

CASE NO. I 2760/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANDREA DREYER

APPLICANT

and

NAUDE DREYER

RESPONDENT

CORAM: MAINGA, J.

Heard on: 2007.06.05

Delivered on: 2007.07.13

JUDGMENT

MAINGA, J.: [1] This is an application for relief brought under Rule 43 of the Rules of Court for the maintenance *pendente lite* for two minor children in the amount of N\$2000.00 per month per child and the applicant in the amount of N\$2000.00 per month and for a contribution to costs of the

pending matrimonial action between the parties in the sum of N\$50 000.00.

[2] The parties married on 12 September 1987 out of community of property. During November 2005 the respondent instituted divorce proceeding against the applicant to which applicant has pleaded and counterclaimed. They no longer live as husband and wife. At the time they separated a *mensa et thoro* (which is not clear from the documents filed) they entered into an agreement in terms of which respondent would pay maintenance for the applicant and the two minor children in the sum of N\$6000.00 per month until 6 months after the final order.

[3] In compliance with this agreement respondent paid an amount of N\$50 000.00 from June to December 2005. The amounts were paid as follows:

June	N\$1500.00
June	N\$4500.00
July	N\$6 000.00
August	N\$6 000.00

September	N\$18000.00
November	N\$6 000.00
December	N\$8 000.00

[4] Applicant maintains that the N\$18 000.00 was a wedding anniversary present for her which respondent used as maintenance for three months and the N\$8 000.00 paid in December was maintenance for January 2006 and the extra N\$2000.00 was for a new computer motherboard.

[5] During 2006 applicant received three payments, N\$500.00 and N\$1000.00 in March and N\$1000.00 in June which was for Reiner's 18th birthday party.

[6] Applicant has given her minimum expenses as N\$5044.00 and that of her two children as N\$5034.00 totalling to N\$10 068.00. She states that she cannot make ends meet on her salary. She takes home a salary of N\$8 943.00 and she attached a letter from her employer Charly's Desert Tours CC confirming the salary. Applicant states that she has been compelled to borrow money from her mother in the sum of N\$143 290.38 during the period 27 January 2006 to 20 October 2006.

Respondent who is a dentist is a man of means although she do not know his salary he does not earn less than N\$40 000.00 per month, so states the applicant.

[7] On the contribution to her costs, applicant states that her legal costs between June and September 2006 came to N\$46 921.24 and she requires a contribution of N\$50 000.00 to her legal costs and contends that the respondent can afford the contribution and maintenance for herself and their two sons.

[8] Respondent opposes the application and filed a reply running into twenty two pages, nineteen pages of annexures and a two page confirmatory affidavit of a legal practitioner one Mr Burger. He further filed supplementary affidavits, one his and that of Mr Burger again. The basis of respondent's opposition is that applicant failed to disclose the means at her disposal and the income she received during the period which applicant uses to support her application. He contends that applicant can maintain herself, contribute to the maintenance of their two sons and pay her legal costs.

[9] Mr Dicks who appeared for the applicant contended that the agreement between the parties should be enforced and that applicant is entitled to the N6000.00 per month which should be ordered retroactively effective January 2006. He referred the Court to *Harwood v Harwood* 1976 (4) SA 586 (c). In addition, Mr Dicks contended that the details of respondent's reply, the supplementary affidavit, the confirmatory and supplementary confirmatory affidavit of Mr Burger should be strike off for non compliance with the requirements of Rule 43(2) which in the circumstances is an abuse of the process of the Court. He on this point referred the Court to the headnote in *Nienaber v Nienaber* 1980 (2) SA 803 (O).

[10] Mr Mouton who appeared for the respondent countered this argument. His case is that while the object of Rule 43 is to afford the parties an opportunity of dealing with applications under the rule inexpensively and expeditiously as possible with papers restricted in volume and costs severely curtailed, he contended that in special circumstances deviation from this norm may be justified and he referred to *Dodo v Dodo* 1990 (2) SA 77 (W) at 79 C-F. He nevertheless conceded that the confirmatory affidavits of Mr Burger should be strike off and they

are strike off. In addition he contended that the applicant did not make out a case in the main divorce action and cannot approach this Court under the Rule 43 and referred to *Du Plooy v Du Plooy* 1953 (3) SA 848 (T) and submitted that on this point alone the application should fail. I need not in this interlocutory matter decide on this issue which is a prerogative of the trial Court. Mr Mouton further submitted that applicant is entitled to reasonable *pendente lite*, the essentials only. He further submitted that the applicant was untruthful to this Court for she has over a million dollars in her pocket and can pay her own costs.

