

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1443/2016

In the application between:

MZ

APPLICANT/PLAINTIFF

And

PZ

RESPONDENT/DEFENDANT

Neutral citation: *MZ v PZ* (I 1443/2016) [2017] NAHCMD 29 (7 February 2017)

Coram: UNENGU AJ

Heard: 7 December 2016

Delivered: 7 February 2017

Flynote: Interlocutory – matrimonial – *Rule 90* application – plaintiff applied for maintenance *pendente lite* – applicant must prove *prima facie* case in the main action – failing which that is the end of the matter – however, plaintiff discharged this onus in her application – court has discretion to grant relief sought – application granted.

Summary: Before the finalization of the parties' divorce, the plaintiff brought an interlocutory application in terms of *Rule 90(2)* claiming maintenance. Plaintiff failed to make out a *prima facie* case in the main action, however, discharged this onus in the

application brought. Although the court granted her application for interim maintenance pending the divorce proceedings, it amended her relief sought to the extent that the court deemed it necessary and fit.

ORDER

1. The application in terms of *Rule 90(2)* is hereby granted on the following terms:
 - i. The respondent shall pay the applicant a monthly allowance of N\$25 000.00.
 - ii. The respondent shall not damage, transfer, encumber, conceal or otherwise dispose of any assets of the joint estate (save to give effect to this order, or in the ordinary course of business or for the reasonable maintenance of the applicant and the respondent) while the matrimonial cause is pending.
 - iii. The respondent shall make a contribution towards the costs of the applicant of the pending matrimonial action between them in the sum of N\$ 250 000.00.
 - iv. Each party to pay own costs.

JUDGMENT

UNENGU AJ:

Introduction

[1] On the 22 August 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

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

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

‘1. That the respondent pays maintenance *pendente lite* in respect of the applicant in the amount of N\$ 50,000.00 per month.

2. That the respondent be ordered to pay the amount of N\$ 300 000.00 in respect of the further maintenance requirements of the applicant.

3. That the respondent be ordered not to damage, transfer, encumber, conceal or otherwise dispose of any assets of the joint estate (save to give effect to this order, or in the ordinary course of business or for the reasonable maintenance of the applicant and the respondent) while the matrimonial cause is pending.

4. That respondent be ordered to make a contribution towards the costs of the applicant of the pending matrimonial action between them in the sum of N\$ 250 000.00.

5. Costs of the application including the costs of one instructing and one instructed counsel; and

6. Further or alternative relief.’

[3] On the 6 October 2016 the application became opposed and the application was accordingly set down for hearing and argued on the 7 December 2016.³

Background

[4] The applicant/plaintiff in this matter is a 75-year-old unemployed adult female currently residing temporarily with her youngest daughter at House No. 302, 10th Street, Tsumeb, Republic of Namibia (hereinafter referred to as the applicant).

[5] The respondent/defendant in this matter is a 74-year-old adult businessman currently residing at Erf 21, 3rd Road, Tsumeb, Republic of Namibia (hereinafter referred to as the respondent).

² Index: Interlocutory Rule 90 Application, p1-2.

³ Index: Interlocutory Rule 90 Application, p136.

[6] The parties were married on the 4 September 1970 in Okahandja in-community-of-property and remain so married.⁴ They have two (2) children, both of whom are over the age of majority.⁵ The applicant however instituted divorce proceedings in this court on the 12 May 2016 and such proceedings are still pending.⁶

[7] The applicant, pending finalization of the divorce, filed an interlocutory application in terms of *Rule 90(2) of the Rules* claiming maintenance.⁷ The parties have however entered into an *interim* settlement agreement whereby the respondent pays maintenance *pendente lite* in respect of the applicant in the following amounts per month:⁸

- 1.1 +- N\$ 6 000.00 to the medical aid to retain the applicant as beneficiary
 - 1.2 All other excess payments in respect of the applicant's medical expenses not covered by the medical aid specifically excluding chronic medication;
 - 1.3 N\$ 5 000.00 directly to the applicant in respect of her chronic medication;
 - 1.4 N\$ 4 000.00 directly to the applicant in respect of her clothing allowance;
 - 1.5 N\$ 25 000.00 directly to the applicant as a general living allowance.
2. An interim contribution towards the applicant's legal cost in the amount of N\$ 50 000.00, which shall be paid on/before the 7th of September 2016 directly to the Applicant's legal practitioner of record.
3. The respondent undertakes not to damage, transfer, encumber, conceal or otherwise dispose of any assets of the joint estate (otherwise) than in the ordinary course of business) while the matrimonial cause is pending.'

