NOT REPORTABLE

CASE NO.: I 2247/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RODGERYNE TERESA MARTIN **APPLICANT**

and

OLAYINKA OLADAPO AROWOLO **RESPONDENT**

CORAM: **NAMANDJE AJ**

Heard on: 20 September 2010

Delivered on: 22 September 2010

Reasons released on: 12 October 2010

JUDGMENT : **URGENT APPLICATION**

NAMANDJE, AJ.: [1] The applicant's urgent application was struck from the court's roll with costs on 22 September 2010. I indicated, at the time, that the reasons would be furnished in due course. These are the reasons.

[2] The application first came before me on 20 September 2010 at 14h15 on an urgent basis. At that time the application was not, as yet, served upon the respondent. I postponed the matter to 22 September 2010 and directed that the application be served upon the respondent. The respondent was subsequently served with the application.[1]

[3] On 22 September 2010, without the respondent having filed his opposing affidavit, Mrs van der Westhuizen appeared for the respondent and informed the court that the respondent had no sufficient time, after service of the application, to prepare his opposing affidavit. She however indicated that she was prepared to argue, without the respondent's opposing affidavit having been filed, that the applicant's application was not urgent. Mr Tjombe for the applicant did not have a problem with the parties, *in limine*, arguing whether the applicant's application was urgent or not. There were thus no arguments on the merits.

[4] The applicant approached this court on an urgent basis initially without notice to the respondent and at a time later than 09H00 am.[2] She sought the following relief:

"*(i) Condoning the Applicant's non-compliance with the Rules of this Honourable Court and the time periods prescribed therein in so far as these have not been complied with and directing that this matter be heard as one of urgency as contemplated in rule 6(12) of the Rules of this Honourable Court.*

(ii) That the Applicant be awarded full custody of and control over the parties' minor children, to wit: JOSEPH JAMES AROWOLO (age 6 years) and

[1]According to the return of service at 20H56 on 20 September 2010.

[2]Paragraph 27(1) of Consolidated Practice Directive requires urgent applications to be heard at 09h00 unless counsel certifies that the facts are such that the application should be heard at a time other than 09h00 am or on any other day.

RACHAEL AROWOLO (age 3 years), pending the finalisation of the divorce proceedings between the Applicant and the Respondent (the defendant in the main action).

(iii) *That the respondent be permitted access to the minor children every alternative Saturday from 09h00 am to 17h00 pm, commencing on Saturday 25 September 2010.*

(iiii) *Granting Applicant such further and or alternative relief as the above Honourable Court may deem fit.*

(v) *That the Respondent pays the costs of this application*."

[5] The applicant's application was said to be in terms of Rule 43[3] of the Rules of the High Court. It comprises of forty A4 pages inclusive of annexures attached to the founding affidavit. During the hearing the court asked counsel whether the applicant's application complies with the provisions of Rule 43(2) which provides that:

> "*The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the ground therefor, together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule, and the statement and notice shall be signed by the applicant or his or her attorney and shall give an address for service within 8 kilometres of the office of the registrar and shall be served by the sheriff*." (Own emphasis)

[6] Without deciding, as it is not necessary given a different ground on the basis of which the application was struck from the roll, I doubt whether the applicant's application complies with the above rule. See in this regard Du Preez v Du Preez, 2009 (6) SA 28

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[3]Rule 43 provides that:

"*43(1)This rule, with the exclusion of sub-rule (9), shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:*
(a) *Maintenance pendente lite;*
(b) *a contribution towards the costs of a pending matrimonial action;*
(c) *interim custody of any child;*
(d) *interim access to any child.*
(2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the ground therefor, together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule, and the statement and notice shall be signed by the applicant or his or her attorney and shall give an address for service within 8 kilometres of the office of the registrar and shall be served by the sheriff.
(3) The respondent shall within 10 days after receiving the statement deliver a sworn reply in the nature of a plea, signed and giving an address as aforesaid, in default of which he or she shall be ipso facto barred.
(4) As soon as possible thereafter the registrar shall bring the matter before the court for summary hearing, on 10 days' notice to the parties, unless the respondent is in default.
(5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.
(6) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.
(7) Unless the court otherwise directs counsel in a case under this rule shall not charge a fee-
(a) of more than N$450 for appearance if the claim is defended or N$200 if it is undefended.
(b) of more than N$450 for any other services rendered in connection with the claim; and
(8) When an undefended divorce action is postponed the action may be continued before another court notwithstanding that evidence has been given."

(T), Colman v Colman, 1967 (1) SA 291 at 292 A and Visser v Visser, 1992 (4) SA 530 (SE).

[7] The parties are presently involved in divorce proceedings. Based on the court file's contents a plea to the respondent's counterclaim has just been filed. If the parties keep to time periods provided for in the Rules of this Court a trial date can soon be applied for.

