IN THE HIGH COURT OF SWAZILAND

Case No.2390/99

IN THE MATTER BETWEEN:

LINDIWE KUNSENE (BORN DLUDLU) APPLICANT

AND

BHEKI KUNENE RESPONDENT

CORAM :MASUKU J.

FOR APPLICANT : MR T.M. SIMELANE

FOR RESPONDENT : MS P. P. DLAMTNI

JUDGEMENT

17/11/99

This is an application under Rule 43 which was initially brought under a Certificate of Urgency and in which the following relief was sought:

1. Dispensing with the usual forms and procedures relating to the institution of the proceedings and allowing this matter to be heard as a matter of urgency.
2. That the Respondent be ordered to pay maintenance pendente lite in respect of the Applicant in the sum of E1,500.00 per month, with immediate effect.
3. That the Respondent contribute the sum of E10,000.00 as a preliminary contribution towards Applicant's legal costs.
4. That the Respondent return to the Applicant a motor vehicle bearing 2 registration number SD 850 DG.
5. That the Respondent pay the costs of this application on Attorney and client scale.

The matter first came before me on the 8th October, 1999, and I refused to grant prayer 1, on the grounds that the peremptory provisions of Rule 6 (25)(a) and (b) had not been complied with. In particular, the Applicant had failed to state at all the reasons why the matter was to be declared as one of urgency. The matter thus took its normal course, allowing the Respondent to file within the time limits set out in Rule 43 and the Respondent accordingly joined issue. At the commencement of the hearing the Applicant indicated that she was abandoning prayer 4, a wise and advisable step for obvious reasons, regard being had to the circumscribed matrimonial relief set out in the Rule in question.

It is common cause that the parties were married according to civil rites and in community of property at Nhlangano on the 28th December, 1991. The marriage still subsists. One minor child was born of the union. The Applicant herein instituted divorce proceedings against the Respondent before the Subordinate Court for the District of Lubombo, based on malicious desertion. The present Respondent is apparently contesting the divorce action. It appears further that the matter has been set down for hearing the divorce action on the 24th November, 1999.

The point for determination raised in limine by the Respondent is whether this Court has jurisdiction to entertain this application in light of the fact that the lis is pending before the Subordinate Court. That Court, according to the Respondent, which is seized with the matter must perforce be the one to deal with an application of the nature presently before this Court.
Mr Simelane for the Respondent did not contest the submission made on the Respondent's behalf to the effect that the Subordinate Court does have jurisdiction. His main submission was that urgency justifies this Court intervening and granting the relief sought notwithstanding that the matter is pending before the Subordinate Court.

It indeed appears to me that the Subordinate Court has the jurisdiction to entertain and grant the relief sought by the Applicant herein. This view is supported by the provisions of Section 15 (c) of the Magistrates Court Act No.66/1938, which read as follows:-

"Saving any other jurisdiction assigned to any courts by this Act, or by any other law the persons in respect of whom the court shall have jurisdiction shall be –

(c) any persons whatever, in respect of any proceeding incidental to any action or proceeding instituted in the court by such person himself;"

The application in issue is a proceeding pendente lite, incidental to an action instituted by the present Applicant before the Siteki Magistrate's Court. For that reason, it is clear that that Court has jurisdiction to entertain the application and grant relief that it may be minded to give.

In support of the point in limine, Miss Dlamini referred the Court to the following cases, namely, SCHLESINGER v SCHLESINGER 1979 (4) SA 342 and GREEN v GREEN 1987 (3) SA 131. I will hasten to state that the Schlesinger case is clearly distinguishable from the instant case as its relevant ratio decidendi is that the court in ex parte applications has a duty not to condone serious and deliberate breaches of the principle of full disclosure. It proceeds to hold that a costly confusion "too ghastly to contemplate" will ensue if two matrimonial actions with their attendant pendente lite proceedings are allowed to proceed pari passu before two different Courts.

