

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-ACT-MAT-2019/02448

In the matter between:

R W M

PLAINTIFF

And

F F M

DEFENDANT

Neutral citation: *RWM v FFM* (HC-MD-CIV-ACT-MAT-2019/02448) [2020]
NAHCMD 8 (17 January 2020)

Coram: **PRINSLOO J**
Heard: 26 November 2019
Delivered: 17 January 2020
Reasons: 21 January 2020

Flynote: Husband and wife – Spousal Maintenance – Spouse asking for spousal maintenance must establish he or she is in need of such maintenance – 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: In this matter the parties had a partial settlement in mediation in terms of division of assets and requested a ruling pending the divorce on the issue of spousal maintenance. Maintenance of one spouse by the other – Spouse asking for spousal maintenance must establish he or she is in need of such maintenance – Court applied principle in *Neil Roland Samuels v Petronella Samuels* Case No. I 902/2008 (I 902/2008) NAHC 28 (26 March 2010) – 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 – Court finding that the defendant needed the spousal maintenance – However, Court not inclined to make an order for permanent maintenance to the extent that defendant requested on the basis that the defendant relies very heavily on her age as an impediment to her getting a job and also on the fact that she has an impaired daughter to take care of. It must however be kept in mind that the plaintiff has no obligation towards the defendant's daughter as she is not his biological father. The defendant is not without skills and this is patently clear from her previous positions. At her age of 48 she still has a number of productive years ahead wherein she can get a job and earn a living. The Court is quite satisfied that the plaintiff can afford rehabilitative maintenance in the amount of N\$ 4500 and therefor the Court orders so.

ORDER

1. The plaintiff to pay rehabilitative maintenance to the defendant in the amount of N\$ 4500 per month with effect from the first day of the month following the date of granting of the final divorce and thereafter on or before the first day of each following month for a period of 24 months.
2. The plaintiff to retain the defendant on his medical aid for a period of 24 months from the date of decree of divorce.
3. The plaintiff to retain J N d K on his medical aid in so far as the medical aid fund is willing to allow it in the event of a final divorce order being granted.
4. Cost to follow the result.
5. The matter is postponed until **30 January 2020** at **15h00** for RCR Proceedings, allowing the defendant to proceed on her counterclaim.

RULING

PRINSLOO J:

Introduction

[1] The parties before this court were married to each other in community of property at Otjiwarongo on 18 December 2004 which marriage still subsists. No children were borne of this marriage. The defendant however has a daughter from a previous relationship but her daughter was never adopted by the plaintiff subsequent to the marriage. The defendant's daughter, who is currently 24 years of age is mentally impaired and still under the care of the defendant.

[2] The plaintiff instituted divorce proceedings and issued summons on 30 May 2019 seeking a final order of divorce and ancillary relief pertaining to the division of the joint estate. The defendant subsequently lodged a counterclaim on 16 September 2019 in terms of which the defendant claims the following relief:

- a) Final order of divorce;
- b) To be awarded immovable property in Block C, Rehoboth, Republic of Namibia;
- c) Equal division of the remainder of the estate;
- d) Spousal maintenance in the amount of N\$ 8000 per month, which amount to escalate at the rate of 7% per annum until the date of her remarriage or death.
- e) The plaintiff to maintain the defendant on his medical aid until her remarriage or death.

[3] The parties attended Alternative Dispute Resolution and was able to resolve the majority of the issues between them and a settlement agreement was filed in this regard. It was also agreed that the defendant would proceed with the divorce

proceedings on her counterclaim and the grounds on which the defendant will rely in seeking said divorce. The issue that the parties could not resolve amicably is the issue of spousal maintenance, which is to be determined before this court.

[4] The defendant claims spousal maintenance in the amount of N\$ 8000 per month and for the plaintiff to retain her on his medical aid until date of her remarriage or death. The plaintiff in turn tendered an amount of N\$ 3000 per month for a period of 12 months from date of final order of divorce. This tender was not accepted by the defendant. In addition the plaintiff further tendered the retention of the defendant's handicapped child on his medical aid, on condition that the medical aid fund permits this once the divorce proceedings has been finalized. This tender by the plaintiff was accepted by the defendant.

