

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON THE RULE 90 APPLICATION

Case Title: Erle Hansen (Born Van der Merwe) Plaintiff and Gideon Greghard Hansen Defendant	Case No: HC-MD-CIV-ACT-MAT-2023/00386
Heard before: Honourable Justice Sibeya	Division of Court: High Court (Main Division)
	Heard on: 22 June 2023 Delivered on: 29 June 2023
Neutral citation: <i>Hansen v Hansen</i> (HC-MD-CIV-ACT-MAT-2023/00386) [2023] NAHCMD 366 (29 June 2023)	
The order: <ol style="list-style-type: none">1. The defendant must settle the deposit payable in respect of the new lease concluded to accommodate the plaintiff and the minor children, if the current lease is not extended.2. The defendant must pay monthly maintenance for the minor children in the amount of N\$4 000 per month per child with an annual escalation of 7% until finalisation of the	

pending divorce action.

3. The defendant must pay the minor children's school fees and kindergarten fees.
4. The defendant must retain the plaintiff and the minor children on his medical aid scheme and be liable for 85% of the costs and excess payments not covered by the policy.
5. The defendant must pay spousal maintenance to the plaintiff in the amount of N\$2 000 per month with an annual escalation of 7% until finalisation of the pending divorce action.
6. There is no order as to costs.
7. The matter is postponed to 6 July 2023 at 08:30 for status hearing.
8. The parties must file a joint status report on or before 4 July 2023.

Reasons:

SIBEYA J

Introduction

[1] The plaintiff instituted divorce proceedings by issuing summons on 27 January 2023 for a final order of divorce, ancillary relief including custody and control, and maintenance of the minor children as well as spousal maintenance. The plaintiff's claim is defended. The matter is adjudicated on the papers filed by the parties. Ms Delport appears for the plaintiff while Mr Marais appears for the defendant.

[2] The defendant raised a point *in limine* that the plaintiff failed to comply with rule 90(2) which requires that the applicant, in a rule 90 application, to deliver a sworn statement in the nature of particulars of claim setting out the relief and the grounds together with a notice to the respondent on Form 19. The defendant argued that the plaintiff failed to file a notice on

Form 19.

[3] Considering that the issue at stake is one of maintenance, particularly of the minor children who must constantly be maintained, the court becomes duty-bound to make its determination on the matter as soon as practically possible but without delay. In further keeping with the overriding objective of the rules of this court, provided for in rule 1(3) to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable”, the court decided that considering that the rule 90 application was exchanged between the parties, and substantively, the relief sought and the grounds on which such relief is based is clear from the plaintiff’s papers, the point *in limine* ought not to be upheld in order for the court to get to the real dispute between the parties without delay. It is on this basis that the court ordered the parties to argue the merits of the application.

Relief sought

[4] Pending divorce, the plaintiff filed an application for maintenance *pendente lite* in terms of rule 90 where she seeks the following relief:

4.1 That the defendant be ordered to settle the deposit payable in respect of a new lease to be concluded to accommodate the plaintiff and minor children, in the event that the current lease is not extended;

4.2 That the defendant be ordered to pay monthly maintenance, as a cash contribution in the respect of the minor children in the amount of N\$6 500 per month per child with an escalation of 7% until such time as the final action is adjudicated on;

4.3 That the defendant be ordered to pay the minor children’s school fees and kindergarten fees;

4.4 That the defendant be ordered to retain the plaintiff and the minor children on a medical

aid scheme and to be liable for 85% of the costs and excess payments not covered by the policy;

4.5 That the defendant be ordered to pay spousal maintenance to the plaintiff in the amount of N\$8 200 per month, with an escalation of 7% until such time as the main action is adjudicated on.

