REPUBLIC OF NAMIBIA

CASE NO. I 983/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARGRETH LUGONDO NDAPEWA WALENGA **Applicant**

and

JOHN WALENGA **Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 10 November 2011

Delivered: 30 December 2011

REASONS FOR JUDGMENT IN MATTERS IN TERMS OF RULE 33(4) AND RULE 43

VAN NIEKERK, J: [1] In this matter I made an order on 30 December 2011. In setting time limits within which to comply with specific parts of the order, I took into consideration that the offices of both legal

firms involved were closed for the Christmas holiday. I also gave notice in advance that the order would be made by the end of December and arranged that the order also be sent by e-mail to both legal practitioners who appeared before me. The reasons now follow.

[2] The applicant in this rule 43 application is the defendant in an action for divorce in which the respondent claims that she unlawfully, maliciously and with the fixed intention to terminate the marriage "constructively" deserted the plaintiff by indulging in certain conduct, details of which are set out in the particulars of claim. The applicant denies any of the alleged conduct, but in the alternative pleads that, should the Court finds that she indeed committed any of the alleged conduct, she did not do so with the malicious and fixed intention to terminate the marital relationship between the parties. She further unconditionally tenders restoration of conjugal rights to the plaintiff in the event that the Court should find that she has wrongfully and maliciously deserted the plaintiff. Applicant has also filed a conditional counterclaim in which she makes allegations against the respondent of unlawful and malicious desertion based on actual, alternatively, constructive desertion. In his plea to the counterclaim the respondent denies all the unlawful conduct laid at his door, but admits that he left the common bedroom because sharing it with the applicant had become intolerable as a result of her alleged misconduct during the marriage.

[3] It is common cause that since the pleadings have closed, the respondent left the matrimonial home and is residing elsewhere, while the

applicant and their three minor children remain behind in the matrimonial home.

[4] It is further common cause that the parties were married to each other in terms of section 17(6) of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), as amended, (hereinafter "the Proclamation") at Oniipa, Ondangwa and that the said Proclamation applies to them.

The question to be decided in terms of rule 33(4)

[5] One of the issues in dispute in the litigation between the parties is whether they are married in or out of community of property. The respondent alleges in the particulars of claim that they were married out of community of property in terms of section 17(6) of the Proclamation. In response to a request to provide further particulars on the legal provision on which he relies for this assertion his answer is, "The provisions pertaining to the exclusion of community of property in the concerned marriages unless a declaration to the contrary is made." The applicant in her plea denies that the marriage was concluded out of community of property and pleads that the marriage was, as agreed between the parties, concluded in community of property. In response to the allegation in her conditional counterclaim that the parties married in community of property the respondent merely pleads, "It is denied that the marriage between the parties has consequences of a marriage in community of property."

[6] The parties agreed in terms of rule 33(4) that this issue be decided separately and that the only evidence to be used in determining the issue shall be Annexure "WM2" and the marriage certificate attached to the applicant's rule 43 application. The parties further agreed that this issue be argued at the same time as the rule 43 application.

[7] Annexure "WM2" consists of two documents. The first bears the heading "**MARRIAGE IN COMMUNITY OF PROPERTY**", followed by a second heading underneath, "DECLARATION IN TERMS OF SECTION 17 (6) OF PROCLAMATION 15 OF 1928". It records the full names of the bridegroom and bride's forenames and maiden name and states: "We ..... declare under oath/solemnly declare that the (*sic*) marriage in community of property and subsequent hereditary rights have been explained to us by REV. HALOYE NASHIHANGA. We hereby notify you that it is our intention and desire that community of profit and loss shall result from our marriage." The declaration was signed on 17 May 1997 by the respondent as bridegroom and by the applicant, using her maiden name, as bride and then attested by Rev Nashihanga.

[8] The second page of Annexure "WM2" is a form by the Department of Civic Affairs in the Ministry of Home Affairs on which the applicant, using her maiden name, *inter alia* declared under oath that the personal particulars of herself and her "prospective husband" (the respondent) are correct; that they are not within the prohibited degrees of relationship; and that there is no lawful impediment to their marriage.

[9] The third document is the marriage certificate, which indicates that the marriage was solemnized without an antenuptial contract.

[10] Both counsel's oral submissions in this case focused mainly on the first document. Mr *Namandje* on behalf of the respondent submitted that on the basis of the documents only the Court cannot make a finding that the marriage is in community of property as it cannot be determined that prior to the solemnization of the marriage the parties complied with the proviso in section 17(6), whereas Ms *Schickerling* on behalf of the applicant submitted the opposite.

