

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2020/01963

In the matter between:

J H N

PLAINTIFF

and

L T N

DEFENDANT

Neutral Citation: *JHN vs LTN* (HC-MD-CIV-ACT-MAT-2020/01963) [2021] NAHCMD 227 (12 May 2021)

CORAM: SIBEYA J

Heard: 26 – 27 April 2021

Delivered: 12 May 2021

Flynotes: Husband and wife – Divorce – Claims by plaintiff - Counterclaim by defendant – Parties raising mutually destructive versions in terms of the cause of the

breakdown of the marriage – Court to determine whether the plaintiff or the defendant caused the breakdown of the marriage – Court forming the view that based on a balance of probabilities, the defendant's conduct 'drove' the plaintiff out of the marriage but the plaintiff is not spared as he engaged in extra marital affairs – Marriage irretrievably broken down.

Summary: The facts are as they appear in the judgment below.

ORDER

1. The court hereby condones the plaintiff's adultery.
2. The subsistence of the marriage between the plaintiff and the defendant is hereby dissolved.
3. Custody and control of the minor children is awarded to the defendant subject to the plaintiff's reasonable access, such access to be exercised at the defendant's premises.
4. The plaintiff must pay maintenance to the amount of N\$1000 per month per child.
5. The defendant will be responsible for payment of N\$1000 towards the nanny's monthly fees.
6. The parties must contribute 50% each to all school fees for primary and secondary education of the minor children, extra-mural activities including but not limited to clothing, sport apparatus and other activities incidental thereto, as well as tertiary education of the children should the minor children show an aptitude therefore and in so far as such costs are not covered by bursaries.
7. The defendant must retain the children on her medical aid and the plaintiff must pay 100% of all excess regarding the costs of medical, surgical, pharmaceutical, orthodontic, hospital and related expenses for the minor children.

8. Each party retains all the assets and liabilities currently in his or her names and/or possessions.
9. There is no order as to costs.
10. The matter is removed from the roll and is regarded as finalized.

RULING

SIBEYA J

[1] The plaintiff instituted divorce proceedings against the defendant on 29 May 2020 in terms of which he based his claim for a final order of divorce, alternatively restitution of conjugal rights on the following alleged conduct of the defendant:

- a) Shows no love and affection towards the plaintiff;
- b) Fails to communicate with the plaintiff;
- c) Elicits unnecessary quarrels with the plaintiff;
- d) Uses foul and abusive language towards the plaintiff;
- e) Shows extreme fits of jealousy;
- f) Fails to contribute to the financial expenses of the common household;
- g) Engages in activities of witchcraft.

[2] Based on the abovementioned conduct, the plaintiff moved out of the common home on 22 March 2020 and further became involved in an extra-marital affair with another woman, wherefore the plaintiff sought condonation from this court. Accordingly, the plaintiff came to the conclusion that the defendant has wrongfully and constructively deserted him, in which desertion she persists.

[3] The defendant, acting in-person, opposed the relief sought by the plaintiff and stated that it is in actual fact the plaintiff that brought about the breakdown of the marriage by engaging in extra-marital affairs from 2017. Notwithstanding the alleged affairs, the defendant submitted that she forgave the plaintiff. She further literally begged the plaintiff to return to the marital home after he moved out in 2020. As a result, she submitted, that it is the plaintiff who denied her marital rights and not the contrary.

[4] The defendant denied the allegations of practicing or being involved in witchcraft, which she claims that she does not believe in. The defendant testified that she attempted to salvage the marriage by initiating family interventions. She further proposed that the parties should seek counselling from a social worker or common person to the parties, but these proposals fell on deaf ears.

[5] The defendant denied being a jealous person. Hers was a concern which she expressed when she pounced on the plaintiff with other women, whom he admitted to having extra-marital affairs with. The defendant described this concern to be associated with love and eagerness to preserve a marriage. She further stated that she has been contributing to the household by paying for the children's medical aid, purchasing furniture and utensils, monthly groceries, children's food and clothes, toiletries, contributing to electricity payments and providing plaintiff with transport funds.

