CIV/APN/259B/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

ELIZABETH M. MAKHETHA APPLICANT

and

EZEKIEL L. MAKHETHA RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 23rd February, 1996

In this matter the applicant has applied for maintenance pendente lite claiming:

1. That a Rule Nisi issue returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause (if any) why:

   (a) The forms of service provided for by the Rules of court shall not be dispensed with on account of urgency;

   (b) The Respondent shall not be ordered to pay M1,000-00 per month towards maintenance of applicant pendente lite;

   (c) The Respondent shall not be ordered to pay M500-00 per month towards the maintenance of the minor child pendente lite;

   (d) The Respondent shall not be asked to assist applicant towards legal fees in the amount of M1,000-00;

(e) The respondents shall not be ordered to pay costs hereof in the event of opposition;

(f) Applicant shall not be given such further and or alternative relief.

In her Founding Affidavit the Applicant inter alia says that she was married to the Respondent by civil rites and that the marriage still subsists pending divorce proceedings. Applicant has further deposed that she was expelled from the marital home by the respondent together with the minor child Pride a girl born in 1980.

That since then she has not been employed and she has no source of income save charitable contributions from her brother with whom she stays. That since her departure respondent has failed or neglected to maintain the applicant and the minor child. Further, that the respondent runs several businesses in Maseru and can afford to maintain the applicant and the minor child.

In his Answering Affidavit the respondent has claimed, inter alia, that he has not chased the applicant and the minor child Pride from the marital home. That in the divorce proceedings the applicant has failed to appraise the court of this important fact. That the applicant left the joint home by consent of the parties because of bad relationships between the applicant and the respondent.

Concerning the minor child, that she is staying in Johannesburg with her grandmother who has been looking after her since birth. Respondent has also claimed that applicant has not said how the amount of M1,000-00 is arrived at.

In her replying affidavit the applicant has said that the child is in her custody and not in the grandmother's custody and therefore that she is consequently entitled to maintenance.

She has replied that the amount of maintenance is made up as follows:-

(a) M250-00 being water and electricity;

(b) M300-00 for food;

(c) M450-00 for clothing

For the child:

(a) Transport to school M150-00

(b) School fees M50-00

(c) Clothing, food and medical care M300-00.

In addition, that while applicant stayed with respondent applicant was given M1,500-00 for her own purposes. Respondent's Answering Affidavit hereto referred is that of 31st August, 1995. However, Respondent does appear to have filed a 4th Affidavit dated 15 December, 1995 in which amongst other things he offers M450-00 per month towards applicant's food and clothing needs as an interim relief. He also says that though

the business bring in profits these are not enough to keep him going and to live comfortably and it cannot be said that his butchery is "flourishing.'

My concern is how this 4th affidavit came in seeing that the law does not admit of such an affidavit save with the leave of court. I say with leave of court because Rule 8 of the Rules of Court reads:-

Sub-rule (11):-

> within seven days of the service upon him of the answering affidavit aforesaid the applicant may deliver a replying affidavit.

sub-rule (12):

> No further affidavit may be filed by any party unless the court in its discretion permits further affidavits to be filed.

South African rules are substantially the same as our own rules and in particular Rule 6(5) (e) reads:-

> In general no further affidavits may be filed but the court has a discretion to permit the filing of further affidavits.

Although it is not desirable to allow a further affidavit after the replying affidavit, such an affidavit may be allowed if it is desirable and especially where respondent in his replying affidavit has introduced new matter. Thus in RIESEBERG v. RIESEBERG, 1926 W.L.D.59 at p.60 Tindall, J. is reported to have said:

> _____it is quite true that it is not usual to allow new matter to be introduced by respondent in a further affidavit after the applicant has filed his answering affidavits, but the court may allow that to be done if it is considered

> desirable. In this case the applicant alleges a verbal lease while respondent denies ___. As the court is asked to decide this controversy on affidavit against the respondent's version, I do not think that the court should debar him from putting further affidavits before the court on that issue.

The above remarks notwithstanding, there are cases where a fourth affidavit has been refused as in JOSEPH and JEANS v. SPITZ and OTHERS, 1931 W.L.D. 48 where Greenberg, J. after referring to remarks by INNES, C.J. and SMITH J. refused the submission of further affidavits on the grounds that in as much as in civil cases a plaintiff after leading his evidence and closing his case the defendant also leads his evidence and closes it and that thereafter no further evidence may be lead without leave of court, it also goes without saying that when an applicant has filed his sets of affidavits and the respondent having answered the applicant the latter replies thereto, no further affidavits may be admitted. And while Greenberg J. conceded that there may be special cases where there is something unexpected in the plaintiff's affidavit or where new matter is raised and a relaxation of the rule will be allowed, he could nevertheless

> see no reason in the present case to take it out of the category of cases to which the rule is intended to apply.

