IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 55/11

In the matter between:

MVUSELELO FAKUDZE **APPELLANT**

AND

MILLICEENT NOMALUNGELO FAKUDZE (NEE NGWEKAZI) **RESPONDENT**

Neutral citation: *Mvuselelo vs Millicent N. Fakudze (55/11) [2012] SZSC (31 May 2012)*

CORAM: A.M. EBRAHIM JA,
S.A. MOORE JA,
M.C.B. MAPHALALA JA

Heard : 2nd May 2012
Delivered : 31st May 2012

Summary

Civil Appeal – maintenance *pendete lite* in terms of Rule 43 of the High Court Rules – whether such order are appealable without leave of court in terms of section 4 of the Court of Appeal Act – the test applicable discussed – such orders not subject to section 4 of the Court of Appeal Act.

JUDGMENT

MAPHALALA J.A.

[1] This is appeal against the judgment of *Justice Sey* delivered on the 19th December 2011 in the court *a quo.* The respondent lodged an application in the court *a quo* in terms of Rule 43 for an order directing the appellant to pay maintenance to E1 500.00 (one thousand five hundred emalangeni) in respect of the respondent pending finalization of the main action. The respondent further sought an order directing the appellant to pay E5 000.00 (five thousand emalangeni) per month in respect of the maintenance of their two minor children; she further sought an granting her custody of the two minor children, namely Bonginkosi Fakudze and Siphesihle Fakudze

[2] The parties concluded a marriage on the 3rd February 2002 in accordance with Swazi Law and Custom at the parental homestead of the appellant. There is a dispute between the parties whether or not the marriage still subsists; this is the issue in the pending main action. However, it is not in dispute that the parties now live separately from each other.

[3] She alleged that after their marriage, they lived together with the appellant and their minor children in a rented townhouse in Mbabane; and, that the appellant subsequently requested that she resigns from her job to take care of their family.

[4] She further alleged that the appellant catered for all their needs with the minor children inclusive of groceries, medical attention, toiletries and other personal needs; and that she also enjoyed the use of a family car for shopping, transporting the minor children to and from school as well as entertainment on weekends.

[5] She alleged that in November 2006 the respondent took her to his parental home at Nhlambeni on the pretext that he wanted them to sort out their marital problems; she argued that their conflict with the appellant was caused by his extra-marital relationship with another woman called Thulisile Phiri, and that she was against their relationship. It is common cause that the appellant subsequently married her in 2002 in terms of Swazi Law and Custom. I should mention at this that polygamy is lawful in Swaziland in respect of a men married in accordance with Swazi Law and Custom.

[6] She also alleged that at his parental homestead she was made to stay in a house together with her second minor child; the appellant and their first born child stayed with his family in the main house. His family at his instance decided to take her back to her parental house together with her belongings on the 31st December 2006 on the pretext that they did not want them to hurt each other because of their differences; a delegation consisting of his cousins, sisters and other people accompanied her.

[7] The respondent alleged that since she was returned to her parental home the appellant has been failing to maintain her and the two minor children adequately, and that he has failed to establish a home for them; hence, she was leasing an apartment. Her monthly requirements amount to E5 800.00 (five thousand eight hundred emalangeni) and include groceries, cosmetics, rent, transport, electricity and water as well as medical aid. The children's monthly expenses amount to E8 100.00 (eight thousand one hundred emalangeni) and include clothes, food, school transport for the first child Bonginkosi, helper for both children, entertainment, school uniform for Bonginkosi, accommodation, water and electricity.

[8] She conceded that the appellant pays a monthly maintenance of E1 000.00 (one thousand emalangeni) per child directly to her; she argued that such maintenance was paid inconsistently and was insufficient. She further conceded that she has recently been employed but that she was not earning enough money to cater for herself and the two minor children who reside with her. She argued that the appellant has a duty to maintain her as his wife as well as their minor children; she argued that he was financially able to do so and still be left with enough money to cater for his needs.

[9] Subsequently and before this application could be heard; the respondent lodged an application to amend her earlier application to increase her maintenance to E10 000.00 (ten thousand emalangeni) per month, and that the said amount should exclude school fees for the minor children; she further sought an order directing the appellant to pay all medical expenses for herself and the minor children. She also sought an order directing the appellant to contribute towards her legal fees in an amount of E95 000.00 (ninety five thousand emalangeni). The claim of maintenance for the minor children in the amount of E5 000.00 (five thousand emalangeni) was not amended; similarly, the prayer for custody of the minor children was not affected.

[10] The respondent is currently employed by the Swaziland Environmental Authority and gets a gross salary of E10 062.50 (ten thousand and sixty two emalangeni fifty cents), and after the total deductions of E6 897.88 (six thousand eight hundred and ninety seven emalangeni eighty eight cents), she is left with a net pay of E3 164.62 (three thousand one hundred and sixty two emalangeni sixty two cents).

[11] The application in terms of Rule 43 of the High Court Rules was opposed by the appellant. He argued *in limine* that the matter was

improperly placed before the court and should be dismissed with costs for two reason: first, that the respondent had failed to disclose whether or not there is a pending matrimonial action between the parties in any court; secondly, that he marriage between the parties was solemnised in terms of Swazi Law and Custom, and that a dissolution of that marriage is not pending before any court.