[11] Section 17(6) provides as follows:

> "A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage."

[12] In my view the short answer to the question to be decided is that the first document speaks for itself. Although the document itself does not state expressly that the declaration was made prior to the solemnization, it does indicate that it was executed on the date of the marriage. It further states

clearly that it is concerned with a marriage in community of property and that it is a declaration "in terms of section 17(6)" of the Proclamation. A declaration cannot be a declaration "in terms of section 17(6)" if it does not comply with the provisions of section 17(6), one of which is that the "intending spouses" shall "at any time within one month previous" to the celebration of the marriage jointly declare before the officials mentioned "that it is their intention and desire that community of property and of profit and loss shall result from their marriage". In the absence of any evidence to the contrary, and there is none, it must be accepted that the declaration is what it says it is namely, a declaration "in terms of section 17(6)".

[13] When I suggested same to Mr *Namandje* during oral argument, he moved for the withdrawal of the rule 33(4) question from adjudication, electing rather to present oral evidence during the trial on the sequence of events that occurred on the day of the marriage. Not surprisingly, counsel for the applicant objected to this course of action, pointing out that the rule 33(4) question was agreed upon at the insistence of the respondent. In my view the respondent has made his proverbial bed and so he must lie on it.

[14] The result is that I am satisfied that the question of law is to be resolved in favour of the applicant.

The rule 43 application

In limine: respondent's application that the rule 43 application be struck

[15] The respondent gave notice in his reply and submitted *in limine* that the application should be struck from the roll for non-compliance with rule

43(2) as far as the format of the application is concerned. He contended that the application amounted to an abuse of process. Expanding upon these contentions during argument, Mr *Namandje* submitted that the application is "too cumbersome". He pointed to specific parts of the papers to which I shall return later.

[16] It is trite that the purpose of rule 43 is that interlocutory applications of this kind "should be dealt with as inexpensively and expeditiously as possible." (*Colman v Colman* 1967 (1) SA 291 CPD at 292C.) It was stated in the *Colman* case that:

> "The whole spirit of Rule 43 seems to me to demand that there is to be only a very brief succinct statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent, and that the Court is then to do its best to arrive expeditiously at a decision as to what order should be made *pendente lite*."

[17] This statement was approved when MAINGA, J (as he then was) in *Dreyer v Dreyer* 2007 (2) NR 553 (HC) also echoed the words used in *Dodo v Dodo* 1990 (2) SA 77 (WLD) at 79C by stating (at 556E):

> "[12] The authorities are *ad idem* that the object of rule 43 applications is that they should be dealt with in a manner which is ordinarily quick, with papers restricted in volume and costs severely curtailed. In other words, the applicant delivers a succinct statement of the reasons why he or she is asking for the relief claimed, with an equally succinct reply by the respondent."

[18] Mr *Namandje* referred the Court to various cases in which issue was taken with lengthy affidavits and annexures thereto, or to multiple affidavits, in rule 43 applications. For instance, in the *Colman* case where both parties filed "voluminous" affidavits, the court limited the costs to be paid by the unsuccessful party to the costs of such an affidavit as contemplated in rule 43(2), i.e. a brief and succinct statement. In *Smit v Smit* 1978 (2) SA 720 (WLD) the founding affidavit consisted of some 24 pages and the replying affidavit of 45 pages. Both parties included in their papers irrelevant material which was set out in great detail. As the court considered this to be an abuse of the process by both parties the court made no order on the papers and no order as to costs. In *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (TPD) the applicant's affidavit consisted of 27 pages and although "somewhat prolix and repetitious" it was considered not to seriously offend rule 43 or to be too excessive in the circumstances. However, the respondent filed a sworn statement and replying affidavit consisting of 90 pages of which 50 pages were supporting affidavits and annexures. The court struck the respondent's papers with costs.

[19] At this point it is apposite to remember that rule 43(2) states that the "applicant shall deliver a sworn statement in the nature of a declaration" and that rule 43(3) states that the respondent "shall deliver a sworn reply in the nature of plea". In the *Smit* case, on which counsel for the respondent heavily relied, much emphasis was placed on this aspect. So too in *Varkel v Varkel* 1967 (4) SA 129 (C) at 132C-F the following was stated:

