

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: HC-MD-CIV-ACT-MAT-2019/03955

In the matter between:

A S

APPLICANT/DEFENDANT

and

M S

RESPONDENT/PLAINTIFF

**Neutral citation:** A S v M S (HC-MD-CIV-ACT-MAT-2019/03955) [2020]  
NAHCMD 98 (11 March 2020)

**CORAM:** NDAUENDAPO J

**Heard:** 12 February 2020

**Delivered:** 11 March 2020

**Flynote:** Interlocutory – Matrimonial – Rule 90 application – Applicant applied for maintenance *pendente lite* – Applicant must prove *prima facie* case in the main action – If the applicant is the defendant, it is sufficient to show there exists a bona fide defense – failing which that is the end of the matter – Plaintiff discharged onus – Court has discretion to grant relief sought – Application granted.

**Summary:** The applicant and the respondent were married to each other since 19 July 2003, out of community of property, subject to the accrual system. Three minor children were born out of the marriage between the parties.

During September 2019 the respondent (plaintiff) instituted divorce proceedings against the applicant (defendant) on the grounds of adultery and constructive desertion. The divorce proceedings have not yet been finalized. The defendant must still file her plea and counterclaim, if any. In the founding affidavit to the rule 90 application, she denies that she is responsible for the breakdown of the marriage and has set out the circumstances which according to her caused the breakdown of the marriage and alleges that the respondent is the sole cause thereof. The plaintiff has further denied that she committed adultery.

The Rule 90 application is opposed by the respondent. In her founding affidavit, the applicant states that she needs the amount of N\$47 308.33 in respect of the monthly expenses of the children on a standard not higher than that maintained while the parties were still living together. The applicant is also asking that the respondent be ordered to refund her the bond instalment on the common home that is deducted from her Standard Bank account on the 1<sup>st</sup> of each month, that the respondent be interdicted from visiting the common home and her work place and that he be restrained from harassing her.

*Held*, the court is satisfied that the applicant has made out a prima facie case to defend the main action.

*Held further*, that the applicant has made out a case for additional maintenance for the minor children in the amount of N\$22 000.

*Held further*, that the respondent is ordered to refund the applicant the bond repayment which is deducted from her Standard Bank account on or before the 1<sup>st</sup> of each month.

*Held further*, that as the parties are married out community of property, subject to the accrual system, and the divorce has not been finalized, the respondent is ordered to

refrain from encumbering and/ or concealing and/or otherwise disposing of any assets subject to the accrual, including but not limited to his shares in IJG Holdings (Pty) Ltd

*Held further* that the respondent is ordered to refrain from committing any act of domestic violence against applicant and to stay away from the work place of the applicant at Standard Bank Namibia, Business Banking, Suite 4, Town Square Building, Post Street Mall, Windhoek, Namibia.

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**ORDER**

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Having considered all the facts and submissions by both parties, the application is upheld and following order is made:

1. The respondent is ordered to repay to the applicant the home loan bond repayments in respect of the common home of the parties in the amount of N\$63 000.00 which is deducted from the account of the applicant, on or before the 1<sup>st</sup> of each month.
2. The respondent is ordered to continue paying the bond instalment on the common home in the amount of N\$63 000.00, water and electricity including rates and taxes (N\$5 550), Mnet (N\$920), Swimming lessons (N\$2 520), Internet, phone (N\$2 500), medical aid (N\$6 270), School fees (N\$15 776.25), Hockey (583.33) and household cleaning (N\$3 750). In addition to those payments, the respondent is ordered to pay an amount of N\$22 956.75 to the applicant for the maintenance of the children.
3. The respondent is ordered to refrain from encumbering and/or concealing and or otherwise disposing of any of his assets that are subject the accrual, including but not limited to his shares in IJG holdings (Pty) Ltd.

4. The respondent is ordered to refrain from committing any act of domestic violence against the applicant and that he is ordered to stay away from the applicant's place of work, at Standard Bank Namibia, Business Banking, Standard Bank Head Office, Chasie Street, Kleine Kuppe, Windhoek.
5. There is no order as to costs.