But in VOLKWYN v. THOMSON, 1941(2) P.H. f108 RAMSBOTTOM, J. distinguished JOSEPH and JEANS v. SPITZ above and allowed the petitioner in his answering affidavit to raise new matter not dealt with the basis being that:

> when he filed his petition, had no reason to believe that a particular allegation in the petition would be denied and that there was no obligation on a petitioner to burden his petition with all his available corroborative evidence of such an allegation.

In HERSMAN v. JACOBSZ BROTHERS, 1931 E.D.L. 284 the defendant in provisional sentence proceedings sought to file further affidavit in reply to the plaintiff's answering affidavits GUTSCHE, J. allowed the affidavits to be admitted in so far as they themselves raised new matter but were otherwise rejected GUTSCHE, J. saying at p.286.

> I am of opinion that the court should accept affidavits if they contain matter that is material to the issue and should not reject them merely because they were not timeously filed when the explanation is that knowledge of the matter in question reached the party after he had filed his affidavits. If I were satisfied now that this information reached the defendants after they filed their affidavits, I could admit it, but there is no satisfactory proof that this knowledge did reach the defendants too late.

Williamson, J. in TRANSVAAL RACING CLUB v. JOCKEY CLUB OF SOUTH AFRICA, 1958(3) S.A.599 (W.L.D.) at p.604 held

> As there was a completely satisfactory explanation as to why the affidavits containing new facts were not filed earlier, as there was no suspicion of mala fides and no culpable remissness, and as there was no prejudice to the applicant which could not be cured by an appropriate order as to costs, that the further set of affidavits should be allowed to be filed.

Be this as it may, that doyen of our Legal practice INNES, C.J. had in TRANSVAAL GOVERNMENT v. STANDERTON FARMERS ASSOCIATION, 1906 T.S. 21 intimated:

> the proper practice in motions and applications was that after any affidavits in support of the an application have been filed, the respondent should file his opposing

> affidavits and then the applicant his in reply. No further affidavits should be received by the Registrar. If either party desired on good grounds to file further affidavits they should be tendered from the Bar....

In this case the applicant filed his Founding Affidavit with the Registrar of this court on 14 July, 1995 and respondent's answering affidavit is dated 31 August, 1995 while applicant's replying affidavit is dated 22 September, 1995. Respondent then filed with the Registrar of this Court a further answering affidavit dated 15 December, 1995 plus a supporting affidavit by the respondent bearing the same date. In filing these affidavits it is difficult to say what was crossing respondent counsel's mind though respondent's counsel has this to say in his Heads of Argument, p. three thereof:

> The Respondent has not yet replied to the amended counterclaim for reasons of accident as he shows in his application to file a 4th set of affidavit.

On page five it is also stated:

> These new matters necessitated a 4th set of affidavits wherein Respondent stated that: _____

I have looked through the file and find that on 15 December, 1995 the respondent did by way of Notice of Motion apply, inter alia:

> "for leave to file further answering affidavit to applicant's replying affidavit."

Except the cursory remarks to which I have referred above, neither applicant's nor respondent's counsel seemed to expend their energies on this aspect of the application. Mr. Matooane for the applicant made no reference to this aspect at all. It

is to this further answering affidavit that the respondent has, amongst other things, offered:

> to pay M450-00 per month, in the interim, towards her food and clothing _____

and further:

> I admit that I am a businessman and own a butchery although it is not "flourishing" as applicant wants the Honourable Court to believe. I verily aver that the business brings in profits just enough to keep me going on to live comfortably.

He also denies that he gave the applicant, for her own purposes, far beyond M1,500-00.

As was stated in JOCKEY CLUB OF SOUTH AFRICA above, I find that not only has there been satisfactory explanation as to the desirability of the affidavit petitioned for, I also find that there is in this case no suspicion of mala fides or culpable remissness nor is there any prejudice to the applicant if this affidavit is admitted. I have accordingly admitted it.

In his Heads of Argument respondent's counsel has submitted that although applicant claims to be living with his brother he has not sought support from either his brother or mother to this effect.

It seems to me counsel for the respondent is intimating that since the onus is on the applicant the latter has not discharged this onus. But respondent has also asserted that by family arrangement the child Pride is not living with the applicant but with applicant's mother. Respondent has also asserted that applicant is living with her mother, that applicant pays neither rent nor electricity.

I am not impressed by respondent's assertion that the child Pride is living with her grandmother by arrangement with the respondent and applicant's mother. The reason is that the applicant is not part of the arrangement and cannot be bound by what she has neither participated in nor personally approved. Of course whoever asserts proves and if the respondent wished this court to take the assertion seriously an affidavit from respondent's mother-in-law should have been submitted also showing, in addition, that applicant is not called upon to pay water and electricity charges.

