



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 3503/2012

In the matter between:

MARIA MAGDALENA LOUBSER

(Born DU PLESSIS)

APPLICANT

and

JOHANNES JACOBUS LOUBSER

RESPONDENT

Neutral citation: *Loubser v Loubser (I 3503/2012) [2013] NAHCMD 335* (15 November 2013)

Coram: DAMASEB, JP

Heard: 11 November 2013

Delivered: 15 November 2013

Flynote: Matrimonial – Rule 43 Application – Order for interim maintenance, interim custody and control of the minor children, use of Toyota Double Cap Bakkie and contribution towards legal costs – Applicant must satisfy the court that there is prospects of success in the proceedings for the Restitution of Conjugal Rights in order to succeed with a rule 43 application – Court being satisfied that there is prospects of success –

Applicant must clearly set out the financial position with documentary evidence in order for the court to properly determine the issue of maintenance.

Summary: The applicant in this matter brought a rule 43 application seeking interim order for maintenance, custody and control, use of vehicle and contribution towards legal costs. The court pointed out that in order for the applicant to succeed on a rule 43 applicant, the applicant must satisfy the court that there are prospects of success on the proceedings for the restitution of conjugal rights. The facts reveal that the parties are married out of community of property and that the respondent does not live in the family home. In fact, a protection order is in place against the respondent. The issue of custody and control and use of vehicle were contested at this point. On the issue of maintenance, it is a requirement that the amount is justified and broken down clearly with documentary evidence to enable the court to assess the financial position and needs of either party. The applicant failed to prove to the court that she is entitled to spousal maintenance as she earns a salary and has additional funds coming in monthly or that one of the major child who is self-employed is also entitled to maintenance. Court ordered, as the upper guardian of all minor children, monthly payments towards the household and for the wellbeing of the three minor children.

ORDER

I make the following order:

The respondent is ordered to make the following payments to the applicant:

1. N\$ 10 000 payable in four equal installments, first such payment to be made on or before the end of November and thereafter on or before the 7th day of the three succeeding months, as a contribution towards the arrear water and electricity account of the Municipality of Windhoek. All such payments to be made directly into the account of the applicant.

2. N\$ 10 000 per month directly into the applicant's bank account in respect of the household expenses and maintenance of the three minor children. The first payment to be made on or before the end of November 2013 and thereafter on or before the end of every month until the finalisation of the divorce action.
3. N\$ 15 000 as a contribution towards the legal costs of the applicant to cover the applicant's legal costs of preparation, including the first day of trial. The amount of N\$ 15 000 is payable in three equal installments commencing end of December 2013, directly into the trust account of the applicant's legal practitioners of record.
4. The respondent is directed to continue payment of the school fees of the three minor children (including J-M), their school uniform and all stationary as and when the need arises, until the finalisation of the divorce proceedings.
5. The respondent is directed to retain the three minor children, including J-M, on his medical aid scheme and to pay for all medical, dental and pharmacy accounts not covered by the medical aid scheme, until the finalisation of the divorce action.
6. There shall be no order as to costs.

JUDGMENT- RULE 43

Damaseb, JP:

Introduction

[1] This is an application in terms of rule 43 of the rules of this court allowing a party in a pending divorce action to seek interim maintenance, interim custody and control of a child of the marriage or a contribution towards legal costs associated with the pending divorce action.

[2] The pleadings in the divorce action have closed. The next step is the allocation of trial dates. The applicant is plaintiff in the defended divorce action. She relies on

constructive desertion which the respondent denies and counterclaims for divorce based on her alleged adultery which the applicant denies.

[3] There are four children of the marriage, one of whom (Dahirta) has since attained the age of majority and is now self-supporting but resides with the applicant in the family home. The respondent has since left the common home and for all practical purposes lives in Angola where he is employed. The applicant has a protection order against the respondent which prevents him from coming close to her or the family home.

Relief sought in the main action

[4] In the main action, the applicant seeks custody and control of the minor children. She seeks N\$7000 maintenance per child per month; an order that the respondent take out a life policy in the name of each of the minor children; a further order that he retain the minor children on his medical aid scheme and pay for all medical, hospital, surgical, orthodontical, pharmaceutical, dental and ophthalmological expenses not covered by the respondent's medical aid; an order that the respondent pay all primary, secondary and tertiary educational fees and/or tuition costs, bursary fees and university fees for the minor children should they show an aptitude for such further academic training and make reasonable progress therein. She also seeks a special order that a vehicle bought by the respondent and availed to her for use as a family vehicle be transferred into her name.

