

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2407/2013

In the matter between:

A E PLATT

PLAINTIFF

and

A S P PLATT (born MEDDISON)

DEFENDANT

Neutral citation: *Platt v Platt* (I 2407/2013) [2014] NAHCMD 84 (13 March 2014)

Coram: PARKER AJ

Heard: 18 February 2014

Delivered: 13 March 2014

Flynote: Husband and wife – Divorce – Defendant (wife) not defending action respecting dissolution of the marriage but praying for certain ancillary relief – Ancillary relief includes right to immovable property – Plaintiff offered to pay 50 percent of mortgage Bank’s valuation to defendant (wife) in return for the plaintiff becoming the sole and exclusive owner of the property – On the facts and in the circumstances of the case the court granted the relief.

Summary: Husband and wife – Divorce – Defendant (wife) not defending action respecting dissolution of the marriage but praying for certain ancillary relief – Ancillary relief includes right to immovable property – Plaintiff had proposed to defendant that defendant pays to him 50 percent of value of the property in order for defendant to become sole and exclusive owner of the property – Defendant declined the offer – Plaintiff prayed the court for an order that he pays to the defendant 50 percent of the value of the immovable property in return for the plaintiff becoming the sole and exclusive owner of the property which he wants to keep for the children of the family – Court found that in the circumstances and for the reason given by plaintiff for the relief sought it was fair and reasonable to grant the relief – Court accordingly awarded the immovable property to the plaintiff as his sole and exclusive property.

Flynote: Husband and wife – Divorce – Defendant (wife) not defending dissolution of the marriage but praying for certain ancillary relief – Spousal maintenance – The court held that a court may only award spousal maintenance if it is proven on a balance of probabilities that he or she is in need of it.

Summary: Husband and wife – Divorce – Defendant (wife) not defending dissolution of the marriage but praying for certain ancillary relief – Spousal maintenance – The court held that a court may only award spousal maintenance if it is proven on a balance of probabilities that he or she is in need of it – Plaintiff (husband) undertook to take full financial responsibility for the minor children's schooling and tuition costs and related costs and medical costs and related costs – Court found that the defendant earns an appreciable money as an employee – More important, the defendant did not place any evidence before the court in order to prove that she is in need of maintenance – Based on these reasons, in the exercise of its discretion, the court declined to award spousal maintenance.

ORDER

- (a) The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
- (b) The custody and control of the minor children K A Platt, A K Platt and K Platt are awarded to the defendant, subject to the plaintiff's right to reasonable access, and, further the plaintiff shall have custody of the children –
- (i) for weekends, between 13h00 on Friday to 18h00 on Sunday.
 - (ii) during alternative short and long school holidays of the children.
 - (iii) during alternative birthdays of the children.
- (c) A party, in whose custody a child is, may take such a child along with him or her when travelling outside the country, except that such party shall not so take a child without obtaining prior consent of the other party, which consent shall not be withheld unreasonably.
- (d) The plaintiff shall pay all excess payments incurred and not recovered from a medical aid fund in respect of the minor children respecting medical, dental, pharmaceutical, surgical, hospitalisation, orthodontic and ophthalmological expenses. The plaintiff shall pay 100 per cent of all school and tuition costs, including tertiary level school and tuition costs and costs of extra-mural activities, except that any additional extra-mural activity shall have to be approved by the plaintiff, which approval the plaintiff shall not withhold unreasonably.
- (e) Each party shall retain any movable property he or she acquired before or during the subsistence of the marriage; and in that behalf, the defendant shall retain the motor vehicle VW Polo.
- (f) The property Erf 1..., M..... T.... Street, A..., Windhoek, is awarded to the plaintiff as the sole and exclusive owner of that property, except that the

plaintiff shall obtain a valuation of the property from the mortgagee Bank and pay to the defendant 50 per cent of the value of the property so determined by the Bank. After such payment has been made the defendant and the plaintiff must do all that is necessary and required, including signing all documents, to effect transfer of that property into the name of the plaintiff; and if the defendant fails or refuses to so act when called upon to do so, the Deputy Sheriff responsible for Windhoek is hereby authorized to sign all such documents in the shortest possible time for purposes of transfer of the property into the name of the plaintiff.