[12] On the merits the appellant argued that the papers filed before court by the respondent did not allege that there was a pending matrimonial action before any court; he further argued that the marriage between the parties was dissolved in January 2007. He denied that he requested the respondent to resign from her employment; and, he argued that she was forced to resign from her employment after she had quarrelled with her employers.

[13] He denied that the respondent transported the minor children to and from school; he alleged that he paid for a kombi which transported the children.

[14] He further denied that there is an extra-marital affair in a marriage solemnised in accordance with Swazi Law and Custom allegedly because such marriage allows for polygamy. He argued that he took the respondent to his parental home as part of her marital duties as a wife married under Swazi Law and Custom; he denied that the underlying reason was to sort out their differences.

[15] He argued that the respondent was returned to her parental home because the marriage between them and been dissolved. He further argued that he maintains the minor children adequately, and, that he has no legal duty to maintain the respondent in light of the dissolution of the marriage.

[16] He also argued that the application for custody was brought out of malice since the respondent has always had custody of the minor children; and, that it was agreed during the dissolution of the marriage that she would have custody of the minor children.

[17] The matter was referred to oral evidence. The respondent reiterated her evidence in the Founding Affidavit; she further told the court that they started staying together with the appellant in 1999 after the birth of their first child. During that time, she was working for UNITRANS and he was working for Price Waterhouse Coopers, an accounting firm.

[18] She told the court that in 2005 the appellant was in the United States of America, and, he sent her an electronic mail asking her to stop working because he didn't want the minor child to be raised by a domestic worker; he stated that children raised by maids are subjected to unbearable traumas. He promised that he would look after her after she had resigned from work and that he would give her the financial independence that she had always enjoyed. He undertook that when the younger child was three or five years and attending pre-school, he would establish a business for her to operate. The electronic mail was subsequently admitted as part of her evidence and marked exhibit "C".

[19] She further told the court that she accepted his proposal and resigned form her employment after her employer has asked her to reconsider her resignation. At the time they were both staying at a leased apartment in Mbabane; and, that he subsequently took car of all household expenses including groceries, rental water and electricity bills, school fees for the minor children, her clothing and that of the children, transport for the children to school, her cosmetics as well as medical expenses.

[20] She told the court that when she resigned from her place of employment in 2005, she was pregnant with their second child, and, that her salary was E4 800.00 (four thousand eight hundred emalangeni) per month. Notwithstanding his promise to give her an allowance he did not. In addition she told the court that the appellant subsequently removed her as a beneficiary of the medical aid at SwaziMed; her minor children were still beneficiaries but under the appellant's new wife as the principal member.

[21] The respondent further told the court that when they left the rental apartment in Mbabane, the appellant informed her that elders in his family want her to stay at his parental home; and that she was not supposed to stay in the main house with his family and she was staying in a flat outside the main house with the young baby. In addition he would occasionally ask her what she was doing at his parental home; this happened until his family ordered her to go back to her family in December 2006 on the pretext that they don't want them to hurt each other since they were no longer in good terms. Incidentally the delegation that brought her home told her uncle upon arrival that they did not know why she was being returned home. She was only allowed to take with her the baby because he was breastfeeding; she was told to leave behind the elder child.

[22] She stayed with her uncle and his family for a month in 2007; thereafter, she was forced by circumstances beyond her control to relocate to where her mother was staying. However, her siblings did not accept her, and she was forced to move with her sister at her rented apartment at Mobeni in Matsapha. It was during that period that the appellant brought the elder child with his belongings; this was in the course of the third term of a school calendar. The appellant had removed him from Usutu Forest Primary School in Mhlambanyatsi and registered him at

Khanyisile Primary School in Manzini; he was doing Grade 3. The appellant had not discussed the transfer of the child with her to the new school; and the year was about to end. She told the court that the child was not happy at the new school and that she had to take her back to Usutu Forest Primary School.

[23] In addition to paying school fees to the school, the appellant was also paying E1 000.00 (one thousand emalangeni) directly to the respondent; this amount was subsequently increased to E2 000.00 (two thousand emalangeni) after the intervention of the Supreme Court.

[24] In February 2008, she was employed as a receptionist by the Swaziland Environmental Authority; initially her salary was E6 700.00 (six thousand seven hundred emalangeni) and it was later increased to E8 700.00 (eight thousand seven hundred emalangeni).

[25] She argued that the appellant introduced the children to the current lifestyle because he could afford, and, that the children should not be subjected to a lower standard of living as a result of his current lifestyle. She insisted that the children should maintain the same lifestyle.

