



CASE NO.: I 2848/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WALDI-BEATE KUBIRSKA (born HEINS)

APPLICANT/PLAINTIFF

and

ERNST AUGUST KUBIRSKA

RESPONDENT/DEFENDANT

CORAM: UNENGU, AJ

Heard on: 01 February 2011

Delivered: 18 February 2011

### JUDGMENT

**UNENGU, AJ:** [1] Applicant has instituted divorce proceedings against respondent and the matter is set down for trial in this Court from 15 to 18 March 2011.

[2] After the pleadings have been closed and both applicant and respondent have filed their discovery affidavits, applicant served a Notice in terms of Rule 35(3) of the rules of the High Court in which she wanted respondent to discover additional documents to her. Respondent did not comply with the notice. Because of the non-compliance by the respondent to the notice

aforesaid, plaintiff decided to approach the court to compel respondent to discover the additional documents. Respondent is now opposing this application, which, as a result thereof, a trial was held on the 1<sup>st</sup> of February 2011.

[3] Rule 35(3) of the High Court provides that *"is any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him or her to make the same available for inspection....."*

[4] Rule 35(3) basically provides for an additional remedy to any party involved in a litigation with another to ask for additional documents or tape recordings which may be relevant to any matter in question. The party asking such documents must believe that such documents are in possession of the other party. As previously indicated, applicant and respondent are engaged in a divorce action, now, applicant wants respondent to discover additional documents like his bank statements from the day of their marriage until present, his payslips, also from the month of marriage until the month when these payslips are discovered and other documentations relating to immovable properties owned by him. These documents according to the applicant, are relevant in establishing the respondent's financial standing currently and in the past which in turn will show that respondent was able to make the contributions he alleges; that he indeed made such payments, what amounts, if any, respondent expended towards the common household and the minor children as opposed to what the applicant expended and what amount of maintenance for the minor children will be justified.

[5] Respondent is opposing this application and took a point *in limine* on the authority of the deponent to the founding affidavit. However, respondent abandoned the point *in limine* later. When the application was heard, the grounds for opposition of

the application by the respondent were as set out on pages 13 - 16 of the opposing affidavit. For the sake of clarity I shall list them hereunder as follows:

- "1. The additional documents required by the applicant are irrelevant to the disputes in the pending main action for divorce;*
- 2. The documents pertain to the respondent's finances and estate, and the parties are married out of community of property;*
- 3. In his counterclaim, the respondent has claimed custody and control over the minor children and currently it is only the custody and control (including payment of maintenance) of the child, Nicholas, which is still in dispute and the latter is currently the subject of an investigation by psychologists from both parties;*
- 4. The historic financial statements required by the applicant -going as far back as 20 (twenty) years - have thus no relevance to the matter of custody, control and maintenance;*
- 5. He states under oath that he does not have his bank statements and salary slips from 1991 in his possession and states that the request for further discovery is aimed at harassing him."*

[6] Both applicant and respondent submitted written Heads of Argument which they amplified with oral submissions on the date of hearing. At the beginning of the trial Ms Bassingthwaighte counsel for the respondent applied for condonation for the late filing of the Heads of Argument which application was not opposed by Ms Van der Westhuizen, counsel for the applicant as the delay was not prolonged and the applicant did not suffer any prejudice as a result thereof. Condonation was granted. This was due to the explanation given by respondent which I found to be acceptable in the circumstances. The reason for the delay was also acceptable.

[7] Ms Van der Westhuizen emphasized that documents requested from respondent were relevant and necessary to advance plaintiff's argument that respondent did not make the contributions he claims to have made. Therefore, she argued, the contents of these documents will cast light as to the payments, if any, made by the respondent. She further

submitted that such documents are directly relevant to the disputes between the parties. In addition, the applicant is claiming maintenance for the minor children from the respondent, which maintenance he is disputing. In order to fully canvas the issues of maintenance, the documents required are not only relevant, but also necessary, counsel said. In support of her submissions, Ms Van der Westhuizen referred the Court to various cases from different jurisdictions. One such case is ***Compagnie Financiere et Commerciaux du E Pacifique v Peruvian Guano Co*** (1882) 11 QBD 55, wherein Brett LJ laid down the following principle relating to rule 35(3):

*"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."*

[8] This case and other authorities cited, Ms Van der Westhuizen wanted to persuade the Court to agree with the contention of plaintiff that the documents she wants respondent to discover are relevant to the issues to be resolved in the divorce action between herself and the respondent. In conclusion, counsel argued that sub-rule (3) does not give respondent a discretion to discover or not to discover the documents requested. She expressed the view that respondent who is claiming more than N\$700 000.00 should not refuse to discover documents which may support such a claim. The only reason, she thinks, why respondent is refusing to discover the documents is, the fear that these documents may humper his case if discovered. Consequently, counsel prayed for an order in the following terms:

*"1. THAT the Defendant be directed, to make the documents listed in the Plaintiff's Rule 35(3) Notice available for inspection within FIVE (5) DAYS of granting of the order, alternatively to state on oath within FIVE (5) DAYS of the granting of the order that such documents are not in his possession, in which event he shall state its whereabouts, if known to him, and failing*

