

REPUBLIC OF NAMIBIA



HIGHCOURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1840/2015

In the application between:

RS

APPLICANT/PLAINTIFF

And

RS

RESPONDENT/DEFENDANT

Neutral citation: *RS v RS (I 1840/2015) [2017] NAHCMD 128 (12 April 2017)*

Coram: PRINSLOO AJ

Heard: 17 March 2017

Delivered: 12 April 2017

Reasons provided: 28 April 2017

Flynote: Interlocutory – Matrimonial – *Rule 90* application – Plaintiff applied for maintenance *pendent lite* – An applicant must in the first instance make out a prima facie case in the main action. Should such an applicant fail to do so that is the end of

the application. However should an applicant discharge this onus, the court would then consider the relief sought in the application – The Court is not persuaded that this is a matter of unusual complexities or exceptional circumstance and can find no justification for the inordinate prolixity in the papers on the part of both parties.

Summary: On the 24th of October 2016 the applicant filed an application in terms of *Rule 90(2)* of the High Court Rules claiming interim maintenance for herself pending the finalization of their divorce. Counsel for the respondent applied to have the application struck off the roll on the basis that it is an abuse of the process of this Court.

Court held: The Purpose of Rule 90 application to demand that there should be only a very brief 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 *pendent lite*. However the Court must have a balanced and sensible approach to an application of this nature and each matter need to be treated on its merits.

Court held further: Maintenance *pendent lite* is intended to afford temporary relief; thus the Courts do not insist on the claim being presented with the same degree of precision and exactitude as is afforded by detailed evidence.

Court held further: Prolixity in these proceeding is not in accordance with the spirit and purport of Rule 90 and is an abuse of process because it defeats the purpose or object of the rule. Application is struck.

ORDER

1. The matter is struck off the roll with costs. Such costs to be on the ordinary scale.
2. The matter is postponed until 27 April 2017 at 15:30 for status hearing.

JUDGMENT

PRINSLOO AJ:

Introduction

[1] On the 24th of October 2016 the applicant filed an application in terms of *Rule 90(2)* of the High Court Rules (hereinafter referred to as the 'Rules') claiming interim maintenance for herself pending the finalization of their divorce.¹

[2] In respect of this application, which is presently subject to adjudication before me, the applicant claims the following:²

‘1. That the Respondent be ordered to pay maintenance pendent lite in respect of the applicant in the amount of N\$ 12 000.00 per month, the first payment to be made on or before 1 December 2016 and thereafter on or before the 1st day of each following month until the pending divorce action has been finalized.

2. Costs of the application.

3. Further and/or alternative relief.’

[3] The application was opposed and the matter was set down for hearing on 17 March 2017.

Point in Limine: Law applicable to Rule 90 applications:

[4] At the commencement of the hearing counsel for the respondent applied to have the application struck off the roll on the basis that it is an abuse of the process of this Court. The Court was referred to Rule 90(2) and the relevant part reads as follows:

¹ *Rules of the High Court of Namibia: High Court Act, 1990 – GN 14 of 2014.*

² Pleadings Bundle, p 146-147

'(2) An applicant must deliver a sworn statement in the nature of particulars of claim setting out the relief claimed and the grounds therefor together with a notice to the respondent on Form 19...'

[5] The applicant's papers are anything but brief and the respondent's reply is less than succinct. The applicant's affidavit runs to a sum of 9 pages. It has 7 annexures attached to it is running to 120 pages and the contents of which are incorporated by reference.

[6] The respondent's answering affidavit of 24 pages with 14 annexures attached to it, running to 57 pages, can perhaps be excused as being a response to an overly detailed declaration. However, he too is given to verbosity and unnecessary statements.

[7] The result of the voluminous affidavit filed by the applicant and equally voluminous answering affidavit of the respondent is that this application comprises of 219 pages in total.