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## JUDGMENT

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NDAUENDAPO, J

### Introduction

- [1] Before me is an application in terms of Rule 90 of the rules of this court. The applicant seeks the following relief:
- 1.1 An order that the respondent refund the bond repayment payable in respect of the mortgage bond registered over the common home situated at 16 Demonte Street, Auasblick, Windhoek, Namibia which is deducted from her bank account by the 1<sup>st</sup> day of every month, to her on or before the 1<sup>st</sup> day of each and every consecutive month;
  - 1.2 An order for respondent to pay maintenance pendent lite of N\$42 104.41 per month in respect of the three minor children of the parties, payable on or before the 1<sup>st</sup> day of each and every month;
  - 1.3 That the respondent be ordered to refrain from encumbering and/or concealing and/or otherwise disposing of any of his assets, including but not limited to his shares in IJG Holdings (Pty) Ltd;
  - 1.4 That respondent be ordered to refrain from committing any act of domestic violence against the applicant and that he should stay away from the common

home of the parties and the work address of the applicant, Standard Bank Namibia, Business Banking, Suite 4, Town Square Building, Post Street Mall, Windhoek, Namibia

### Background facts

[2] The applicant and the respondent were married to each other on 19 July 2003 at Franshoek, South Africa, out of community of property, subject to the accrual system. Three minor children were born out of the marriage between the parties.

[3] During September 2019 the respondent (plaintiff) instituted divorce proceedings against the applicant (defendant) on the grounds of adultery and constructive desertion. The divorce proceedings have not yet been finalized. The defendant must still file her plea and counterclaim, if any. In the founding affidavit to the rule 90 application she denies that she is responsible for the breakdown of the marriage and blames the plaintiff. The respondent moved out of the common home and by agreement between the parties the minor children are living with the applicant.

[4] The Rule 90 application is opposed by the respondent. The respondent states that the applicant failed to deal with the prospects of her success on the main grounds raised by respondent in the divorce action, being applicant's wrongful, malicious and constructive desertion of respondent and her extramarital relationship. In her founding affidavit, the applicant states that she needs the amount of N\$47 308.33 in respect of the children's monthly expenses on a standard not higher than that maintained while the parties were still living together. The respondent in the replying affidavit states that he is paying and still pays the bulk of the expenses claimed by the applicant except expenses such as entertainment for the children of N\$3 750.00, gifts for friends and relatives of N\$500.00, extra pocket money of N\$500.00 and clothing of N\$8,000.00 which the respondent states are exorbitant, unsubstantiated and unnecessary luxury items.

The applicable legal principles in respect of rule 90

Rule 90 provides as follows:

- (1) This rule applies whenever a spouse seeks relief from the court in respect of one or more of the following matters –
- (a) maintenance pending suit;
  - (b) a contribution towards the costs of a pending matrimonial action;
  - ...
  - (e) an order that none of the spouses may damage, transfer, encumber, conceal or otherwise dispose of any joint assets while the matrimonial cause is pending.
  - (f) An order that the spouse may not commit any act of domestic violence against the other, which may include and order requiring a spouse to stay away from a specified residence or work place of the other spouse

Hoff, J (as he then was) in *Stoman v Stoman* identifies a two-fold test<sup>1</sup>:

‘An applicant must in the first instance make out a *prima facie* case in the main action. Should such an applicant fail to do so that is the end of the application. However should an applicant discharge this onus, the court would then consider the relief sought in the application e.g. maintenance *pendente lite* and/or a contribution towards costs.

As held in *Taute v Taute*, the factors (not exhaustive) the court may consider whether the applicant is entitled to reasonable maintenance *pendente lite* are:

‘...dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of the husband to meet such requirements

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<sup>1</sup>*Stoman v Stoman* I 12409/2013 [2014] NAHCMD 116 (27 March 2014) at paras 26 – 27.

which are normally met from income although in some circumstances inroads on capital may be justified <sup>2</sup>.’

“[8]

[20] In *Margreth Lugondo Ndapewa Walenga v John Walenga*, Unengu AJ cited with approval the matter of *Haman v Hamman 1949(1) SA 1191 (W) at 1193*, where it was held that:

‘In order to decide whether a prima facie case has been made out in a petition of this character, the Court must ask itself whether, if all the allegations in the petition were proved, the applicant would succeed in the main action. The court cannot speculate as to who is likely to succeed by nicely balancing the probabilities. Of course, where a respondent produces overwhelming proof (such as correspondence or documentary or equally convincing evidence) showing that there is no foundation at all for the allegations in the petition, the Court would be obliged to hold on the papers that a prima facie case had not been made out and the test set out above would not be applicable. Short of such evidence by the respondent, however, the Court will assume that the allegations in the petition are capable of proof and will consider whether the applicant would be entitled to judgment in the main case, if the facts set out in the petition were proved”