[5] It bears mention that in the main action the applicant seeks no order for spousal support or being retained on the respondent's medical aid scheme or to be provided for by the respondent in that respect. The parties are married out of community of property.

[6] Most of the relief that the applicant seeks in the main action is, I was advised during argument, not contested and a settlement is considered a real possibility.

The present rule 43 application

[7] In the present application, the applicant seeks interim maintenance for herself and the children of the marriage; interim custody and control of the minor children; an order entitling her to the use of the Toyota Double Cab Bakkie, and a contribution

towards legal costs in the pending divorce action. The applicant instituted the interim maintenance claim on the basis that she and the children of the marriage need increased maintenance from the respondent whom she pertinently accuses of failing 'to provide adequately or at all for the common household ...buys almost no food and does not contribute to any of the other expenses.'

Undisputed claims

[8] There is no dispute over the applicant's claim for interim custody and control of the minor children and her claim to retain the Toyota Double Cab Bakkie for use by her and the children of the family. In fact, the respondent's case is that it was unnecessary for the applicant to come to court on the rule 43- procedure in respect of those matters. The relief on those issues therefore becomes moot.

Prerequisite for obtaining interim relief

[9] To succeed with her claim to interim maintenance and a contribution towards her legal costs in the pending divorce action, the applicant is required to satisfy the court that she has reasonable prospect of success with her claim for restitution of conjugal rights based on the respondent's alleged constructive desertion.¹

[10] It is common cause that the respondent, a father of four children of whom three are still minors, lives majority of the time in Angola leaving the rearing of the children entirely to the applicant. He only visits Namibia for very short periods of time and lives by himself when he is in Namibia – not surprisingly I must add given that there is a protection order against him. Although the respondent's version is that his seeking job opportunities in Angola was with the agreement of the applicant, his rather long absences away from home and the family raises a strong inference that marital life is thereby made intolerable and most onerous for the applicant who now bears the brunt of the parenting responsibility. For this reason, I am satisfied that the applicant has demonstrated reasonable prospect of success in obtaining an order for restitution of conjugal rights if she proves all the allegations made in her founding papers.

¹RH v NS 2010 (2) NR 584 at 588 para 11; Du Plooy v Du Plooy 1953 (3) (3) SA 848 (T) at 851-2; Hamman v Hamman 1949 (1) SA 1191 (W).

Basis for interim relief claimed

[11] It has been held that an application under rule 43, based as it is only on two affidavits, is not capable of precise determination as where evidence is presented. The court is expected to draw inferences and to look at the probabilities as they emerge from the papers. It is critical, however, that the applicant, who bears the onus, produces sufficient information to enable the court to come to his or her assistance.²

[12] In the founding papers the applicant alleges that in order to augment her monthly salary she requires 'at least' N\$ 21 000 per month, excluding school fees, to be able, she says, to 'properly maintain myself and our children'. According to the applicant, she carries the brunt of the expenses on the family and the common household, in particular payment for the rent, food, water, electricity and fuel. According to the applicant, 'a large portion' of the N\$ 32, 600 she either spends or contributes on 'the children's maintenance requirements', excluding on school fees 'originate directly from the maintenance of our children'. She adds in that regard:

'In any event I, together³ with the children⁴, have always, throughout my married life enjoyed a standard of living as depicted supra and am informed that I am entitled to continue enjoying this standard of living'. (My underlining)

[13] The applicant also seeks to justify the increased maintenance to enable her to secure medical aid for herself and the children, alleging that the respondent unreasonably removed Dahirta (now a major) and herself from his medical aid scheme.

[14] As far as her claim for a contribution towards legal costs is concerned, the applicant deposed that 'until finalisation of the divorce' her 'prospective legal fees' will be 'approximately N\$50 000'. She adds:

'In the light of the above I submit that I am in desperate need of a contribution towards legal costs in the amount of at least N\$ 50 000, so as to enable me to proceed with this matter to its finalisation'. (My underlining)

Respondent's criticism of the application

² Ibid.

