CASE NO: A 343/2009

NOT REPORATABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

M G H **APPLICANT**

and

C M H
(Born S) **RESPONDENT**

CORAM: **HOFF, J**

Heard on: .09.14

Delivered on: .09.14 *(Ex tempore)*

Reasons on: .09.21

JUDGMENT
Urgent Application

HOFF, J: [1] This is an application in which the applicant prayed for the following relief:

> "1. That the writ of execution issued by this Honourable Court in case number (P) I 2049/2001 be set aside.
>
> 2. Costs of suit (only in the event of this application being opposed)"

[2] The application was opposed.

I gave my ruling dismissing the application, indicating then that reasons would follow. These are the reasons.

[3] The applicant and respondent were married to each other. On 4 February 2002 a final order of divorce was granted. In terms of a settlement agreement concluded between the parties (which settlement agreement was made an order of court), the custody and control of the minor children was awarded to the applicant subject to respondent's right to reasonable access. It was also ordered that the respondent will pay maintenance for the two minor children in the sum of N$500.00 per month per child plus 10% an annual escalation.

[4] There appears to have been a patent error in the deed of settlement since the parties' intention was that the applicant would pay the maintenance in respect of the children and that custody and control should be awarded to the respondent. In practice this intention of the parties was correctly implemented since the applicant paid maintenance in respect of the two minor children and the respondent had custody and control of the children.

[5] The Court also ordered that the applicant retained the minor children and plaintiff on his medical aid and pays all medical, dental, pharmaceutical, surgical, hospital, orthodontic and ophthalmological expenses incurred in relation to the minor children and plaintiff.

[6] It was also ordered that applicant shall be liable for all primary, secondary and tertiary educational costs as well as accommodation fees of the minor children.

[7] The applicant also agreed to pay maintenance to the respondent personally in the sum of N$500.00 per month plus 10% annual escalation thereon from the date on which the final divorce order is granted

[8] During February/March 2009 respondent obtained a writ of execution against the applicant in the amount of N$56 922.96 together with interests and costs, for arrear maintenance in respect of the respondent herself.

[9] The writ of execution does not relate to any maintenance in respect of the children.

[10] The applicant subsequently launched and urgent application in which an order was sought for the staying of the writ of execution. On 9 October 2009 this Court, by agreement between the parties,stayed the writ of execution pending an application by the applicant within fourteen days to have the writ set aside, hence the application presently before this Court.

[11] The application to set aside the writ of execution was not set down by the applicant. This prompted the respondent to have the application set down. The attorneys of record of the applicant received notice of set down on 14 July 2010 in which notice it was indicated that the matter would be heard on 14 September 2010 at 10h00. The applicant was also by means of registered post on 14 July 2010 informed of the set down date. In addition applicant was personally served on 27 July 2010 with the notice of set down by the deputy sheriff.

[12] Applicant’s attorney of record did not appear to argue this application.

No notice of withdrawal was filed. The applicant himself was also absent.

[13] The dispute relates to the court order that the applicant should pay the plaintiff personally N$500.00 per month plus 10% annual escalation thereon. This amounted to N$56 922.96 at the stage when the writ of execution was issued on 6 July 2010. The applicant in his founding affidavit stated that he has a bona fide defence since he *"had somehow lost track of the annual escalation"* remained a balance of N$12 551.00 which he offered to pay by way of instalments.

He averred that since their divorce he had paid a total amount of N$129 325.95 in respect of maintenance for the two minor children from his bank account directly to the minor children.
The respondents reply to this defence was to deny that the applicant had paid any amount in respect of maintenance to her personally and by stating that all the monies paid by the applicant were in respect of maintenance towards the children. The respondent stated that applicant has subsequent to the issuing of the writ of execution continued to neglect to pay maintenance towards the respondent personally and has exposed himself to further litigation for the recovery of arrear maintenance in the amount of N$7 972.02.

[14] The applicant attached to his founding affidavit three bundles of documents consisting of copies of deposit slips of cash amounts, copies of bank statements and notes of payments purportedly paid in respect of maintenance personally to the respondent.

