

Summary: The plaintiff instituted divorce action against the defendant, in which action the plaintiff claims that the defendant unlawfully, maliciously and with the fixed intention to terminate the marriage, deserted the plaintiff by leaving the common home of the parties on 22 April 2020, taking with her all her personal belongings. The defendant however denies that she deserted the common home of the parties or that she left the common home with a malicious and fixed intention to terminate the marital relationship between the parties. She admits having left the common home but alleges that she was forced to leave the common home as the plaintiff constructively deserted her. The defendant launched and filed an interlocutory application in terms of *Rule 90(2) of the Rules of Court*, claiming an amount of N\$15 000 maintenance per month pending the outcome of the divorce action and a contribution of N\$70 000 to her legal costs.

Held that an applicant in an application for maintenance *pendente lite* and/or contribution towards costs, must, in the first instance, make out a *prima facie* case in the main action, that is, whether, if all the allegations in the application were proved, applicant would succeed 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 said application. On the other hand, where a respondent produces overwhelming proof showing that there is no foundation at all for the allegations in the application, the Court would be obliged to hold on the papers that a *prima facie* case had not been made out.

Held that if the allegation made by the defendant are proven at the trial, she would succeed to prove that it was indeed the plaintiff who constructively deserted her. Court is therefore of the view that the defendant is entitled to maintenance *pendente lite*. No overwhelming proof from the plaintiff showing that there is no foundation at all for the allegations made by the defendant in her affidavit.

Held further that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. In the court's view, the demands by the defendant are reasonable and supported by moderate details

ORDER

1 The plaintiff must pay maintenance to the defendant, *pendente lite* in the amount of N\$11 500–per month, the first payment must be made on or before 07 October 2021 and thereafter on or before the 7th day of every month.

2 The defendant is granted leave to approach this Court on the same papers, duly amplified where necessary, to claim a contribution to her legal costs in the pending litigation.

3 No order as to costs is made.

4 The defendant must, if so advised, file her plea and counterclaim by not later than 28 September 2021.

5 The plaintiff must, if so advised, replicate to the defendant's plea and plead to the defendant's counterclaim by not later than 11 October 2021.

6 The defendant must, if so advised, replicate to the plaintiff's plea to the defendant's counterclaim by not later than 22 October 2021.

7 The plaintiff must file his affidavit in terms of rule 89 and his discovery affidavit and bundles of discovered documents by not later than 01 November 2021.

8 The defendant must file her affidavit in terms of rule 89 and her discovery affidavit and bundles of discovered documents by not later than 05 November 2021.

9 The parties must file a joint case management conference report by not later than 12 November 2021.

10 The matter is postponed to 16 November 2021 for a case management conference.

JUDGMENT

UEITELE J:

Introduction and Background

[1] The applicant, who is the defendant in the main divorce action, is a major female person. She states that she currently has no fixed employment and income. She furthermore states that she resides at Erf 124, Omafo Village, Ndingweanyama Location, Ohangwena. I will, for ease of reference refer to the applicant as the defendant in this ruling.

[2] The respondent, who is the plaintiff in the main divorce action, is a major male, residing at Number 66, Wilhelm Zeraeua Street, Omaruru, Erongo, Namibia. I will, for ease of reference refer to the respondent as the plaintiff in this ruling.

[3] The parties married each other on the 25th of August 2018 at Swakopmund, out of community of property, however subject to the accrual regime, and that marriage still subsists. No children were born between the plaintiff and the defendant, however, the plaintiff has a 10-year-old boy and the defendant too has a 10-year-old boy from previous relationships.

[4] On 10 February 2021, the plaintiff instituted divorce action against the defendant, in which action the plaintiff claims that the defendant unlawfully, maliciously and with the fixed intention to terminate the marriage, deserted the plaintiff by leaving the common home of the parties on 22 April 2020, taking with her all her personal belongings. In the alternative, the plaintiff states that the applicant indulged in certain conduct, details of which he sets out in the particulars of claim.

[5] The defendant entered notice to defend the action instituted by the plaintiff. Upon her entering her notice of intention to defend the action the matter was, in

terms of Practice Direction 19¹, referred to court-connected mediation. Mediation took place on 20 May 2021 and on that day the mediator reported that the parties failed to settle the disputes between them.