> "The statement required by the applicant under Rule 43 is a document in the nature of a declaration. A declaration in our practice is considered to be a document containing a concise statement of the facts and conclusions of law on which the claim is founded with a statement of the relief sought. A declaration is not supposed to contain unnecessary narrative or evidential facts intended to be adduced at the trial in support of the claim. There is annexed to the stated case I am presently considering a copy of a document which was intended to serve as a statement by Mrs. Varkel in her capacity as an applicant under Rule 43. A perusal of this document indicates that the practitioners responsible for its preparation entirely misconceived the purpose of a statement required by Rule 43. The document in question is prolix, running to as much as 35 folios, and contains allegations not required or permissible in a statement which is supposed to be in the nature of a declaration. The Rule contemplates that the parties to the dispute will appear at a summary hearing and give evidence before the Court. That is the proper occasion for the production by one or other of them of evidence in support or contradiction of the claim for the relief sought. The statement under Rule 43 is not intended to be the vehicle for the production of such evidence. Accordingly it would have been sufficient in regard to the prospective respondent's financial position to have alleged in the statement that he was a man of considerable means."

[20] On the other hand there are cases in which the courts have preferred not to take such a pared down view of what they would consider to be advisable in rule 43 applications. In *Boulle v Boulle* 1966 (1) SA 446 (D & CLD) the following was said (at 449G – 450D) in regard to a point *in limine* taken that the applicant's statement does not comply with Rule 43(2) in that it is not a statement in the nature of a declaration because it sets out a great deal of detail:

> "Mr. *Meskin*, in support of the point taken *in limine*, urges that the provisions of the Rule requiring that the applicant's statement be in the nature of a declaration are peremptory, and that non-compliance with the terms of the Rule operates to nullify the proceedings. I am not persuaded that the provisions of the Rule are peremptory. No doubt the intention of the Rule is that the essential facts relied upon by the applicant should be stated concisely, but it appears to me to be *prima facie* desirable that some details should be given so as to enable the Court to deal with the application, if possible, without recourse to *viva voce* evidence..... Mr. *Meskin* suggested that instead of setting out details of expenditure of her own household she should merely have confined herself to a bald statement that she was in need of maintenance in a specified sum, without indicating the basis for such need. It appears to me that that is not what is contemplated by the Rule: if bald statements of that kind were what were contemplated, it would follow that it would be necessary in almost every case for the Court to hear *viva voce* evidence in support of them, and I am sure that that was not intended. It seems to me that the particulars which have been given by the applicant in her statement, though they have to some extent been set out with undue prolixity, comply essentially with the intention of the Rule. I overrule the objection *in limine*."

(See also *Eksteen v Eksteen* 1969 (1) SA 23 (OPA) 24F-25C.)

[21] I prefer the views expressed in *Boulle* and *Eksteen*, as they seem to me, with respect, to be based on a balanced and sensible approach giving expression to the true purpose of rule 43. Nowadays this Court has become so busy that it cannot be expected to, as a rule, hear oral evidence in rule 43 applications. Moreover, in the *Dreyer* matter this Court approved the approach in *Dodo v Dodo* namely that, where special circumstances exist, deviation from the norm may be justified. In *Dreyer* the Court permitted a "bulky and cumbersome" reply which contained a supplementary affidavit

and annexures because they were necessary for the purposes of the application and simplified the issues before the Court (556J-557A). It also found that the great detail into which the respondent went with regard to expenses incurred in relation to some of the children and his earning capacity were for a good cause. The objections to the reply were dismissed (557G-H).

[22] While Mr *Namandje* did not propose that oral evidence should be heard on the circumstances of the parties, he did point to certain specific parts of the applicant's papers and submitted that their inclusion in applicant's statement is unnecessary. He stated in regard to paragraph 7 of the applicant's affidavit that she need not deal with the main action. In response hereto Ms *Schickerling* submitted that it is required of an applicant for relief under rule 43 to make allegations of fact upon which, if proven, she will succeed in the main action. She further submitted that the contents of paragraph 7 are aimed at satisfying this requirement. It is indeed so that an applicant for relief *pendente lite* must *inter alia* show that he/she has a *prima facie* case in the main action. In *Hamman v Hamman* 1949 (1) SA 1191 (W) the requirement is set out as follows (at 1193):

> "In order to decide whether a *prima facie* case has been made out in a petition of this character, the Court must ask itself whether, if all the allegations in the petition were proved, the applicant would succeed in the main action. The Court cannot speculate as to who is likely to succeed by nicely balancing the probabilities. Of course, where a respondent produces overwhelming proof (such as correspondence or documentary or equally convincing evidence) showing that there is no foundation at all for the allegations in the petition, the Court would be obliged to hold on the papers that a *prima facie* case had not been

> made out and the test set out above would not be applicable. Short of such evidence by the respondent, however, the Court will assume that the allegations in the petition are capable of proof and will consider whether the applicant would be entitled to judgment in the main case, if the facts set out in the petition were proved."