4.6 Costs of the application.

4.7 Further and/or alternative relief.

The main action

[5] In the main action, the proceedings are at the stage where the defendant is yet to file his plea, and counterclaim, if any. The plaintiff alleges fault, the basis on which she seeks divorce, on the following grounds:

5.1 That the defendant abuses alcohol;

5.2 That the defendant accuses her of having extra-marital affairs;

5.3 The defendant is excessively jealous;

5.4 The defendant challenges the paternity of the minor children;

5.5 The defendant subjects her to verbal and emotional abuse;

5.6 The defendant fails to give her emotional support;

5.7 The defendant indicated that he has no intention to continue with the marriage;

5.8 The defendant relocated to Mariental and has failed to visit the plaintiff and the children.

[6] In the main action, the plaintiff claims for the following orders against the defendant:

6.1 A final order of divorce;

6.1 That custody and control of the minor children be awarded to her, with restricted and supervised access to the children;

- 6.2 Maintenance in the amount of N\$6 500 per month per child;
- 6.3 That the defendant retain or register the minor children on his medical aid and pays 85% of all excess costs and all costs not covered by the medical aid;
- 6.4 That the defendant be liable to 85% of all school fees and other costs relating thereto;
- 6.5 That the defendant registers her on his medical aid scheme for a period of 36 months or until she can secure gainful employment;
- 6.6 That the defendant pays rehabilitative spousal maintenance in the amount of N\$8 500 per month until she secures gainful employment;
- 6.7 That the defendant allows her to use the Isuzu 2.5l vehicle until the hire purchase is settled in full and final settlement to transfer ownership to her.

[7] As alluded to above, the defendant is yet to file his plea and counterclaim, if he so elects. Suffice to state, in the answering affidavit, the defendant denies being at fault for the breakdown of the marriage. He contends that it is actually the plaintiff who is the cause for the divorce after she committed adultery. It is difficult at this stage of the proceedings to determine as to who is at fault, and besides this is a matter for the trial court, not this court.

Children's maintenance

[8] It was submitted by Mr Marais that the defendant harbours no objections to paying maintenance for the children but at a ratio of 23% responsibility by the plaintiff and 77% responsibility by the defendant. I shall return to this subject. The defendant, however, took issue with the claim for spousal maintenance.

Plaintiff's case

[9] The plaintiff, in this rule 90 application, contends that the maintenance for the children, who are aged seven and five years old respectively, and spousal maintenance claimed is calculated on the principle of need versus affordability, her inability to immediately secure alternative employment, the children being enrolled at school and the accommodation required.

[10] The plaintiff contends that prior to her instituting divorce proceedings, the defendant was responsible for payment of the children and the plaintiff's accommodation expenses while he lived in a separate town, Mariental. The lease was to terminate on 31 March 2023. The plaintiff stated that she earns a monthly salary of N\$10 000 while the defendant claims to be earning a salary of N\$33 886,28, while his bank statements reveal more than the said amount. The plaintiff alleges that the defendant earns about N\$50 453,24 net salary per month. The plaintiff states further that the proportionate responsibility ratio is 85% for the defendant and 15% for the plaintiff respectively.

[11] The plaintiff set out the following as the monthly expenses of the children:

12.1 Accommodation	N\$7 000;
12.2 Insurance	N\$750;
12.3 Fuel	N\$1 150;
12.4 Food	N\$2 000;
12.5 Medicine	N\$250;
12.6 Electricity	N\$500;
12.7 TV	N\$500;
12.8 Paratus	N\$400;
12.9 Domestic worker	N\$500;
12.10 School lunches	N\$2 000;
12.11 Toiletries	N\$500;
12.12 Clothing	N\$1 000
Total	N\$16 550.

[12] The plaintiff contends further that she has a shortfall of N\$8 200 to sustain herself and the minor children. The defendant did not set out his monthly expenses nor did he disclose all his bank statements, and on this basis, Ms Delpont argued that the defendant cannot resist the relief sought.

Defendant's case and argument

[13] It is the defendant's case that although he is willing and prepared to maintain his minor children he can only do so on the ratio of 23% to 77% and only on the children's reasonable needs, not extravagant demands.

[14] The defendant disputes the assertion that his net monthly salary is N\$55 000 but states that it is N\$33 866,28. He states further that the pro rata ratio that the court should consider for maintenance should, therefore, be on the consideration of the said net salary of the defendant.

[15] The defendant further contends that the maintenance sought should be reduced due to the financial implications of splitting a single household into two as the parties leave apart. He suggested that the children be removed from private school and be enrolled in public school to lessen the maintenance obligation.

[16] The defendant states that he has been paying N\$14 000 monthly rental for the children and the plaintiff's accommodation. He has also been paying for the monthly instalment of the motor vehicle driven by the plaintiff. He states further that he takes no issue with retaining the children on his medical aid and pay for all the excess payments. He further states that he is able to pay maintenance in the amount of N\$3 000 per month per child and a total amount of N\$9 600 for school fees and aftercare of the children.