[6] Before the defendant filed her plea, she launched and filed an interlocutory application in terms of *Rule 90(2) of the Rules of Court*, claiming an amount of N\$15 000 maintenance per month pending the outcome of the divorce action and a contribution of N\$70 000 to her legal costs. In the sworn statement filed in support of the application she denies that she deserted the common home of the parties or that she left the common home with a malicious and fixed intention to terminate the marital relationship between the parties. She admits having left the common home but alleges that she was forced to leave the common home, because the plaintiff would physically and emotionally abuse her. She alleges that she opened criminal cases against the plaintiff for the alleged physical abuses. She further states that she intends to file a counter claim against the plaintiff.

The defendant's grounds on which she claims maintenance and contribution to costs

[7] The defendant, in her affidavit, alleges that prior to their marriage she was employed as a receptionist at Taisen Occupational Therapy and Rehab at the Ongwediva Medipark. She further alleges that she had to leave that employment because the plaintiff lived and conducted business in Omaruru and indicated that she must relocate to Omaruru, where he lived and that he undertook to financially support her. She confirms that the plaintiff kept his word and financially supported her during their marriage.

[8] The defendant alleges that she is currently unemployed. The last gainful employment, she had, was prior to their marriage. She alleges that the reason why she is unemployed was that the plaintiff did not want her to work whilst being married to him. She alleges that the plaintiff was and is of the strong opinion that a wife's place is to stay home and take care of her husband. She furthermore alleges that every time she would search for employment or receive offers, the plaintiff saw this as a termination of the marriage, they accordingly reached consensus that the

¹ High Court Practice Directions published under Government Notice No. 67 of 9 May 2014 (As amended).

plaintiff would give her an amount of N\$3000 per month, which he still continues to do.

[9] The defendant continues and state that the amount of N\$3000, though very little, did sustain her because, prior to being forced to leave the common home, the plaintiff took care of all her needs, which *inter alia*, included him purchasing clothing, cosmetics, and food for her.

[10] The defendant continues and states that having moved out of the common home she must now take care of all her needs, which *inter alia*, include purchasing clothing, cosmetics, and food for herself. She alleges that she is currently looking for employment and have since been unable to secure any employment and find herself unable to take care of herself. She furthermore confirms that the plaintiff offered an amount of N\$7000 per month as maintenance pending the outcome of the divorce action.

[11] She, however, laments the inadequacy of the amount offered. She states that the amount of N\$7000 is simply insufficient to sustain her and pay her legal fees. She states that a reasonable amount for groceries is about N\$2500, together with cosmetic that would be an amount of N\$1500, medical expense in the amount of N\$1500 and clothing in the amount of N\$2000 per month and other ancillary necessities. She furthermore states that she secured accommodation in Windhoek and the rent for that accommodation is N\$7500. She attached what she say is a lease agreement in respect of the accommodation she says she secured. On this basis she claims an amount of N\$15 000 per month for interim maintenance.

[12] The defendant concluded by stating that the plaintiff has simply made her accustomed to a certain standard of living and that the request for N\$15 000 per month is reasonable and the plaintiff is able to provide for that amount.

The plaintiff's grounds on which he opposes the maintenance claim and contribution to costs

[13] The plaintiff in his opposing affidavit to this application at the outset denied that the defendant is resident in Ohangwena, he states that he was aware of the fact

that she resides with her friend Emily in Windhoek. He furthermore denied the defendant was employed at the time when they first met each other which was during April 2017 or that she had resigned at his insistence. He states that, due to the fact that the defendant was, at the time that they met, unemployed, they agreed that she would accompany him to Omaruru during April or May 2017 where he would maintain her. He further denied that he ever required that the defendant must not work. He alleges that he has encouraged her on several occasions to become gainfully employed and have also given her money to enable her to do so. As to the defendant's current status of employment he admits that he does not know whether she is employed or unemployed and can therefore not confirm or deny her employment status.

[14] The plaintiff also denies that he has physically or emotionally abused the defendant and states that the defendant, on numerous occasions, chose to leave the common home where she was being maintained. He states that the defendant deserted the common home on numerous occasions, and more specifically on the following dates:

(a) *Prior to the marriage* on the 24th of August 2017, 1st of November 2017, 1st of February 2018, 10th of March 2018 and 1st of June 2018.

(b) *Subsequent to the marriage* she has deserted the common home on the 4th of October 2018, 10th of November 2018, 12th of November 2018, 22nd of November 2018, 1st of February 2019, 1st of March 2019, 15th of April 2019, 31st of May 2019, 1st of September 2019 and on the 23rd of April 2019 for different periods of time. The plaintiff states that as a result the defendant has been away from the common home at her own instance for approximately 70% of the time since their marriage.