(See also *Du Plooy v Du Plooy* 1953 (3) SA 848 (TPD) 852D-F; *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) 417C-D).

[23] Respondent's counsel also directed complaint against certain paragraphs of the applicant's affidavit which deal with the issue of interim custody and control of the minor children. He submitted that they were unnecessary and provide indication of an abuse of process because there is no dispute about custody and control. It is indeed so that the applicant states in her affidavit that there are no arguments between her and the respondent regarding custody and control of the three minor children, yet she deems it in the best interests of the children to obtain certainty as to their interim custody "to avoid any future confusion or unnecessary quarrels."

[24] I agree with Mr *Namandje* that this Court should not be required to adjudicate matters of this nature on an interim basis where the *de facto* situation is not an issue between the parties and where there is no reason to anticipate a dispute. It does not mean, however, that the entire application should be struck. However, I ultimately did not make any order regarding the issue of interim custody and control of the minor children.

[25] I do not think there is merit in respondent's complaint directed at paragraphs 14-28 of the affidavit as going completely overboard when

making allegations about the need for interim maintenance for the applicant and the minor children. The applicant provides useful factual details to assist the Court to come to a reasonably informed decision on the matters under consideration. If anything, the details are somewhat sparse in some instances, more notably when dealing with the issue of a contribution to legal costs, an aspect to which I shall return later.

[26] The applicant's affidavit consists of 10 pages of which one page is made up of the heading and citation of the applicant. Another page is taken up by the attestation of the affidavit. Annexures to the affidavit make up a further 16 pages. These set out details regarding proposed access to the minor children (which is irrelevant), four documents relating to the proprietary regime and the celebration of the marriage, applicant's payslip, a list of assets and liabilities of the joint estate, applicant's monthly budget and copies of receipts and statements in relation to legal costs, as well as one document regarding school enrolment of one of the children, which appears to have been annexed by mistake.

[27] Although the affidavit may here and there contain too much narrative detail, it cannot be described as excessive. In my view there is no merit in the objection that the application is too cumbersome.

[28] In his heads of argument Mr *Namandje* placed some emphasis on the fact that the applicant should, as part of the application, deliver a notice to the respondent "as near as may be in accordance with Form 17 of the First Schedule". Form 17 contains a very short notice to the respondent which reads as follows:

> "TAKE NOTICE that if you intend to defend this claim you must, within 10 days, file a reply with the registrar of this court, giving an address for service as referred to in rule 6 (5) (b), and serve a copy thereof on the applicant's attorney. If you do not do these things you will be automatically barred from defending, and judgment may be given against you as claimed. Your reply must indicate what allegations in the applicant's statement you admit or deny, and must concisely set out your defence."

[29] In this case the applicant's notice is a combination of parts of Form 2(b), which is the form of notice required by rule 6(5)(a), and Form 17. It fully sets out the relief claimed, something which is not required by Form 17. The respondent is not prejudiced by the notice being in this form (except perhaps in relation to costs) and its use in this case may be condoned. I therefore I do not think that the non-compliance with Form 17 in this case is a reason to strike the whole application. The notice in the form issued by the applicant constitutes 3 pages. If her notice had been done in accordance with Form 17 it would at most have filled 1½ pages. Any prejudice in regard to costs may be taken care of by a special order. However, the attention of litigants is drawn to the fact that rule 43(2) requires a specific notice in abbreviated form as set out in Form 17, presumably to curtail costs, and that rule 43 notices should in future be limited to this form.

[30] Finally, the conclusion I reached on the application to strike the entire application is that it should be dismissed.

The respondent's application to strike annexure "W5"

[31] The respondent gave notice of an application, which was moved, that Annexure "NW5" read with paragraph 18 of the applicant's affidavit be struck on the ground that it is riddled with inadmissible hearsay as well as inadmissible opinion evidence. In paragraph 18 of her affidavit the applicant states:

> "The respondent's assets, as far as I could establish, are set out in an annexure hereto marked "NW5". Needless to say the respondent is a person of substantial financial means."

[32] Annexure "NW5" is a document which sets out a list of assets and liabilities of the joint estate with their respective estimated values and a proposed division of same between the parties. Mr *Namandje* emphasized the use of the words "as far as I could establish" and submitted that they indicate that the list is based on inadmissible hearsay because, *inter alia*, the sources of the applicant's information are not mentioned. He further submitted that the estimated valuations amount to inadmissible opinion evidence as the applicant is not an expert valuator.