[26] She stated that her needs are as follows:

- Groceries inclusive of lunch boxes for the children when going to school E2 300.00
- Transport for groceries E 120.00
- School taxi for attending school Meetings E1 000.00
- Photo shoots and school trips E1 500.00
- Extra-mural activities including Swimming and bike riding E1 000.00

- Medical aid for children E1 000.00
- Rent E3 600.00
- Electricity and water E1 000.00
- Domestic worker E 800.00
- Full burke E 560.00
- Birthday parties E 500.00
- Children's entertainment E1 000.00
- **Total** **E15 180.00**

Her requirements

- Respondent's therapy E 200.00
- Respondent's toiletry and cosmetics E1 000.00
- Respondent's other accounts E1 000.00
- Respondent's cellphone expenses E 900.00
- Respondent's medical aid E1 000.00
- **Total** **E5 100.00**

[27] The total amount claimed is now E18 480.00 (eighteen thousand four hundred and eighty emalangeni); however in the Notice of Motion, she claimed payment of E10 000.00 (ten thousand emalangeni) for the maintenance of her two minor children, E11 050.00 (eleven thousand and fifty emalangeni) for school related expenses payable directly to the school as well as E95 000.00 (ninety five thousand emalangeni) being a contribution towards her legal fees.

[28] The respondent argued that the applicant could afford the amount claimed because he has a better paying job; she told the court that previously he was a partner at Price Waterhouse Coopers, and, that he was now working for ABSA as Chief Financial Officer. However, she denied knowledge of his monthly earnings.

[29] She further asked the court for an order directing that a medical aid be made for the children in which she would be the principal member; she disclosed that the current arrangement in which the children are beneficiaries and appellant's new wife is the principal member is problematic because when asked by medical doctors about the details and personal particulars of the principal member she is unable to provide them. She explained that due to these problems, she was forced to have her own medical aid because other clinics and doctors refused to accept the medical aid car in which appellant's wife was the principal member.

[30] In his evidence in-chief, the appellant conceded that he was married to the respondent in 2002 in accordance with Swazi Law and Custom; and, that he only stayed with her from 2002 to 2006 when the marriage terminated due to irreconcilable differences between them. However, it is common cause that the question with regard to whether or not the marriage still subsists is a subject to a pending civil case before the court *a quo.*

[31] He testified that he pays the following monthly expenses in respect of the minor children:

▪ Medical aid	E2 000.00
▪ School fees	E2 975.00
▪ School transport	E 775.00
▪ School uniform	E 500.00
▪ Clothes	E2 500.00
▪ Food received by Respondent monthly	E2 000.00
▪ Miscellaneous	E 300.00
▪ **Total**	**E11 050.00**

[32] The appellant argued that the maintenance that he pays was adequate and that he would not be in a position to pay the amount of money demanded by the respondent. He told the court that he earns a salary of E48 322.30 (forty eight thousand three hundred and twenty two emalangeni thirty cents) and that his total expenditure inclusive of the E11 050.00 (eleven thousand and fifty emalangeni) paid in respect of the minor children amount to E46 425.00 (forty six thousand four hundred and twenty five emalangeni).

[33] Under cross-examination, he conceded that he never paid her a personal allowance as he had promised. Even though he denied asking her to resign form her employment, it was evident not only from the electronic message that he had written to her but from the cross-examination that he did ask her to resign from her employment. He further conceded that the respondent was at liberty to use the family car. Equally, he conceded that their marriage has not yet been annulled and that the marriage certificate had not been expunged from the Registry of Births, Marriages and Deaths; he conceded that pending the nullification of their marriage, he was under an obligation to support the respondent. Similarly, he conceded that he was now earning double the salary he earned at Price Waterhouse Coopers with a gross of E94 183.80 (ninety four thousand one hundred and eighty three emalangeni eighty cents)

[34] He told the court that he pays E8 000.00 (eight thousand emalangeni) a month towards his credit car to purchase household items and clothes for himself, his new wife as well as his other son Thami Fakudze; however, annexure K2 showing his monthly expenses indicates E3 500.00 (three thousand five hundred emalangeni) for groceries in addition to the money to his credit card.

[35] *Mabuza J* who heard the application in terms of Rule 43 under case No. 788/2008 ordered the appellant to pay the interim maintenance as sought by the respondent without any evidence to support the amounts claimed, the need for maintenance as well as the financial circumstances of the parties. The appellant was dissatisfied with her judgment and appealed her decision on that basis; the Supreme Court allowed the appeal on the 31st March 2011 and further referred the matter back to the court *a quo* for hearing to determine the quantum of maintenance to be paid by the appellant.

[36] *Justice Sey* heard the matter in the court *a quo* as directed by the Supreme Court on the 6th and 12 December 2011 and delivered her judgment on the 19th December 2011. Her Ladyship heard evidence on the income of the parties and their expenses, the needs of the minor children and the ability of the parties to maintain the minor children.

[37] Her Ladyship directed that pending finalization of the dissolution of the marriage, the appellant should pay monthly the following

(a) School fees of E2 975.00 (two thousand nine hundred and seventy five emalangeni) to be paid directly to the school for the two minor children
(b) E775.00 (seven hundred and seventy five emalangeni) in respect of school transport to be paid directly to the school.
(c) E500.00 (five hundred emalangeni) in respect of uniforms to be paid directly to the school.
(d) E2 000.00 (two thousand emalangeni) for the medical aid of the two minor children to be paid directly through his membership of Swaziland Medical Aid Fund.
(e) The aforesaid aid should henceforth reflect the name of the respondent as the principal member.