[11] Rule 43 clearly states that the applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefore.....and the respondent shall within seven days of receiving this statementdeliver a sworn reply in the nature of a plea”,

[12] The authorities are *ad idem* that the object of Rule 43 applications is that they should be dealt with in a manner which is ordinarily quick, with papers restricted in volume and costs severely curtailed. In other words, the applicant delivers a brief

succinct statement of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent. (*Colman v Colman* 1967 (1) SA 291 (C) at 292 A; *Dodo v Dodo* *supra* at 78j-79 A; *Erasmus, Superior Court Practice*, B1-312 and *the authorities the author refers to in footnote 2.*)

[13] However where special circumstances exists deviation from the norm may be justified. (*Dodo v Dodo*, *supra* at 79D). Annexures to affidavits are admissible provided that (a) the contents thereof constitute admissible evidence, and (b) they are documents which may be annexed to a pleading such as a declaration or a plea. (*Erasmus, Superior Court Practice*, *supra*, at B1-316A). The headnote in *Gerber v Gerber* 1979 (1) SA 352 is instructive on the admissibility of annexures and reads as follows:-

“It is true that the affidavits in an application under Rule of Court 43 for maintenance should be similar to pleadings but it does not follow that they are in all respects similar to pleadings. There might be instances where a husband in an application under Rule 43 wishes to deny and avoid facts which the applicant has alleged against him and in this

regard he would like to prove to the Court that his account of the facts is true and accordingly would wish to annex certain exhibits. In such circumstances he can annex exhibits which strictly speaking cannot be annexed to pleadings.”

[14] Although the respondent offers to pay to applicant an amount of N\$2000.00 per month as maintenance for Juergen and assumes liability for the reasonable expenses of Rainer who is studying at the University of Cape Town, as and when it arises strenuously opposes this application. The respondent’s reply may be bulky and cumbersome for the purposes of Rule 43 but the affidavits and the annexures are necessary for the purposes of this application and simplifies the issue before Court.

[15] Mr Dicks strenuously argued that the respondent’s supplementary affidavit should be strike off and yet that affidavit confirms what respondent had already stated in his reply and reveals that not long ago, on 17 April 2007, applicant received a cheque in the amount of N\$1 002 562.20 (one million two thousand five hundred and sixty two Namibia Dollar and twenty cents) as her share of the proceeds of the sale of the equity held

by applicant and respondent in Namibia Travel Service CC. To reject or strike off that affidavit will amount to refuse to hear the factual financial position of the applicant.

[16] It was not Mr Dicks' argument that Rule 43 does not permit the introduction of any extra affidavit. On this point Wulfsohn AJ in *Dodo v Dodo*, supra at 84j-85 A-C had the following to say:-

“No point was made that Rule 43 does not permit the introduction of any extra affidavit beyond the applicant’s sworn statement in the nature of a declaration and the respondent’s sworn reply in the nature of a plea. Rule 27(3) would, ‘on good cause shown’, permit the filing of an additional affidavit. It has been so held in respect of provisional sentence, Rule 8(5) expressly mentioning solely the right of the defendant to deliver an answering affidavit and the plaintiff to deliver a replying affidavit. (Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) at 628D-G; Sadler v Nebraska (Pty) Ltd and Another 1980 (4) SA 718 (W) at 720-1). Also, in ordinary applications, although Rule 6 permits three affidavits, being the applicant’s founding affidavit, the respondent’s answering

affidavit and the applicant's replying affidavit, the Courts have a discretion to allow the admission of further affidavits. This is said to be based on the need for flexibility in applying the Rules, and would depend on the circumstances of each case. (James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co (Pty) Ltd) v Simmons NO 1963 (4) SA 656 (A).

[17] The respondent's affidavit which he supplemented by table of contents and annexures, mostly the bank statements of the applicant which applicant also annexed to her application reveals clearly that applicant earns extra income other than her salary only. The bank statements as at 31 May – 31 August 2006 which applicant attached to her application reveals numerous credits deposited to her account which runs into thousands of dollars, which respondent summed up together in the amount of N\$335 122.69 in a period of nine months. Respondent goes into great detail as to his expenses in regard to the two minor sons, his earning capacity since his health deteriorated. The details are for a good cause. Mr Dicks' objection to the respondent's reply and the supplementary affidavit is rejected and both the

reply and the supplementary affidavit are admitted on to the record.