[8] The applicant set out the purpose of her application in the following terms:

> "*This is an application in terms of Rule 43 of the rules of the Honouarble Court for an interim order that I be awarded custody of my minor children (namely Joseph James Arowolo (age 6 years) and Rachel Arowolo (age 3 years) pending the outcome of the divorce action that I have instituted against the respondent. The respondent is the father of the minor children*."

[9] The applicant makes several allegations of domestic abuse against the respondent and other allegations relating to his social life.[4] In a number of annexures attached to the applicant's founding affidavit in particular correspondences from the respondent's legal practitioners' counter allegations which equally put in doubt whether the applicant is better positioned to be in custody and control of the minor children are also made by the respondent's legal practitioners against the applicant.

[10] What triggered the applicant's application is said to be the fact that the respondent on 15 September 2010 picked up the two minor children from their respective schools and kept them when the applicant was at the time enjoying the right of custody and control.

[4] *Inter alia* that he abuses alcohol and drugs.

[11] In motivating why her application should be heard on an urgent basis the applicant *inter alia* states that:

> "*38.* *This application is urgent. The Respondent has forcefully and without my consent, taken the children from the school and from my custody and control. As stated above, I know the Respondent insatiable desire to drink alcohol and using drugs and party away during the night – he will most certainly neglect the children, as he always did since the birth of the children. I have a reasonable apprehension that he would drive with the children whilst intoxicated, which could be fatal for the children. He is violent, also against the children. It is not in the best interest of the children that the children remain with the Respondent pending the outcome of the divorce proceedings.*
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> *39.* *I further submit that the protection order is still valid, and I attach hereto a copy of the notice from the Court, inviting the parties for a hearing to finalise the matter (marked "G"). I therefore submit that the Respondent is in violation of the court order, which aggravates the urgency of this application.*
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> *40.* *On the day of deposing to this affidavit – 20 September 2010 – I confirmed from the schools of the children that the Respondent did not take the children to school, thus jeopardising the education and well being of the children even further.*
>
> *41.* *The children have been with me since their birth, even at the times when the Respondent and I were together (he would always be intoxicated and*

> *or away partying, and not attending to the children's concerns, needs or well-being). It is not in the best interest of the children that they are suddenly uprooted and placed with a person who is violent and generally neglect the children*."

[12] While this court has a duty to ensure that the best interest of the minor children is, at all times, safeguarded, any litigant approaching this court on an urgent basis is, notwithstanding the fact that the matter pertains to minor children, bound to satisfy the court of the alleged urgency.[5] Proper and explicit facts should be placed before court to satisfy the requirements of Rule 6(12). One of the most important requirements to be satisfied before the court grants condonation for a matter to be heard on an urgent basis is that the applicant on the facts alleged cannot be afforded a substantial redress at a hearing in due course but on an urgent basis.

[13] Amongst the annexures attached to the applicant's founding affidavit is a notice of set down by the clerk of the Domestic Violence Court in Windhoek setting down a pending domestic violence inquiry for hearing on 30 September 2010.

[14] I inquired from the applicant's counsel whether the relief sought in *casu* could have been sought in the Domestic Violence Court as per section 8 read with section 14 of the Domestic Violence Act.[6] I understood counsel for the applicant to have conceded that the applicant could as well have sought an interim *ex parte* order pertaining to the control and custody of the children in the Domestic Violence Court. Counsel however expressed sceptism about the effectiveness of that court.

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[5]See the Sentiments of Hoff J in Hendrik Gerhardus Esterhuysen v Rozette Esterhuysen, Case No A 121/2010, unreported Judgment, delivered on 26 April 2010, par 11 where he stated that:
"*Though as a general proposition an application relating to the interests and* ***well-being of a minor child may be inherently urgent, each application must be considered on the merits of such application***."
[6]Act 4 of 2003.

[15] I cannot think of no good reason, why the applicant on the facts of this application could not wait for the hearing set down for 30 September 2010 at the Domestic Violence Court where the relief sought in this application could as well have been sought seeing that the minor children's custody and control issue was already dealt with by that court and a hearing in due course was imminent.[7]

[16] The most glaring deficiency in the applicant's application, is however for failure to allege facts explicitly, as required, that make out a case that the applicant could not be afforded a substantial redress at a hearing in due course.

[17] Those are the reasons why the applicant's application was struck from the roll with costs.

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NAMANDJE, AJ.

[7]This application was heard on 2 September 2010 and the parties' domestic violence enquiry was set down for 30 September 2010.

ON BEHALF OF THE APPLICANT:	MR N TJOMBJE
INSTRUCTED BY:	NORMAN TJOMBJE LAW FIRM
ON BEHALF OF THE RESPONDENT:	ADV C VAN DER WESTHUIZEN
INSTRUCTED BY:	BAZUIN INC.