



**CASE NO.: I 1583/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**MARIA MAGRIETA SCHNEIDER**

**PLAINTIFF**

and

**JAN PETRUS SCHNEIDER**

**DEFENDANT**

**CORAM: MULLER J**

Heard on: 20 October 2010

Delivered on: 17 November 2010

**JUDGMENT**

**MULLER J**

[1] After an order for the Restitution of Conjugal Rights has been granted on 13 July 2009, this Court gave a final order on 12 October 2009 in terms of which the marriage between the parties had been dissolved, but the issue of the maintenance for the Plaintiff stood over to be heard at a later date.

[2] This order followed the judgment by Maritz JA, with whom Shivute CJ and Chomba AJA concurred, in the case of *Fernado Shaningwa Vahekeni v Katrina-Ndamono Vahekeni*, case no. SA 7/2006, delivered in the Supreme Court of Namibia on 14 July 2008. In that judgment Maritz JA considered the legal position in respect of the question whether ancillary relief also has the effect of *res judicata* as often been held in several decisions of South African and Namibian Courts, namely the merits regarding the desertion and jurisdiction issues in the hearing upon which a *Rule Nisi* for a restitution order is issued. The Supreme Court of Namibia came to the conclusion in the *Vahekeni* case, *supra*, that the issues of a ancillary relief are not *res judicata* and can be raised and determined on the return date of the *Rule Nisi*. This is exactly what happened in this case, namely the marriage was dissolved on the return date of the *Rule Nisi* and the issue of ancillary relief, to wit maintenance for the Plaintiff, stood over to be decided at a later stage.

[3] On 20 October 2010 the matter was set down for hearing in respect of the maintenance claimed by the Plaintiff. The parties were represented by Ms Petherbridge on behalf of the Plaintiff and Mr Mbaeva on behalf of the Defendant, respectively. The Plaintiff and the Defendant testified themselves. No other witnesses were called. By agreement between the parties, the Defendant commenced with his evidence and after the close of his case, the Plaintiff commenced with her testimony. Several documents, contained in the bundle, were presented by the Plaintiff and cross-examination of the Defendant ensued upon those documents, whereafter the Plaintiff in her evidence also dealt with several of these documents.

[4] Before I deal with the evidence presented at the trial, it is necessary to have regard to the issue of guilt or innocence and to decide whether it is still a requirement in our law in respect of a claim of maintenance for the Plaintiff. Although it was decided in the *Vahekeni* matter, *supra*, by the Supreme Court of Namibia that it remains open for a Defendant to have the ancillary relief adjudicated upon at the later stage and that the evidence presented at the stage when the restitution order was granted is not

*res judicata*, it was not decided what a position is in respect of the guilt factor. Is that issue considered to be *res judicata* in further hearings regarding ancillary relief, or not?

Although the Marriage Equality Act no. 1 of 1996 repealed certain sections of the Matrimonial Affairs Ordinance, no. 25 of 1955, Section 5(1) of that proclamation still remains of force and effect in Namibia.

Section 5 of the Ordinance provides as follows:

"5 (1) The Court granting a divorce may, notwithstanding the dissolution of the marriage -

- a) Make such an order against the guilty spouse for the maintenance of the innocence spouse for any period until death or until remarriage of the innocence spouse, whichever event may first occur, as the Court may deem fit."

(My emphasis).

(*Neil Ronald Samuels v Petronella Samuels*, an unreported judgment delivered on 26 March 2010, *Van Wyk v Van Wyk* 1954 (4) SA 594 at 595 A-H)

[5] Consequently, the issue of guilt still remains an issue to be determined in respect of maintenance for the innocence spouse. After considering several previous decisions in respect of the question whether maintenance can also be awarded to the guilty party, Ueitele AJ came to the conclusion in the case of *B. A de Kerk v R-A de Klerk*, case no. I 841/2009, an unreported judgment delivered on 9<sup>th</sup> August 2010, that Section 5 of the Ordinance does not prevent the court from granting an order of maintenance in favour of the guilty spouse who is in need of it. He then continued consider whether that spouse was in fact in need of maintenance. (*De Klerk, supra* paragraph [67] at p30). In this matter the question that was considered in the *De Klerk* case is irrelevant, because after hearing the evidence of the Plaintiff, the Court that issued the restitution order, decided to grant that order based on the malicious desertion of the Defendant and consequently had already decided on the guilt issue. That decision is *res judicata* and as a result thereof further evidence was not only unnecessary, but this Court cannot again determine an

issue which was already decided and which is *res judicata*.

[6] The evidence of the two parties will be briefly referred to hereinafter. The evidence of the Plaintiff boils down thereto that she borrowed money from her pension fund and from her life policy at Old Mutual during the course of marriage for several purposes, namely to obtain and purchase certain erven in Rehoboth, or to provide for expenditures in respect of their common home in Khomasdal, which belongs to her, or to purchase motor vehicles, as well as for other expenditures of the marriage. In this regard she financially over-stretched herself and incurred vast debts, which she needs to repay. She needs an amount of N\$2 500.00. per month to be able to afford such payments. She also made several allegations in respect of property that the Defendant registered in his own name, while they both paid for it or she paid the major part in respect of it. She also attempted to indicate, on the strength of bank statements, that the Defendant withdrew all the money that he deposited in her account (which was their only bank account) by either using her credit card or caused her to issue cheques, which she signed and provided to him. According to her, he worked for the larger part of their marriage in Owambo and used the money to pay off debts that he incurred. She also alleged that the Defendant still owns a house in which his previous wife and children lives. Although he is the joint owner thereof as a result of his marriage in community of property with his former wife, the Plaintiff alleges he ought to sell it in order to provide funds to enable him to pay the maintenance that she claims.

