REPUBLIC OF NAMIBIA

CASE NO. I 1704/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HARALD GUNNAR VOIGTS **APPLICANT / DEFENDANT**

and

SITTA ELKE VOIGTS **RESPONDENT / PLAINTIFF**
(Born WALDSCHMIDT)

CORAM: DAMASEB, JP

Heard: 24 February 2012

Delivered: 5 March 2012

JUDGMENT

DAMASEB, JP: [1] The applicant is a defendant in a divorce action bought by her estranged husband (respondent), against whom she seeks contribution towards her legal costs[1]

[1]In terms of Rule 43(1) of the Rules of the High Court.

in the amount of N$150 000. She is in what by all accounts is a loveless marriage. The respondent-husband is living in an open adulterous relationship with another woman. From the papers, there is no indication he will give up his paramour in favour of the applicant. In fact he justifies the adultery and says he started it after he found out his wife (the applicant) was committing adultery with a named man but denied it. She has since admitted adultery in her plea and seeks condonation on the basis that, she says, the respondent had condoned it. The respondent denies ever condoning her adultery and says he never relied on it previously because they had agreed that he should not – in the interests of the children. The applicant concedes there seems to be no prospect either of reconciliation or the amicable resolution of the proprietary disputes between the parties. Yet she suggests in her papers that she offers restitution and that if the respondent wants a divorce, he will have to prove the grounds in Court.

[2] It is clear from her prayers that she is pursuing the following strategy:

1) That she will resist divorce from her husband based on either desertion or her adultery;

2) That she will not seek divorce on account of the respondent's admitted adultery;
3) That she will, only if the Court should grant the respondent divorce, make proprietary claims against the respondent on the strength of the ante nuptial contract based on the accrual system – a concept alien to our legal system and which will therefore require expert evidence.

[3] The N$150 000 the applicant seeks as a contribution towards her legal costs is based on the above strategy. The parties are married out of community of property, subject to an accrual system – a concept which, as I said, is alien to our law. She suggests that in effect it amounts to a community of property. The respondent denies that is the case and persists they are married out of community of property.

[4] The following facts are not in dispute:

1) The respondent is a very wealthy man;
2) The parties had been married for over 26 years;

3) The respondent has cut off the applicant's access to his bank account, credit card and petrol card;
4) The applicant runs a horse stud from which she derives an income;
5) The applicant's only income is from the horse stud.

[**5] Applicant's version**

The applicant states that the income from the horse stud is *ad hoc* and does not meet all her expenses – hence the need for her to receive extra income from the respondent. She says she is unemployed otherwise, and sees no prospect on the job market because of her age and lack of qualifications. She also says that between 2009 and the present she incurred a legal bill of about N$83,000. Given the litigation that she foresees going forward, based on the strategy I set out, she estimates her legal costs at N$90,000 to get the matter to trial; and then additional costs in respect of experts, interlocutory skirmishes and such like, bringing the total to N$150,000.

[6] It is clear to me that for strategic reasons the applicant does not wish to file a counterclaim for divorce based on the respondent's admitted adultery and desertion.

The respondent has however amended his particulars of claim in the interim and has relied on the applicant’s admitted adultery. She admits the adultery. The only question is if the Court must condone it. The resolution of that issue falls within a very narrow factual matrix. In my view, the only really difficult issue in this case is the nature of the marriage out of community of property based on the accrual system. She maintains –

(i) that it means marriage in community of property; and
(ii) that it entitles her to 50% of the estate of the respondent.

[7] Under Namibian law, a marriage out of community of property does not have the consequence relied on by the applicant. Accordingly she bears the *onus*. Considering that the accrual system is unknown to our law, she would have to call expert evidence. The respondent may of course contradict her expert with his own. The only other issue, assuming the marriage has the consequences for which she contends, would be the value of the common estate. Rule 37(6) requires the parties to disclose all relevant information bearing on that issue under oath. The parties

would be entitled to engage experts to provide expert testimony on the value of the estate.