[18] Applicant approached this Court for the reason that respondent renegaded on the agreement the parties entered into when they separated. She provided her expenses and that of her sons. She provided her salary and states that she cannot make ends meet with that salary. The applicant's expenses appears to include those of Rainer who is at university since the beginning of February 2006, for items claimed for the children is headed "my sons". Respondent has taken liability for Rainer's reasonable tertiary educational and living expenses whilst he is at university. This is besides liability of clothes and air tickets to and from the university. I want to accept that the applicant spends on the items she has listed but does Rainer spend water on a monthly basis when he is physically not with the applicant, so are the other items claimed on his behalf, for example, lights, domestic, gardener. DSTV and Deukom appears to be one for the applicant and the other for the boys. Respondent states that the applicant and the two boys are on his comprehensive medical aid but N\$80.00 monthly each is claimed for the applicant and the children.

[19] Applicant in support of this application states that she has borrowed money from her mother to make ends meet in the amount of N\$143 290.38 during the period 27 January – 20 October 2006. Mr Mouton objected to this evidence as hearsay. For the purposes of this application I will admit that evidence. However a careful examination of the periods in which the money was borrowed raises doubts as to whether the money was borrowed for purposes of ordinary household expenses. Firstly, that kind of money alone gave the applicant an average income of N\$11 940.87 per month. Secondly on 25 August 2006 she borrowed N\$40 000.00. Exactly fourteen days thereafter (09.09.2006) she borrowed N\$39 853.00 and fifteen days thereafter (25.09.2006) she borrowed another N\$15 000.00. In the month of September alone in a period of seventeen days she borrowed N\$54 853.

[20] I agree entirely with the remarks made by Hart AJ when he said, 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 as indeed is contemplated and intended by Rule 43. (*Taute v Taute* 1974 (2) SA 675 ECD at 676F).

[21] In regard to the earning capacity of the respondent the applicant states that the respondent is practicing as a dentist in Windhoek and has a practice in Swakopmund which he visits fortnightly. She continues to say the following: ‘although I do not know the precise amount, the respondent does not earn less than N\$40 000.00 per month’. Applicant also relies on a letter or demand in which respondent alleged that his practice in Hentiesbay which he has lost earned him N\$8 000.00 per day.

[22] Respondent on the other hand maintains that the loss of that practice has reduced his earning capacity. Since the beginning of 2006 the respondent’s income has been erratic and has generally declined and cannot meet all his monthly liabilities so he maintains. It is common cause that he is no longer practicing for his own account but employed with another dentist doctor in Windhoek and maintains a small practice in Swakopmund with another dentist. His capacity to earn a reasonable income has been worsened by damage which he sustained to his spinal cord whilst undergoing back surgery

which left him without control of his bladder and bowel. He can no longer work at the pace and frequency as before, which is corroborated by Table C of his reply. The gross income range from N\$82 829.00 to N\$18 021.00 for the period March-October 2006. The average gross income is N\$52 920.75.

[23] Respondent admits that he agreed to pay maintenance in the sum of N\$6000.00 per month but the agreement was subject to:-

1. the finalisation of the divorce matter within a reasonable time of the conclusion of the agreement (on this point respondent accuses the applicant who keeps on making unsubstantiated and exorbitant amounts in settlement of the divorce and maintains that applicant is indebted to him in the sum of N\$17 000.00 being wasted costs occasioned by the postponement of the hearing of the main action at applicant's instance during 2007).
2. detrimental change in his financial circumstances.
3. ability to pay the agreed amount.

4. Any change in their respective circumstances in general.

[24] 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 the husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified'. (*Taute v Taute* supra at 676F).

[25] Very little, if non is said about the parties' marital standard of living, nor is anything said about the properties they might own. Respondent is a dentist who at some point before the loss of his practice in Hentiesbay and before he suffered a back injury who was earning a reasonable salary. However those circumstances have considerably altered. No mention is made about property that he might own.

[26] The respondent mentioned a share of the proceeds of the sale of the equity held by the parties in Namibia Travel Service

CC from which he received the sum of N\$1 350 000.00 from which he has spent N\$63 629.00 on the school fees, boarding fees and extra mural activities of the two minor sons. The children including the applicant are on his comprehensive medical aid, he has taken liability of Reiner's reasonable university expenses and he pays the school fees and extra mural activities of the younger brother, including his pocket money and has offered to pay N\$2000.00 for Juergen who is currently not in boarding school but lives with the mother.

[27] The evidence before Court shows that applicant has some other sources of income other than her salary and from that income she can maintain herself. This is over and above the over a million she received from the sell of Namibia Travel Service CC. That money alone if properly invested the interest thereon together with her salary should be sufficient to maintain herself. I may be wrong, but to properly ventilate these kind of applications, applicant should have disclosed more or less her financial position. I am not sure whether the extra income she earned was of a permanent nature or it was temporal. She earned N\$1 020 000.00 which she also omitted to mention and this Court has no idea how she is going to spend that money.