[15] The respondent in her answering affidavit deals with the individual payments reflected in the three bundles to show that the payments made were in respect of maintenance towards the children and not in respect of maintenance for herself. In addition to categorically denying that the figures reflect payment to herself respondent pointed out that having regard to the various amounts reflected in those bundles it should be clear that payments were not for maintenance in respect of herself. For example a great number of

payments reflect the amounts of N$1 000.00 some of N$2 000.00, some less than N$500.00, amounts less than N$100.00, amounts between N$1 000.00 and N$2 000.00, one amount of N$5 000.00, one amount of N$10 000.00, and an amount of N$25 000.00. Notes accompanying these payments made by the respondent read inter alia as follows: "Money paid into my account for maintenance in respect of the minor children, paid into my account for payment of Sherne's Active Brain Gym, down payemnt for monies he borrowed from me, 'for Sherne's physics spring school, for Vicky's prescribed medicine, Sherne's Grade 11 camp, paid into my account so I can pay the taxi driver who took Sherne to school, arrear school fees, after school classes, Edumeds, prescription for Sherne, school fees, additional payments to doctors, Sherne's university and Fernando etc.

[16] The applicant did not file a replying affidavit.

[17] It was submitted on behalf of the respondent that applicant unreasonably delayed the bringing of the application to have the writ of execution set aside. I need not decide this requirement in the light of what is stated *infra.*

[18] The applicant is burdened with the onus of proof in this application.

In the oft-quoted case of *Plascon Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634 E – 635 C Corbett JA* stated the following approach in application proceedings:

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together wit ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA*

234 (C) 235 E – G, to be:

> " ... where there is a dispute as to the facts a final interdict should not be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

The rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976 (2) SA 930 (A) 938 A – B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430 – 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1082 (3) SA 893 (A) at 923 G – 924 D)*. It seems to me, however, that this formulation of the general rule, and particularly the second sentence therof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings' on notice of motion disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court give such final relief on the papers before it is, however, not confined such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 at 882 D – H)*. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under *Rule 6(5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428*; *Room Hire supra* at *1164*) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is

> entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283 E – H)*. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries*case, *supra*at *924 A*)."

[19] On applicant's own version, he is indebted to the respondent for maintenance albeit in a lesser amount than reflected in the writ of execution.

[20] The denial by respondent on the papers in my view raises a genuine dispute of fact and the application stands to be determined on the principles set out in the *Plascan Evans (supra)*i.e. on the facts stated by the respondent together with admitted facts in the founding affidavit of the applicant.

[21] I therefore find that the amount of N$44 371.00 paid by the applicant to respondent was in respect of maintenance for the minor children and not in repsect of maintenance to the respondent herself.

[22] The applicant in my view did not comply with the provisions of the deed of settlement and is liable to the respondent in "the amount of N$56 922.96 together with interest *a tempore morae*thereon at the rate of 20% per annum calculated as from the date upon which this writ is issued to date of final payment, which is recovered by an ORDER OF COURT dated 4 February 2002 as well as the sum of N$200.00 for the *"Writ of Execution and also all other costs and charges of the Plaintiff in the said case to be hereafter duly taxed*

according to law, besides all your costs thereby incurred".

(Quoted from the writ of execution).

[23] It must furthermore be mentioned that the applicant was made aware of the respondent's stance as early as September 2009 (paragraph 26.4 of applicant's founding affidavit), but applicant nevertheless chose to launch application proceedings instead of action proceedings.

[24] The respondent in her answering affidavit prayed for the dismissal of the application with costs on an attorney own client scale. I am of the view that costs on this scale is not warranted under the circumstances.

[25] In the result the court made the following order:

> The application is dismissed with costs on an attorney-client scale which costs shall include the costs of one instructing counsel and one instructed counsel.

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HOFF, J

ON BEHALF OF THE APPLICANT: **NO APPEARANCE**

Instructed by: **CHRIS BRANDT ATTORNEYS**

ON BEHALF OF THE FIRST RESPONDENT: **ADV. VAN DER MERWE**

Instructed by: **KIRSTEN & CO.**