[33] These objections may be rejected out of hand. The words to which counsel refers do not necessarily mean that hearsay is being relied upon. In any event, the purpose of the document is clearly to provide an indication to the Court of the estimated extent and value of the joint estate so that the Court may form an opinion on whether the amounts claimed by the applicant are reasonable and likely to be affordable. To rely on estimates would be acceptable at the interim stage of the litigation between the

parties. The estate is allegedly made up of a considerable number of assets, certainly more so than that of the average person, and many of the assets fall under business operations which are the respondent's domain. In my view it is reasonable that the applicant follows a cautious approach by not making bald statements of fact and by, in effect, intimating to the Court that the list may not be accurate in all respects, but that she did her best to put forward accurate information. If the applicant is not permitted to present the information in this way, she will open herself to the criticism that her affidavit is cumbersome because she is attaching affidavits by deponents who are the sources of her information. In a rule 43 application she is also not generally permitted to attach supplementary or confirmatory affidavits. Moreover, if the respondent expects her to attach affidavits by the sources of her information and by expert valuators how much more cumbersome would the already, according to respondent, cumbersome application then be? It seems, on respondent's arguments, that applicant is damned if her affidavit contains detail and damned if it does not.

[34] The application for striking out of the annexure should be dismissed.

The merits of the rule 43 application

[35] Before considering the merits of this application I should point out that, although the applicant in her notice claimed custody and control of all three children of the marriage, specifying them by name, the prayer setting out the claim for maintenance for the children only refers to "the two minor children". Applicant's counsel stated that this was merely a typing error and informally moved for its correction to refer to the three children.

Respondent's counsel objected to this amendment on the basis that the respondent is prejudiced because it was understood that the maintenance claim was limited to the two older children, the youngest being a toddler and, as I understood it, not requiring much in the way of maintenance. Although there is a reference in the applicant's budget to "infant care", there are no clear indications in the papers that the applicant included the youngest child in the claim. In light hereof I accept that the respondent might have dealt with the issue differently in reply if he knew that the claim is for all three children. I therefore decided to grant the applicant leave to approach the Court on the same papers, duly amplified where necessary, to claim maintenance *pendente lite* in respect of the youngest child.

[36] The applicant states in her affidavit that, since she instituted her counterclaim she and the respondent have frequently become involved in arguments concerning their proprietary rights. She alleges that, since he left the common home during June 2011, the respondent has paid no maintenance for her or the children, apart from the school fees of the two older children. On one occasion he did buy groceries to the value of N$3500.

[37] She sets out her personal income from her salary in the public service as a training officer. She earns a basic salary of N$14 104-25 and an additional allowance for housing (N$1 812-00) and transport (N$520-00), bringing the total gross salary to N$16 436-25. The following is deducted from the gross salary: 2 insurance policies (total N$ 775-53), repayment of

the home loan (N$4 500-00), social security (N$54) and pension contribution (N$3 517-05), leaving her with disposable income of N$6 452-33.

[38] The applicant states that she has always earned substantially less than the respondent; that throughout the marriage the respondent left the care of the minor children and the homemaking duties to her, while he pursued his varied business interests; that the respondent always was the breadwinner; that he paid the day-to-day expenses of the family and that they have become accustomed to a high standard of living. She states that the respondent receives what I understand to be a monthly income in excess of N$150 000-00 from 6 businesses which she mentions by name, as well as various other dividends.

[39] The applicant attaches an annexure in which she sets out a monthly budget. This document does not appear to have been drawn up specifically with the rule 43 application in mind and is therefore not applicable in every respect. Nevertheless, from the document it is evident that the applicant's alleged needs are the following: domestic worker (N$950), food (N$5 000), DSTV (N$650), fuel (N$2 000), vehicle repair and maintenance (N$1 000), water and electricity (N$2 000), children's pocket money (N$500), children's sports events (N$500), additional medical costs (N$300), medical aid additional cover (N$740), study policies (N$1 100), telephone (N$500). I do not include items here which already are paid by the respondent, like the school fees, or items already subtracted from the applicant's salary, or the amount of N$ 2 000-00 for infant infant care which I assume relates to the youngest child. I note that no provision is made for clothing. I assume

cleaning materials and cosmetics are included in the "food" item. The applicant also included an item "savings and investments" of N$1 500 and "other" of N$1, 500. I shall not consider these two items for purposes of interim relief as no further details are given of what they are about.