[28] The only other issue is that of Reiner who it is common cause he is at university, but the respondent has taken liability for the reasonable expenses of Reiner while he is at university. This issue applicant also failed to disclose and in actual fact she claimed expenses on behalf of Reiner which renders applicant's claim in regard to the children inaccurate. Mr Dicks contended that Reiner comes home during vacations which was an issue raised from the bar. It is not raised in the papers for how long Reiner resides with the applicant when he is on holiday. A full N\$2000.00 is demanded for him as if he was full time residing with the applicant. The non-disclosure that he was at university and what period he resides with the applicant makes his assessment somewhat difficult. It is most certainly unfair to order the applicant to pay a full maintenance of a child who is hardly at home except for holidays especially that he has taken liability of all his expenses while at university.

[29] On the evidence disclosed in the papers I accept that the applicant is capable of maintaining herself and if I am wrong in that regard which can be attributed to the non disclosure by the applicant of her true financial position, she can always launch

another Rule 43 application. Respondent has offered and states that he has resumed payment of the N\$2000.00. This creates no problems and will be ordered. The only problem is that Mr Dicks contended that the maintenance *pendente lite* should be ordered retroactively, that is from the beginning of 2006. This is not without problems. Firstly respondent has resumed payments, when, it is not disclosed. Secondly respondent states as follows, 'our youngest son Juergen previously resided at the Swakopmund German Private Hostel but, as from the end of March 2006, he will reside with the applicant'. Taking into consideration that respondent's affidavit was authored and commissioned during April 2007, the sentence do not make sense. The sentence reads as if the affidavit was authored before March 2006. For the sake of brevity I find it difficult to attach a period of retroactivity to that claim and I decline to do so. Reiner is at university and it has not been shown why this Court should order a full amount of N\$2000.00. That claim should also fail.

[30] I will now deal with the application for contribution towards costs in the sum of N\$50 000.00. All that the applicant stated in support of this claim is that 'my legal costs between June 2005 and September 2006 come (sic) to N\$46 921.24. I require the

respondent to make a contribution of N\$50 000.00 to my legal costs'. The last page of applicant's annexures is a summary of how the amount of N\$46 921.24 is made up and indicates that of the N\$46 921.24 only an amount of 1280.49, it would appear for G September/Malherbe has not been paid.

[31] The main file is unfortunately before me. The divorce action is ripe to go on trial and was set down for two days, 3 and 4 July 2007 and has by agreement between the parties been removed from the roll. In my view the applicant should have averred that the N\$50 000.00 she is seeking are 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, the scale of litigation of the parties. To base the estimation on what she has spend so far in costs is insufficient. Nevertheless, maintenance is always determined in accordance with the needs of the party requiring the maintenance and the availability of funds. That applies whether it is maintenance *stricto sensu* or a contribution towards costs. (*Dodo v Dodo*, supra at 99I) (the underlining is mine)

[32] On the evidence before me, applicant has sufficient financial resources to pay her own costs. Applicant as I have already stated received N\$1 020 000.00 on or about 17 April 2007. She does not need a contribution from the respondent. The depth of the respondent's purse has hit a low level since the divorce, compounded by respondent's state of health. Regard being had to the altered circumstances of the respondent, his offer to pay N\$2000.00 for Juergen who is residing with the applicant, his willingness and taking liability of his school fees and his extra mural activities, his pocket money, Reiner being at University and the respondent assuming the liability of his reasonable expenses while at university, the probability of the applicant maintaining herself and paying her own costs, the applicant and the minor children being on the respondent's comprehensive medical aid, I am not convinced that the respondent should be ordered to pay maintenance for the applicant and Reiner and contribute towards the costs of applicant.

[33] In regard to the question of costs, the application failed for respondent offered or resumed payment of N\$2000.00 for Juergen and ordinarily the applicant being the unsuccessful

party should bear the costs. However it appears that the applicant believed that the respondent renegaded on the parties' agreement to pay maintenance in the amount of N\$6000.00 for her and the two minor children and approached this Court to enforce that agreement and *inter alia* requested a contribution towards her costs. That being the case, I depart from the ordinary rule that the unsuccessful party should bear the costs.

[34] The orders I make are as follows:

1. Respondent is ordered to pay maintenance *pendente lite* for Juergen in terms of his offer in the sum of N\$2000.00.
2. Part of the relief sought in paragraph 1 (maintenance for Reiner Dreyer), paragraph 2 and 3 of the notice in terms of Rule 43 is refused.
3. No order as to costs.

MAINGA, J.

ON BEHALF OF THE APPLICANT

Mr Dicks

Instructed by:

Fisher Quarmbly & Pfeiffer

ON BEHALF OF THE RESPONDENT

Mr Mouton

Instructed by:

Engling, Stritter & Partners