

SUMMARY

REPORTABLE?/SPECIAL INTEREST?

IN THE HIGH COURT OF NAMIBIA

CASE NO : I 4602/2009

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

ISOLDE VENTER

APPLICANT

and

INGO ERNST VENTER

RESPONDENT

CORAM: GEIER AJ

Application in terms of Rule 43 of the Rules of High Court – claim for interim maintenance – parties required to make a frank and full disclosure of all their assets to enable the Court to determine the maintenance needs and liabilities of the parties’ properly – the parties’ failure to do so will negatively impact on their claims – court *in casu* reducing applicant’s claim for interim maintenance at the same time increasing respondent’s offered amount in regard to interim maintenance



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Heard on: 7 February 2012

Delivered on: 7 February 2012

EX TEMPORE JUDGMENT

GEIER AJ: [1]In this Rule 43 Application the Applicant seeks interim custody of the two minor children born of her marriage, interim maintenance in the amount of N\$5 000-00, per month, per child, and payment of the amount of N\$12 670-00 in respect of a debt incurred by her, relating to the school fees of the minor child A.

[2]The Respondent has opposed this matter and has disputed the Applicant's entitlement to the relief sought.

CUSTODY

[3]Although the Respondent initially sought to maintain the *status quo* in this regard - the parties already having separated and the minor child A returning with the Applicant to Windhoek - the minor child G, remaining in Respondent's custody in Walvis Bay - the Respondent, now, in Heads of Argument filed of record conceded this aspect.

[4] Reluctantly I accede to this concession as upon a reading of the papers before me I was initially not convinced that the relocation of G to Windhoek would be in the parties' other daughter's best interest, particularly as she had for some time now been enrolled in a private school in Walvis Bay where she currently is still enrolled.¹

¹I have now been informed by the parties that the minor child G has since relocated to her mother in Windhoek.

[5] I also cannot, on the papers before me, conclude that the alleged alcohol abuse of the Respondent has made him an unfit custodian parent - an aspect which was disputed on the papers and an aspect that was known to the Applicant prior to the institution of the divorce action and where this aspect was "unfortunately omitted in the Particulars of Claim" - but most of all - where the Applicant allowed G to live with her father despite such knowledge.

[6] These allegations were thus not proved on the papers before me.

[7] On the other hand I cannot, as the upper guardian of the minor children, say, that the wishes of both parents, that their children should now be placed under the care and custody of their mother, should not be respected, or that this would not be in their best interests, particularly as this move would reunite the sisters, who are both teenagers of impressionable age and who would also naturally have an affinity to their mother, particularly during this stage of their adolescence. Lastly it would appear that the sisters will probably now be enrolled at the same school.

[8] This therefore leaves the issues of interim maintenance and the claim for payment of the arrear school fees for determination.

INTERIM MAINTENANCE

[9] Applicant claims that her reasonable monthly needs amount to N\$20 460.00, which includes an amount of N\$2 100.00 for medical aid and which amount already makes allowance for some expenses should G return to the Applicant's custody.

[10] Both parties say they cannot afford any medical aid.

[11]The Applicant earns N\$12 407-83 nett per month after the deduction of tax, pension and Social Security. This leaves a shortfall, depending on whether or not provision for medical aid is made, of N\$8 057-17, alternatively of N\$5 957-17.

[12]The Respondent's average monthly income on the other hand is N\$17 000-00. He claims that his total monthly expenses amount to N\$18 840-00.

[13]Given the fact that G has now relocated to her mother I have made some allowance in this regard in that I estimate the Respondent's reduced monthly expenses as follows:

- a) Rent - N\$3 000-00;
- b) Water - N\$300-00;
- c) Electricity -N\$500-00;
- d) Food, inclusive dog and cat food, N\$3 000-00;
- e) Toiletries -N\$200-00;
- f) Internet, telephone, inclusive business use, N\$1 500-00;
- g) Fuel - N\$1 500-00

Total - N\$10 000-00).

[14] This would leave an approximate surplus, on average, depending on whether or not medical aid would be included of N\$7 000-00, alternatively of N\$4 900-00.

[15] In deciding what amount of interim maintenance should be awarded I further take into account that the Respondent, on Applicant's own version, maintained the Applicant and the two minor children in the amount of N\$59 650-00 for a period of 11 months from January to November 2010. That amount reduces itself to an amount of N\$5 422-72 per month in respect of both children alternatively to the amount of N\$2 711-36 per month per child.