[9] It is trite that the rule 90 procedure contemplates a speedy and fair decision on the application. Only two sets of affidavits are permitted. The process is intended to provide interim and temporary relief and cannot be determined with the same degree of precision and closer exactitude which afforded by detailed evidence (RH V NS 2010(2) NR 584 at 588. This type of application cannot be determined so precisely as one where evidence is presented. Because there are only two affidavits the court has to draw inferences and look at probabilities as they emerge from the papers. In order to evaluate the probabilities and to make a proper assessment, annexures to prove averments may be important. Sufficient details must be given to enable the court to deal with the matter (RH v NS 2010 (2) NR 584 p589.’

[Own Emphasis]

### This application for interim relief

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<sup>2</sup>*Taute v Taute* 1974 (2) SA 675 ECD at p. 676 at F.

[5] The applicant is employed at Standard Bank Namibia as head of commercial banking and her net monthly income is N\$60,610.52. Her reasonably anticipated monthly expenditure and allowance for herself and the three children on a standard no higher than that maintained while they were living together is the sum of N\$89,179.00 calculated as follows:

1.	Assessment rates, lights and water	N\$6 500.00
2.	Food and household consumables	N\$30 850.00
3.	Petrol	N\$3 000.00
4.	Allowance for clothing/uniform for the children (Monthly average)	N\$1 333.33
5.	Cellphone expenses for myself and the children	N\$1 850.00
6.	Entertainment for myself and children	N\$5 000.00
7.	Toiletries and cosmetics for myself and the children	N\$3 000.00
8.	Gifts for friends and relatives and children's parties	N\$500.00
9.	Extra pocket money for children	N\$1 500.00
10.	Medication/Vitamins	N\$2 100.00
11.	Domestic work/After school care	N\$4 850.00
12.	Car instalments	N\$18 692.67
13.	Clothing (sport uniforms etc.)	N\$10 000.00
	<b>Total</b>	<b>N\$ 89 176.00'</b>

[6] The children's portion of the abovementioned expenses is set out as follows:

1.	Water and electricity	N\$ 3 375.00
2.	Food	N\$ 18 750.00
3.	Petrol	N\$ 2 250.00
4.	Allowance for clothing/uniform for the children (monthly average)	N\$ 1 333.33
5.	Cellphone and telephone	N\$ 500.00
6.	Entertainment for the children	N\$ 3 750.00
7.	Toiletries and cosmetics	N\$ 1 500.00
8.	Gift for friends and relatives and children's parties	N\$500.00
9.	Extra pocket money for children	N\$ 1 500.00
10.	Medication/vitamins	N\$ 1 500.00
11.	Domestic work/after school care	N\$ 3 350.00
12.	Clothing and extra mural uniform	N\$ 8 000.00



**Total****N\$ 47 308.33'**Respondent's liabilities

[7] The respondent is employed as a Group Managing Director at IJG Holdings (Pty). He is a shareholder in IJG Holdings and the value of his shares are approximately N\$19 million. He earns a fixed monthly salary of N\$131,255-33. For the past six months the respondent has earned an average of N\$103,985.73 per month in bonuses bringing his average monthly income to a total of N\$235,241.06 for the past six months. Their common home is registered in a close corporation. There is a bond registered over the property in favour of Standard Bank Namibia. The bond repayment is N\$63 000.00 per month by agreement between the parties the instalment is deducted from the Standard Bank Namibia account of applicant. The respondent has to refund the instalment to applicant every month. He is the plaintiff in the divorce proceedings and the respondent in this proceedings. In the divorce proceedings he alleges that the defendant committed adultery and of wrongful, unlawful and constructive desertion. In his replying affidavit he states that he has been paying and still pays the following monthly expenses for the benefit of the applicant and the three minor children.