[8] The respondent makes the point that:

1) The applicant has enough income from her horse stud business;
2) Is able to pay for her legal costs;
3) Has failed to provide a factual basis for her past and future legal costs; and
4) wants him to pay for all her legal costs and not to make a ‘contribution’ only towards her legal costs.

[9] It is true that the applicant is cagey about just how much she earns from her horse stud business. The truth, however, is that through his conduct of paying for her maintenance and allowing her access to his bank account and his credit and petrol cards until 2010, he accepted that her income, such as it was (and presumably is), required supplementing by him. The applicant has therefore established on a preponderance of probabilities that the income from the horse stud does not meet all her material needs, having regard to her station in life as the wife of a very wealthy man.

[10] The applicant's difficulty is that she has not laid a proper basis for the amount of N$150,000 that she seeks as a 'contribution' towards her legal costs. That she will incur legal costs going forward is not in dispute. The inflated costs seem based on the strategy to which I have referred which is clearly intended to prolong, not curtail proceedings. That she for strategic reasons wishes to prolong the litigation and to hold the respondent to their loveless marriage, buttresses the respondent's assertion that she wants a settlement on her terms by making the dispute larger than it really is. It is her right though to claim whatever she feels is due to her from the marriage. The Court should however be careful not to prolong finalization of the case. There are inherent dangers in this case from a personal human perspective, which calls for a speedy finalization: This is a loveless marriage, yet the couple lives on the same farm. They have two separate lives and the one party is living in open adultery with another person.

[11] When it comes to a contribution towards the legal costs of a litigant in distress, the principles to be applied are those summarized in the case of ***Senior v Senior 1999 (4) SA 955 at 962 D-H*** The court only orders a contribution for

costs up to the first day of trial, and if the person seeking a contribution requires assistance beyond the first day of trial, they would be entitled to apply for additional contributions.[2] It is now accepted that contributions towards legal costs is not confined to disbursements, but will include a legal practitioner's reasonable costs.[3]

[12] The rule, it has been held, does not entitle the applicant for a contribution the full estimated amount of her anticipated costs, just because her husband can afford it. The court will, in the exercise of its discretion, order only an adequate contribution. ***(Service v Service 1968(3) SA 526 at 528B-D).*** In doing so, the court cannot ignore the averments made by the applicant as to what she intends on doing in the future conduct of the case as regards the marital regime and its consequence on the marital regime. I have to consider what she needs for reasonable proceedings in respect of that issue.

[13] In the exercise of my discretion, and mindful of the need not to encourage litigants to unduly prolong litigation, and the fact that an applicant seeking a contribution towards legal costs cannot expect the

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[2] At p 962C-D
[3] At p 963F-J, p 964A

respondent to meet all her legal costs, I will award the applicant an amount that enables her to meet her legal costs:

(i) In respect of the likely disputes on the marital regime applicable to the marriage;

(ii) In respect of the likely disputes on the value of the estate in the event she satisfies the court that the ante nuptial contract between the parties created community of property.

[14] The applicant although she has satisfied me that she needs a contribution towards her legal costs (especially in view of the uncertainty there might be about the marital regime and the value of the estate), has not laid a proper basis for the claim of N$150,000.It seems clearly exaggerated and speculative. Even assuming that is going to be her legal costs, the respondent's obligation is limited to a contribution only and not all her legal costs. I would be happy to make an award as the respondent's contribution towards the applicant's legal costs to the extent of 50% of the unsubstantiated claim of N$150,000- and to include the costs of the present application and the order she obtained on 24 February 2012 granting her N$15,000 per month as maintenance *pendente lite*.

[15] For all the above reasons, I make the following order:

1) The respondent is ordered to pay the amount of N$75,000 to the applicant as a contribution towards her legal costs in the pending divorce action.

2) There shall be no order as to costs.

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DAMASEB, JP

ON BEHALF OF THE RESPONDENT/PLAINTIFF: MR A STRYDOM

Instructed by: THEUNISSEN, LOUW & PARTNERS

ON BEHALF OF THE APPLICANT/DEFENDANT: MR A SMALL

Instructed by: BEHRENS & PFEIFFER