[8] This *interim* agreement however only remains in force from date of signature thereof until finalization of the mediation, being the date when the respondent should file his opposing affidavit within five (5) days from the date of the mediation (should he wish to oppose the *Rule 90* application) unless they have reached a further settlement in respect of the *Rule 90* application, settling their divorce.⁹

⁴ Index: Pleadings, p9.

⁵ Index: Interlocutory Rule 90 Application, p5.

⁶ Index: Pleadings, p1-9.

⁷ Index: Interlocutory Rule 90 Application, p1 – 76.

⁸ Index: Interlocutory Rule 90 Application, p77 – 78.

⁹ Index: Interlocutory Rule 90 Application, p78 para 4.

[9] The parties to date have not reached a further settlement, despite the respondent tendering an offer in his opposing papers filed on the 4 October 2016:¹⁰

‘5.1 make available to the Applicant a fully furnished flat and all meals required by her in the **Makalani Hotel**;

5.2 pay to the Applicant further maintenance at the rate of N\$25 000.00, per month;

5.3 pay directly to the Applicant an amount of N\$4 000.00 per month in respect of a clothing allowance;

5.4 pay directly to the Applicant an amount of N\$5 000.00 per month towards the cost of her chronic medication;

5.5 retain the Applicant on my existing medical aid and pay all further medical, dental and associated costs reasonably incurred;

5.6 make a contribution to the Applicant’s costs in the sum of N\$50 000.00.’

[10] The applicant’s objection to this offer is premised on her allegation that the offer is unreasonable and even before, he never paid the amounts so tendered, specifically referring to the excess payments for medical costs. Also, with regard to the flat offered in the Makalani hotel, she states that she will feel like a prisoner in that the respondent will always have an eye on her and she wants her independence.¹¹

[11] It was accordingly argued before court that her claims as per the notice of motion is both fair and reasonable. Her monetary claims include:¹²

1. Rental allowance (no estimate provided);
2. Once-off payment to furnish her flat in Swakopmund: N\$300 000.00 – N\$500 000.00;
3. Monthly allowance of N\$12 000.00 to save for vacation trips to Greece, the United States of America and the United Kingdom;

¹⁰ Index: Interlocutory Rule 90 Application, p139 -140.

¹¹ Index: Interlocutory Rule 90 Application, p198 para 7.

¹² Index: Interlocutory Rule 90 Application, p16 – 17.

4. Monthly allowance of N\$50 000.00;
5. Relocation amount to cover relocating from Tsumeb to Swakopmund (no estimate provided);
6. Being kept on the respondent's medical aid and him paying for any excess payments not covered by the medical aid;
7. Transport allowance between Windhoek and Swakopmund for medical check-ups as she has a chronic illness (no estimate provided);
8. Legal costs amounting to an estimate of N\$250 000.00 in respect of the divorce proceedings pending; and
9. Costs of this application including costs of one instructing and one instructed counsel.

[12] She justifies her claim on the basis that she is unemployed and all funds at her disposal include N\$54 641.28 held in her account; approximately N\$630 000.00 in treasury bills from Nedbank Namibia of which only N\$150 000.00 will mature during the month of September 2016 and the remainder thereof (N\$480 000.00) during March 2017. Furthermore, she discloses that she has a Standard Bank account with a current balance of N\$5 921.90 and has in her possession a 2009 Mercedes Benz A180 CDI Sedan registered in the respondent's name and he has always maintained the vehicle and fuelled it. She additionally alleges that after she left the common home, the monthly allowance paid to her in the amount of N\$8 000.00 by the respondent has been continuing however, she still claims that such amount does not cover her expenses and she remains destitute as the respondent remains in control of the joint estate.¹³

[13] Subsequently, she concludes that she only has N\$40 563.00 at her disposal, which include a deduction of N\$20 000.00 as a deposit paid to her legal representative for this application. This, according to the applicant, will not be sufficient to maintain her until the parties' divorce has been finalized.¹⁴

Issues

¹³ Index: Interlocutory Rule 90 Application, p9.

