

CASE NO.: A 09/2012



IN THE HIGH COURT OF

NAMIBIA

In the matter between:

LYNN STEPHANSEN

APPLICANT

and

ANTON JOHANNES STEPHANSEN

RESPONDENT

CORAM: SMUTS, J

Heard on: 16 May 2012

Delivered on: 31 May 2012

JUDGMENT

SMUTS, J.: [1] The applicant approached this court on an urgent basis on 30 January 2012. Although a notice of motion was produced in court, the application was based on primarily the oral testimony of the applicant and was brought without notice to the respondent, her husband.

[2] After hearing the applicant's testimony (and that of Dr Kimberg), an interim interdict in the following terms was granted:

1. *"That the applicant's non-compliance with the Rule, forms and services of this Honourable Court and hearing this application as one of urgency in terms of*

Rule 6(12) of the Rules of the this Court and hearing this application on an ex-parte application are hereby condoned.

2. *That the rule nisi and order granted on an ex parte basis by Magistrate Shaanika in the Domestic violence Court for the District of Windhoek held at Windhoek on Friday, 27 January 2012 is stayed with immediate effect pending the final determination of the domestic violence proceedings under case number 39/2012 by the Domestic Violence Court of Windhoek.*
3. *That the Rule Nisi is hereby issued calling upon the Respondent to show cause, if any, to this Honourable Court, on 24 February 2012, at 10h00 why:*
 - 3.1 *The respondent should not be interdicted from harming the minor children Dennis Biermann and Bianca Biermann in any manner whatsoever;*
 - 3.2 *The custody and control, without any rights of access to the respondent, of the aforesaid minor children should not be awarded to the applicant pending the finalisation of divorce proceedings to be instituted by the applicant within 7 days of the date of this order;*
 - 3.3 *Why the respondent should not pay the costs of this application.*
4. *Paragraphs 3.1 and 3.2 operate as interim interdicts with immediate effect."*

[3] The applicant gave evidence to the effect that the respondent suffered from depression and had a history of emotional and mental instability. During January 2012 the applicant informed the respondent that she had decided to institute divorce proceedings against him. This had disturbed him. The applicant testified about an incident on 7 January 2012 where the respondent had had an emotional rage and had tried to kill the whole family including the couple's two adopted minor children born in 2002 and 2004 respectively. He had driven his vehicle dangerously on a gravel road, offloaded them and attempted to run them over after dumping them on the side of the road at a remote spot.

[4] The applicant left the common house after this incident, with the 2 minor children. Subsequently, and on 27 January, the respondent approached the magistrate court and was inexplicably granted an interim protection order on an ex parte basis on the grounds of the applicant alleged economic abuse. That court also granted the respondent interim custody of the two minor children pending a return date of 23 February 2012.

[5] The applicant had also approached the magistrates court on 27 January 2012 for a protection order. When doing so, the clerk of the court informed the applicant of the respondent's protection order and temporary custody order but undertook to inform the respondent only on Monday 30 January 2012 of service of the orders to enable her to take steps to address that order.

[6] On Sunday 29 January 2012, the respondent however informed the applicant that he would not take the children out of her care. But on the next day, the respondent provided the children's school with the protection order and informed the applicant that he would collect them at the school. The applicant then approached her lawyer, Ms Campbell and the urgent application was brought and the order quoted above was granted. The applicant was concerned about harm to the children, given the incident of 7 January 2012 and the respondent's instability, particularly if he were not taking his medication for his condition. The latter had occurred in the past and the applicant apprehended its recurrence.

[7] Shortly before the return date of 24 February 2012, the respondent filed a notice to oppose and an opposing affidavit on 21 February 2012. At that stage, the transcript of the oral proceedings had not been finalised, despite persistent request by Ms Campbell. In the opposing affidavit it was contended that the interim interdict was a nullity because of the failure to serve the transcribed record upon the respondent. This point was understandably not persisted with. Other points were taken and also not persisted with.

[8] The rule was extended on 24 February 2012 and an order was made directing the further exchange of affidavits following receipt of the transcribed record. Further affidavits were exchanged before the extended return date of 14 March 2012. In the meantime, the divorce action proceeded and had reached an advanced stage following the engagement of professionals on both sides around the issue of access to the children on the part of the respondent.

[9] The experts engaged by the parties consulted each other and were able to reach agreement amongst themselves on a recommended regime of supervised access by the respondent pending the finalisation of the divorce action, and thereafter. The parties advisedly each accepted those recommendations and upon the extended return date, the rule was partially confirmed (in respect of paragraph 3.1) and it was further ordered that pending the finalisation of the divorce action, the agreed regime of supervised access on the part of the respondent would apply. The parties were unable to agree on the costs of this application which then stood over. That issue was not resolved between

them in finalising the divorce action and on 16 May 2012, Ms Campbell and Mr Wylie, for the respondent, argued the costs of this application.

[10] Mr Wylie submitted that the applicant should be deprived of her costs because she was not entitled to have approached this court for her interim relief as the respondent did not constitute a danger to the minor children. He further contended that the order sought (and granted) was excessive. He submitted that was borne out by the fact that supervised access was subsequently agreed upon. He also argued that the applicant was not ultimately successful for this reason and, on the basis of the principle of costs following the result, the applicant should be deprived of her costs.

[11] Mr Wylie's approach entirely overlooks the nature of these proceedings – namely an interim interdict pending the divorce action and confuses this application with the divorce action itself and its outcome.

[12] The question is after all whether the applicant was substantially successful in seeking an interim interdict pending the divorce action and whether she was justified in applying for the interim interdict. Upon the extended return date, paragraph 3.1 of the rule was confirmed and a regime of supervised access by the respondent to the minor children was ordered pending the finalisation of the divorce action. This serves to demonstrate that the applicant was justified in applying for and obtaining the interim interdict. The application had after all been precipitated by the respondent obtaining a protection order and securing temporary custody of the children on an ex parte basis –

wholly unjustifiably in my view. That order was rightly discharged by another magistrate shortly afterwards on 24 hours notice to the respondent.

[13] Once it was accepted that the applicant was entitled to an interim interdict – which in my view was clearly the case – as is demonstrated by the terms of the confirmation of the rule, then the applicant was substantially successful with regard to that application. This despite the fact that the prohibition of access was ameliorated to gradually expanding supervised access.

[14] In the course of the application and upon the initial return date the applicant offered the respondent supervised access to the children. But this was refused. This is confirmed by the respondent in his further affidavit. I do not find that the initial prohibition upon access followed by an offer of supervised access in the context of the facts viewed as a whole amounted to making an exorbitant claim by the applicant which would disqualify her from obtaining her costs. In her submissions, Ms Campbell pointed out that applicant only approached this court after it became clear that the respondent intended to exercise his rights of temporary custody under the irregularly granted protection order. That is not placed in dispute by the respondent.

[15] Having been plainly entitled to approach this court for interim relief and being ultimately substantially successful in respect of its import, I find no reason why costs should not follow the event. No grounds for departing from this fundamental principle were advanced by Mr Wylie.

[14] I accordingly direct that the applicants costs of the application, including those related to all appearances in it, are to be paid by the respondent.

SMUTS, J

ON BEHALF OF THE APPLICANT:

MS CAMPBELL

Instructed by:

DU PISANI LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT:

ADV WYLIE

Instructed by:

ANDREAS VAATZ & PARTNERS