



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3241/2012

In the matter between:

M H

PLAINTIFF

and

M H

DEFENDANT

(born NGOLOWA)

Neutral citation: *H v H* (I 3241/2012) [2013] NAHCMD 201 (18 July 2013)**Coram:** PARKER AJ**Heard:** 26 – 27 June 2013**Delivered:** 18 July 2013

Flynote: Husband and wife – Maintenance of minor child – Burden of both parties to support minor child – Court taking into account several factors in the present case to determine reasonable contribution by the plaintiff.

Summary: Husband and wife – Spouses married in community of property – Maintenance of minor child – Court takes into account that the burden of supporting the minor child is common to both spouses and must be borne by them in proportion to their means – Court taking into account the income of each spouse, the fact that the plaintiff agreed that the immovable property of the joint estate be awarded to defendant as her sole and exclusive property and the plaintiff agreed to be responsible for 100 per cent of the scholastic expenses of the minor child – Upon

these factors court ordered plaintiff to pay maintenance in the reasonable and fair amount of N\$1 200,00 per month, rejecting defendant's prayer for N\$3 500,00.

ORDER

- (a) A final order of divorce is hereby granted and this order incorporates the Deed of Settlement, dated 26 June 2013.
- (b) By agreement between the parties, the property situate at Erf No. 266, Arebush Street, Cimbebasia, Windhoek, is awarded to the defendant and it shall be her sole and exclusive property; and in that behalf, the plaintiff and/or the defendant must sign all documents necessary and required to effect the transfer of the property into the name of the defendant, failing which, the Deputy Sheriff responsible for the District of Windhoek, is hereby authorized to so sign all the aforementioned documents.
- (c) The plaintiff must pay N\$1 200,00 per month to the defendant for the maintenance of the minor child.
- (d) There is no order as to costs; each party to pay his or her own costs.

JUDGMENT

PARKER AJ:

[1] In this matrimonial matter the plaintiff, represented by Mr Swarts, claimed an order for the restitution of conjugal rights and, if the defendant failed to restore conjugal rights, a final order of divorce and certain ancillary relief. The defendant noted her intention to defend the action and made a counterclaim in like terms as the plaintiff's claim. Mr Rukoro represents the defendant.

[2] The parties resolved some of the issues themselves and recorded the terms of their agreement in a Deed of Settlement done on 26 June 2013, and it is filed of record. Some of the most significant terms of the Agreement for our present purposes are these. The defendant has agreed to withdraw her defence and counterclaim, and the parties agree that the plaintiff shall proceed with the action, unopposed by the defendant. They agree that an interim control and custody of the minor child N–N H be awarded to the defendant pending the filing with the court by the Ministry of Gender Equality and Child Welfare of a social welfare report about the issue of control and custody of the minor child. It is significant to note that the minor child is a girl child and she is 13 years old. I make this observation to signalize the point that at that age, her view must be solicited, and it should carry some weight. In any case, in the present proceeding the only burden of the court is to determine the issue of financial maintenance of the minor child. Evidence was adduced on both sides of the suit in respect of that issue only.

[3] Both the plaintiff and the defendant filed individual rule 37(6)(b) affidavits to which each party attached his or her pay-slip. The prayer of the defendant is that she be granted child maintenance of N\$3 500,00 per month while the minor child is in her control and custody. The plaintiff's response is that he is able to pay a maintenance of N\$600,00 per month.

[4] From the evidence during the trial and the parties' rule 37(6)(b) affidavits, I make the following significant factual findings. The plaintiff earns a monthly gross remuneration of N\$37 641,16, and includes motor allowance management (running and capital costs) of N\$7 165,66 and housing allowance of N\$4 320,00. In terms of the Deed of Settlement the immovable property situate at Erf No. 266, Arebush Street, Cimbebasia, Windhoek ('the property'), is awarded to the defendant as her sole and exclusive property; and in that behalf, the defendant shall take over the repayment of the mortgage bond registered over the property. In that event, the plaintiff's income will be relieved of the burden of the bond repayment of N\$6 896,65. In this regard, I accept the plaintiff's evidence that he will have to rent or purchase a dwelling house. But, if he acquires a dwelling house he will be receiving housing

allowance from his employer which now stands at N\$4 320,00. Thus, his income will still be relieved markedly by any such housing allowance.

[5] Furthermore, the plaintiff's expenses include the following: N\$1 500,00 per month for his three children who are not children of the family, running of his motor vehicle, municipal services (water and electricity), maintenance of his house in one of the northern regions of the country, maintaining unspecified 'dependents', servicing a high purchase agreement in respect of a solar system and servicing a Jet Stores account on which he spent about N\$1 200,00 for the purchase of clothes for all his children, including the minor child and his three other children; but he does not say how much of this was in respect of the minor child who is the subject of the present enquiry. And in terms of the Deed of Settlement, the plaintiff agrees to pay 100 per cent of the minor child's scholastic expenses. At present, the minor child is in Grade 6 in a private primary school. I take it that 'scholastic expenses' would cover expenses on items connected with, and incidental to, her school education, including extra-curricula activities, development fund payments and books. These will not be the burden of the defendant. I should make the point that this offer would entail a great deal of expenditure on the plaintiff's income. It will leave a big hole in the plaintiff's pocket. The only fly in the ointment is that the plaintiff would have a great relief in that regard whenever the defendant, who is a public servant employed in the Ministry of Foreign Affairs, is serving in a Namibian foreign Mission, as was the case when the defendant served in Germany, Tanzania and South Africa.