¹⁴ Index: Interlocutory Rule 90 Application, p10.

[14] This court is hereby called upon to consider whether the applicant is entitled to the maintenance as per the notice of motion.

Legal principles

Nature of the application

[15] A spouse is entitled to maintenance *pendent lite* as was reflected in the old *Rule 43* is now established in *Rule 90 of the Rules*. Although, the law entitles a spouse to claim such maintenance from the other, the object of why this Rule was published should not be lost in translation:

‘...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.’

[16] *Rule 90 of the Rules* provide for the following:

‘(1) This rule applies whenever a spouse seeks relief from the court in respect of one or more of the following matters –

- (a) maintenance pending suit;
- (b) a contribution towards the costs of a pending matrimonial action;
- ...
- (e) an order that none of the spouses may damage, transfer, encumber, conceal or otherwise dispose of any joint assets while the matrimonial cause is pending; or

...

(2) An applicant must deliver 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 and the –

(3) applicant or his or her legal practitioner must sign both the statement and notice; and

- (b) notice must give an address for service within a flexible radius of the court and be served by the deputy-sheriff,

but, if the matter is already opposed service may be effected on the legal practitioner of the respondent, if he or she is represented.

(3) The respondent must within 10 days after receiving the statement referred to in subrule (2) deliver a sworn reply in the nature of a plea, signed and giving an address as mentioned in subrule (2) and if he or she fails to do so he or she is by that very fact barred.’

[17] Accordingly, the *Rule* outlines what an applicant can claim and furthermore outlines what pleadings must be filed to complete the application. As a result, the applicant is only expected to file a sworn statement (founding affidavit) together with a notice on a Form 19 and the respondent is also expected to file a sworn reply (answering affidavit). The *Rule* therefore makes no provision for parties to file additional affidavits.¹⁵

[18] The court wants to emphasise that bearing in mind the object of the *Rule*, both the founding and the answering affidavits of the parties were in excess of 20 pages (including annexures). Be that as it may, the court had regard to both due to the lengthy claims by the applicant and the extensive financial position explained by the parties. However this court will not have regard to applicant’s further affidavit (replying affidavit) as this is not provided for by the *Rule* itself nor was the court’s permission requested in this regard. As a result, this court stands guided by the general principle and is in agreement with Mr Jones, counsel for the respondent,¹⁶ that it will have no regard to the applicant’s replying affidavit as there is no room therefore nor was an indulgence granted for it.

¹⁵ *Dreyer v Dreyer* 2007 (2) NR 553 (HC), para 16: “No point was made that Rule 43 does not permit the introduction of any extra affidavit beyond the applicant’s sworn statement in the nature of a declaration and the respondent’s sworn reply in the nature of a plea. Rule 27(3) would, ‘on good cause shown’, permit the filing of an additional affidavit. It has been so held in respect of provisional sentence, Rule 8(5) expressly mentioning solely the right of the defendant to deliver an answering affidavit and the plaintiff to deliver a replying affidavit. (*Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628D-G; *Sadler v Nebraska (Pty) Ltd and Another* 1980 (4) SA 718 (W) at 720-1). Also, in ordinary applications, although Rule 6 permits three affidavits, being the applicant’s founding affidavit, the respondent’s answering affidavit and the applicant’s replying affidavit, the Courts have a discretion to allow the admission of further affidavits. This is said to be based on the need for flexibility in applying the Rules, and would depend on the circumstances of each case. (*James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co (Pty) Ltd) v Simmons* NO 1963 (4) SA 656 (A).

¹⁶ Respondent’s Heads of Argument, p7.

Test

[19] Hoff, J in the matter of *Stoman v Stoman* identifies a two-fold test:¹⁷

‘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 application discharge this onus, the court would then consider the relief sought in the application e.g. maintenance *pendente lite* and/or a contribution towards costs.

[20] The court in the case of *Margreth Lugondo Ndapewa Walenga v John Walenga*, cited the matter of *Hamman v Hamman* 1949 (1) SA 1191 (W) at 1193, where it was held that:¹⁸

“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.”

[21] As held in the case of *Taute v Taute*, the factors (not exhaustive) the court may consider whether the applicant is entitled to reasonable maintenance *pendente lite* are:

‘...dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of the husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified.’¹⁹

¹⁷ I 12409/2013 [2014] NAHCMD 116 (27 March 2014) at paras 26 – 27 [my own emphasis].