In that case, matrimonial proceedings had been instituted in Switzerland and this was not disclosed to the Court in South Africa, which was being moved to entertain a similar matrimonial action between the parties as that pending in Switzerland. In casu, only one matrimonial cause has been instituted in the Magistrate's Court. The only issue is that the pendente lite proceedings of that action are sought to be prosecuted before this Court. SCHLESINGER v SCHLESINGER (supra) is in my view of no application in this case.

In the case of Green v Green (supra) the husband sued the wife for divorce in the Durban and Coast, Local Division of the Court and the wife applied for maintenance pendente lite in the South East Cape Local Division. At page 132 G - H, Jones J. stated as follows;-

" The jurisdiction of the Court in which it is pending, namely the Durban and Coast Local Division, is not in dispute on the papers before me. The issue here is simply whether a Court of one Division has the competence to make preliminary or interim orders in connection with litigation pending in a Court of another Division. The authors which I have been able to find satisfy me that in the absence of considerations of urgency our law and procedure lays down that no such competence exists, "

In VAN DER SANDT v VAN DER SANDT 1947 (1) SA 259 (T), Neser J, stated as follows at 262

"The Plaintiff in the action for restitution of conjugal rights has selected the Witwatersrand Local Division as the forum, and he is entitled, in my opinion, to have all matters which are incidental or ancillary to that action to be heard in that forum. It would in my opinion, be anomalous if the Witwatersrand Local Division, having jurisdiction to hear the trial action by reason of the fact that the action is instituted there, could not proceed with the trial because of some order which had been made in this division. "

In both cases, the learned Judges dismissed the applications with costs. I am persuaded to follow that course in this matter. Before I do so however, there is one argument by Mr Simelane's for the Respondent, namely urgency, which merits consideration. Mr Simelane's argument was that there was some urgency in this matter and that alone should justify this Court in allowing a departure from the normal procedure that the Court in which the matrimonial action has been instituted must hear all ancillary and incidental applications.

As I pointed out earlier, no allegations of urgency in this matter were disclosed in the Applicant's Founding Affidavit. In fact, no attempt to do so was made. Mr Simelane argued that the urgency required by Rule 6 (25) is no longer in issue as the Applicant was penalized by having the application not enrolled for failure to comply therewith, Mr Simelane, submitted that Rule 43 applications are by their very nature urgent and that the Court, even in the absence of necessary allegations in the papers should draw an inference of urgency from the entirety of the attendant circumstances of the case.

I do not agree with this submission, attractive as it may be. The urgency which can justify this Court dealing with the matter notwithstanding that the main action is pending in another Court must be such that if the Applicant would move it before that Court she would suffer serious prejudice. This urgency, which differs from that required by Rule 6 (25) should be clearly set out in the Founding Affidavit. No allegations why this Court rather than the one chosen by the Applicant to try the divorce should hear the application have been disclosed. In fact, the Siteki Court is the closest to the Applicant's residence and is the most convenient for her to use, in terms of access, familiarity with the issues and more importantly, is less costly in terms of costs.

In the premises, I am of the view that the application ought to be dismissed. The Applicant elected a Court that she wanted to hear the matrimonial action. That Court has jurisdiction in terms of Section 15 of the Magistrate Courts Act to grant the ancillary relief now sought before this Court. No averments of urgency, which dictate that this Court rather than the Subordinate Court should hear the matter have been disclosed either in the Affidavit or in argument. No good reason has been suggested as to why this Court should entertain the matter despite the fact that it is pending in Siteki.

In the absence of urgency or some good reason as aforesaid, authority, convenience and common sense dictate that this, as all other incidental matters, should be heard by the Subordinate Court. This Court, notwithstanding its inherent jurisdiction and authority, is precluded by the Applicant's election from entertaining this application. Further unnecessary delays would be occasioned to the Applicant if this Court were to

intervene, particularly as a date for trial has apparently been obtained. Considering the allegations and counter-allegations made in the papers, oral evidence in terms of Rule 43 (6) would be absolutely necessary, thus resulting in loss of valuable time to the Applicant. This would militate against the Applicant's expressed desire to bring the divorce action to speedy finality.

In the result, the application is dismissed and the costs will follow the event.

T. S. MASUKU

JUDGE