[8] Muller J discussed the requirements of an application for maintenance *pendent lite* in the matter of *RH v NS* 2010 (2) NR 584 at p589, as follows:

*'[11] In the rule 43 application an applicant has to put facts before the court that, if proved, will ensure success in the main action³. The rule does not prohibit annexures as long as they constitute admissible evidence⁴. No replying affidavit is allowed⁵. Each case depends on its own facts⁶. This type of application cannot be determined so precisely as one where evidence is presented.⁷ Because there are only two affidavits the court has to draw inferences and look at the probabilities as they emerge from the papers. Of course a finding of the court in respect of a rule 43 application is not binding on the trial court in the main action⁸. In order to evaluate the probabilities and to make a proper assessment, annexures to prove averments may be important. In the case of *Taute v Taute*, supra, a balance sheet and tax assessments*

³ Du Plooy v Du Plooy 1953 (3) SA 848 (T) at 852D.

⁴ Nathan, Barnett & Brink Uniform Rules of Court 3 ed at 270; *Williams v Williams* 1971 (2) SA 620 (O); *Maree v Maree* 1972 (1) SA 261 (O); *Gerber v Gerber* 1979 (1) SA 352 (C).

⁵ *Mather v Mather* 1970 (4) SA 582 (E) at 585 B

⁶ *Mather v Mather* 1970 (4) SA 582 (E) at 587H

⁷ *Taute v Taute* supra at 676B; *Levin v Levin and Another* 1962 (3) SA 330 (W) at 331D; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 1118.

⁸ *Taute v Taute* supra at 676C – D.

were provided to prove the income of the applicant⁹. Sufficient details must be given to enable the court to deal with the matter¹⁰. In respect of further evidence a party must apply for leave to provide such evidence¹¹. Although the affidavits in a rule 43 application should be similar to pleadings, they cannot be similar in all respects. In certain instances where a respondent needs to prove the truth of his/her version, he or she may need to annex certain documents, which would normally in the main case be handed in as exhibits. In such circumstances exhibits may be annexed to the papers¹².

[9] The purpose of Rule 90 (old Rule 43) proceedings was captured in the words of Theron J in *Colman v Colman*¹³ in which the learned Judge said:

'The whole spirit of Rule 43 seems to me to demand that there should be only a very brief 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 pendent lite.'

[10] The Court must have a balanced and sensible approach to an application of this nature and each matter need to be treated on its merits. This is evident from the matter of *Dreyer v Dreyer*¹⁴ where the Court deviated from the norm and accepted a 'bulky and cumbersome' reply as the Court was of the opinion that the annexures were necessary for purposes of the application and that it simplified the issues. In this regard the Court followed the approach of *Dodo v Dodo*¹⁵. It is however important to note that the Court in the Dodo matter went further to qualify that the deviation applies "*wherein complexities in Rule 43 applications are unusual*"¹⁶. (My emphasis)

[11] Counsel for the applicant submitted that all these annexures were filed to show some detail in the application and further to show the applicant's prospects of success in the main action with reference to the matter of *Stoman v Stoman*¹⁷.

⁹*Taute v Taute* supra at 677A – B; Harms Civil Procedure in the Supreme Court at 463.

¹⁰ Nathan, Barnett & Brink Uniform Rules of Court 3 ed at 272.

¹¹ Nathan, Barnett & Brink supra at 272; *Vester v Vester* 1975 (3) SA 493 (W)

¹² *Gerber v Gerber* 1979 (1) SA 352 (C) at 353 E-F.

¹³ 1967 (1) SA 291 (C) at 292A

¹⁴ *Dreyer v Dreyer* 2007 (2) NR 553 (HC) at 556

¹⁵ 1990 (2) SA 77 (W) at p79

¹⁶ *Dodo v Dodo* supra at p 79 D: "However, there should be no reason why special circumstances may not justify a deviation from that norm, wherein complexities in Rule 43 applications are unusual."

¹⁷ (I 1209/2013) [2014] NAHCMD 116 (27 March 2014)

[12] Court is in agreement with the fact that an application of this nature should show some detail to enable the court to deal with the application, and avoid recourse to viva voce evidence¹⁸. The operative word however is some detail.