*compliance therewith;*

*2. Authorising the Plaintiff to apply on the same papers, duly amplified (if necessary), for an order striking out the Defendant's defence and dismissal of the Defendant's counterclaim with costs;*

*3. Directing the Defendant to pay the costs of this application, which costs to include the costs of one instructing and one instructed counsel."*

[9] As indicated previously, the point *in limine* was abandoned and the application for condonation of the late filing of the Heads of Argument was also granted. Ms Bassingthwaighe kicked off by reminding the Court that the onus of proving the application was on the applicant. She quoted the case of **Santam Ltd and Others v Segal** 2010(2) SA 160 (N) at paragraph (9) as authority for her point, and argued further that the applicant has the onus to prove that the documents requested may be relevant to the matter. Although the **Santam** case referred to by Ms Bassingthwaighe also dealt with an application to compel further discovery, the relevant part of which counsel referred to is distinguishable from the issues in the application *in casu*. In the **Santam** case *supra* the Court dealt with an order dismissing the application for the further discovery where it held that such an order was appealable. Ms Bassingthwaighe was of the view that the relevancy of such documents was to be decided now not at a later stage. She referred the court to a Namibian case of **Kanyama v Cupido** 2007(1) NR 216 (HC) at 221 D-E and said that the Court should look at the pleadings to be sure whether documents are relevant or not. According to her, parties were married in 1991 out of community of property and indeed respondent contributed more than 50% to the common household. Accordingly, she continued, defendant was asking for maintenance in the amount of N\$5000.00 per month and custody and control of the minor children. Ms Bassingthwaighe, further submitted that bank statements of one year or six months will do, not earlier than that. She however, conceded that the application should succeed to some of the documents but for bank statements and payslips be limited to six months starting from July 2010. She agreed that respondent be ordered to discover and asked the court to apportion the costs of the application.

[10] In reply Ms Van der Westhuizen was of the view that all documents requested are relevant as from date of marriage and indicated that there was no basis for costs to be reduced. Even though, counsel for the respondent initially argued that the applicant bore the *onus* to prove the relevance of the documents requested, it would appear that the respondent is no longer opposing the granting of the order directing the discovery of the documents requested. The only issue left to be decided, is whether the Court should order the discovery from the inception of the marriage or from a shorter period, as submitted by Ms Bassingthwaite. From what I have observed during arguments of counsel is, that respondent did not only concede that the application should succeed but also indicated, though not in so many words, that if she were involved in the matter at an earlier stage, she would have advised respondent not to oppose the application. This is the impression I gained from what she said towards the end of her submissions.

[11] Be that as it may. It is no longer an issue between the parties that the documents requested in this application are not relevant to the main action and that they should not be discovered. Counsel for respondent said that they are relevant and they can be discovered. She only asked for the period to be reduced which applicant is opposing.

[12] Relevancy of a document is determined from the pleadings and not extraneously and a party may only obtain inspection of the documents relevant to the issues on the pleadings. (See ***Kanyama v Cupido*** 2007(1) NR 216 at 219 I-J. and cases cited therein.)

[13] Rule 35(3) amongst other provides that.....the former may give notice to the latter requiring him or her to make the same (documents or tape recordings) available for inspection in accordance with sub-rule (6) or to state on oath within 10 days that such

documents are not in his or her possession, in which event he or she shall state their whereabouts, if known to him or her. (Emphasis added).

[14] It is therefore, clear from the aforesaid that the law does provide an alternative remedy to a party who is not in possession of the documents requested to state under oath within 10 days of the notice that such documents are not in his or her possession and state their whereabouts, if, known to him or her. This option was available to the respondent but opted to oppose the discovery. That being the case, applicant was compelled to approach the court to force respondent to discover. The conduct of respondent in this regard did not only result in wasted costs for applicant but also unnecessary delay in the finalization of the matter. Respondent knew or at least was advised that the additional documents requested by applicant were necessary and relevant to the matter between them. For respondent to counterclaim the request and to contend that the request for further discovery was aimed at harassing him is misleading and a waste of Court time.

[15] That being so, I come to the conclusion that applicant has proved that the additional documents requested in the notice are relevant to the main action, in particular to the issue of maintenance of the minor children and also to the claim of the respondent. Therefore, any order to be made in respect of the documents, time will not be limited to one year or six months, as requested by counsel for the respondent. Similarly, the court is not prepared to reduce the costs to be granted.

[16] In the result I make the following order:

1. That the defendant is directed to make the documents listed in the Plaintiff's Rule 35(3) Notice available for inspection within five (5) days of granting of this order, alternative to state on oath within five (5) days of the granting of this order that such documents

are not in his possession in which event he should state its whereabouts, if known to him, and failing compliance therewith;

2. The Plaintiff/Applicant is authorised to apply on the same papers duly amplified (if necessary) for an order striking out Defendant's/Respondent's defence and dismissal of the Defendant's/Respondent's counterclaim with costs;
3. The Defendant/Respondent is directed to pay the costs of this application. Costs to include one instructing and one instructed counsel.

**UNENGU, AJ**

ON BEHALF OF THE APPLICANT/PLAINTIFF

Adv. Van der Westhuizen

Instructed by:

Etzold-Duvenhage

ON BEHALF OF THE RESPONDENT/DEFENDANT

Adv. Bassingthwaighte

Instructed by:

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