[7] The Defendant admitted that they bought properties in Rehoboth and it is apparently not in dispute that money was provided by the Plaintiff for those purposes and also for other purposes. He also averred that he spent an amount of money in respect of the renovation of the Plaintiff's house in Khomasdal. According to him he has diabetes, asthma and high blood pressure. She conceded that he suffered from these ailments even when they were still married. He further testified that he is only employed until the end of the month (October) and because of these illnesses, he will find it difficult to

get another job. According to him this illnesses led thereto that he lost nearly fifty percent of his sight, which will also effectively prevent him from getting other employment.

[8] The bottom line is that the Defendant alleges that he is unable to pay any maintenance. In respect of the house in which his previous wife lives with his two children, he feels responsible to provide a roof over their heads and cannot sell that house because they will then be left destitute.

[9] In the matter of *Samuels, supra*, Damaseb JP inter alia considered maintenance for the Defendant, namely the wife in that matter. In that regard the learned Judge-President said the following in [33] on page 19:

*"[33] The duty to pay maintenance, and the quantum thereof, will hinge on the ability of the guilty party to pay, the ability of the innocent party to earn an income from her own maintenance, and the period for which their marriage lasted. The innocent party is not entitled to be placed in the same position in regard to maintenance as if she were still married to the husband, although she needs to show actual necessity."*

In that case the learned Judge-President ordered the Plaintiff to pay maintenance to the Defendant in the amount of N\$500.00 per month, escalating by 10% per annum, payable for a period of 24 months from the date of order. (*Samuels, supra*, [39], p22-23)

[10] In this matter the Plaintiff would be entitled to maintenance, but she has to prove that she is in need of maintenance for herself. Furthermore, the Defendant has to be able to pay such maintenance. In respect of the first issue, namely entitlement to maintenance, it is evident that she did not prove that she needs a specific amount of money based on the particular needs that she may have. She is employed. What she in fact did is to clothe her liabilities as 'maintenance', although is not maintenance at all. According to her she incurred debts and currently has severe financial liabilities as a result of money that she borrowed either from her pension fund or from Old Mutual for specific purchases and

expenditures of herself and the Defendant during the marriage and which she now has to repay. That is clearly not maintenance. The Plaintiff should in my opinion have instituted claims against the Defendant as ancillary relief on another basis. She could e.g. have claimed for money provided by her to him during the marriage over and above the contribution for which she was liable, or that there existed a universal partnership between them for which she borrowed money and is entitled to repayment of what can be found that he owes her. That is the sort of claims that should have been made by the Plaintiff in her particulars of claim and which could have been decided on at a later state as ancillary relief on the basis of the *Vahekeni* case. She did not do that, but claimed maintenance.

[11] I have no doubt that she, as the innocent party, is entitled to maintenance if she is able to prove that she is in need of it and that the Defendant can pay it. However, from the lack of evidence of her needs for maintenance, I cannot make such an order. I have no basis on which I can order the Defendant to pay a specific amount in respect of maintenance. Furthermore, because being unemployed, the Defendant will be unable to execute such an order because he cannot pay maintenance. In several decisions courts have in the past granted a "nominal" or "token" amount in respect of maintenance in order to preserve the right of the person entitled to maintenance. (See *Hahlo - The South African Law of Husband and Wife*, third edition, p44). Where the right of maintenance is reserved, the person entitled thereto can then in future apply for an increase of such maintenance if he/she can prove what he/she needs, as well as that the other party is able to pay it. Such an application can of course then be brought in the Maintenance Court and does not have to be instituted in this Court. To bring this matter closer to home; if the Plaintiff's right to maintenance is reserved by awarding a nominal amount to her, she can always in future approach the Maintenance Court depending thereon that the Defendant's circumstances in respect of employment has improved and she can prove that she needs that maintenance.

[12] Although the Plaintiff is partly successful with her claim for maintenance for herself, she failed to prove what she needs for maintenance. In my opinion it would be unfair to burden the Defendant with a cost order in these circumstances and it would probably be an ineffective order to execute because of the Defendant's financial circumstances. Consequently, each party has to pay its own costs and no order of costs will be made.

[13] Having considered the evidence presented (or lack thereof) and the arguments submitted on behalf of the parties, the Plaintiff's claim for maintenance for herself should succeed, but that in the circumstances; only a nominal amount for such maintenance should be awarded. In terms of Section 5(1) such maintenance is limited until her death or re-marriage. In the result the following order is made in respect of the ancillary relief of maintenance for the Plaintiff:

**The Defendant is ordered to pay maintenance for the Plaintiff in the amount of N\$1.00 per month.**

**MULLER J**

**ON BEHALF OF THE PLAINTIFF:**

**Ms Petherbridge**

**Instructed by:**

**Petherbridge Law Chambers**

**ON BEHALF OF THE DEFENDANT:**

**Mr Mbaeva**

**Instructed by:**

**Mbaeva & Associates**