The view of this court is that once a married woman is in desertion pending finalisation of decree of divorce as in this case, such a woman is entitled to support barring infidelity or misconduct on her part. Apart from this, the respondent has made an offer of maintenance in the sum of M450-00 thus acknowledging that he is liable for support. Unless the respondent has been

able to satisfy this court that he has always been willing and has continued to support the child Pride, this court would have no reason to order such maintenance for the minor child Pride.

Respondent has in broad terms and in indeterminable language asserted that by arrangement with his mother-in-law the child is supported and the mother-in-law has not complained. Well, this is information within respondent's knowledge and I cannot say that even on a balance of probabilities the respondent has been supporting the child Pride - the statement is too bald to be of assistance to this court.

In the case of TAUTE v. TAUTE, 1974(2) S.A. 675 (E.C.D.) which respondent's counsel cited to this court Hart, A.J. said at p.676:

> The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and reasonable requirement and the capacity of her husband to meet such requirements which are normally met from income _____.

In his Answering Affidavit of 15 December, 1995 which this court has admitted, in reply to allegations by the applicant respondent has deposed

AD. PARA 4.3 THEREOF:

> I admit that I am a businessman and own a butchery although it is not "flourishing' as applicant wants the Honourable Court to believe. I verify aver that the business brings in profits just enough to keep me going on to live comfortably.

If, as respondent is saying the business brings in profits just enough to keep me going _____ Respondent should have said what these profits amount to and made a breakdown of them leaving what was perhaps enough for him. Instead of making a full disclosure as he was bound to do, respondent, respondent has flung a bald statement into the face of the court plus the impression that business brings in profits enough to keep me going on to live comfortably? Well since plus the impression that business brings in profits just enough to keep me going on to live comfortably. Well, since respondent by his admission lives comfortably his wife is, in my view, entitled to similar comfort. As I have said, it was up to the respondent to convince this court that he cannot afford the amount of maintenance claimed both for the applicant and the minor child of the marriage.

In the TAUTE v. TAUTE case to which I have referred Hart, A.J. also observed:

> "A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them".

While respondent has shown partial willingness to support the applicant, he appears bent on avoiding same obligations to support the minor child of the marriage under the guise of the child not being in lawful custody of the applicant. I have said

that the respondent has done nothing to convince me that he is not obliged to support this child or that this child is not in custody of the applicant.

Quoting a judgment in ROSE v. ROSE (1950) ZALL E.R. 311 at p.313 by DENNING L.J. Hart, A.J. said:

> "A very important matter in awarding maintenance is the conduct of the parties. In this case it has been established that the husband broke up the marriage after twenty-one years of married life, leaving the wife with two children, one of them very young. It was a particularly bad case because the husband committed adultery with a Swiss student help who came to the house".

In this matter there are claims and counterclaims not yet determined and I do not think that these will influence the court in reaching its decision. Suffice it to say that the applicant is in constructive desertion and the respondent is in any event not living with either the applicant and the minor child.

As who was in the circumstances of each particular case entitled to maintenance, VIEZRA, J. seemed to be of the view that in especially divorced couples maintenance was discretionary and that although it was true that a court may exercise its discretion in favour of a grant where hardship is established that the proposition cannot be posited as a sine qua non. He also seemed to be of the view that age of the spouses and length of marriage were factors to be considered.

In the case considered by VIEZRA, J. the spouses were income earning and it seemed there wasn't much difference between their incomes after deducting expenditures which were considered by the court not to be extravagant. The court also found because of certain commitments set out by the defendant he would not find it easy at the present moment to fulfil his obligations to his children. And this is what has previsely bothered this court for the respondent has not said what his obligations are so that for purposes of this judgment I will take it he has no obligations at all.

OXLEY v. OXLEY, 1964(3) S.A. 242 (D. v C.L.D.) is a case where the wife having asked for and been awarded maintenance and the minor children had failed to disclose that she was guilty of adultery. On application to have the maintenance order varied the order in respect of wifes maintenance was varied but not in respect of the minor children. This was done contrary to observations by Milne J. and Aubstein J. who were of the view that while the court might consider such an eventuality a single act of unchastity was not good cause to interfere with the order. To avoid interference though, it appears that the unchaste spouse is obliged to disclose her unchastity before divorce.

As I have said, this application being maintenance pendente lite, the above considerations do not apply and in my discretion I have ordered that pending the result of divorce proceedings respondent:

(a) Pay applicant maintenance in the sum of M750-00 per month with the effect from the date of this judgment;

(b) Pay the minor child Pride maintenance in the sum of M250-00 per month with the effect from the date of this judgment;

(c) The amount of M600-00 already paid towards the maintenance of the applicant to be part of the mainteneous order.

(d) There will be no order as to costs.

G.N. MOFOLO
JUDGE
25th January, 1996.

For the Applicant: Mr. Matooane
For the Respondent: Mr. Sooknanan