[15] The plaintiff furthermore deposes that the defendant assaulted him on the 4th of October 2018 by hitting him in the face, threatening to stab him with a knife and throwing various objects at him as a result of which he laid a criminal charge against her. He proceeds and states that prior to the 4th of October 2018 assault she had assaulted him and threatened him on various occasions.

[16] The plaintiff, in his answering affidavit, furthermore alleges that his legal practitioners requested the defendant's legal practitioners, per letter dated 10 June 2021, to provide them with a statement supported by documentary proof of the defendant's income/expenditures. He says that the defendant or her legal practitioners have to the date of the hearing of this application not provided him with the requested statement of income/expenditures. He says that he is therefore not in the position to judge as to whether the maintenance claimed by the defendant, that is the N\$ 15 000 per month, is reasonable or not.

[17] The plaintiff further states that he has, before the defendant brought this application, offered to pay the defendant an amount of N\$ 7000 as interim maintenance and a contribution to her legal expenses, which amount he says is more than reasonable under the circumstances, especially in view of the fact that he has not been provided with any detail as to how the amount claimed by the defendant is made up and arrived at. He states that the mere fact that he might have the financial ability to pay the amount claimed by the defendant does not make the defendant entitled to such an amount, in the absence of proof that such an amount represents her reasonable maintenance needs.

[18] The plaintiff contends that he has supported the defendant adequately whilst she lived with him, but that she simply was not interested in living with him anymore. He states that he did not deprive the defendant of maintenance as he is still paying maintenance to her on a monthly basis. He confirms that he is prepared to increase the maintenance amount to N\$ 7000 per month.

[19] The plaintiff casts doubt on the authenticity of the lease agreement which the defendant attached to her sworn statement. He contends that the defendant simply attached a copy of the alleged lease agreement in an attempt to convince the Court that she has an expense of N\$ 7500 per month for rental. He further states that he has established that the average rental for a two bedroom apartment in the same area (that is the suburb of Academia in Windhoek) amounts to N\$ 3500 per month, and not N\$ 7500.

[20] The plaintiff deposed that the defendant does not anywhere in her affidavit justify her request for the balance of maintenance required by her in the amount of

N\$ 7500 per month by means of proof of expenses. He further states that the defendant does not allege that she has to pay rental to her mother for living with her in the village. He thus states that he sees no need for the defendant to rent a two bedroom apartment in Windhoek against payment of rental which she requires him to assume liability for if she currently stays free of charge. He contends that the defendant currently lives in Windhoek together with a female friend.

[21] The plaintiff concludes by stating that the mere fact that the defendant has been accustomed to a certain standard of living does not mean that he is liable to maintain her to such standard. He states that the living expenses of the defendant whilst having lived with him definitely did not amount to N\$ 15 000 per month.

[22] Having set out the contentions of the parties I will now proceed to consider the legal principles that are applicable to this application.

Legal principles

[23] The purpose of Rule 90 proceedings was captured in the words of Theron J in the matter of *Colman v Colman*² in which the learned judge said:

'The whole spirit of Rule 43 [the predecessor of Rule 90] seems to me to demand that there should be only a very brief statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent and that the court is then to do its best to arrive expeditiously at a decision as to what order should be made *pendent lite*.'

[24] This court in the matter of *Walenga v Walenga*³ referred with approval to the case of *Hamman v Hamman*⁴) wherein the test for determining whether an applicant has made out a case for the relief he or she seeks was set out as follows:

'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, applicant would succeed in the main action. The Court cannot speculate as to who is likely to

² *Colman v Colman* 1967 (1) SA 291 (C).

³ *Walenga v Walenga*: An unreported judgement of this Court case I 983/2010 [2011] NAHC 366 (Delivered on 30 December 2011).

⁴ *Hamman v Hamman* 1949 (1) SA 1191 (W).

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.'

[25] In the matter of *Du Plooy v Du Plooy*⁵ the test was stated as follows:

'In an application for a contribution towards the costs of a matrimonial action, custody of a minor child and maintenance *pendente lite*, what the applicant has to lay before the Court are facts whereupon she, should the fact be proved, would succeed in the main action. Should it appear from the respondent's refutation of such facts that she cannot succeed in the main action, or that the possibility that she will succeed is so small that the hearing in the main action would not be justified, then she fails to discharge the *onus* and has no claim to a contribution towards costs nor to an order *pendente lite* in regard to maintenance or the custody of the minor child.'