[6] The plaintiff, on the other hand, testified that whenever they would have marital problems, the defendant would not discuss same with him but rather involved other family members and friends. The plaintiff testified further that he would find out about the defendant's concerns about the marriage from third parties, without same being directly addressed with him. The plaintiff testified further that, despite his efforts for the parties to sit down and see how to resolve problems, the defendant persisted with her chosen method of addressing their marital problems with third parties. The defendant's approach, made it difficult for the parties to amicably resolve their disputes, claimed the plaintiff.

[7] The plaintiff further testified that the defendant continuously used foul and abusive language towards him and threatened to deal with him. He believed that the defendant would eventually carry out such threats. The plaintiff testified that he took the threats seriously and began to fear the defendant.

[8] The plaintiff further testified that the defendant believes in witchcraft and traditional healers. This belief she never revealed to the plaintiff. The plaintiff testified that he confirmed the witchcraft activities in August 2019, when he recovered his underpants and two vests which went missing between 2018 and 2019, in the defendant's handbag wrapped in a black plastic bag, together with items associated with witchdoctors. The plaintiff testified further that when he confronted the defendant about the witchcraft activities, she initially denied but later admitted and promised to cease such activities. Notwithstanding, so the testimony went, the plaintiff persisted with her activities. This led the plaintiff to fear for his life, and he could no longer sleep in peace next to the defendant.

[9] The plaintiff further testified that he made several attempts to save the marriage, but the defendant's failure to change her conduct made it impossible to continue with their relationship.

Discussion

[10] From the evidence adduced during trial, it became apparent that each party contributed to the breakdown of the marriage. There is testimony that the defendant conducted or sought-after witchcraft activities while the plaintiff engaged in extra-marital affairs, all of which collapsed the marriage. With such testimony and beliefs held by each party against the other, it is apparent that the marriage has irretrievably broken. The parties are playing the blame-game in respect of who initially broke down the marriage.

[11] In such circumstances, it is rather difficult to pin either party as being responsible for disintegrating the marriage union. Both parties have presented two mutually destructive versions.

[12] The defendant stated that the plaintiff requested her to leave the common home as he allegedly indicated to her that he no longer wished to stay with her. This request was rejected by the defendant. Subsequently, so claimed the defendant, the plaintiff elected to move out of the common home. The plaintiff was emphatic that the decision to move out of the common home was premised on the defendant's difficult or unreasonable behaviour alluded to above, and admitted to getting involved in an extra-marital affair to which he seeks condonation.

[13] The plaintiff remained steadfast on the point that he became fearful for his life by the fact that the defendant seemingly engaged in witchcraft practices and utilises traditional herbs and consults traditional healers. This was buttressed by the defendant's testimony that when their minor child was sick, she approached a traditional healer. She mentioned that she informed the plaintiff about this however this version was never put to the plaintiff during cross examination. In respect of the plaintiff's evidence about his missing underpants and vests being found in the defendant's bag, the defendant, although not disputing same, stated that these items were in the minor children's bedroom.

[14] It is evident that the witchcraft issue is one of the sources of the collapse of the marriage. In the mind of the plaintiff, this is solidified by the position that the defendant has not undertaken to cease from practicing witchcraft and consulting traditional healers. The plaintiff has also testified that he jumps out of bed when the defendant touches him, as he is afraid of her.

[15] In respect of the ground that the defendant fails to communicate directly with the plaintiff and only finds out from third parties about their marital problems, the defendant did not dispute this. She however qualified the statement and testified that she

consulted family members and the person who was the best man at their wedding about their marital problems. This corroborates the evidence of the plaintiff and on a balance of probabilities, it may be probably true. I therefore find that on a balance of probabilities the defendant's conduct 'drove' the plaintiff out of the marriage. This, however does not exonerate the plaintiff and he retain his fair share of the blame for the breakdown of the marriage attributed to his involvement in extra marital affairs with other women. Both parties are therefore at fault. Suffice to state that the marriage has irretrievably broken down.