(f) The sum of E10 000.00 (ten thousand emalangeni) to cover reasonable accommodation, groceries, feeding, personal wearing apparels and other school amenities for the two minor children.

(g) E4 500.00 (four thousand five hundred emalangeni) monthly maintenance for the respondent.

(h) The payments (a) to (g) to be backdated to the 1st September 2011.

[37] She further ordered the appellant to pay a contribution towards the respondent's cost in the sum of E50 000.00 (fifty thousand emalangeni).

[38] The effect of the judgment of the court a quo is that the appellant would continue to pay monthly the amount of E11 050.00 (eleven thousand and fifty emalangeni) for the school fees of E2 975.00 (two thousand nine hundred and seventy five emalangeni), school transport of E775.00 (seven hundred and seventy five emalangeni), uniforms of E500.00 (five hundred emalangeni). All school-related expenses were payable directly to the school. The medical aid of E2 000.00 (two thousand emalangeni) was payable to Swazimed. In addition the appellant was ordered to pay E2 500.00 (two thousand five hundred emalangeni) for clothing. E2 000.00 (two thousand emalangeni) contribution for food and miscellaneous expenses of E300.00 (three hundred emalangeni); these would be payable to the respondent. In addition the court *a quo* added E5 200.00 (five thousand two hundred emalangeni) maintenance of the minor children to cover accommodation and other school related expenses; this amount is also payable directly to the respondent.

[39] It is common cause that the respondent claimed E3 600.00 (three thousand six hundred emalangeni) for rental. However, the current rental for the apartment where she lives with the two minor children is E2 600.00 (two thousand six hundred emalangeni); no evidence has

been advanced by the respondent why more money for rental is required.

[40] The court *a quo* further ordered the appellant to pay E4 500.00 (four thousand five hundred emalangeni) as monthly maintenance *pendete lite* for the respondent; in doing so the court did not specify what the amount would cater for what expenses. In her application the respondent claimed E5 100.00 (five thousand one hundred emalangeni) in respect of E200.00 (two hundred emalangeni) for therapy; toiletries and cosmetics E1 000.00 (one thousand emalangeni), other accounts of E1 000.00 (one thousand emalangeni), medical aid of E1 000.00 (one thousand emalangeni), cellphone costs E900.00 (nine hundred emalangeni) as well as E1 000.00 (one thousand emalangeni) for entertainment.

40.1 The court *a quo* correctly disallowed the claim for therapy because there were no supporting documents produced by the respondent to justify the amount. The respondent did not bother to justify the "other accounts" of E1 000.00 (one thousand emalangeni). The amount of E1 000.00 (one thousand emalangeni) for toiletries and cosmetics is excessive and an amount of E500.00 (five hundred emalangeni) would be reasonable. The medical aid of E1 000.00 (one thousand emalangeni) is reasonable in light of the same amount paid in respect of each child. The amount of cellphone expenses is also excessive and could also be reduced to E450.00 (four hundred and fifty emalangeni); and entertainment reduced to E500.00 (five hundred emalangeni).

[41] The appellant has objected to certain items which he viewed as luxuries. He suggested that groceries of E2 300.00 (two thousand three hundred emalangeni) per month were excessive and suggested an amount of

E1 500.00 (one thousand five hundred emalangeni); this amount is not excessive considering the lifestyle of the parties and their children when they stayed together. The objection to the amount of E1 000.00 (one thousand emalangeni) per month for school taxi fees when she attends school activities is justified because tht is seldom done; the evidence of the appellant which had not been disputed is that such activities are done at least twice a year. An amount of E500.00 (five hundred emalangeni) monthly would be reasonable.

[42] Similarly, the objection of E1 500.00 (one thousand five hundred emalangeni) in respect of the children's daily needs is justified in view of the evidence that such activities are not done frequently; the amount of E800.00 (eight hundred emalangeni) monthly suggested by the appellant is appropriate.

[43] The respondent had not adduced any evidence that the minor children participate in the extra-mural activities of bike riding and swimming; it is logical to reduce this item by half to E500.00 (five hundred emalangeni) per month in view of the possibility that any of the children may wish to participate in the extra-mural activities in future.

[44] The appellant had adduced evidence that he purchased clothes for the children quarterly when they are on vacation with him in South Africa at a total cost of E2 500.00 (two thousand five hundred emalangeni). He told the court that the children always chose clothes of a particular brand which are expensive and not readily available in Swaziland; it is hard to believe that the clothes worn by the children are not available in Swaziland. However, an amount of E2 500.00 (two thousand five hundred emalangeni) quarterly for both children suffices and no evidence has been advanced to justify reducing the amount from what obtains currently. In light of this evidence it would not be in the best

interest of the children to reduce the amount of clothing from E2 500.00 (two thousand five hundred emalangeni) to E800.00 (eight hundred emalangeni).