[5] The parties agreed that the issue of spousal maintenance will be adjudicated on the papers, in similar format as Rule 90 of the Rules of Court, which in essence allows for the filing of founding and answering papers. The parties were therefor not called to testify.

The existing and prospective means of each of the parties

The plaintiff

[6] The plaintiff is currently employed as a lecturer at UNAM, earning a net salary of N\$ 27 000 per month. In addition to the said fixed monthly income the plaintiff also earns additional income in the form of an old age pension in the amount of N\$ 1300 per month and an additional income at times when the plaintiff would be assigned to mark exam papers. This income may vary between N\$ 2000 to N\$ 10 000 per annum as it is dependent on what papers the plaintiff is assigned to mark and the duration of the sessions. It is also alleged that the plaintiff earns a yearly bonus equivalent to his monthly salary.

[7] The plaintiff, by agreement with the defendant, undertook to settle the debts of the parties which forms part of the joint estate. These debts includes a Standard Bank overdraft, a Bears account, an Ackermans' account, a Spar Rehoboth Hardware account and an American Swiss account. The total outstanding amount of

this debt as at 17th of October 2019 totalled an amount of N\$ 73 423.09. The plaintiff pays a total sum of N\$ 8711 per month towards settling this debt.

[8] The plaintiff also indicated in his answering papers that he makes monthly payment towards a Nissan Hardbody pickup in the amount of N\$ 6320.05 as well as the vehicle's insurance in the amount of N\$ 1400. From the submissions made to this court it appears that the vehicle has been sold, resulting in the monthly payment and contribution towards the insurance of the vehicle falling away.

[9] The plaintiff's monthly expenses also includes groceries, telephone, clothes, taxi fare, policies and legal expenses. According to the plaintiff's calculations his monthly expenses amounts to N\$ 27 933.08, which exceeds his monthly income. In this calculation the expenses in respect of the vehicle and insurance of the vehicle was included. This then means that the plaintiff has a N\$ 7720.05 available on a monthly basis.

[10] It is noticeable that the plaintiff does not make provision for payment of accommodation. However it was indicated by Ms O'Malley that the plaintiff is residing with a family friend and does not pay any rental at this stage.

The defendant

[11] It is common cause that the defendant is currently unemployed and was employed up to approximately 2012 when the couple moved to Windhoek and when the plaintiff secured fulltime employment with UNAM. Since 2012 the defendant was a homemaker, maintaining the joint household and also caring for her mentally impaired child. In order to supplement to the joint income of the parties the defendant started a nursery but this business venture was not profitable and as result she registered a day-care centre, which she conducted from home. The day-care centre is not currently operational and it is the intention of the defendant to register the day-care centre again from January 2020.

[12] It would not appear that the defendant has tertiary education but up to 2012 she was gainfully employed. Until 2007 the defendant was employed as a Chief Clerk with a Government Institution and during the period 2008 to 2012 the

defendant was employed as an administrative assistant at UNHCR. During her last employment period with UNHCR the defendant earned an income of N\$ 8000.

[13] The defendant avers that her employment ability is impaired as she would have to seek employment in Windhoek, which would mean that she has to commute between Rehoboth and Windhoek on a daily basis. The defendant further submitted that she is limited to homebased employment as she is the full-time caretaker of her impaired daughter, who was further traumatized by an incident relating to the plaintiff and which is *sub judice* at this point.

[14] Having regard to the previous earning capacity of the day-care centre the defendant estimates an income for the centre (once it is operational again) in the amount of N\$ 4800. The defendant also receives a rental income in respect of a flat in the amount of N\$ 2500 per month. The total projected income of the defendant is N\$ 7300.

[15] The monthly expenses listed by the defendant is calculated in the amount of N\$ 16 350. This expense would include groceries, meat, electricity, water, Wi-Fi, DSTV, fuel, clothing, medical aid, policies, pharmacy account, vehicle insurance and salary in respect of an assistant, presumably for the day-care centre.

[16] It is the case of the defendant that she has a short fall of more or less N\$ 9000 per month and without maintenance contribution from the plaintiff she will not be able to make ends meet.