[16] I am mindful that certain additional expenses were also paid for by the Respondent.

[17] In her divorce Particulars of Claim the Applicant claims maintenance of N\$3 000-00 per month per child subject to an inflationary increase. She also claims 50% of the school fees and related expenses and that the children be placed on the Respondent's medical aid.

[18] It is against this background that the Applicant's claim of N\$5 000-00, per month, per child, and the Respondent's offer of N\$ 1 500.00, per month, per child, should be seen.

[19] Although I am mindful that maintenance is to be determined with reference to the parties' income and expenditure, their respective earning capacities against which their liability for maintenance should be fathomed, *pro rata*, I need to point out that I could not avoid getting the impression that the parties' have not fully disclosed their assets and that they, in this regard, have not been entirely frank with the Court.

[20] It is common cause that the parties' were married for some 12 years, that they used to conduct a tour operating business, the profit of which was used to maintain the family. The monthly expenses, then, were in excess of N\$20 000-00. I find it highly improbable that, in such circumstances, no assets were acquired or any savings or investments made. The papers are however silent in this regard.

[21] It was however always incumbent on the parties to make a frank and full disclosure of all their assets to enable the Court to determine the maintenance needs and liabilities of the parties' properly. Their failure to do so must negatively impact on their claims.

[22] I would in the normal course have considered an amount of N\$3 500-00, per month, per child, as reasonable in these circumstances. In view of the less than frank disclosure of the parties' respective means I deem it proper to reduce the Applicant's claim and increase the offered amount by the Respondent by N\$1 500-00.

[23] What remains to be determined is the claim by the Applicant for the school fees incurred in regard to the younger daughter A.

THE CLAIM FOR ARREAR SCHOOL FEES

[24] Again it becomes apparent that the Applicant has omitted to place all the relevant facts before the Court. She, for instance, fails to explain on what terms and conditions she managed to enrol A at a private school and then run up a debt of N\$19 000-00 in this regard. Applicant fails to explain whether or not the school has placed a moratorium on the payment of its fees pending, for

instance, the determination of the maintenance question or whether or not, for example, the school has a scheme for needy parents, for the payment of reduced school fees, from which she has benefitted? Simply no facts have been placed before this Court in that regard.

[25] In addition it needs to be taken into account that the minor children of the parties were separated and that the Respondent, under whose care G was enrolled in Walvis Bay, at a private school, did not run up a similar debt of such magnitude.

[26] Both parties are liable for the maintenance of their children. So much is clear. In such circumstances the Applicant has allowed the school debt to accumulate while, at the same time, leaving the Respondent to maintain the other child, to whose maintenance she has not contributed. The same is of course true for the Respondent.

[27] It is against this background that Applicant now claims that the Respondent contribute towards this debt in the amount of N\$12 670-00.

[28] In the divorce particulars the Applicant prays that the Respondent contribute 50% toward all tuition costs.

[29] Given these facts and circumstances I consider it fair that the Respondent contributes 50% towards the accumulated school debts.

[30] In the result the following Orders are made:

- (1) The Applicant is awarded interim custody of Gaby Venter, born on 18 August 1997, and Alice Venter, born on 16 July 1999, *pendente lite*, subject to the Respondent's rights of reasonable access being reserved to him;
- (2) The Respondent is directed to pay to Applicant interim maintenance - in respect of the aforementioned minor children - in the amount of N\$3 000-00, per month, per child - the first such payment to be made on or before the 7th of March 2012 and all subsequent payments to be effected on or before the 7th day of each subsequent month;
- (3) The Respondent is ordered to make a contribution of N\$9 500-00 in respect of the arrear school fees incurred in respect of A;
- (4) Such amount is to be paid- off in equal monthly instalments of N\$1 000-00 per month - the first instalment to be paid to the Applicant on or before the 7th of March 2012 - each subsequent instalment to become due and payable on or before the 7th day of each subsequent month;
- (5) No order as to costs is made.

GEIER AJ:

ON BEHALF OF THE APPLICANT

ANDREAS VAATZ & PARTNERS

PER: MS C WILLIAMS

ON BEHALF OF RESPONDENT

MB DE KLERK & ASSOCIATES

PER: MR S HORN