- (g) Each party to pay his or her own costs.

JUDGMENT

PARKER AJ:

[1] The progression of this matter has been tortuous, to put it mildly. Mr Basson represents the plaintiff. The defendant represents herself. I am constrained to say that the defendant has not done much by way of cooperating with Mr Basson, particularly through getting processes filed of record pursuant to the judicial case management procedures. I have not evoked rule 37(16) of the rules of court only because Mr Basson did not apply for such an order and the defendant represents herself.

[2] Be that as it may, the defendant filed with the court a document entitled 'Particulars of Plea'. It seems to me clear that the defendant does not defend the dissolution of the marriage. She only prayed for certain ancillary relief which is dealt with below. Thus, the document contains primarily the things that she 'humbly proposed' should be ordered by the court. The contents appear to be answers to what the plaintiff claims in the plaintiff's Particulars of Claim concerning ancillary relief. Evidence was given by the plaintiff and the defendant only. No witnesses gave evidence in support of either party.

[3] I have carefully considered the papers filed of record and the evidence placed before the court. Having done that I make the following factual findings. As I have said previously, the defendant does not challenge the granting of the relief sought by the plaintiff respecting the dissolution of the marriage. The defendant prayed the court to award custody and control of the minor children to her, subject to plaintiff's right to reasonable access to them. The plaintiff does not oppose such an order. Defendant prayed further that the plaintiff should pay all medical and related expenses in respect of the minor children. The defendant does not oppose any such order. The defendant prayed for an order that the plaintiff should pay for all tuition costs, including costs of books and stationery, and connected and incidental costs. The plaintiff does not oppose any such order, except that it is the plaintiff's prayer that the order does not restrict the schools the children attend to private schools. In any case, in my opinion, it would not be reasonable and fair that the order restricts the schools the children may attend to private schools.

[4] The defendant prays further that she be put back on the plaintiff's medical aid scheme. I accept the plaintiff's evidence that the defendant was on the plaintiff's medical aid scheme and she herself decided to remove herself from the scheme and did so, accordingly. The plaintiff opposes an order restoring the defendant unto the plaintiff's medical aid scheme. On the facts, and in the circumstances, of the case I think I should decline the defendant's prayer. It would be unfair and unreasonable to order that she be put back on the plaintiff's medical aid scheme.

[5] There was no cogent evidence placed before the court that could persuade the court to order that the plaintiff forfeit 'any right' to the immovable property Erf 1, M T S, A, Windhoek ('the property'). The evidence, which I accept, is that when some time ago the defendant obtained a protection order from the lower court against the plaintiff, the plaintiff vacated the property. The defendant left the property unoccupied for some three weeks as she had moved to her parent's home. The plaintiff was, therefore, forced by the circumstances to move back into the property. Furthermore, the plaintiff had offered the property to the defendant on condition that the defendant paid to the plaintiff 50 per cent of the value of the property. The defendant declined

the offer. The plaintiff has now offered to take over the property as his sole and exclusive property and in return pay the defendant 50 per cent of the value of the property, after the bond payment has been deducted therefrom.

[6] I find the plaintiff's offer to be fair and reasonable having considered the plaintiff's explanation as to why he proposes this arrangement. It is to ensure that the property remains in the Platt family for the benefit of the children of the family instead of the property being sold to a total stranger. I am persuaded by this unselfish, forward-looking and reasonable explanation. The defendant put forth no explanation – none at all – for her position that the property be sold to a total stranger. She only expressed her wish without any reason to support it. I do not think it is reasonable and fair in the circumstances and on the facts of the case that the property be sold to a total stranger and the proceeds shared equally between the parties after deducting the bond repayment amount therefrom.

[7] The next issue is that for the defendant, the plaintiff should either reinstate her on his medical aid scheme or pay her 'N\$50 per day spouse maintenance'. That will come up to N\$1 500 per month. I have already declined, for good reason, to grant an order that she be put back on the plaintiff's medical aid scheme. The plaintiff gave evidence about his income and expenses. And the plaintiff has, as I have mentioned previously, agreed to pay 100 per cent of the children's tuition costs and connected and incidental costs and 100 per cent of the children's medical and related and incidental costs.

