IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1506/98

IN THE MATTER BETWEEN:

MOLLY KIWANUKA	Applicant
And	
SAMUEL MUWANGA	Respondent
CORAM	: MASUKU A.J.
FOR APPLICANT	; MS. N.E. GWIJI
FOR RESPONDENT	: ADV. E.V. THWALA (Instructed by Maphalala)

RULING ON POINTS INLIMINE 19th MAY 1999

This is an opposed application in which the Applicant seeks an Order inter alia:-

a) Compelling the Respondent to pay the arrear maintenance for the months of August to December 1997 and January to June 1998, amounting to a total sum of E3,199-00 as per the agreement between the parties at the Social Welfare Offices, Regional Secretary, Siteki, Lubombo District;
b) That Respondent is ordered to contribute maintenance for two minor children PRISCILLA MANSUBUGA and JACKIE NAMUNGENYI at the rate of E500-00 per month per child, until the said children attain the age of majority or become self-supporting, whichever shall first occur;
c) That Respondent pays the costs of this application; and
d) Further or alternative relief.

At the commencement of the hearing Mr. Twala indicated that he intended to raise two points in limine from the bar, attacking this Court's jurisdiction to hear and determine this matter. By way of comment, I wish to point out that it is good and sound practice to reduce any points in limine to writing and serve the same to on other side, preferably some days before the hearing. This practice yields good results in that it eliminates the element of surprise, which normally accompanies points raised from the Bar.

Furthermore, it benefits Counsel on both sides and the Court in the sense that well researched argument and submissions are placed before Court to enable it to make a correct decision. It must be borne in mind that one of the ethical duties of Counsel on both sides is to assist the Court in arriving at the right decision. In this connection, I will refer to comments which fell from the mouth of Mr. Justice F.X. Rooney O. B. E. on the 7th October 1992 during the occasion of his retirement from this Court. He stated as follows:

"There is no point in a legal person's when he can say "I know it all. Nobody knows it all. Certainly, the judges do not know it all. And that is why when we seek the assistance of counsel in this Court, we expect counsel to come to Court fully prepared and fully briefed to perform their main function, which is to assist judges to reach the right decision in their favour, but that is not always the case ".

When points of law are hastily raised from the bar, this militates against counsel performing this their main function, to which the Court is ever indebted.

Mr. Twala mentioned his predicament in adhering to this practice by stating that he had received his brief very late and this explanation is accepted.

Mr, Twala's attack on this Court's jurisdiction was two pronged, namely:

(i) that one minor child, namely Priscilla is resident in Uganda and in terms of the dictates of Private International Law, this Court does not have jurisdiction but the Courts of Uganda;

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(ii) that he presumed that the application before Court was made in pursuance to the provisions of the Maintenance Act, 35 of 1970, which in Section 2 defines "Court" in the following terms:-

• "Court" means a Subordinate Court of the First Class presided over by a judicial officer nominated by the Chief Justice by notice in the Gazette to preside over such Courts for the purposes of this Act;

In Mr. Twala's submission, the Maintenance Act 35 of 1970 excluded the High Court's jurisdiction in cases of maintenance and accorded exclusive jurisdiction to Magistrate Courts.
Miss Gwiji made counter-arguments to the following effect:

• That the question of Priscilla's presence in Uganda is irrelevant to the question of jurisdiction. She argued that the child was born in Swaziland and was living in Uganda only for purposes of her education. She argued further that this Court has jurisdiction by virtue of its position as the upper guardian of all minors to entertain the application as it clearly involved a minor.

Having considered the submissions made and having perused relevant authorities within the short time available to me, I am of the considered view that the points in limine should fail for the reasons that follow. I will deal with Mr. Twala's submissions seriatim.

(i) Priscilla's domicile

In my view, the child's domicile, if that is the right word to use, is an irrelevant consideration, regard being had to the nature of the relief sought. The Applicant seeks an order for maintenance of the parties' minor children, including the child in Uganda. The Applicant and the Respondent are resident within the jurisdiction of this Court where they are both employed and it is convenient to institute the proceedings in Swaziland rather than in Uganda.

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In the work entitled "Private International Law, Juta & Co. Ltd, 1981, (First Edition), C.F. Forsyth and T.W. Bennett recognise at page 156 that residence is a ground upon which the Court has jurisdiction.

Residence has not been given any one fixed meaning, save to state that it is a flexible concept and its meaning has varied considerably, depending on the facts of the individual cases. In the words of Forsyth (supra) at page 157, it must be shown "that the de cujus had some real interest there which gives his presence some permanence". In casu, it is clear that both parties are not travellers in Swaziland and their presence in the Court's jurisdiction is habitual and not merely incidental. Their residence grants this Court the jurisdiction to deal with this matter in accordance with the laws of Swaziland.

There is another aspect which renders Mr. Twala's argument fallacious, namely, the doctrine of effectiveness. The parties being resident within this Court's jurisdiction places this Court in a position where it can give an effective judgement which it can enforce.

In the case of STEYTLER N.O. v FITZGERALD 1911 AD 295 @ 346, the Court stated thus:
"A Court can only be said to have jurisdiction in a matter if it has the power, not only of taking cognisance of the suit, but also of giving effect to its judgement.

In the case of FORBES v UYS 1933 TPD 362 at 369, it is stated as follows:-

"The practice has always been to grant an arrest of either of the property or of the person of the

debtor ad fundandum jurisdictionem ..... There is, therefore, always something against which, in the event of the judgement being given favour of the Plaintiff, the decree can operate..... ".