1.	Home Loan at Standard Bank – De Monte Street (Residence of applicant and children)	N\$ 63 000.00
2.	Rates & taxes; including electricity and water	N\$ 5 550.00
3.	M-Net, De Monte Street	N\$ 920.00
4.	Swimming lessons for children	N\$ 2 520.00
5.	Internet & phone, De Monte Street	N\$ 2 500.00
6.	Gym fees for applicant	N\$ 650.00
7.	House & car insurance	N\$ 1 683.50
8.	Medical Aid	N\$ 6 270.00
9.	School fees	N\$ 15 776.25
10.	Sport (Hockey) children	N\$ 583.33
11.	Girls' Hockey tour (once-off)	N\$ 1 750.00
12.	Swimming tour (March and September 2019)	N\$ 2 692.42
13.	Household cleaning	N\$ 3 750.00
14.	G4S security	N\$ 400.00
	<b>Total</b>	<b>N\$ 108 045.50'</b>

### Discussion

[8] As alluded to, the respondent instituted divorce proceedings against the applicant on the grounds of adultery and wrongful and constructive desertion. The divorce is not finalized and the applicant must still file her plea and counterclaim, if any. The applicant in the founding affidavit to the rule 90 application vehemently denies those allegations. She in fact blames the respondent for the breakdown of the marriage and also accuses him of adultery. In annexure "AS2" to the applicant's founding affidavit there is an email from the respondent to the applicant in which he says:

'Over the past 14 years I have made many promises that have not materialized, have been selfish and emotionally unsupportive of yourself. It dawned upon me last night, having gone through my notes on my phone, for how long you have been trying to work on us. I have simply failed to listen to you. '

The applicant in my view has on balance of probabilities made out a *prima facie* case to defend the main action.

[9] As far as prayer 1.1 (bond payment) is concerned, there is no dispute that the monthly repayments (installments) of the bond is deducted from the applicant's account and that respondent has to refund her, the only bone of contention is that the respondent does not do that promptly on the 1<sup>st</sup> of each month and that adversely affect her cash flow and her ability to honour her other financial commitments timeously. The respondent states that he will make arrangements that the bond instalments are paid to applicant in advance on or before the 7<sup>th</sup> of each month. I inquired from counsel for the applicant whether it was not possible for applicant to arrange with her bank to have the bond deductions done on the 7<sup>th</sup> of each month and her instructions were that was not possible as she pays a special reduced interest rate on the bond loan for staff members and as a condition the bond instalment must be deducted on the 1<sup>st</sup> of each month. I have perused the pay slips of the respondent annexed to the replying affidavit for a period of six months and it is clear that the respondent receives his salary at the end of each month and therefore

there should be no problem if this Court should order that the respondent pays the bond payment refunds to the applicant on or before the 1<sup>st</sup> of each month.

[10] In prayer 1.2, the applicant in the founding affidavit is claiming for maintenance in the amount of N\$42,104.41. However, at the commencement of the hearing the court was informed by counsel for the applicant that the parties discussed and have agreed on two options to be considered as regards the liabilities of the parties. The two options are as follows:

Option 1

'Water and electricity	N\$ 5 500.00
Food and household necessities	N\$ 18 750.00
Petrol	N\$ 2 250.00
Allowance for uniforms	N\$ 1 333.33
Cellphone and telephone	N\$ 2 500.00
Entertainment (Incl. Mnet	N\$ 3 750.00
Toiletries and cosmetics	N\$ 1 500.00
Gifts	N\$ 500.00
Pocket money	N\$ 1 500.00
Medication/vitamins	N\$ 1 500.00
Domestic worker	N\$ 3 750.00
Clothing	N\$ 8 000.00
Swimming lessons	N\$ 2 520.00
Medical Aid	N\$ 6 270.00
School fees	N\$ 15 776.25
Hockey	N\$ 583.33
	N\$ 76 032.91

Apportionment 80/20

Mark (Respondent 80%)	N\$60 826.33
Ali (Applicant 20%)	N\$15 206.58
	N\$76 032.91'

Option 2

'Expenses paid directly by Mark (respondent)

Liability (80% of the amount of N\$76 032.91)		<b>N\$60 826.33</b>
Less payments made		
Rates and taxes	N\$ 5 550.00	
Mnet	N\$ 930.00	
Swimming lessons	N\$ 2 520.00	
Internet, phone	N\$ 2 500.00	
Medical Aid	N\$ 6 270.00	
School fees	N\$ 583.33	
Hockey	N\$ 3 750.00	
	<b>N\$ 37 869.58</b>	<b>N\$-37 869.60</b>
Amount due		<b>N\$22 956.75'</b>

The court has considered the facts, the history, income of the parties and most importantly the lifestyle maintained and accustomed to by the children while the parties were living together and the court is of the view that an apportionment of 20/80 (applicant 20% and respondent 80%) payments or liabilities in terms of option 2 will be just and equitable in the circumstances.