[17] The defendant contends further that if he is found liable to pay spousal maintenance, which liability he is opposed to, then it should be considered that the plaintiff is young, healthy and has a great income earning potential, which must all be taken into account to reduce the spousal maintenance sought *pendent lite*. He further contends that there are additional payments made to the plaintiff as observed from bank statement which are excluded from her list of income. He concludes that the plaintiff failed to establish entitlement to spousal maintenance at all or spousal maintenance claimed.

The law

[18] Ueitele J in *DK v DK*¹ said the following:

[63] It is trite that when the legislature confers discretion on the court that discretion must be exercised judicially. One of the guiding principles is that the court will only grant maintenance if it is proven on a balance of probabilities that the party who asks for maintenance is in need of it — *Van Wyk supra*; *Hossack v Hossack* 1956 (3) SA 159 (W); *Portinho v Portinho* 1981 (2) SA 595 (T) at 597G – H where Van Dijkhorst J said:

“In my view the test to be applied is whether on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in s 7(2) come into play. If on the probabilities it is not shown that maintenance is or will not be needed no award thereof (whatever its size) can be made.”

[64] In *Hossack v Hossack supra* at 165B – F Ludorf J stated that maintenance is not to be granted as a matter of course. Factors taken into account in relation to the question as to whether maintenance should be granted at all and in regard to the amount thereof —

“. . . includes such considerations as the period that the marriage has endured, the age of the innocent spouse and her qualifications for earning a living as well as the conduct of the guilty spouse”.

[19] In a decision relied on by Mr Marais, Unengu AJ remarked as follows in *MZ v PZ*,² at para 22:

‘maintenance claims must not only be justified by the surrounding circumstances the applicant finds himself/herself, but must be quantified and therefore “the quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits...” Accordingly, the test for the amount of maintenance payable, if any, should be determined according to the funds available and the needs of the applicant.’

¹ *DK v DK* 2010 (2) NR 761 (HC).

² *MZ v PZ* (I 1443/2016) [2017] NAHCMD 29 (7 February 2017) para 22.

Analysis

[20] As the defendant agrees to payment of maintenance for his children except for what he refers to as extravagant demands I find it prudent to consider the relief sought separately.

[21] The defendant stated that he takes no issue with the amount claimed for the maintenance of the children but pleads for reduction in the amount as it is unaffordable.

[22] It is clear from payslips and the bank statement of the defendant that his net monthly salary is N\$33 866,28 payable to his Bank Windhoek account. His Standard Bank account also reveals that he receives sporadic payments although not substantial but difficult to collate. The plaintiff, on the other hand, speculated on the monthly income of the defendant. The amount that the defendant receives on a monthly basis over and above his monthly salary has not been established, suffice to state that he receives extra varying amounts monthly.

[23] On the defendant's own version, he is responsible for payment of accommodation for the children and the plaintiff, and I find no reason why he should not be ordered to ensure that there is a roof over his children and the applicant *pendente lite*. The payment for accommodation shall be N\$7 000 as claimed. The defendant will further be ordered to retain his children on his medical aid and be responsible for payment of 85% of the excess payments not covered by the policy as claimed. The defendant shall further be ordered to pay the school fees and kindergarten fees of the children, which he used to do, totalling to N\$10 050. It is remembered that the defendant further pays for the monthly instalments of the vehicle driven by the plaintiff.

[24] In respect of the maintenance amount claimed of N\$6 500, it should be mentioned that the defendant literally maintains two homes, his residence in Mariental and the children and plaintiff's residence in Windhoek. The defendant's willingness to comply with his obligation to maintain his children is also considered. The plaintiff further states that the

defendant pays the school fees and kindergarten fees for the children, yet in the calculation of her expenses, she includes payment for the said school fees and kindergarten. This, in my view, coupled with the fact that the defendant shall pay for accommodation, school fees and kindergarten fees should reduce the amount of maintenance to be paid by the defendant. I am in agreement that extravagant expenses or expenses that are not reasonably required for the upkeep of the children should be reduced if not removed from the list of expenses.

[25] Maintenance should be equated with affordability as it is pointless to award maintenance in the amount that is unaffordable to the person ordered to make such payments. It should be remembered that maintaining children is a duty not a punishment and the amount to be fixed should be judicially determined.