[17] The defendant submitted that she is currently the sole provider of her impaired daughter but she intends to take steps to obtain maintenance from her daughter's father in order to assist in providing for the needs of their daughter.

[18] From the settlement agreement it appears that the defendant will be the owner of the immovable property, which forms part of the joint estate. As a term of the settlement agreement the defendant will become the sole and exclusive owner of the joint property situated in Block C, Rehoboth. This house has a minimal bond of approximately N\$ 32 000 registered against the house. The monthly instalments in respect of the bond is paid by the plaintiff.

The legal framework and application to the facts

[19] In his papers the plaintiff takes issue not so much with the monthly expenses of the defendant but more with her entitlement to permanent spousal maintenance. The plaintiff was resolute in his stance that the defendant should be entitled to rehabilitative maintenance only and tendered rehabilitative maintenance in the amount of N\$ 3000 for a period of twelve months.

[20] Damaseb JP, in *Neil Ronald Samuels v Petronella Samuels*¹ considered the aspect of spousal maintenance in an instance where the payment of spousal maintenance was claimed by the defendant (the wife), as follows:

‘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.’

[21] Following on the *Samuels* judgment Ueitele J made the following observations in *DK v DK*²:

[63] It is trite that when the legislature confers discretion on the court that discretion must be exercised judicially. One of the guiding principles is that the court will only grant maintenance if it is proven on a balance of probabilities that the party who asks for maintenance is in need of it — *Van Wyk* supra; *Hossack v Hossack* 1956 (3) SA 159 (W); *Portinho v Portinho* 1981 (2) SA 595 (T) at 597G – H where Van Dijkhorst J said:

“In my view the test to be applied is whether on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in s 7(2) come into play. If on the probabilities it is not shown that maintenance is or will not be needed no award thereof (whatever its size) can be made.”

[64] In *Hossack v Hossack* supra at 165B – F Ludorf J stated that maintenance is not to be granted as a matter of course. Factors taken into account in relation to the question as to whether maintenance should be granted at all and in regard to the amount thereof —

¹ (I 902/2008) NAHC 28 (26 March 2010) para 33.

² 2010 (2) NR 761 (HC).

“. . . includes such considerations as the period that the marriage has endured, the age of the innocent spouse and her qualifications for earning a living as well as the conduct of the guilty spouse”.

[22] Although the plaintiff initially took issue with the submission of the defendant based on the fact that the defendant was allowed to proceed with her counterclaim, the plaintiff felt that that amounted to an admission of guilt on his part. This contention was however departed from during oral argument and it is accepted that there is indeed an admission of guilt on the part of the plaintiff and that the defendant is the innocent party during these proceedings.

[23] This court accepts that for the past 7 years, since the parties relocated to Windhoek/Rehoboth the defendant was financially maintained by the plaintiff, who is holding good position at UNAM, whereas the defendant was a homemaker.

[24] From the facts placed before me it is clear that the plaintiff has a stable and regular income, which is supplemented with a monthly pension and a yearly service bonus and marking fees. The defendant on the other hand has currently no income and is financially dependent on the plaintiff. As the day-care centre has not been registered for 2020 and is not generating any income as yet it is clear that she cannot survive without the assistance of the plaintiff.

[25] This must however be tempered by the potential of the defendant to earn an income and maintain herself. The defendant relies very heavily on her age as an impediment to her getting a good position and also on the fact that she has an impaired daughter to take care of. It must however be kept in mind that the plaintiff has no obligation towards the defendant's daughter. Furthermore, this court gets the impression that the position of the defendant is that as she needs to care for her daughter the plaintiff must pay permanent maintenance, but this can surely not be the case. The biological father of the defendant's daughter has an obligation in respect of the maintenance of his child. A simple example of the expectations of the defendant is that she need DSTV for the entertainment of her daughter, yet as previously pointed out, the plaintiff has no obligation towards the defendant's daughter.