³ I reiterate that in her main claim, the applicant seeks no lifestyle relief for herself.

⁴ Obviously she includes Dahirta who is a major.

[15] The crisp complaint raised by the respondent against the application is that it fails to explain to the court which of the expenses referred to by the applicant are attributable to her personally and which ones to the minor children and which to the adult child who is now self-supporting – a consideration which, it said on respondent's behalf, is all the more important because Dahirta is now a self-supporting major who should contribute to the expenses of the household she shares with the applicant and the rest of her siblings.

The amount the applicant actually claims from the respondent

[16] The applicant says she requires at least N\$ 21 000 from the respondent, presumably to cover the rental, food, fuel, water and electricity, entertainment, cosmetics and clothes. She in addition wants him to be held liable for the school fees and medical treatment costs of the children who are school-going.

The applicant's means

[17] According to the applicant, she earns a net monthly income of about N\$12 000. The respondent says that cannot be because according to her own attached pay-slips (Annexures 'B' and 'C') for January and February 2013, she earns a salary of N\$ 14 136. Her counsel sought to convince me during argument that I should take judicial notice that she pays tax and that that should be deducted from the amounts reflected in the Annexures. I am not told how I should go about doing that because I am not even told in the papers what is the rate of tax she pays and why for two months the same figure appears as her net income. She therefore understated her income by N\$ 2136. The applicant's proven income is therefore N\$ 14 136 plus the N\$ 6000 rental she receives from subletting a portion of the family home: a total of N\$ 22, 272.

[18] According to the respondent, the deserving children⁵ remain on his medical aid scheme and will so remain and he undertakes to pay for all related medical and dental expenses. As far as the applicant is concerned, the respondent states that they are

⁵ In his answering papers he refers only to the two minor boys and inexplicably excludes the girl J-M who is still a minor at 17.

married out of community of property and that she has no entitlement to be provided for by him in respect of medical aid.⁶

The criticism is justified

[19] Although the applicant concedes in her own papers that the eldest of the four children, Dahirta, is now a major who is employed, has a child of her own and still lives in the family home, she nowhere explains why Dahirta is not excluded from the maintenance she seeks for all the four children of the marriage. In addition, she also fails to explain what share Dahirta contributes, as she ought to, towards rental, water and electricity, and the food consumed in the home.

[20] The applicant also seeks a certain amount which she alleges she needs for a medical aid scheme for herself and, again, all the children, including Dahirta whom she claims was unreasonably removed from the respondent's medical aid scheme together with her. Why Dahirta, a self-supporting major, should be provided for a medical aid by the respondent is not explained.

[21] The respondent's criticism of the applicant's case as formulated, in particular that it fails to set out in respect of whom she claims what, is a fair criticism. Satisfied that, for example, Dahirta is not entitled to maintenance from the respondent and that she ought to make a contribution towards certain heads of expense, I am left to guess what discount to make for that in the global sums claimed by the applicant who bears the risk of non- persuasion. Similar considerations apply when it comes to her personal claims for maintenance.

What respondent says he pays in maintenance

⁶ This is not a correct statement of the law: the duty to support one's spouse arises regardless of the marital regime and is limited only by (a) need by the spouse requiring support and (b) the ability of the other spouse to afford paying spousal support. Therefore, the applicant's not being entitled must be premised on the fact that she makes no case for spousal support in her main claim.

[22] The respondent's version is that he has and continues to pay the amount of N\$14 246 36 towards the maintenance of the family and offers now to increase that by another 3000 per month. The respondent alleges in his answering affidavit that he pays:

‘a monthly amount of N\$ 14 246.36 ...since December 2012 until date hereof to the upkeep of the common household and towards maintenance for the applicant and minor children’.