[45] The appellant objected to payment of E500.00 (five hundred emalangeni) per month in respect of the children's birthday; he viewed this amount to be excessive and suggested an amount of between E1 500.00 (one thousand five hundred emalangeni) to E2 000.00 (two thousand emalangeni) per year. He further argued that this item is discretionary because the children do not need to celebrate their birthdays every year. It is normal for children born of people of the status of the appellant to celebrate their birthdays every year and invite friends for the occasion. The appellant does not deny that this was the lifestyle of the children at the time he was staying with them. An amount of E4 200.00 (four thousand two hundred emalangeni) per year for the two children would be reasonable; this mans that the appellant would pay E350.00 (three hundred and fifty emalangeni) per month in respect of both children.

[46] I do not agree with the appellant that the amount of E1 000.00 (one thousand emalangeni) for entertainment is a duplication since it involves movies, outings, funfair and air shows; these items fall under entertainment as opposed to extra-mural activities such as swimming and bike-riding. However, an amount of E500.00 (five hundred emalangeni) would suffice. I agree with the learned judge in the court *a quo* that the meaning and scope of the term "maintenance" is a duty of support which extends to accommodation, food, clothes, medical aid and other necessities of life on a scale in line with the social position, lifestyle and financial resources of the parties. I further agree with the learned judge that the maintenance of children embraces more than these necessities and include education. For this proposition, she quoted page

three of the book of entitled Handbook of the South Africa Law of Maintenance by Lesbury Van Zyl.

[47] During the hearing of this appeal, the appellant filed an application for condonation for the late filing of the Record in terms of Rule 16 and 17 of the Supreme Court Rules; he further sought an order placing the appeal on the roll for hearing by the Supreme Court during the May 2012 session. The appeal was filed on the 21st December 2011; and, in terms of Rule 30 of the Supreme Court Rules, the appellant had to tile the record within two months pursuant to the noting of the appeal.

[48] Rule 30 provides the following:

> "30. (1) The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct….
>
> (4) Subject to rule 16 (1), if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned….
>
> (9) Upon receipt of the Record, the Registrar shall transmit one copy thereof to the Judge President who will thereupon assign a date for the hearing of the appeal not less than sic weeks ahead and notify the Registrar thereof. Upon receipt of such notification the Registrar shall immediately inform the parties to the appeal of such date."

[49] The application in terms of Rule 30 (4) is subject to Rule 16 (1) which provides the following:

> "16. (1) The Judge President or any judge of appeal designated by him may on application extend any time prescribed by those rules:
> Provide that he Judge President or any such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision.
>
> (2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted."

[50] Rule 17 provides the following:

> "The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practise and procedure as it considers just and expedient."

[51] The reasons advanced for the delay are two-folded; first, that the appellant's attorneys were of the view that the record or appeal would not be required and that the pleadings would suffice; and, that they only realized their misjudgement on the 16th March 2012. This reasoning is misconceived in light of the peremptory provisions of Rule 30.

[52] Secondly, that after they had realised their mistake they had difficulty in tracing and obtaining the recordings. Again this problem could have

been averted if the appellant had prepared the record timeously after the noting of the appeal; this explanation of the delay in not convincing and it borders on a lack of diligence on the part of the attorneys for the appellant.

[53] The appellant further argued that the degree of non-compliance is not substantial when considering the date on which the record was to be filed. I agree with appellant's counsel that the period in which the High Court and Supreme Court was on recess should not be counted for purposes of the "dies". It is the Chief Justice as head of the Judiciary who determines the sitting of both courts as well as the recess. See section 7 of the High Court Act and Rule 3 of the Court of Appeal Rules of 1971. In 2011 the Chief Justice determined that the Supreme Court would be on recess from the 17th December 2011 to the 16th January 2012; hence, the record had to be filed on the 16th March 2012, but it was only filed on the 4th April 2012.

[54] In computing the number of court days, the definition section of the High Court Rules provides that a court day means any day other than a Saturday, Sunday or public holiday and that only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court.

[55] The appeal is important because it relates to the maintenance of the respondent as well as the minor children; they were awarded a substantial variation by the court a quo which has been stayed pending finalization of the appeal. It is in the interest of all parties involved and in particular the minor children that the matter reaches finality.

[56] The prospects of success are good in respect of the deductions maintenance amount which has been reduced accordingly in accordance

with the social position, lifestyle as well as the financial resources of the appellant. It is in respect of the prospects of success eluded above that the application for condonation is granted.

[57] It is trite law that an application for condonation for non-compliance with the rules of Court should be made immediately as soon as the defaulting party realises that it is required. The rules require the party to show good cause and/or sufficient cause to succeed in the application for condonation; he must at least furnish an explanation for his default and furnish an explanation for his default. Other factor are the degree of non-compliance, the sufficiency of the explanation offered, the importance of the case as well as the prospects of success on the proposed action:

- **Minister of Agriculture and Land Affairs v. Rance (PTY) Ltd 2010 (4) SA 109 (SCA) at para 36**
- **Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at para 10**
- **Unitrans Swaziland Limited v. Inyatsi Construction Ltd Appeal Case No. 9/96 at pages 11-12 (unreported)**
- **Okh Farm (PTY) Ltd v. Cecil John Littler N.O. and Four Others Appeal case No. 56/08 at page 15 (unreported)**