[16] Regarding parenting of minor children, the Supreme Court in *P v P*¹ remarked that in recent cases, the value systems and societal beliefs underpinning the “maternal preference” or “tender years” principle have been challenged and the Courts have stressed “that parenting is a gender-neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era.” Evidently, the overriding reason for this development is that the interests of the child must prevail. It is further well established that the court is the upper guardian of the children, and therefore the courts should jealously guard the interest of the children, while ensuring the protection of their welfare as the primary concern.

[17] In *McCall v McCall*, it was stated that in determining what is in the best interest of the child concerned, the court must decide as to which parent is able to promote and ensure the physical, moral, emotional and spiritual welfare of the child. In this regard, it has been stated that the court is to *inter alia*, have regard to the following factors:

- a) The love, affection and other emotional ties which exist between parent and child and a parent's compatibility with the child;
- b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

¹ *P v P* 2007 (5) SA 94 (SCA) para. 26 (101J–102A); *P v P* (*supra*) para. 26 (101E–F).

- c) The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- d) The capacity and disposition of the parent to give the child the guidance which he/she requires, etc.²

[18] In this regard, the Plaintiff testified that he wants to remain an active father, that he is a father of three other children and that he would like all his children to bond and know each other. He wants to exercise his rights to reasonable access to his two minor children, without being confined to the premises or presence of the defendant. The defendant on this point stated that her main reasons for opposing the access sought by the plaintiff to have the minor children every second holiday and 50% of holidays is because firstly, he hid himself away from the defendant when he moved out of the common home. The plaintiff remarked on this aspect that he informed her of the area where he was staying when he moved out and further submitted that that he undertakes to inform the defendant of his address should he relocate so that she would be at liberty to drop-off and collect the children.

[19] The defendant stated in his affidavit,³ which was received into evidence, *inter alia*, that:

'I am a father of 5 children..., including a daughter whom I solely raised by (sic) since she was 4 years old and she currently lives with me while attending University. I am perfectly capable of taking care of my sons responsibly while they are with me. My eldest daughter, who used to live in our common home, will also be around to assist me with the boys whilst they are in my care. My extended family love our boys and thus (sic) will be well taken care off even during holidays.'

[20] The above paragraph suggests that the plaintiff has a stable home where reasonable access can be granted to him resulting in minor children being able to visit

² *McCall v McCall* 1994 (3) SA 201 (C) at 204 T- 205 G; DM v SM 2008 (2) NR 704 (HC).

³ Affidavit in terms of Rule 89(2)(b) dated 26 October 2020.

him, and spend days at his place of residence. The affidavit reveals that his eldest daughter whom he raised from the tender age of four years lives with him and will be around to assist with the minor children. Astoundingly, while providing oral evidence in court, the plaintiff testified that he lives alone at his place of residence. No explanation was tendered as to why in October 2020 he stated that he lived with his eldest daughter if he did not reside with her. If it is suggested that probably her daughter moved out of his house after October 2020 but before he testified in court in April 2021, the long and short answer thereto is that there is simply no evidence to that effect.

[21] It consequentially follows that the version that the plaintiff lives with his eldest daughter who will assist him in taking care of the minor children stands in total contrast to his testimony that he lives alone. In this respect oral evidence under oath prevails that the plaintiff lives alone at his place of residence. Although the question why the plaintiff would say that he lives with his eldest daughter while in the same breath stating that he lives alone was not explained by the plaintiff, the intention of such statement can be deduced from the latter part of the sentence where it appears. The latter part provides that: "My eldest daughter ... will be around to assist me with the boys while they are in my care."

[22] It is not easy to understand the intention of the plaintiff why he decided to draw in his eldest daughter in his claim for access to the children at his residence. It could be said that the plaintiff brought in his eldest daughter to assist him to take care of his children because: (a) he doubts his capability to take care of the children on his own and at his place of residence; or (b) to convince the court that the children will be well cared for because over and above his presence, his daughter (who turned out not to live there) will also be at his residence because she lives there after all. The intention of the plaintiff drifts more to have been to convince this court that his eldest daughter who resides with him will be around to help him take care of the children. This I find to be misleading to say the least and raises doubts whether the plaintiff can on his own (as he resides alone) take care of his children at his place of residence.

