



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 788/08

In the matter between:

**MILLICENT NOMALUNGELO FAKUDZE
(NEE NGWEKAZI)
APPLICANT**

v

MVUSELELO FAKUDZE

RESPONDENT

In Re:

**MILLICENT NOMALUNGELO FAKUDZE
(NEE NGWEKAZI)**

PLAINTIFF

and

MVUSELELO FAKUDZE

DEFENDANT

CORAM : Q.M. MABUZA -J
FOR THE APPLICANT : ADV. L. MAZIYA INSTRUCTED BY
T.L. DLAMINI & ASSOCIATES
FOR THE RESPONDENT : MR. B. MAGAGULA OF MAGAGULA
ATTORNEYS

JUDGMENT 6/08/10

Mabuza J:

[1] The Applicant Millicent Nomalungelo Fakudze (nee Ngwekazi) seeks maintenance from her husband Mvuselelo Fakudze who is the Respondent herein. The Applicant seeks maintenance for the couple's two minor children and for herself.

[2] She seeks an order in the following terms:

1. The Respondent be directed to pay E1,500.00 (One Thousand) per month in respect of maintenance of the Applicant pending finalisation of the main action.
2. The Respondent be directed to pay E5,000.00 (Five Thousand Emalangi) in respect of maintenance of his two (2) children.
3. The Applicant be granted custody of two (2) minor children namely Bonginkhosi Fakudze and Siphesihle Fakudze.
4. Further and/or alternative relief.

[3] The Respondent opposes the application and has raised points *in limine* thereto.

- [4] The couple married by Swazi Law and Custom on the 3rd February 2002. The Respondent paid 17 head of cattle to the family of the Applicant as lobola.
- [5] The couple lived an idyllic life together in a townhouse at Mountain View, Mbabane. Two children were born of this marriage.
- [6] During 2006, the bubble burst and the Respondent's heart was taken by one Thulisile Phiri whom he took as a second wife by Swazi Law and Custom during 2007. As happens more often than not the first wife was put to pasture; as a result the high standard of living she had been accustomed to came crashing down as the second wife's status ascended. The Respondent has no children with Miss Phiri.
- [7] The Applicant states that since then the Respondent has been failing to adequately maintain her and their two children and has failed to establish a home for them; hence she had to secure accommodation in a flat.
- [8] She has computed her monthly needs and those of her children as follows:

“My requirements, computed on a monthly basis are as follows:

Groceries (food)	E1,800.00
Cosmetics	500.00
Rent	2,500.00
Transport	200.00
Electricity and water	500.00
Medical Aid	<u>300.00</u>
	<u>E5,800.00</u>

The Children’s monthly expenses are:

Food	E1,800.00
Clothes (seasonally)	400.00
School transport (for Bonginkosi)	1,700.00
Helper (for both children)	500.00
Entertainment	200.00
School Uniforms (for Bonginkosi)	500.00
Accommodation	2,500.00
Electricity and Water	<u>500.00</u>
	<u>E8,100.00”</u>

[9] The total amount is E13,900.00. She seeks a total of E6500.00 per month. She believes that the Respondent can afford this amount as he earns in excess of E30,000.00 per month. He is an accountant by profession.

[10] The Respondent raised points *in limine* as follows:

- (a) The Applicant has failed to disclose in her founding affidavit as to whether there is a pending matrimonial action between the parties either before this honourable court or any magistrate's court.
- (b) The marriage between the parties is a marriage in accordance with Swazi law and custom. The dissolution of that marriage is not pending before this honourable court or any other lawful court in the country.
- (c) In the premises this matter has been improperly placed before this honourable court and should be dismissed with costs.

[11] The application was brought in terms of rule 43 (1) which provides as follows:

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

[12] Mr. Maziya has argued that the Applicant has failed to disclose in her affidavit as to whether there is a pending matrimonial action between the parties either before

this Honourable Court or any magistrate's court. That maybe true but Mr. Magagula has directed my attention to civil case no. 3312/07 (High Court) wherein a summons was issued on the 13th September 2007 by the Applicant against the Respondent. In it the Applicant seeks an order declaring that the marriage between her and the Respondent still subsists plus costs. The present application was instituted on the 4th March 2008. The cause of action in the summons relates to a pending matrimonial matter as envisaged by Rule 43 (1).

[13] Mr. Maziya has further argued that the marriage between the parties is a marriage in accordance with Swazi Law and Custom and that the dissolution of that marriage is not pending before this Honourable Court or any other lawful court in the country.

[14] Rule 43 refers to matrimonial matters; making the subject matter very wide. The subject matter of the summons commencing action in case 3312/07 is whether the customary marriage between the parties is dissoluble or not; this in my view falls under "matrimonial matters" as envisaged by the Act.

[15] I had thought that I would not pay much attention to case no. 3312/07 because of the peculiarly drawn pleadings by the Applicant's attorneys but I cannot dismiss it out of hand in the light of the injustice that may be visited upon the Applicant and her children who require maintenance. Mr. Maziya also contends that there is not longer a marriage between the parties. His contention is based on the opinion of the Respondent who is no expert on Swazi Law and Custom. Divorces in customary marriages are not easy to come by as marriages contracted under civil rites. And as there is no proof that indeed the parties are divorced; the matter is therefore properly before this Court.

[16] In the event it is ordered:

- (a) The points *in limine* are hereby dismissed.
- (b) The application is granted with costs.

Q.M. MABUZA
JUDGE OF THE HIGH COURT OF SWAZILAND