pending matrimonial proceedings is hereby dismissed.

A handwritten signature in black ink, appearing to be 'M. Dlamini', written over a horizontal dashed line.

**M. DLAMINI
JUDGE**

For Applicant: N. Manzini of C. J. Littler & Co.

For Respondent: S. Mngomezulu of Mngomezulu Attorneys