CIV\APN\83\91

IN THE HIGH COURT OF LESOTHO

In matter between:

ALFRED MKWANAZI APPLICANT

and

AGNES NKWANAZI RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 28th day of November, 1991.

This is an application for an interdict pendente lite for an order that -

(a) The retail shop styled Mkwanazi Store owned by the applicant should be closed pending the finalisation of CIV\T\284\90.

(b) The respondent should be restrained from operating and using the money deposited in Savings Account No. 2117070963 in the Lesotho Bank which account was opened by the applicant in respondent's name.

(c) Respondent should pay the costs of this application.

(d) Prayers (a) and (b) should operate as interim interdict with immediate effect.

On the 20th March, 1991 the applicant obtained a

rule nisi which was made returnable on the 2nd April, 1991. The matter was argued before me on the 31st October, 1991 and to-day is the extended return day.

The applicant and the respondent were married to each other on the 13th May, 1978. They own a retail shop styled Mkwanazi Store situated at Maputsoe. The respondent is the Manageress of the said store. The couple also own flats rented out to tenants. The applicant alleges that tenants pay rent directly to the respondent. The respondent denies this allegation but admits that since January this year tenants started paying the rent directly to her. The applicant alleges that since August, 1989 the respondent has refused or neglected to account to him for money collected from the business and rented flats because of her adulterous love affair with Moeketsi Rapitsi. She now uses all the money for her own benefit and for the benefit of her paramour.

The applicant avers that on a number of occasions he caught the respondent supplying the said Moeketsi Rapitsi with stock from the said shop free of charge and without his authorisation. He fears that if the shop is not closed the respondent will continue to give her paramour goods free of charge to the extent that the shop might

become insolvent. He is already faced with a big electricity bill of M1,684-20 which was incurred from the running of the store and the residential premises. The electricity has already been disconnected for failure to pay. It came as a shock to the applicant because he alleges that he gives money to the respondent at the end of each month to pay the bill. The neglect to pay the bill confirms his fear that if the shop continues to operate, respondent will incur more debts which will result in his being insolvent. He avers that he tried to close the shop but the respondent and their son opened it. He alleges that he fully supports the respondent.

In her answering affidavit the respondent denies that the applicant had been maintaining her and the children. She denies that she has any illicit love affair with one Moeketsi Rapitsi. Despite the numerous denials which the respondent makes in her affidavit, there are certain important matters she has admitted; they are that she and applicant are married to each other by civil rites and that their marriage is in community of property; that the shop in question forms part of the joint estate.

It is trite law that in marriages in community of

property the husband is the administrator of the community and his rights and duties in this regard do not vary even if it is abundantly clear that a division of the joint estate pursuant to divorce or similar action will be granted. He is in sole control of the assets and may ordinarily freely alienate them. See Vilyra, J in **Strauz v. Strauz & and others**, 1964 (1) S.A. 720 (W) at p. 722.

In **Pickles v. Pickes**, 1947 (3) S.A. 175 (W.L.D.) it was held that the husband is not bound to give an account of his good or bad administration.

In **Mundy v. Mundy**, 1946 W.L.D. 280 at pages 282-283 Ramsbottom, J. said:

> "Where the plaintiff in a vindicatory or quasi-vindicatory action applies for an interdict to protect the property pending action and shows that **prima facie** he is entitled to the property, then **prima facie** any dealing with the property by the respondent in the interval is unlawful and an infringement of the applicant's rights. But in the case of spouses married in community of property the position is quite different. Although pending action, the husband is in possession of assets an individed half of which belongs to the wife, and although on a division of the joint estate a divided half will be awarded to her,

> until that occurs the husband is lawfully in possession of the assets and is lawfully entitled to deal with them in his administration of the joint estate. I do not know how he can be restrained from doing that which in law he has the right to do. If an unlawful dealing with the assets is reasonably apprehended, i.e., if there is a reasonable apprehension that he will dispose of the assets so as to defeat his wife's rights, he will be restrained from doing so, but it follows, I think, that a reasonable apprehension of unlawful dealing must be shown."

Following the principles of law set out above I am of the view that in the present case the applicant was completely entitled in the exercise of his marital power as the administrator of the joint estate to close the shop and freeze the bank account. He did not even have to give an account of his bad or good administration. The denials by the respondent to the allegations made by the applicant do not advance her case any further. She has not shown any reasonable apprehension of unlawful dealing with the property so as to defeat her rights.

In the result the rule is confirmed. There will be no order as to costs.

J.L. KHEOLA
JUDGE

28th November, 1991.

For Applicant - Mrs. Kotelo
For Respondent - Mr. Teele.