[6] Moreover, by agreement between the parties, as aforesaid, the plaintiff is going to lose any interest he may have in the property. It will, therefore, be a substantial gain for the defendant and a great loss to the plaintiff. This conclusion must carry a great deal of weight in favour of the plaintiff in the present enquiry. This conclusion leads me to further factual findings.

[7] The further factual findings are the following. The defendant, as I have mentioned in para 4, will take over the repayment of the mortgage bond in respect of the property, which at the moment amounts to N\$6 896,65 per month. She will retain the minor child on her medical aid. She spends close to N\$2 300,00 per month on

the minor child on, for example, electricity, water, food (including daily school lunch-boxes), clothes (including school uniform), and transport to-and-from school. But it cannot be disputed that these are only some of the expenses, considering that she is a girl child and she would need girlie things, eg toiletries and personal hygiene things. As the defendant testified, there are other unnamed expenses. It is my view that such expenses would be in respect of child girl things.

[8] It emerges clearly from the evidence that the plaintiff is not denying his duty to maintain the minor child. The dispute, as I have intimated in para 3, is rather the amount of maintenance he may be ordered to pay. In this regard, the defendant prays for N\$3 500,00, and the plaintiff says he is only able to pay N\$1 000,00 per month. This leads me to the next significant factual findings.

[9] As I have mentioned in para 4, the plaintiff earns a gross remuneration of N\$37 641,16 per month, and the defendant N\$9 182,17, that is about 24 percent of the plaintiff's remuneration. Of course whenever she is serving in a Namibian foreign Mission, the defendant receives allowances from her employer on top of the N\$9 182,17. But this is not a permanent feature. She may or may not go on such assignment; even though at the moment there is the likelihood that she may do so. In any case, this court cannot arrive at a reasonable and just determination based on speculation. It is, therefore, safer to rely on what appears to be a more permanent feature. Of course, I should not close my eyes to the fact that whenever the defendant serves in a foreign Mission during a tour of duty of about four years her remuneration is enhanced, depending upon where she is sent to serve.

[10] In all this, it must be remembered that in making an award of maintenance of the minor child the court takes into account that the burden of supporting the child is common to both spouses and must be borne by them in proportion to their means. (See *Kemp v Kemp* 1958 (3) SA 736.) And the duty to support should be considered in correlation with the means at the parents' disposal. (See Erwin Spiro, *Law of Parent and Child*, 4th ed (1985): p 398.) In the instant case, the means at the disposal of the parties is their individual income from their respective remuneration payable by their respective employers. As I have set it out previously, the defendant's

income is about 24 per cent of the plaintiff's. But, as I have observed previously, the plaintiff is going to be responsible for all the scholastic expenses of the minor child. Moreover, the plaintiff is going to lose to the defendant any interest he has in the property. What this means is that the plaintiff may rent accommodation and pay for the rental or purchase a dwelling house and most probably will have to service a mortgage bond repayment in respect thereof. And so the means of the parties should be considered in correlation with this fact about housing and the scholastic expenses in order to get the correct picture discussed in para 4 in this judgment.

[11] From all the evidence and my conclusions thereanent, particularly about the hidden expenses that are the bare minimum in respect of a girl child like the minor child, less scholastic expenses, I think N\$4 000,00 per month is a reasonable amount necessary and required to maintain the minor child.

[12] In determining a fair and reasonable amount of maintenance of the minor child, I have taken into account the following relevant factors and considerations that emerge largely from the evidence. (a) The amount of N\$4 000,00 maintenance per month is reasonable. (b) The plaintiff has agreed that the property be awarded to the defendant as her sole and exclusive property. (c) The plaintiff may rent accommodation or purchase property (dwelling house) of his own under a mortgage bond. (d) The defendant's income derived from her remuneration is about 24 per cent of the plaintiff's, although this proportion will change *if and when* the defendant is serving in a foreign Mission. (*'if and when'* are italicized for obvious emphasis.) Having taken all these factors and considerations into account I think it is just and reasonable to order the plaintiff to pay maintenance of N\$1 200,00 per month in respect of the minor child.

[13] It remains to consider Mr Rukoro's submission that on the facts of the case the court should at this stage grant a final order of divorce. The defendant testified that she would not restore conjugal rights to the plaintiff. The plaintiff does not have any objection to the court granting the prayer of the defendant. In the circumstances, to order restitution of conjugal rights would be beating a dead horse. I would, accordingly, in the circumstances and on the facts of the case grant a final order of

divorce, incorporating the Deed of Settlement concluded by the parties on 26 June 2013 (Exh. "B"). In the circumstances of the case, I think it is reasonable and fair to make no order as to costs.

[14] In the result, I make the following order:

- (a) A final order of divorce is hereby granted and this order incorporates the Deed of Settlement, dated 26 June 2013.
- (b) By agreement between the parties, the property situate at Erf No. 266, Arebush Street, Cimbebasia, Windhoek, is awarded to the defendant and it shall be her sole and exclusive property; and in that behalf, the plaintiff and/or the defendant must sign all documents necessary and required to effect the transfer of the property into the name of the defendant, failing which, the Deputy Sheriff responsible for the District of Windhoek, is hereby authorized to so sign all the aforementioned documents.
- (c) The plaintiff must pay N\$1 200,00 per month to the defendant for the maintenance of the minor child.
- (d) There is no order as to costs; each party to pay his or her own costs.

C Parker
Acting Judge

