

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2961/2013

In the matter between:

R J K (born MINNAAR)

PLAINTIFF/APPLICANT

and

I K

DEFENDANT/RESPONDENT

Neutral citation: *Kauvee v Kauvee* (I 2961/2013) [2014] NAHCMD 161 (22 May 2014)

Coram: PARKER AJ

Heard: 15 April 2014

Delivered: 22 May 2014

Flynote: Husband and wife – Maintenance – Of minor children of the family – Court held that the burden of supporting a child of the family is common to both spouses and must be borne by them in proportion to their means – Court held further that in considering the means of the parents the court it is equally important to take into account also the financial burden that each party will shoulder respecting the

minor children after the divorce and unavoidable expenses that come naturally to the party having custody and control of the minor child.

Summary: Husband and wife – Maintenance – Of minor children of the family – Court held that the burden of supporting a child of the family is common to both spouses and must be borne by them in proportion to their means – Court held further that in considering the means of the parents the court it is equally important to take into account also the financial burden that each party will shoulder respecting the minor children after the divorce and unavoidable expenses that come naturally to the party having custody and control of the minor child – In the instant case while plaintiff earns no income the defendant is self-employed and earns an appreciable income – But the plaintiff is awarded custody and control of the minor children – Court remarked that the amount of child maintenance ordered is fair and just.

ORDER

- (a) (i) The custody and control of the minor children is awarded to the applicant/plaintiff pending the finalization of the divorce action;
- (ii) There is no order respecting spousal maintenance; and
- (iii) The respondent/defendant must contribute an amount of N\$5 500 towards the applicant's/plaintiff's legal costs, which amount shall be paid by means of installments in the amount of N\$500 per month commencing 30 April 2014 and on or before the 7th day of each subsequent month until the full amount is paid.
- (b) The respondent/defendant must pay to the applicant/plaintiff child maintenance in the amount of N\$3 000 per month in respect of the minor children P..... K..... and H..... K..... pending the finalization of the divorce action.

- (c) There is no order as to costs; each party to pay his or her own costs.

JUDGMENT

PARKER AJ:

[1] In the present proceeding the plaintiff is the applicant, and defendant is the respondent. I shall refer to the parties as the plaintiff and the defendant. The plaintiff, represented by Ms Shifotoka, has brought an application in terms of rule 43 of the rules of court. The defendant represented by Mr Coetzee has moved to reject the application. The relief prayed for appears in the rule 43 notices. At the commencement of the hearing counsel brought it to the attention of the court that the plaintiff was no longer moving for all the items appearing in the notice. For instance, she was not moving for spousal maintenance. The only relief both counsel urged the court to determine is child maintenance for the minor children of the family Phabee who is eight years old and Haylee who is seven years old pending the granting of a final order of divorce. Pursuant to the agreement of the parties, the parties' legal practitioners submitted a draft order for inclusion in the order that this court may make in the present proceedings. The legal practitioners should be commended for their efforts. The draft order reads:

'Having heard Ms Shifotoka, counsel for the applicant/plaintiff and Mr Coetzee, for the respondent/defendant and having regard to submission by counsel, the managing judge hereby makes the following order as per agreement between the parties:

- (a) That custody and control of the minor children be awarded to the applicant/plaintiff pending the finalization of the divorce action;
- (b) That applicant/plaintiff has abandoned spousal maintenance claim;
- (c) That the respondent/defendant shall contribute an amount of N\$5 500-00 towards the applicant's/plaintiff's legal costs, which amount shall be paid by means of installments

in the amount of N\$500-00 per month commencing 30th April 2014 and on or before the 7th day of each subsequent month until the full amount has been paid.'

[2] In the nature of the relief being considered, I should say that the starting point should be what I stated in *Hamukwaya v Hamukwaya* (I 3241/2012) [2013] NACHMD 201 (18 July 2013):

'[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.'

[3] It is, therefore, to the means at the disposal of the plaintiff and the defendant individually, that I now turn my attention. And in considering their means, it is equally important to take into account also the financial burden that each party will shoulder respecting the minor children after the divorce. (*Platt v Platt* (I 2407/2013) [2014] NAHCMD 84 (13 March 2014)) and other unavoidable hidden expenses that come naturally and as a matter of course in connection with bringing up and caring for young child girls and which will be borne by the party who is granted custody and control of the minor children of the family. Such expenses include medical and connected and incidental expenses, especially where, as in the instant case, the defendant has suspended payments towards medical aid cover of the children, and the parties have agreed that it is in the best interest of the children that the plaintiff is awarded custody and control of the children.

[4] On the papers, I make additional factual findings and conclusions thereanent. The plaintiff has not earned any income since the beginning of February 2014. The defendant, on the other hand, is self-employed, and on bad days he takes home an income of N\$19 243,66 per month. The defendant has placed before the court what he characterizes as 'Expenses'. Some of the items are clear to understand. Others like 'Furniture', 'Life/Funeral Insurance' and 'Church' are so nebulous that they cannot assist the court. In my opinion, the defendant has put forth those items in order to fatten artificially the size of his expenses; and so, I take no cognizance of them. In her sworn statement the plaintiff has given a list of items and their cost required and needed for the maintenance of the children and herself. The cost involved is N\$7 650. The plaintiff states that in her opinion the needs of the children will cost N\$3 000, that is, N\$1 500 apiece, and the needs of her N\$3 000. But the plaintiff has abandoned her prayer for spousal maintenance. And in terms of the draft order, the defendant has agreed to contribute N\$5 500 towards the plaintiff's legal costs by means of instalment payments of N\$500 per month starting from 30 April 2014.

[5] Having taken all these factual findings and conclusions and observations into account, I am of the view that in the fairness and reasonableness of the case, it is just that the defendant pays N\$3 000 per month as child maintenance for the children; whereupon I make the following order:

- (a) (i) The custody and control of the minor children is awarded to the applicant/plaintiff pending the finalization of the divorce action;
- (ii) There is no order respecting spousal maintenance; and
- (iii) The respondent/defendant must contribute an amount of N\$5 500 towards the applicant's/plaintiff's legal costs, which amount shall be paid by means of installments in the amount of N\$500 per month commencing 30 April 2014 and on or before the 7th day of each subsequent month until the full amount is paid.

- (b) The respondent/defendant must pay to the applicant/plaintiff child maintenance in the amount of N\$3 000 per month in respect of the minor children P..... K..... and H..... K..... pending the finalization of the divorce action.

- (c) There is no order as to costs; each party to pay his or her own costs.

C Parker
Acting Judge

APPEARANCES

PLAINTIFF/APPLICANT : E Shifotoka
Of Conradie & Damaseb, Windhoek

DEFENDANT/RESPONDENT: E E Coetzee
Of Tjitemisa & Associates, Windhoek