[26] An examination of the monthly expenses for the children reveals that the children requires an amount of N\$1000 per month for clothing. It may not be necessary that every month children must purchase clothes. The amount sought for school lunches of N\$2 000 is not broken down to be appreciated and leaves room for possible reduction. The amount allocated for toiletries and food may be reduced. The claimed amount for Paratus which is said to be for the Wi-Fi connectivity is not justified. I shall return to the maintenance amount as the judgment unfolds.

[27] In respect spousal maintenance, as stated it is difficult at this stage to determine as to who is at fault. The plaintiff blames the defendant for breaking down the marriage while the defendant returns the blame to the plaintiff on the basis of adultery. Considering that in these proceedings there is no provision made for filing replying papers, it makes it difficult to determine the plaintiff's position to the allegation raised by the defendant. That should, however, not restrict the court from determining the question of spousal maintenance although, it would have been ideal to have an idea as to which party is at fault even on a *prima facie* basis. This is so, in my view, as a party should not benefit from his or her wrong doing.

[28] In *casu*, while the defendant earns a salary of N\$33 866,28 with a few sporadic income appearing on his Standard Bank account statement, the plaintiff earns a monthly salary of N\$10 000. The First National Bank account statement of the plaintiff also shows sporadic income or payments received over and above the monthly salary.

[29] The defendant argued that the plaintiff is young and has potential to earn more than she is currently getting and I received no counter-argument to this submission.

[30] It is inevitable that the plaintiff will not be in a position similar to that in which she was prior to the separation and living apart of the parties. It is an established fact that the defendant maintains his residence in Mariental, as he should, together with the residence for the children and the plaintiff in Windhoek, as he should. He also pays for the instalment of the vehicle driven by the plaintiff and this should favour the defendant as he is already providing support to the plaintiff. As a result, I find that expecting the defendant to pay N\$8 200 per month spousal maintenance is unaffordable by the defendant who must still maintain himself in order to continue to work. I find that, notwithstanding the above finding, spousal maintenance must still be paid but at a reduced amount compared to the amount claimed by the plaintiff.

[31] As I conclude, I make an observation that the parties locked horns on the issue of custody, control and access of the children. This dispute is, however, not ripe for the determination by the court as the parties agreed to engage an expert to make recommendations thereon and this process is not finalised.

Conclusion

[32] In view of the foregoing findings and conclusions, I opine that the defendant is liable to pay maintenance for the children for reasonable and necessary expenses. The defendant is further liable to pay spousal maintenance *pendente lite* at a reduced amount.

Costs

[33] It is established law that costs follow the result, and no basis was laid for the court to find otherwise. In *casu*, both parties succeeded in part. The plaintiff succeeded to establish that maintenance must be ordered although not to the claimed amount, while the defendant managed to establish that he is maintaining his children and stated his willingness to continue to maintain them. As a result and in the exercise of my discretion, I find that none of the parties can claim to be more successful than the other and, therefore, none of them should, in my view, be mulched in costs. It follows that there shall be no order as to costs.

[34] Accordingly, it is ordered that:

1. The defendant must settle the deposit payable in respect of the new lease concluded to accommodate the plaintiff and the minor children, if the current lease is not extended.
2. The defendant must pay monthly maintenance for the minor children in the amount of N\$4 000 per month per child with an annual escalation of 7% until finalisation of the pending divorce action.
3. The defendant must pay the minor children's school fees and kindergarten fees.
4. The defendant must retain the plaintiff and the minor children on his medical aid scheme and be liable for 85% of the costs and excess payments not covered by the policy.
5. The defendant must pay spousal maintenance to the plaintiff in the amount of N\$2 000 per month with an annual escalation of 7% until finalisation of the pending divorce action.
6. There is no order as to costs.
7. The matter is postponed to 6 July 2023 at 08:30 for status hearing.
8. The parties must file a joint status report on or before 4 July 2023.

Judge's signature:

Note to parties:

<p style="text-align: center;">O S SIBEYA JUDGE</p>	
<p style="text-align: center;">For the plaintiff: A Delport Of Delport Legal Practitioners, Windhoek</p>	<p style="text-align: center;">For the defendant: K Marais Of Fischer, Quarmby & Pfeifer, Windhoek</p>