[58] The respondent argued during the hearing that a decision made by the Court *a quo* under Rule 43 (1) is interlocutory and therefore not appealable without leave of the court. For this proposition the respondent relied on the judgment of this court in the case of *Malcos Bhekumthetho Sengwayo v. Thulisile Simelane* and others appeal case No. 5/11 at pages 8-9. In that case the appellant has brought an application seeking an order declaring the marriage in community of property entered between the parties to be declared null and void,

directing the Registrar of Birth and Marriages and Deaths to cancel all entries in the Marriage Register concerning the above marriage, as well as custody of the minor children to be granted to the applicant. The respondent counter-claimed for damages and maintenance *pendete lite;* she further sought a contribution to her legal costs. The court *a quo* granted orders in favour of the respondent *pendete lite* in respect of the maintenance. On appeal two issues were raised for determination, namely: (1) the first appeal was filed out of time; (2) whether the orders appealed against were interlocutory, and if so, whether an appeal lies to this court without leave.

[59] The court relied on section 14 of the Court of Appeal Act and concluded that the Orders appealed against were merely interlocutory and that the appellant was obliged to seek the leave of court. Section 14 provides as follows:

> **"14. (1) an appeal shall lie to the court of appeal-**
>
> **(a) From all final judgments of the High Court; and**
>
> **(b) By leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only."**

[60] I should mention that part of the counter-claim granted by the court concerned interdicts *pendete lite*. The first order was that the main proceedings pending before this court relating to annulment of the marriage be stayed and determined simultaneously with the counter-claim relating to damages. The second order was that the first respondent should be interdicted from transferring and /or encumbering four immovable properties pending the final determination of the main proceedings as well as the counter-claim relating to damages. The third order was that the first respondent should be ordered to pay maintenance

pendete lite of E3 000.00 (three thousand emalangeni) per month to the applicant.

[61] The Sengwayo case is distinguishable from the present case; in addition to the maintenance order *pendete lite*, which had a final and definitive effect on the main action; the court further ordered interlocutory interdicts *pendete lite*; which were simple and/or purely interlocutory interdicts. The appellant should have been allowed to appeal the maintenance order as of right because it is final and definitive in nature; however, the other orders were subject to section 14 of the Court of Appeal Act because they were simple or purely interlocutory interdicts.

[62] In South Cape *Corporation v. Engineering Management Services* 1977 (3) SA 534 (AD), the appellant was defendant in an action instituted in the court *a quo* by the respondent, and, the court gave judgment in favour of the respondent and ordered the appellant to pay the respondent the sum of E111 700.50 (one hundred and eleven thousand seven hundred emalangeni fifty cents) together with interest and costs. The appellant noted the appeal which had the effect of suspending execution of the judgment of the trial court. The respondent made an application to the same division for leave to execute the judgment subject to furnishing security *de restituendo*; this application was opposed by the appellant. A full bench of Witwatersrand Local Division made an order granting leave to execute subject to the furnishing of security *de restituendo*.

[63] A point *in limine* had to be determined whether or not the order of the court a *quo* granting leave to execute was interlocutory; the basis of the appeal was the legislative provision that no interlocutory order shall be subject to appeal save with the leave of the court which made the order.

His Lordship Justice Corbett who delivered the unanimous judgment of the appellate Division outlined the test as follows at pages 549 to 551:

> "(a) …the term interlocutory refers to all orders pronounced by the court, upon matters incidental to the main disputes preparatory to or during the progress of the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those known as "simple" (or purely) interlocutory orders or interlocutory order proper, which do not….
>
> (b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory orders….Final orders including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation….
>
> (c) The general test as to whether an order is a simple interlocutory one or not…a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any portion of the issue in the main action or suit which amounts to the same thing unless it irreparably anticipates or precludes some of relief which would or might be given at the hearing…
>
> (d) In certain earlier cases the view had been expressed that a relevant criterion was whether the order, when given effect to or executed, might cause a party damage or prejudice irreparable in the final judgment; if it did, then it was purely interlocutory….

(e) At Common Law a purely interlocutory order may be corrected, altered or set aside by the judge who granted it at any time before final judgment, whereas as order had final and definitive effect, even though it may be interlocutory in the wide sense, in *res judicata*."

[65] *His Lordship Gubbay CJ* in the case of *Accutt v. Accutt* 1990 (4) SA 873 (ZSC) at 874-876 stated the following:

"There are two kinds of interlocutory orders. Some have the effect of a final and definitive sentence which cannot correctly express the decision of the court be altered by the same tribunal which pronounced it. Others do not. There are known as simple interlocutory orders. They stand on a different footing and are subject to variation. It is only the latter which the lawmaker intended to be unappealable without leave….

In Pretoria Garrison *Institutes v. Danish Variety Productions (PTY) Ltd* 1948 (1) SA 839 *Schreiner JA*, with the concurrence of the majority of the court on this issue stated the test to be that a preparatory or procedural order is a simple interlocutory order unless it disposes of any issue or any portion of the issue in the main action or which amounts to the same thing unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing. Conversely put, the question to be posed is: does the order bear directly upon and, in any way affect, the decision in the main suit?"