[40] The respondent's reply in general is brief to the point of baldness. In regard to the allegation fuel about the children's maintenance he contents himself by merely denying that he fails to maintain the children, mentions that he pays the school fees of the two older children, (which is in any event admitted by the applicant) and states that he "continues maintaining the children". Later in his reply he alleges that he has been paying for all the children's needs, including school fees, extramural activities and all their other financial needs, as well as food. Curiously though, in the list of expenses he drew up for the Court, only the school fees are listed. The item listed as "food" at N$1500 appears to refer to his own food. He further states that he has exclusively been maintaining the children and describes this as unfair, as the applicant is also able to contribute to the maintenance of the children. In my view the respondent's reply lacks persuasiveness because of the lack of specific detail. The impression I have of the respondent's reply is that he is deliberately saying as little as possible and contenting himself with bare, blanket and, at times, evasive denials even where explanations or details are screaming to be mentioned. It seems to me that this stance is taken against the background of the respondent's allegation that the marriage is out of community of property, an allegation which has no validity in light of the Court's finding on this aspect.

[41] In regard to the allegations regarding his monthly income the respondent's reply is also vague and evasive. He denies that he receives a monthly income of N$150 000 and alleges that his net salary is ±N$33 000-00. He denies receiving a monthly salary from the entities mentioned by the applicant, but does not deal specifically with the allegation that he receives a monthly income from the entities mentioned. He does not disclose the source of the salary he does receive. He does not provide a salary slip nor does he provide any details about his basic salary, any additional allowances, his gross salary or deductions from his gross salary.

[42] The list of monthly expenses he provides lists the school fees for the two older children (N$8 000-00), the hire purchase instalment for the Pajero vehicle (N$7 147-96), the bond repayment (N$5 606-98), gym (N$529-00), N$300 each for daughters Monica and Sylvia (not the children concerned in this application) (N$600-00), food (N$1 500-00), water and electricity (N$1 300-00), his mother and her household (N$900-00), legal fees (N$1 500-00), short term insurance for the marital home (N$4 252-61), tuition fees for Frieda Walenga (not one of the children concerned in this application (N$1 495-30). When these are totalled, they come to N$32 833-85, just N$575-75 short of his alleged net salary.

[43] In argument Mr *Namandje* submitted that an analysis of the respondent's list of expenses shows that he provides maintenance in the form of a roof over the family's head by paying N$5 606-98 towards the bond and by paying N$4 252-61 for the short term insurance cover in respect of the contents of the house. I agree that this is indeed a way of providing

maintenance by ensuring that there is accommodation and furniture and other appurtenances which go with the family home. However, I am keeping in mind that hereby the respondent is also at the same time serving his own interests by preserving his assets, instead of spending money on consumables used by his wife and children and from which he derives no material benefit. I further note that the applicant also contributes N$4 500-00 towards repayment of the bond.

[44] Although the respondent generally disputes the accuracy of annexure "NW 5" which sets out the applicant's estimates regarding the assets and liabilities of the joint estate, he does not state what the correct position is. In fact, he does not provide any details whatsoever about any assets or liabilities. In these circumstances I am inclined to accept the applicant's estimates. From this exposition it is clear that the parties indeed are wealthy. If need be, the reasonable requirements of support for the applicant and the children must be met from capital, if the respondent's income is not sufficient.

[45] It is clear from the deductions from the applicant's gross salary read with the budget, that apart from compulsory deductions such as pension, tax and social security, she mainly contributes to the repayment of the home loan and insurance policies to the benefit of the family. Her net salary is clearly not sufficient to meet the other reasonable needs of the children and herself. I am of the view that the amount of N$5 000 she claims for herself and the N$3 000 per child for the two older children is fair and reasonable.

Contribution to legal costs

[46] The applicant alleges that she has to incur considerable legal costs to defend the action for divorce and to bring these proceedings. As to the latter, rule 43(7) is clear that the maximum fees that may be charged for an opposed rule 43 application, including appearances are N$1 260-00. As to the divorce action she merely states that she is advised that "a fully fledged divorce trial can incur considerable legal costs." She claims N$50 000-00 as a reasonable contribution towards legal costs which will ensure proper representation at least until the trial stage, when she will reconsider practitioners to the total of sum of N$15 900-00 for fees already paid. According to a statement dated 24 August 2011 it appears that there was still an amount of N$1 634-64 due, which brings the total legal costs already incurred to N$17 534-64.