[26] Up to 2007 the defendant was gainfully employed which goes against her argument that she cannot leave her daughter alone. I must however immediately qualify that this court is not saying that the defendant must leave her impaired daughter alone, but surely she will be able to get the assistance of a carer to enable her to look for alternative employment. The argument that the defendant is limited to homebound employment hold no merits. In any event if one considers the defendant's list of income and expenditure it would appear that she would earn N\$ 4800 per month from the day-care centre yet she needs to pay N\$ 2000 for an assistant and N\$ 700 per month for Wi-Fi. This leaves the defendant with a 'profit' of N\$ 2100 per month. In this 'profit' there is no food or the cost of the utilities included in the defendant's calculations in respect of the day-care centre. From a cursory glance at the defendant's figures it appears that the day-care is bound to run at a loss. This court must therefore question the correctness of the defendant's figures presented to court.

[27] The plaintiff makes no averments of ill health or any incapacity which will preclude her from earning a living and supporting herself. What is a given fact is that the defendant makes a concerted effort to secure employment with remuneration. This court understands that in the current economic climate obtaining employment will not happen overnight and therefore whilst the defendant makes the efforts to obtain employment there will be a period wherein she will require the financial assistance by the plaintiff.

[28] The defendant is not without skills and this is patently clear from her previous positions that she held with the Government and UNHCR. To hold these positions the defendant must have had administrative and computer skills and it is the attitude of this court that the defendant has the potential to be gainfully employed. I am of the opinion that too much emphasises is placed on the age of the defendant. At her age of 48 she still has a number of productive years ahead wherein she can contribute to the economy and the job market and earn a living.

[29] H R Halho in *The South African Law of Husband and Wife*³ remarked as follows:

³ 5 ed at 364.

'Today, the courts are no longer prepared to award maintenance to young women who has been working before marriage, and can be expected to work again after the divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. Middle-aged women who have for years devoted themselves full-time to the management of a house hold and care of the children of the marriage are awarded 'rehabilitative maintenance' for a period sufficient to enable them to be trained or retrained for a job or profession. 'Permanent maintenance' is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry.'

[30] The defendant will not be in the same position as she was prior to divorce but she is not per se 'entitled to be placed in the same position in regard to maintenance as if she were still married to the husband'⁴. In the circumstances, I am not inclined to make an order for permanent maintenance to the extent that defendant requested it.

[31] The purpose of divorce is to cut all ties and it is incumbent on this court to equip the defendant to live independently of the plaintiff and to focus on developing and empowering herself to secure and sustain her future. I am of the considered view that a period of two years of rehabilitative maintenance is reasonable given the circumstances. The approach taken by this court is bolstered by the fact that the defendant will receive an unencumbered immovable property as part of the settlement agreement as well as be cleared of any debt which will go a long way in enabling the defendant to achieve self-sufficiency.

[32] I am quite satisfied that the plaintiff can afford rehabilitative maintenance in the amount of N\$ 4500. The fact that the vehicle (and insurance) that he is currently paying is about to be sold, if it is not sold already, clears approximately N\$ 7720 per month from the plaintiff's projected expenses. Over and above the maintenance the plaintiff will be required to maintain the defendant on his medical aid for the duration of the rehabilitative maintenance order which amounts to approximately N\$ 2000 per month. It should also be noted that in terms of the settlement agreement the plaintiff will also retain the defendant's daughter on his medical aid in so far as the medical aid will allow it.

⁴ *Samuels v Samuels* footnote 1.

[33] My order is therefor as follows:

1. The plaintiff to pay rehabilitative maintenance to the defendant in the amount of N\$ 4500 per month with effect from the first day of the month following the date of granting of the final divorce and thereafter on or before the first day of each following month for a period of 24 months.
2. The plaintiff to retain the defendant on his medical aid for a period of 24 months from the date of decree of divorce.
3. The plaintiff to retain J N d K on his medical aid in so far as the medical aid fund is willing to allow it in the event of a final divorce order being granted.
4. Cost to follow the result.
5. The matter is postponed until **30 January 2020** at **15h00** for RCR Proceedings, allowing the defendant to proceed on her counterclaim.

JS Prinsloo

APPEARANCES:

PLAINTIFF:

V O'Malley
Kangueehi & Kavendjii Inc.

DEFENDANT:

A Delport
Delport Legal Practitioners