[66] In *Bashford v. Bashford* 1957 (1) SA 21 (N) at 24 A-D, *His Lordship Holmes J*, as he then was, stated the following:

"There are two kinds of interlocutory orders. Some have the effect of a final and definitive sentence, others do not….the latter…unappealable

> without leave…. The test for distinguishing between the two is whether the order is such as to dispose of any issue of any portion of the issue in the main action or suit.
>
> …. Interlocutory matters arise during the course or pendency of an action and are incidental to the main dispute …. An order as to custody *pendete lite* is not interlocutory at all because it concerns a separate issue which has no bearing, either procedurally or substantively, upon the issue at the trial. Superficially, such orders may seem to resemble interdicts *pendete lite*, which have been regarded as interlocutory. But the reason why the latter are interlocutory is that they are incidental to the main dispute, their object is usually to ensure the effectiveness of the trial judgment."

[67] In conclusion the order in the present cases is not interlocutory because it concerns a separate issue, the amount of maintenance payable for the minor children and the respondent pending the dissolution of the marriage, and not after the dissolution of the marriage. Such an order once made will be definitive and final in nature and not designed to secure the effectiveness of the trial judgment. Furthermore, during the trial of the main action the court *a quo* will not be entitled to reconsider its award of maintenance *pendete lite*, although it may, simultaneously with the dissolution of the marriage, grant maintenance for each minor child in an amount different from that awarded *pendete lite*.

[68] Furthermore, even after the judgment in the main action, the respondent would still be entitled to execute for the recovery of arrear maintenance not paid prior to the judgment on the basis of the order granted *pendete lite*. It is necessary to emphasise that maintenance *pendete lite* is intended to afford temporary relief, and the court makes a value judgment based on the income of the parties; the purpose of maintenance p*endete lite* is to allow the continuation of a comparable

standard of living to that formerly enjoyed. *His Lordship Van Den Heever J in Micklem v. Micklem* 1988 (3) SA 259 CPD at 262 H stated the following:

> "The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs. What she is entitled to, is to maintain the standard of living to which she was accustomed, not to increase that.
>
> A wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the court nor all costs incurred to-date…. She should be enabled adequately to place her case before the court."

[69] *His Lordship Ogilvie Thompson J* in the case of *Van Riper v. Van Ripen* 1947 (4) SA 634-638 dealt with a contribution towards the costs of a pending matrimonial action in the following manner:

> "…the application for a contribution towards costs essentially remains what its name indicates; it is the making available of funds to the applicant for the purpose of enabling her adequately to place her case before the court…. The court has never under this contribution procedure provided the applicant's attorney with complete advance cover for all his fees."

[70] At page 639 *His Lordship* further held that a contribution to costs lies in the discretion of the court which could determine not only the amount but whether or not to grant the order. He continued on the same page and stated the following:

> "In the exercise of that discretion the court should … have the dominant object in view of that, having regard to the circumstances of

> the case the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before court…. The paramount consideration is that… the court should have as its object the determining of an amount which in its discretion it considers necessary for the wife adequately to place her case before the court. Before that it is … undesirable to attempt to state anymore specific rules. In matters of discretion it is not desirable to attempt to propound detailed rules."

[71] *His Lordship Justice Levinson J* in the case of *Samsudin v. Berrange NO* and others 2005 (3) SA 529 at 534 C-D stated the following:

> "Now the right of a wife married in community of property, and indeed out of community of property to claim a contribution towards costs in matrimonial proceedings is well-established. In the past century our courts have on occasion been called upon to consider the juridical basis upon which these orders are made. A common thread running through the decisions appears to be that a claim for a contribution towards costs in a matrimonial suit is *sui generis* and is founded essentially on the duty of support that spouses owe to each other. It is also aimed at putting her in a position where she cold adequately put her case before the court."

[72] The original amount which was sought by the respondent as a contribution towards her legal costs was E95 000.00 (ninety five thousand emalangeni); however, she later produced a statement of account of E85 440.50 (eighty five thousand four hundred and forty emalangeni fifty cents). It is trite law that these costs are discretionary; the court has a discretion not only to determine the amount to be paid but whether or not to grant them. It is also settled that a contribution towards legal costs is part of the duty of support that spouses owe to

each other; and, it is intended to put her in a position where she could adequately put her case before the court.

[73] In exercising its discretion to come to the appropriate figure to be paid as a contribution towards legal costs, the court is enjoined to have regard to the circumstances of the case, the financial position of parties and the particular issue to be involved in the litigation. It is common cause that the appellant is the Chief Financial Officer in ABSA with a gross income of E94 183.80 (ninety four thousand one hundred and eighty three emalangeni eighty cents) with deductions of E45 861.49 (forty five thousand eight hundred and sixty one emalangeni forty nine cents) leaving him with a net income of E48 322.31 (forty eight thousand three hundred and twenty two emalangeni thirty one cents).

[74] It is also common cause that the respondent earns a gross salary of E10 062.50 (ten thousand and sixty two emalangeni fifty cents) with deductions of E6 897.88 (six thousand eight hundred and ninety seven emalangeni eighty eight cents) leaving a net pay of E3 164.62 (three thousand one hundred and sixty four emalangeni and sixty two cents. The financial position of the appellant places him in a better position to engage the most experienced legal team to represent him in his matrimonial battle with the respondent; on the other hand the respondent is incapable of providing for herself with the most basic necessities of life such as food, shelter, clothing and medical expenses. She does not have adequate financial means to engage competent counsel to represent her.