[47] The respondent denies that the applicant is entitled to a contribution for legal costs because she is able to pay for her own legal costs and because she is married out of community of property. To my mind the applicant has shown clearly that she is not able to carry the full costs of her legal expenses on her salary. Apart from the fact that I have already found that the parties are married in community of property, it should be said that even a spouse married out of community may, in law, claim a contribution to legal costs based on the mutual duty on married parties to support each other. (See generally Hahlo, The South African Law of Husband and Wife, (4th ed) p520).

[48] I do, however, agree with the respondent's contention that the applicant has not made out a case for the amount of costs demanded. In *Dreyer's* case (*supra*) this Court laid down what is expected from an applicant claiming a contribution to costs. In that case the applicant stated what her legal costs had been during a certain period in the past and that she requires the respondent to make a contribution of N$50 000 to her legal costs. She provided documents to show that she had paid all but a small amount of the costs she had already incurred. In this regard MAINGA J stated (at 560I-561A):

> "[31] The main file is unfortunately not before me. The divorce action is ripe to go on trial and was set down for two days, 3 and 4 July 2007, and has by agreement between the parties been removed from the roll. In my view, the applicant should have averred that the N$50 000 she is seeking are for the expenses she will incur in presenting her case. This involves, inter alia, how much the lawyer has requested, the status of counsel presenting the case, and the scale of litigation of the parties. To base the estimation on what she has spent so far in costs is insufficient. Nevertheless, maintenance is always determined in *accordance with the needs of the party requiring the maintenance* and the availability of funds. That applies whether it is maintenance *stricto sensu* or a contribution towards costs. (*Dodo v Dodo supra* at 99I.) (The emphasis is mine.)"

[49] *In casu* the main file is indeed before me. It is evident that the pleadings have closed and that discovery notices have been exchanged. The joint case management report indicates that no further interlocutory applications are envisaged. The parties indicated that a decision on the marital proprietary regime will assist settlement negotiations. They have further agreed to jointly appoint an expert to report on the custody and control of the minor children. The applicant does not indicate what the

costs for such appointment would be. There is no indication whether counsel is to be instructed to represent applicant at the trial and what reservation fees must be deposited in anticipation of trial. Furthermore, there is no indication of the fees required by instructed or instructing counsel. There is only an estimation by the applicant that an amount of N$50 000 would be "more than reasonable" until the trial starts.

[50] Looking at the financial situation of the applicant I am satisfied that she is in need of a contribution to costs, but the amount itself is not properly motivated. As I am inclined to assist the applicant in this regard, leave should be given to supplement the papers to place more detailed information before the Court so that the amount required may be properly assessed. In fact, it is hoped that, in light of the decision on the issue of the proprietary regime and other remarks made during the course of this judgment, the parties will, in a spirit of reasonableness, come to some agreement on the outstanding interim matters, namely maintenance for the youngest child, and a contribution towards applicant's legal costs.

<u>The claim for delivery of a motor vehicle</u>

[51] The applicant alleges that, actuated by malice, the respondent took away "her" motor vehicle, a 2009 Toyota Lexus 2,5 Sport, and that, as a result, she is unable to drive the children to and from school and other activities. She now has to depend upon friends and relatives to assist her in this regard. She further alleges that the respondent has, throughout their marriage, always made a vehicle available to her. She also alleges that she does not have the means at her disposal to purchase a vehicle for herself. In

light hereof she prays that the respondent be ordered to return the Lexus to her, alternatively, that the respondent provides her with a suitable other vehicle *pendente lite*.

[52] The respondent denies that the applicant had any vehicle that was taken away from her. He alleges that the applicant, with the concurrence of Omalaeti Productions, a company "associated with the respondent" used the company's vehicle for a limited time. The company has since taken the vehicle back. The respondent does not, however, deny the allegation that he always, during the subsistence of the marriage, provided a motor vehicle to the applicant. In any event, the respondent alleges that the relief sought in relation to the vehicle is incompetent. In oral submissions Mr *Namandje* expounded upon this stance by stating that it is not permissible to claim a specific asset as maintenance *pendente lite* and that only the payment of a sum of money, be it periodical or a lump sum, may be prayed for.

[53] It is so that in terms of the repealed Maintenance Act, 1963 (Act 23 of 1963) a "maintenance order" was partly defined as an order for the periodical payment of sums of money. The current Maintenance Act, 2003 (Act 9 of 2003) contemplates payments of specified sums of money, although section 17(4) of the Act does provide that a maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments.