[23] The court being the upper guardian of the children should be reluctant to send children to a place where it harbours doubt whether their welfare will be protected. In this case the plaintiff claims that custody and control of the minor children be awarded to the defendant subject to his right of reasonable access, such access not to be limited to the place or presence of the defendant. This court has no qualms with the request that custody and control to be awarded to the defendant subject to the plaintiff's right of reasonable access.

[24] There is mutually destructive evidence that as defendant claims, when the plaintiff left the common home, he resided with his lover with whom he had an extra marital affair. The plaintiff testified contrariwise that when he left the common home, he went to live with his aunty whereafter he moved to his current residence. I must point out that the plaintiff was not impressive as witness when he testified about the places where he resided from the time that he left the common home. His movements were sketchy and left much to be desired.

[25] On the other hand, it is a fact that since birth, the children resided with the defendant and the defendant proffered no reason why the plaintiff should not have access to the children at her residence. She only opposed the claim for the plaintiff to take the children to his place of residence. She further submitted that the plaintiff did not establish that his place of residence is conducive to the children. He also did not produce a social welfare report to assist in this regard, so she claimed. I am inclined to accede to her submission that the plaintiff did not establish that his place is conducive to the children. This is buttressed by the unimpressive testimony of the plaintiff regarding the places where he stayed after leaving the common home and fabrication about living with his eldest daughter who would assist with caring for the children. In the premises I am not convinced that the plaintiff proved that he should be granted reasonable access to the children at his place of residence. I do not find any particular evidence why the plaintiff's access to the children should always be in the presence of the defendant but same should only be at the defendant's residence.

[26] Regarding maintenance, the evidence adduced is that the plaintiff paid maintenance in the amount of N\$1200.00 per month and a further extra N\$1000.00 towards the nanny of the minor children. He indicated that he will not be able to afford to pay more than that because of his own growing needs. The plaintiff further submitted that he is able to pay 50% of the minor children's school fees as well as excess fees on the medical aid. The plaintiff further testified on the financial overload that he suffers and that he would not be able to afford an amount over N\$600.00 per minor child. The defendant on the other hand, offered to pay the nanny's costs. The plaintiff testified that his payslip does not make room for extra expenses and the N\$1000.00 paid in nanny fees can thus be adjusted to cover school fees and the medical excess fees, which would make up the N\$1000.00 paid to the nanny.

[27] Further on the issue of the joint estate, the plaintiff submitted that when he left the common home in March 2020, he took his personal belongings and left the defendant with the furniture, beddings, cutlery and other household goods. The plaintiff further gave the proposition that the defendant can retain these properties in her possession and further that all parties retain all the assets and liabilities currently in their names and/or possessions. On this note, there are no suggestions or counters made by the defendant and there are no reasons advanced why this position cannot be adopted.

[28] In view of the counter accusations and testimonies against each other and no ultimate success for either party, I find it befitting within the exercise of my discretion that neither party should be mulcted in costs.

[29] In the result, I make the following orders:

1. The court hereby condones the plaintiff's adultery.
2. The subsistence of the marriage between the plaintiff and the defendant is hereby dissolved.
3. Custody and control of the minor children is awarded to the defendant subject to the plaintiff's reasonable access, such access to be exercised at the defendant's

premises.

4. The plaintiff must pay maintenance to the amount of N\$1000 per month per child.
5. The defendant will be responsible for payment of N\$1000 towards the nanny's monthly fees.
6. The parties must contribute 50% each to all school fees for primary and secondary education of the minor children, extra-mural activities including but not limited to clothing, sport apparatus and other activities incidental thereto, as well as tertiary education of the children should the minor children show an aptitude therefore and in so far as such costs are not covered by bursaries.
7. The defendant must retain the children on her medical aid and the plaintiff must pay 100% of all excess regarding the costs of medical, surgical, pharmaceutical, orthodontic, hospital and related expenses for the minor children.
8. Each party retains all the assets and liabilities currently in his or her names and/or possessions.
9. There is no order as to costs.
10. The matter is removed from the roll and is regarded as finalized.

O SIBEYA

Judge

APPEARANCES:

FOR THE PLAINTIFF:

R Shipindo

Metcalfe Beukes Attorneys

FOR THE DEFENDANT:

In-Person