[13] The applicant's affidavit is prolix, verbose and contains unnecessary and irrelevant information. Describing the affidavit and annexure thereto as bulky and cumbersome would be putting it lightly. Annexed to the affidavit are a multitude of receipts for pre-paid electricity, municipal accounts, receipts for prescribed medicine from the pharmacy, petrol receipts and bank statements (personal and in respect of the guest house).

[14] Further amongst the annexures to the applicant's affidavit is correspondences from applicant's legal practitioner to respondent's legal practitioner and a letter from the respondent directed to Bank Windhoek dating back as far as 2014.

[15] The parties' anxiety to ventilate the issues in the pending divorce action clearly manifests itself in the affidavits and annexures, were many of such issues have no place. The issue of the fixed property and the couple's debt relating to it appears to the axis upon which this application is turning.

[16] Annexures may be attached to the affidavit of the applicant and/or respondent. It is however notable that the proviso is that (a) the contents thereof constitute admissible evidence; and (b) they are documents which may be annexed to a pleading such as a declaration or a plea¹⁹.

[17] I am of the opinion that at this point it should be added that such documents annexed should also be relevant. In order to be admissible it must be relevant although relevancy alone is not sufficient enough for admissibility under Rule 90, as is clear from the Dreyer matter. The Court is expected to plough through the multitude of documents which could have been prepared in summary fashion and although relevant in the main action, the majority of the annexures are not relevant for these proceedings.

¹⁸*Boulle v Boulle* 1966 (1) SA 446 (D & CLD) at 449H-450A-C

¹⁹*Dreyer v Dreyer* supra at [13]; Erasmus Superior Court Practice supra at B1-316A

[18] An application in terms of Rule 90 should be self-contained but the Court can be referred to the pleadings in the main action²⁰ and all need not be attached to the affidavit.

[19] This Court is fully in agreement with the test set in the *Stoman* matter in respect of a Rule 90 application, as set out by Hoff J (as he then was) as follows:

*'It appears to me from these authorities that the test is twofold. An applicant must in the first instance make out a prima facie case in the main action. Should such an applicant fail to do so that is the end of the application. However should an applicant discharge this onus, the court would then consider the relief sought in the application eg maintenance pendent lite and/or a contribution towards costs.'*²¹

[20] In applicant's endeavour to comply with the test set out, she repeated her ground for divorce relied upon in respect of Claim 1 dealing with malicious and constructive desertion verbatim and also filed the whole summons with the said particulars of claim and annexures, which was unnecessary.

[21] Maintenance *pendent lite* is intended to afford temporary relief; thus the Courts do not insist on the claim being presented with the same degree of precision and exactitude as is afforded by detailed evidence.

[22] The entitlement to maintenance *pendent lite* arose from the general duty of a husband to support his wife. What is relevant in an application in terms of Rule 90 is for the Court to be placed in the position to consider the factors that need to be taken into account in reaching a just decision, i.e. the standard of living of the parties during the marriage, the applicant's actual and reasonable requirements, the income of the parties and the respondent's ability to make payment. The documents in support of these averments need to be filed. Applicant filed an annexure proposing to be her income and expenditure that almost got lost in the magnitude the rest of the annexures.

²⁰ *Dodo v Dodo* supra at p 89.

²¹ *Stoman v Stoman* supra at [26]

[23] I am not persuaded that this is a matter of unusual complexities or exceptional circumstance and can find no justification for the inordinate prolixity in the papers on the part of both parties.

[24] Prolixity in these proceeding is not in accordance with the spirit and purport of Rule 90 and is an abuse of process because it defeats the purpose or object of the rule²².

[25] The order which I make is the following:

1. The matter is struck off the roll with costs. Such costs to be on the ordinary scale.
2. The matter is postponed until 27 April 2017 at 15:30 for status hearing.

JS Prinsloo,
Acting

²²*Smit v Smit* 1978 (2) SA 720 (W) at 722G

APPEARANCES:

PLAINTIFF/ APPLICANT:
OF:

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DEFENDANT/RESPONDENT:
INSTRUCTED BY:

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