[54] The High Court rules do not define the word "maintenance" and there is no indication in rule 43 that a claim for maintenance is limited to a claim

for a sum of money. Rule 43(1)(a) merely states that it shall apply whenever a spouse seeks relief "in respect of maintenance *pendente lite*." The common law duty to support a spouse includes the provision of accommodation, food, clothing, medical and dental attention and other necessaries of life on a scale commensurate with the social position, lifestyle and resources of the spouses. It is trite that the scope of this duty is determined by the spouses' standard of living and their standing in the community (*Gammon v McClure* 1925 CPD 137 at 139, *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 297). The duty to support is not limited to household necessaries (*Young v Coleman* 1956 (4) SA 213 (D) at 218). How the support is to be provided will depend on the discretion of the spouses. (Van Heerden and others, Boberg's Law of Persons and the Family, (2nd ed) p236).

[55] In *Van der Spuy v Van der Spuy* 1981 (3) SA 638 KPA at 642F-G the Court held that there was no reason in principle why a Court may not, e.g. order a father to place an empty house at the disposal of his spouse and children *pendente lite* and that the obligation to maintain need not necessarily be executed by way of payment of money. A parent is also entitled to tender support in kind, e.g. by providing accommodation or by undertaking to be responsible for certain specified obligations. In this case the Court ordered *pendente lite* that the respondent husband should deliver from the matrimonial home certain items of furniture which were previously used by the wife and children.

[56] There is also authority that an order for maintenance may include sufficient money to maintain a motor vehicle (*Young v Colman (supra)* 218D).

[57] *In casu* the applicant states that she was always provided with a vehicle in relation to her driving the children to and from school and other activities. She does not state expressly whether this vehicle (apart from the Lexus) belonged to the joint estate or what the position was. In my view it does not matter. As I said before, the respondent does not deny that in the past he has always provided a vehicle to the applicant. This was the way the parties were accustomed to live and the manner in which they exercised their discretion to provide support to the applicant. There is no denial that this is the manner in which the applicant fulfilled her duties as caretaker of the children and I see no reason why she should not continue doing so or why she should not use the vehicle for her own transport where required. As no indication is provided in the affidavit of the value and/or the costs of these vehicles and/or to acquire them, I considered it best not to order the respondent to pay a specific sum of money for a vehicle, but rather to order him to provide such a vehicle. It is clear that he is able to afford it, if not from his income, then from capital. I do not see how the respondent can expect to drive around in a Pajero while the applicant who has the *de facto* custody of two teenage children and a toddler must make do with favours from friends and relatives or, perhaps, public transport. In order to give the respondent sufficient time to obtain a suitable vehicle, I ordered him to provide same within a month from the date of the order. In case there is any clarity required, by "suitable" I mean a reliable vehicle with which to convey the applicant and the children in the style and comfort to which they have ordinarily been accustomed.

Costs

[58] In my view the issue of costs should stand over for determination after the main action. However, I wish to specifically limit the amount of costs of the rule 43 application to the amount provided for in the rules, namely N$1 260-00.

Order

[59] Having considered the arguments presented and the papers before me, as well as the applicable law, I made the following order on 30 December 2011:

> "1. The marriage between the applicant and the respondent on 17 May 1997 at Oniipa, Ondangwa, was concluded in community of property.
>
> 2. The respondent's application to strike the rule 43 application is denied.
>
> 3. The respondent's application to strike Annexure "NW5" read with paragraph 18 of the applicant's sworn statement in the rule 43 application is denied.
>
> 4. No order is made on the application that custody and control of the minor children be awarded to the applicant *pendente lite*.
>
> 5. The respondent shall pay maintenance to the applicant *pendente lite* in the amount of N$5 000-00 per month, the first payment to be made on or before 10 January 2012 and thereafter on or before the 7th day of every month.
>
> 6. The respondent shall pay maintenance in respect of the two older minor children *pendente lite* in the amount of N$3 000-00 per month per child, the first payment to be made on or before 10 January 2012 and thereafter on or before the 7th day of every month.

7. The applicant is given leave to approach this Court on the same papers, duly amplified where necessary, to claim maintenance *pendente lite* in respect of the youngest child.

8. The applicant is given leave to approach this Court on the same papers, duly amplified where necessary, to claim a contribution to her legal costs in the pending litigation.

9. The respondent is ordered to provide the applicant on or before 31 January 2012 with a suitable vehicle to transport herself and the minor children *pendente lite*.

10. The costs of the issue determined in terms of rule 33(4) and the costs of the rule 43 application shall stand over for determination at the end of the case."

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VAN NIEKERK, J

Appearance for the parties:

For the applicant: Ms C Schickerling

Instr. by Etzold-Duvenhage

For the respondent: Mr S Namandje

Instr. by Sisa Namandje & Co Inc