[8] As to spousal maintenance; it has been held that the court may award spousal maintenance 'if it is proven on a balance of probabilities that he (or she) is in need of it'. (*Neil Ronald Samuels v Petronella Samuels* Case No. I 902/2008) (judgment delivered on 26 March 2010) (Unreported), para 31) In the instant case the defendant has not placed any evidence before the court in order to prove that she is in need of maintenance. In any case, the defendant is working and she is earning an appreciable remuneration between N\$6 000 and N\$30 000 per month. The plaintiff gave evidence about his income and expenses, including the following. The plaintiff has, as I have mentioned previously, agreed to pay 100 per cent of the

minor children's tuition costs and connected and incidental costs and 100 per cent of their medical costs and connected and incidental costs. In this regard, it must be remembered 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. (*Kemp v Kemp* 1958 (3) SA 736) But, in the instant case, the plaintiff has undertaken to take full responsibility for all these expenses and costs in respect of the children. For these reasons, it will be unfair and unreasonable for the court to award spousal maintenance to the defendant.

[9] The next issue is about a motor vehicle Toyota Hilux. The evidence was that the motor vehicle was sold before summons was issued in this matter. There is also the evidence that the plaintiff bought a motor vehicle VW Polo for the defendant's use; and he says the defendant can keep that motor vehicle as the sole and exclusive owner thereof. This, in my opinion, is a fair and reasonable arrangement.

[10] As I have mentioned previously, it is clear from the papers, which the defendant filed of record, and from her evidence that she was not defending the dissolution of the marriage. She sought to defend rather only the ancillary relief that the plaintiff had sought, and she also put forth what relief she prays the court to grant.

[11] I have considered all the items of ancillary relief which the plaintiff seeks, against the evidence that was placed before the court, including the prayers of the defendant in that regard. Having done all that, I make the following order which, in my opinion, meets the justice and fairness of the case:

- (a) The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
- (b) The custody and control of the minor children K A Platt, A K Platt and K K Platt are awarded to the defendant, subject to the plaintiff's right to reasonable access, and, further the plaintiff shall have custody of the children –

- (i) for weekends, between 13h00 on Friday to 18h00 on Sunday.
 - (ii) during alternative short and long school holidays of the children.
 - (iii) during alternative birthdays of the children.
- (c) A party, in whose custody a child is, may take such a child along with him or her when travelling outside the country, except that such party shall not so take a child without obtaining prior consent of the other party, which consent shall not be withheld unreasonably.
- (d) The plaintiff shall pay all excess payments incurred and not recovered from a medical aid fund in respect of the minor children respecting medical, dental, pharmaceutical, surgical, hospitalisation, orthodontic and ophthalmological expenses. The plaintiff shall pay 100 per cent of all school and tuition costs, including tertiary level school and tuition costs and costs of extra-mural activities, except that any additional extra-mural activity shall have to be approved by the plaintiff, which approval the plaintiff shall not withhold unreasonably.
- (e) Each party shall retain any movable property he or she acquired before or during the subsistence of the marriage; and in that behalf, the defendant shall retain the motor vehicle VW Polo.
- (f) The property Erf 1....., M..... T... Street, A....., Windhoek, is awarded to the plaintiff as the sole and exclusive owner of that property, except that the plaintiff shall obtain a valuation of the property from the mortgagee Bank and pay to the defendant 50 per cent of the value of the property so determined by the Bank. After such payment has been made the defendant and the plaintiff must do all that is necessary and required, including signing all documents, to effect transfer of that property into the name of the plaintiff; and if the defendant fails or refuses to so act

when called upon to do so, the Deputy Sheriff responsible for Windhoek is hereby authorized to sign all such documents in the shortest possible time for purposes of transfer of the property into the name of the plaintiff.

- (g) Each party to pay his or her own costs.

C Parker
Acting Judge

APPEARANCES

PLAINTIFF : B D Basson
 Of BD Basson Inc., Windhoek

DEFENDANT: In Person