[75] It is also not in dispute that the pending matrimonial action is not only highly contested as between the parties but it is complex and lengthy and this inturn escalates the legal bill. The necessity for the respondent to be legally represented in court is not only a Constitutional right but it

is part of the duty of support which spouses owe to each other. It should also be borne in mind that the circumstances of this case are such that the respondent had to resign from a more paying job at UNITRANS at the instance of the appellant; the appellant undertook to give the respondent an allowance equivalent to what she was earning, but, this never happened. The evidence further shows that the appellant deliberately abandoned as his wife for another woman, and subsequently chased her from the marital home without any source of income. No evidence has been advanced by the appellant to show that the cause of the breakdown of the relationship between the parties. All that the appellant could advance was that they have irreconcilable differences with the respondent. It is apparent that from the evidence and it has not been disputed that the appellant that the cause of the acrimony between them was the advent of his new love relationship to which the respondent objected.

[76] The respondent is entitled to a contribution for costs from the appellant as part of the duty of support which they owe to each other. I am aware that the respondent, as a matter of law, is not entitled to payment in full of her legal costs but a contribution. Applying these principles, I am convinced that the Judge in the court a quo exercised her discretion properly when she ordered a contribution to costs of E50 000.00 (fifty thousand emalangeni).

[77] I now turn to deal with the order by the court a quo to backdate monthly maintenance payments to the 1st September 2011 in respect of school fees of E2 975.00 (two thousand nine hundred and seventy five emalangeni), transport of E775.00 (seven hundred and seventy five emalangeni), school uniforms of E500.00 (five hundred emalangeni), and E2 000.00 (two thousand emalangeni) for medical aid. The evidence before court is that prior to the order by the court a quo, the

appellant paid this amount which totals E11 050.00 (eleven thousand and fifty emalangeni). In addition he paid E2 000.00 (two thousand emalangeni) directly to the respondent, E2 500.00 (two thousand five hundred emalangeni) for clothing as well as E300.00 (three hundred emalangeni) for miscellaneous expenses. There is no evidence before court that the appellant stopped making these payments on the 31st August 2011; hence, there is no lawful justification to backdate them.

[78] In May 2011 the Supreme Court made an order referring to the matter back to the court a quo for the proper determination of interim maintenance for the respondent and the minor children. The court further ordered that the court a quo should finalise this application as a matter of urgency, and in any event, not later than 31st August 2011. However, this was not possible and the application was finalised on the 19th December 2011 when judgment was delivered. There is no evidence that the appellant was at fault in delaying the application.

[79] In the circumstances there is no lawful justification why the order of the court *a quo* relating to the personal maintenance of the respondent of E4 500.00 (four thousand five hundred emalangeni) should be backdated to the 1st September 2011 when such an order did not exist. The order was only made on the 19th December 2011. Furthermore, the order for the payment of E10 000.00 (ten thousand emalangeni) for accommodation groceries, feeding, personal wearing apparels and other school amenities for the two minor children was on the 19th December 2011; tangible reasons were advanced by the court *a quo* why the orders should have a retrospective effect. The fact that his court had ordered the court a quo to finalize the Rule 43 applicable not later than 31st August 2011 does not justify backdating the order to the 1st September 2011. Furthermore, the respondent has not advanced any justification for backdating the orders.

[80] Accordingly the appeal is dismissed. The judgment of the court *a quo* is set aside and substituted with the following judgment:

(i) The order backdated payments of maintenance for the respondent and the minor children to the 1st September 2011 is set aside.

(ii) The appellant is directed to pay a contribution towards the costs of the respondent in the sum of E50 000.00 (fifty thousand emalangeni).

(iii) The appellant is directed to pay all school-related expenses for the two minor children directly to the school on a monthly basis including the following:

(a) School fees of E2 975.00 (two thousand nine hundred and seventy five emalangeni).
(b) School transport of E775.00 (seven hundred and seventy five emalangeni).
(c) School uniforms of E500.00 (five hundred emalangeni).

(iv) The appellant is directed to pay E2 000.00 (two thousand emalangeni) monthly for medical aid of the two minor children through his membership of the Swaziland Medical Aid Fund in which the respondent shall be the principal member.

(v) Pending the determination of the main action for the dissolution of the marriage under High Court civil case No 3312/2007, the appellant is directed to make the following monthly payments *pendete lite* directly to the respondent:

(a) The sum of E3 000.00 (three thousand emalangeni) maintenance for the respondent.

(b) The sum of E8 000.00 (eight thousand emalangeni) to cover reasonable accommodation groceries clothing and other necessities for the minor children.

_____
M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

_____
A.M. EBRAHIM
JUSTICE OF APPEAL

I agree:

_____
S.A. MOORE
JUSTICE OF APPEAL

For Applicant — Attorney S.C. Simelane
For Respondent — Attorney S.P. Mamba

DELIVERED IN OPEN COURT ON 31st MAY 2012.