[11] As far as prayer 1.3 is concerned, Rule 90(e) provides an order that none of the spouses may damage, transfer, encumber, conceal or otherwise dispose of any joint assets while the matrimonial cause is pending may be made. In support of prayer 1.3, the applicant alleges that the valuation of the respondent's shares in IJG Holdings (Pty) Ltd as N\$19,392,786.00 is speculative and incorrect. The respondent states that valuation was done by an independent valuator. The applicant does not state why that valuation is incorrect nor does she provides an alternative valuation and therefore I agree with the respondent that it is the correct valuation of the shares. She further states that they engaged in extensive communication before the institution of the divorce proceedings and they exchanged their respective income and expenses with each other and that the respondent was not transparent because he is hiding an amount of N\$6 million because the net asset value of their joint estate per his calculations have not shown an increase in value since his representations in

2016 and accordingly, states the applicant, the respondent is attempting to under value and or conceal his assets and in particular his shares in IJG Holdings(Pty) Ltd and he must be interdicted to further encumber any of his assets. The respondent denies those allegations and states that the lack of increase in the value of the joint estate can be attributed to the economic meltdown. The court can take judicial notice that it is indeed correct that the economy is experiencing a meltdown and property prices have contracted/decreased and that may well explains the decrease in the value of the joint estate.

The divorce proceedings in this matter have not been finalized, the parties are married out of community of property, subject to the accrual system and no reasons were advanced by the respondent why such an order should not be granted.

[12] Prayer 1.4, the applicant prays that the respondent be ordered not to commit any act of domestic violence against applicant and be ordered to stay away from the common home and the work premises of the applicant. Rule 90(f) provides for an order that a spouse may not commit an act of domestic violence against the other, which may include an order requiring a spouse to stay away from a specified residence or workplace of the other spouse.

The applicant alleges that since 2019 the respondent has been constantly harassing her telephonically and has been entering the common home uninvited. That includes threat to wait outside her home outside the agreed visitation times and obtaining house keys from the children and refusing to return them. The respondent denies any form of harassment and states that he sometimes goes to the house to pay the domestic worker her salary and attend to the children. On the issue of harassment, although the respondent denies that, there is no prejudice if this court should grant such a relief including the relief of prohibiting the respondent to go to the work premises of the applicant. As far as visiting the common home is concerned, the respondent states that he goes there to pay the salary of the domestic worker and to attend to the children. The children is his and therefore to prohibit him to visit the common home to attend to the children and pay the domestic worker will be unreasonable.

[13] Having considered all the facts and submissions by both parties, the application is upheld and following order is made:

1. The respondent is ordered to repay to the applicant the home loan bond repayments in respect of the common home of the parties in the amount of N\$63 000.00 which is deducted from the account of the applicant, on or before the 1<sup>st</sup> of each month.
2. The respondent is ordered to continue paying the bond instalment on the common home in the amount of N\$63 000.00, water and electricity including rates and taxes (N\$5 550), Mnet (N\$920), Swimming lessons (N\$2 520), Internet, phone (N\$2 500), medical aid (N\$6 270), School fees (N\$15 776.25), Hockey (583.33) and household cleaning (N\$3 750). In addition to those payments, the respondent is ordered to pay an amount of N\$22 956.75 to the applicant for the maintenance of the children.
3. The respondent is ordered to refrain from encumbering and or concealing and or otherwise disposing of any of his assets, including but not limited to his shares in IJG holdings (Pty) Ltd.
4. The respondent is ordered to refrain from committing any act of domestic violence against the applicant and that he is ordered to stay away from the applicant's place of work, at Standard Bank Namibia, Business Banking, Standard Bank Head Office, Chasie Street, Kleine Kuppe, Windhoek.
5. There is no order as to costs.

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**G N NDAUENDAPO**

**Judge**

**APPEARANCES**

**FOR THE PLAINTIFF/RESPONDENT**

Mr Van Vuuren  
Of Kruger Van Vuuren & Co.

**FOR THE DEFENDANT/APPLICANT**

Ms Delport  
Of Delport Legal Practitioners