[23] What is quite clear is that of this global sum, only	N\$ 4200
plus	<u>N\$ 1000</u>
totaling	<u>N\$ 5200</u>

is cash provided directly to the applicant, the balance⁷: being

school fees	N\$ 3700
medical aid for the two boys	N\$ 2560
and insurance cover for the two minor boys	<u>N\$ 3386.36</u>
represents cash payments for the benefit of the children but,	<u>N\$ 9646.36</u>

which does not represent cash in the hands of the applicant

towards household maintenance. The consequence of this is that only N\$ 5700 is a direct cash contribution made by the respondent towards water and electricity, food, fuel and running costs of the family vehicle, entertainment for the children, cosmetics and toiletries, the housekeeper, gardener and house alarm. Besides, the respondent appears to concede that apart from paying for her school fees, he makes no cash contribution to the applicant for the needs of J-M, the 17-year-old minor girl who also lives with the applicant. I get the impression reading the respondent's answer that he pays scant attention to the financial needs of this minor girl. Until she reaches the age of majority or becomes self-supporting, he is liable for her maintenance and should be made to maintain her too.

⁷ Representing the amount of N\$ 9 646.36.

[24] It is common cause that the applicant has not pleaded spousal support in her particulars of claim. It has not been explained to me during argument on what basis she now seeks such support in the present application. To the extent she does, for herself and Dahirta, the claim for 'at least N\$ 21 000' is extravagant and ought properly to be disregarded in determining the needs of the deserving minors as part of the household of the applicant and Dahirta.

Has the applicant made out the case?

[25] The applicant's case is not quite a model of clarity: She ought to have more clearly explained how she arrived at the sum of N\$ 21 000 she needs as a direct cash contribution to her for the household expenses and the maintenance of the minor children. That failure is compounded by the failure to properly account for Dahirta's contribution to the common expenses: In fact, she rather misleadingly includes Dahirta in the claim she makes for maintenance.

[26] The applicant lists the following amounts as part of the N\$ 32 600 what she says she spends per month:

pension:	N\$ 2000
medical:	N\$ 3500
telecom & internet:	<u>N\$ 1300</u>
	<u>N\$ 6 800</u>

It is not clear how these amounts relate to each member of the household. In addition, she lumps the following expenses together without, again, specifying how each relates to each member of the household:

rental	N\$ 11 000
water and electricity:	N\$ 4500
housekeeper:	N\$ 1200
food:	N\$ 3500

household sundries:	N\$ 500
clothing:	N\$ 1000
pocket money:	N\$ 1000
cosmetics:	N\$ 800
entertainment:	<u>N\$1500</u>
	<u>N\$ 25 000</u>

[27] Given that the applicant makes no claim for her own maintenance in the main claim, the presumption must be that the applicant is quite capable of looking after her own needs. She has not made out any case for interim maintenance for herself.

[28] The applicant has failed to satisfy me on a preponderance of probabilities that she requires the amount of N\$ 21 000 which she claims. I am satisfied though that the current level of cash contribution by the respondent towards the direct household expenses of the household is inadequate. This court is upper guardian of the minor children whose interests in these proceedings are represented by the applicant. It is in their interest that the court, even if uncertainty exists about what their actual needs are, does its best on the available information, to achieve a balance that meets their needs as far as reasonably possible.

The needs of the three minors

[29] In her particulars of claim, the applicant seeks maintenance in the amount of N\$ 7000 for each of the minor children and in addition an order requiring the respondent to pay for their school-related expenses and also medical expenses. The cash she seeks is therefore N\$ 21 000. It is not yet clear to me how that amount is made up. As I have already demonstrated, in the present application that same amount is claimed in respect of herself and all of the four children. I have shown the inappropriateness of that claim. I do not therefore propose to use the amounts she claims in the particulars of claim as a reliable guide.

[30] As far as the maintenance for the children is concerned, not only is the case therefor a given, but I am satisfied on a preponderance of probabilities that the respondent's cash contribution of N\$ 5700 towards the direct household expenses of the minor children as part of the household to which they belong, is not adequate given that the bulk of the finances which the applicant commands goes towards rental, water and electricity and other sundry yet essential household expenses.

[31] It requires no rocket science to surmise, on the prevailing costs of living, that the applicant is bound to be under financial stress on her income of N\$ 22 600 given that she pays therefrom rental of N\$ 17 000, water and electricity of N\$ 2500, and an expense of N\$3 500 related to the family vehicle. I am not even adding to that the expenses on the housekeeper, toiletries, food, entertainment and other essential expenses. It appears to me that all of the income she receives, barring a contribution from Dahirta, is swallowed up by the rental and water and electricity. Had it not been for the contribution from Dahirta, the shortfall was bound to be even much larger. It seems unrealistic in such circumstances to argue that the applicant's contribution towards the needs of the minor children be assessed on a more finer scale.