[26] Hoff, J in the matter of *Stoman v Stoman*,⁶ after surveying the authorities, noted that it appears that the test is twofold and he remarked that:

'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.'

[27] It is further apparent from these authorities that the allegations of facts made by an applicant are not considered in isolation, but a court must also consider the allegations of fact (if any) presented by the respondent and where a court finds, as was stated in *Hamman*⁷, 'equally convincing evidence' showing that there is no foundation at all for the allegations of fact by the plaintiff, the test set out hereinbefore 'would not be applicable'.

⁵ *Du Plooy v Du Plooy* 1953 (3) SA 848 (TPD) at 852D-E

⁶ *Stoman v Stoman* I 12409/2013 [2014] NAHCMD 116 (Delivered on 27 March 2014) paras 26-27.

⁷ *Supra* footnote no. 4.

[28] The Court in the matter of *Taute v Taute*⁸, opined that there are certain basic principles which govern an application of this type. One such basic principle is that maintenance *pendente lite* is intended to be interim and temporary and cannot be determined with that degree of precision and closer exactitude which is afforded by detailed evidence. The court went on and said:

‘The applicant spouse (who is normally the wife) is entitled to reasonable maintenance *pendente lite* dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified.’

Has the defendant discharged the onus resting on her?

[29] From the authorities discussed in this ruling the first hurdle that the defendant has to overcome is to establish that the facts she has laid before the Court are facts whereupon she, should the facts be proved, would succeed in the main action. In other words she must make out a *prima facie* case in the main action.

[30] It is common cause that it was the defendant who left the common home. But she submit that she did not leave the common home with the unlawful and malicious intention to terminate the marital regime, she says she was forced out of the common home by the physical and psychological abuses she endured at the hands of the plaintiff. The plaintiff in his opposing affidavit denied that the defendant left the common home for the reason alleged by her.

[31] Does the denial by the plaintiff amount to overwhelming proof showing that there is no foundation at all for the allegations made by the defendant in her affidavit? I do not think so, for the reason that the plaintiff, although he stated that he has electronic communication between him and the defendant, did not produce any documentary or equally convincing evidence of the reasons why the defendant left the common home. I am therefore of the opinion that if the allegation made by the defendant are proven at the trial she would succeed to prove that it was indeed the

⁸ *Taute v Taute* 1974 (2) SA 675 ECD at 676F.

plaintiff who constructively deserted her. I am therefore of the view that the defendant is entitled to maintenance *pendente lite*.

[32] I fully agree with the comments by Hart AJ⁹ that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them.

[33] With these guidelines I now turn to consider the information relating to the financial issues which are before me. The plaintiff has not in this matter disclosed his financial position and implicitly accepted that he is in the position to meet the defendant's maintenance requirements.

[34] The defendant concedes that the plaintiff is paying her N\$ 3000 per month and says that he is willing to increase this amount to N\$ 7000. The defendant gives the following particulars of her monthly requirements:

Food	N\$ 2 500-00;
Cosmetics and Toiletries	N\$ 1 500-00;
Medical Expenses	N\$ 1 500-00;
Clothing and other expenses	N\$ 2 000-00;
Rent	<u>N\$ 7 500-00;</u>
Total	<u>N\$ 15 000-00</u>

[35] Can it be said that the defendant's claim include extravagant or extortionate demands? In my view ~~not~~ the demands by the defendant are reasonable and supported by moderate details. The only item with which the plaintiff took issue with is the rental claim of N\$ 7500 and he says he has established that rental for areas in a suburb like Academia in Windhoek are around N\$ 3500. But the plaintiff does not inform the Court how he has established that.

⁹ In the *Taute v Taute* matter *Ibid*.

[36] It is common knowledge that the suburb of Academia is one of the low density suburbs of Windhoek in the vicinity of the University of Namibia where there is a large student population. Whether such an area with all its attractions will command such rent as suggest by the plaintiff is not certain.

[37] The plaintiff has questioned the defendant's claim for rent if the defendant is '*staying for free*' with her mother in Ohangwena or friend Emily in Windhoek. The plaintiff's reasoning is in my view contrary to logic and common sense. Surely somebody carries the living expense of any residential establishment, does the plaintiff expect the defendant to leave a parasitic life? I am therefore prepared to allocate an amount of N\$ 4000 in respect of rent for the defendant. I therefore find that the reasonable amount of maintenance required by the defendant is an amount of N\$ 11 500.