¹⁸ CASE NO. I 983/2010, para 22.

¹⁹ 1974 (2) SA 675 ECD at p676F.

[22] Furthermore, maintenance claims must not only be justified by the surrounding circumstances the applicant finds himself/herself, but must be quantified and therefore 'the quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits...'²⁰ Accordingly, the test for the amount of maintenance payable, if any, should be determined according to the funds available and the needs of the applicant.²¹

Application of the law to the facts

[23] This court is of the opinion that the applicant is entitled to maintenance *pendente lite*. However, this court is also of the opinion that some of the claims made by the applicant are exorbitant, unnecessary and/or unsubstantiated.

[24] The court in prayer 1 of the applicant's notice of motion was called upon to grant a monthly allowance of N\$50 000.00, without a proper breakdown as to what this amount would be used for monthly and ultimately concrete evidence to substantiate her claim in this regard. In addition in prayer 2, the applicant claims an amount of N\$300 000.00 for her further maintenance, again to that end was not properly explained.

[25] To this end the court has drawn the inference from the poorly drafted or constructed founding affidavit that prayer 1 was for the day-to-day expenses of the applicant including rent, clothing, cosmetics, groceries, fuel, etc. Furthermore, the court deduces from the facts placed before it that prayer 2 caters for the furnishing of the residence the applicant wishes to rent in Swakopmund.

[26] N\$50 000.00 per month as an allowance is too exorbitant considering that no proper basis and substantiation was made for it. Being the voice of reason herein, the court is only willing to grant, and accordingly accepts reasonableness in the respondent's tender in this regard, the applicant N\$25 000.00 as a monthly allowance. The court is not willing to grant the applicant monies for unnecessary and luxurious vacations abroad, relocation allowance to Swakopmund as this was the applicant's own decision to move to the coast.

²⁰ 1974 (2) SA 675 ECD at p676F.

²¹ *Dodo v Dodo* 1990 (2) SA 77 (WLD) at p991.

[27] As the application is intended to be a 'temporary' solution/arrangement, the court does not find it necessary to burden the joint estate by granting prayer 2 herein. Further to my reasoning, the applicant has not provided the court with a spreadsheet indicating what furniture she intends to buy that will ultimately cost N\$300 000.00. Even if this court were to indulge the applicant's request in this regard, she has to understand that such furniture would never be her sole and exclusive property as it belongs to the joint estate. To that end, the court refuses to grant prayer 2.

[28] The court is willing to make an order in terms of prayer 3 and 4 as I deem it necessary, in respect of prayer 3 to protect the joint estate to all parties' benefit and in respect of prayer 4, to place both parties on an equal footing in terms of litigation in the main action.

[29] The court in addition to this has had due regard to the fact that the applicant is suffering from a chronic illness and makes an order that the respondent will maintain the applicant on his medical aid and shall pay all excess payments not covered by the medical aid in connection to the applicant's health. This shall include paying for all reasonable transport fare, accommodation and meals to and from Windhoek for any medical check-ups required by the applicant's medical practitioner in relation to her chronic illness.

[30] In view of the fact that none of the parties, the applicant or the respondent, could be regarded as the successful party in this application, the court will not grant costs in favour of one of the parties. So each party has to pay their own costs for this application.

[31] Accordingly the following order is made:

1. The application in terms of *Rule 90(2)* is hereby granted on the following terms:
 - i. The respondent shall pay the applicant a monthly allowance of N\$25 000.00.

- ii. The respondent shall not damage, transfer, encumber, conceal or otherwise dispose of any assets of the joint estate (save to give effect to this order, or in the ordinary course of business or for the reasonable maintenance of the applicant and the respondent) while the matrimonial cause is pending.
- iii. The respondent shall make a contribution towards the costs of the applicant of the pending matrimonial action between them in the sum of N\$ 250 000.00.
- iv. Each party to pay own costs.

E P UNENGU
Acting Judge

APPEARANCES

APPLICANT/PLAINTIFF:

A Van Vuuren

Instructed by Etzold-Duvenhage

RESPONDENT/DEFENDANT:

JP Jones

Instructed by Dr Weder, Kauta & Hoveka