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It does not appear, nor is it alleged that there is any property of the Respondent in Uganda, against which any order granted can be satisfied.

This Court is clearly in a better position to give effect to its judgement than its counterpart in Uganda. From the doctrine of effectiveness principle and also on the grounds of convenience, which this Court must consider, it is clear that this Court has jurisdiction to deal with the matter and grant prayer (b). Prayer (a) cannot be included in Mr. Twala's submissions for the reason that it is a prayer for enforcement and the jurisdiction of the authority which granted that order was not questioned at the time. It is not open to the Respondent short of an appeal or review to do so now. In any event, I did not understand Mr. Twala to be attacking the order referred to in prayer (a) of the Notice of Motion on the grounds of lack of jurisdiction. The Respondent submitted and complied therewith albeit for a limited period.

(ii) Effect of Section 2 of Maintenance Act, 35 of 1970 (the Act)

It cannot be said that this Court cannot hear and determine maintenance matters only on the grounds of the meaning of Court as given in Section 2 of the Act.

There is nothing in the wording of the Section which suggests that Parliament intended to give exclusive jurisdiction to Subordinate Courts to deal with maintenance matters to the exclusion of this Court. If it was Parliament's intention to do so, it would have stated that position in very clear and unambiguous language. I will deal with this aspect later in the judgement.

A reading of the Act actually suggests the opposite. Section 2 defines a "maintenance order" as follows:

"Means an order for the periodical payments of sums of money towards the maintenance of any person made by any Court (including the High Court) (my emphasis) in Swaziland and except for the purposes of Section 11, includes any sentence suspended on condition that the convicted person makes periodical payments of sums of money towards the maintenance of any other person"

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From the aforegoing, it is clear that the Legislature did envisage situations in which this Court would sit and determine cases of maintenance, contrary to Mr. Twala's argument.

In Section 15 of the Act, it is stated as follows; -

"Nothing in this Act shall derogate from the right of a person to institute proceedings against another person in a civil court for maintenance, or to enforce an order for maintenance granted other than under this Act by means of the execution of a judgement for such maintenance in his favour or by the institution of proceedings for contempt of Court against such person or by any other civil process allowable by law".

It is abundantly obvious from the foregoing that proceedings for maintenance can be instituted either in terms of the Act or in a civil court (whose procedure will differ from that set out in the Act). There is no indication that these proceedings, particularly prayer (b) were instituted pursuant to the Act. The Notice of Motion and the supporting affidavits do not support that view.

It is therefore my considered view that this Court may be referred to as a "civil court" for purposes of Section 15 of the Act and is sitting as such in dealing with this matter. For that reason this Court's jurisdiction is expressly saved. It must also be borne in mind that this Court is frequently seized with matrimonial proceedings where it grants orders for maintenance. In this connection, reference is made to the provisions of Rule 43.

It must also be borne in mind that Section 2 of the High Court Act, 1954 provides as follows under jurisdiction of the High Court of Swaziland;

"The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this

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or any other law possess and exercise all the jurisdiction power and authority vested in the Supreme Court of South Africa".

Section 104 of the repealed Constitution under Chapter IX stated inter alia of the High Court:
"The High Court shall be a superior court and shall have-(a) unlimited original jurisdiction in all civil and criminal matter.....

The Constitution was subsequently repealed by the King's Proclamation of 1973 and in terms of which the King assumed supreme power in the Kingdom and all Legislative, Executive and Judicial power was vested in the King. There were however saving decrees one of which stated that Parts 1 and 2 of Chapter IX shall again operate with full force and effect. It is common cause therefore that Section 104 is one of the Parts that were saved and remains effectual.

In the unreported Court of Appeal case of SIBONGILE NXUMALO AND THREE OTHERS v ATTORNEY GENERAL AND TWO OTHERS Case No. 25/96, Tebutt J.A. at page 6 stated as follows:

"It is a well-known principle that has been emphasised time and again not only in the courts of Southern Africa but also in courts in other parts of the world where the judicial function power and independence is jealously guarded, that there is a strong presumption against legislative interference with the jurisdiction of the ordinary courts".

His Lordship proceeded to refer to other decided cases which include PHOTOCIRCUIT SA (Pty) LTD v DE KLERK N.O. DE SWAER N.O. AND OTHERS 1989 (4) SA 214 H - J, where Friedman J said
"There is a strong presumption against legislative interference with the jurisdiction of the Supreme Court [which is the equivalent of our High Court per the provisions of Section 2 (1) of the High Court Act].

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It is a well-known rule of statutory interpretation that the curtailment of the powers of a Court of law will not be presumed in the absence of an express provision or a necessary provision to the contrary therein. The Court will therefore examine closely any provisions which appear to curtail or oust its jurisdiction ".

His Lordship Mr. Justice Tebutt concluded that the presumption applies with equal force in Swaziland, where the unlimited jurisdiction of this Court is constitutionally enshrined as part of the Supreme law.

Even a cursory glance at the Maintenance Act, 1970 does not suggest at all that the Legislature ever intended to curtail or oust the jurisdiction of this Court in determining maintenance matters. There is no such express language in support of that line of reasoning nor can it be said that it is so implied. There are positive enactments which suggest that the jurisdiction of this Court was expressly reserved.

In the result, the points in limine be and are hereby dismissed and I order that the matter proceeds on the merits.

T.S. MASUKU

ACTING JUDGE