[38] I will now deal with the application for contribution towards costs in the sum of N\$70 000. All that the defendant stated in support of this claim is that she is informed that historically, the contribution to costs referred to in rule 90(1) (b), and in the rule's predecessor, rule 43, was a reference to a contribution to costs up until the first day of trial. She further states that she is informed that the ratio for that was the possibility that the parties would settle on the first (or prior to the first) day of trial. She says in light of that information she seek a contribution to legal costs in the amount of N\$70 000 which includes the costs she will incur for this application and further legal costs.

[39] The defendant furthermore states that she is informed that the contribution sought is reasonable by virtue of the fact that the matter is complicated and acrimonious. Counsel will need to attend to several case management hearings and the drawing of several process and pleadings and that it is common practice in matters like this, that there will be a flurry of correspondence and communication between the various legal practitioners. Which is even now evident by the number of correspondences already exchanged. She further states that she is informed that in order to properly prepare for hearing and by virtue of the fact that the plaintiff's financial information is in essence a secret, there is a possibility that forensic financial investigations will need to be undertaken. She says that she would imagine that the plaintiff is going to employ a very experienced and senior legal team, and she is entitled to litigate at the same scale.

[40] In the matter of *Dreyer v Dreyer*¹⁰ this Court laid down what is expected from an applicant claiming a contribution to costs. In that case the applicant stated what her legal costs had been during a certain period in the past and that she requires the respondent to make a contribution of N\$50 000 to her legal costs. She provided documents to show that she had paid all but a small amount of the costs she had already incurred. In this regard Mainga, J stated that

‘... In my view, the applicant should have averred that the N\$50 000 she is seeking are for the expenses she will incur in presenting her case. This involves, inter alia, how much the lawyer has requested, the status of counsel presenting the case, and the scale of litigation of the parties. To base the estimation on what she has spent so far in costs is insufficient.’

[41] In the present matter, pleadings have not yet closed and the defendant has not even pleaded or filed her counterclaim, and neither has discovery taken place. The defendant does not indicate what the costs for all those procedural steps would be. There is no indication whether she will instruct counsel is to represent her at the trial and what reservation fees must be deposited in anticipation of trial. Furthermore, there is no indication of the fees required by instructed or instructing counsel. There is only an estimation by the applicant that an amount of N\$70 000 would be ‘more than reasonable’ until the trial starts.

[42] Looking at the financial situation of the defendant I am satisfied that she is in need of a contribution to costs, but the amount itself is not properly motivated. As I am inclined to assist the applicant in this regard, I will grant the defendant leave to, if so advised, supplement the papers to place more detailed information before the Court so that the amount required may be properly assessed.

[43] Having considered the papers before me, as well as the applicable law, I make the following order:

- 1 The plaintiff must pay maintenance to the defendant, *pendente lite* in the amount of N\$11 500-00 per month, the first payment must be made on or before 07 October 2021 and thereafter on or before the 7th day of every month.

¹⁰ *Dreyer v Dreyer* 2007 (2) NR 553 (HC).

- 2 The defendant is granted leave to approach this Court on the same papers, duly amplified where necessary, to claim a contribution to her legal costs in the pending litigation.
- 3 No order as to costs is made.
- 4 The defendant must, if so advised, file her plea and counterclaim by not later than 28 September 2021.
- 5 The plaintiff must, if so advised, replicate to the defendant's plea and plead to the defendant's counterclaim by not later than 11 October 2021.
- 6 The defendant must, if so advised, replicate to the plaintiff's plea to the defendant's counterclaim by not later than 22 October 2021.
- 7 The plaintiff must file his affidavit in terms of rule 89 and his discovery affidavit and bundles of discovered documents by not later than 01 November 2021.
- 8 The defendant must file her affidavit in terms of rule 89 and her discovery affidavit and bundles of discovered documents by not later than 05 November 2021.
- 9 The parties must file a joint case management conference report by not later than 12 November 2021.
- 10 The matter is postponed to 15 November 2021 for a case management conference.

UEITELE SFI
Judge

APPEARANCES:

PLAINTIFF:

LYANA LARDELLI

Of Louis Karsten Legal Practitioner.

DEFENDANT:

NGAKUMBIRUE KATJIVENA

Of Katjaerua Legal Practitioners