[32] I do not find much credence in the respondent's version that the applicant must move out of the present home and find a cheaper place. He loses sight of the fact that the applicant has a rental agreement which cannot be got out of by a stroke of the pen and the needs of the children who are used to a certain standard of living must be taken into account in that respect. It may well be that it is something the applicant must consider seriously post-divorce but as the papers stand presently it has not been demonstrated to me that the time for that to happen is now.

[33] It appears to me that the direct cash contribution that the respondent makes must be increased close to two-fold in order also to include the needs of J-M who is considerably older than the two boys.

Water and electricity

[34] It is not at all disputed by the respondent that there is an arrear bill towards water and electricity amounting to N\$25 000 which the applicant met by borrowing from the employer and still has to repay. I take the view that the respondent should be made to contribute towards that arrear bill. On the assumption that Dahirta too has some liability towards that arrear amount, I come to the conclusion that the respondent must contribute the sum of N\$ 10 000 towards that debt, to be paid in four equal installments.

Contribution towards legal costs

[35] There is common ground between the parties that as regards a contribution towards legal costs, she is entitled to a contribution that covers preparation and only the first day of trial. Inexplicably though she seeks a contribution sufficient 'until finalisation of the entire divorce proceeding'.

[36] Both parties are represented by instructing and instructed counsel. The respondent offers to make a contribution of only N\$7000, to be paid in two equal installments. Even on the basis that she should receive a contribution that covers preparation for trial up to and including the first day of trial, the amount of contribution offered seems to me to be wholly inadequate given that the applicant has, just as the respondent does, instructing and instructed counsel. The applicant is entitled to litigate on the same scale as the respondent. In my view, for the preparation between now and trial and the first day of trial, the applicant will incur an approximate attorney and client legal costs liability of N\$ 30 000. Half of that amount would be a more realistic assessment of the respondent's liability by way of a contribution.

The respondent's means

[37] The respondent avers that his total monthly expenditure is N\$ 54 282.17. He states that he earns an average of N\$ 44 932 per month and an additional N\$ 6 500 rental income- giving a total of N\$ 51 432.

[38] On his own version, the respondent seems to be a man with significant assets in real estate. Apart from the unsubstantiated claim that the assets in South Africa are a

liability, he owns two properties in Namibia; one of which he rents out and another in which he lives. He lives all by himself and supports his parents in South Africa with a monthly allowance of N\$ 500 – meaning they are otherwise capable of taking care of themselves. I am satisfied that he has the means to raise the necessary finance to comply with the orders I propose to make.

The order

[39] I make the following order:

The respondent is ordered to make the following payments to the applicant:

1. N\$ 10 000 payable in four equal installments, first such payment to be made on or before the end of November and thereafter on or before the 7th day of the three succeeding months, as a contribution towards the arrear water and electricity account of the Municipality of Windhoek. All such payments to be made directly into the account of the applicant.
2. N\$ 10 000 per month directly into the applicant's bank account in respect of the household expenses and maintenance of the three minor children. The first payment to be made on or before the end of November 2013 and thereafter on or before the end of every month until the finalisation of the divorce action.
3. N\$ 15 000 as a contribution towards the legal costs of the applicant to cover the applicant's legal costs of preparation, including the first day of trial. The amount of N\$ 15 000 is payable in three equal installments commencing end of December 2013, directly into the trust account of the applicant's legal practitioners of record.
4. The respondent is directed to continue payment of the school fees of the three minor children (including J-M), their school uniform and all stationary as and when the need arises, until the finalisation of the divorce proceedings.
5. The respondent is directed to retain the three minor children, including J-M, on his medical aid scheme and to pay for all medical, dental and pharmacy accounts

not covered by the medical aid Scheme, until the finalisation of the divorce action.

6. There shall be no order as to costs.

P T Damaseb
Judge-President

APPEARANCE:

PLAINTIFF

JP JONES

INSTRUCTED BY

Kirsten & Co Inc, WINDHOEK

DEFENDANT

CJ MOUTON

INSTRUCTED BY

Conradie & Damaseb, WINDHOEK