



'Reportable'

SUMMARY

CASE NO.: I 1382/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERASTUS HAILONGA ANDREAS v JOHANNA KATHINDI

PARKER J

2012 March 16

Husband and wife - Maintenance – Maintenance of children of the family – In instance case Court taking into consideration existing maintenance of the children in the amount of N\$1,400.00 per month as ordered by the Magistrates (Maintenance) Court.

Husband and wife - Maintenance – Maintenance of children of the family – Duty of support – By both parents in proportion to their relative means and circumstances and the needs of the children.

Held, that duty rests upon divorced parents to maintain a child of the dissolved marriage, and the incidence of the duty in respect of each depends upon their relative means and circumstances and the needs of the child from time to time.

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERASTUS HAILONGA ANDREAS

Plaintiff

and

JOHANNA KATHINDI

Defendant

CORAM: PARKER J

Heard on: 2012 February 15 – 16

Delivered on: 2012 March 16

JUDGMENT

PARKER J: [1] The plaintiff instituted the present action against the defendant which the defendant defends and has also instituted a counterclaim.

[2] The personal circumstances and particulars that are relevant to the matter in hand are as follows: The plaintiff resides at No. 36 Military Base (of the Namibia Defence Force (NDF), Suiderhof, Windhoek, and he is employed as Master Chef at the Base. His gross remuneration per month as at December 2011 is N\$7,467.25, and his net remuneration is N\$2,630.32. The difference is made up of deductions amounting to N\$4,836.93, which include N\$1,400.00 being an amount for the maintenance of the children as order by the Magistrates (Maintenance) Court, Windhoek. The defendant is not employed in any formal sector. She derives an income of averagely N\$500.00 per month by selling meat in front of her home. She testified that her older brother used to assist her

financially to make ends meet but that source has dried up because the brother was 'fed up now' with the arrangement.

[3] The plaintiff and defendant are married out of community of property. The parties do not own any immovable property, and they are the joint owners of the moveable property listed in para 4.4.1 of the defendant's affidavit filed pursuant to rule 37(6)(b) of the Rules. There is no such list in the plaintiff's rule 37(6)(b) affidavit. In her affidavit the defendant states, 'There are no matrimonial liabilities. That is, there are no outstanding expenses or debts that have been incurred by the defendant and the plaintiff jointly for the purposes of running our common house.' That is not correct. As Ms Schulz, counsel for the plaintiff, reminded the Court, there is an amount of N\$7,550.00 outstanding on Taimi's fees and charges as at 15 November 2012 (Exh B). I shall revert to the issue of moveable property and the debt of N\$7,550.00 in due course. The parties have reached an agreement that the custody and control of the children be awarded to the defendant, with the plaintiff having reasonable access to them.

[4] There are four children of the family, being:

- (1) Taimi Andreas, born 31 July 1991,
- (2) Emilia Andreas, born 9 October 1994,
- (3) Johanna Andreas, born 10 September 1996, and
- (4) Ndinelago Andreas, born 9 September 1998.

Taimi is undergoing a four-year course of studies in Electrical and Electronics Engineering at the Triumphant College, Windhoek (Exh B). It is not clear from Exh B what qualification Taimi will gain if she is 'triumphant' in her course of studies. She is presently in her second year. As respects Taimi; Ms Schulz

submits that Taimi's college 'is a very expensive school', meaning, as I understand it, that Taimi should enroll in a 'cheap', inexpensive college. But we must remember that the defendant testified that Taimi had informed her that it is her cherished desire to pursue such a course of study as she wishes to qualify as an electrical and electronics engineer. I do not think this Court should assist in any way in killing Taimi's dream; and what is more, Ms Schulz did not adduce any evidence tending to show that there is a cheaper college in Namibia where Taimi can realize her dream. Emilia is in Grade 12 at Mwandikange Kaulinge Secondary School, Ondobe, Ohangwena Region (Exh C). Emilia, Johanna and Ndinelago live with their 92-year old maternal grandmother 'in the North'.

[5] I accept as credible the defendant's evidence that about every two months she goes to visit them and gives them money on continual basis for their upkeep 'in the North' to enable them to eat, to bath every day and to have toiletries and clothes. That, according to the defendant, is her contribution towards supporting the children. I find it to be unreasonable and unfair Ms Schulz's attempt to pin down the defendant to telling the Court how much amount of money she forks out as her contribution towards the support of the children living 'in the North'. The defendant's testimony as to what she does by way of supporting these children is not beyond belief and strange in human experience, considering the fact that those children are living with the defendant's 92-year old mother. In any case, no contrary evidence in that behalf was placed before the Court.

[6] In her rule 37(6)(b) affidavit and her testimony during the trial the defendant gave figures representing the financial needs of the children as follows:

Taimi	N\$ 1,634.00
Emilia	N\$ 1,797.00

Johanna	N\$ 300.00
Ndinelago	N\$ 300.00

It is worth noting that all these amounts relate to school fees and school charges and connected and incidental expenses. They do not cover out-of-school expenses covering meals, toiletries and clothing and suchlike items which are necessities for the upkeep of children.

[7] In his evidence-in-chief the plaintiff testified that Emilia, Johanna and Ndinelago live with their material grandmother (as aforesaid) and their residence is so close to their schools that he does not see the justification for transport expenses included in the calculation because they walk to and from school. This piece of evidence remained unchallenged at the close of the plaintiff's case. It is therefore reasonable and fair to reduce by N\$100.00 the transport cost appearing against the names of Emilia, Johanna and Ndinelago.

[8] From the proposed pre-trial order submitted in terms of rule 37 of the Rules and the submission by counsel it seems to me clear that the only remaining dispute dividing the parties is the issue of maintenance of the children. The defendant claims a maintenance amount of N\$5,000.00 per month for the children. Ms Schulz is correct in her submission that from the aforementioned calculations set out previously the amount should rather be N\$4,031.00 and not N\$5,000.00. I did not hear Ms Angula, counsel for the defendant, to submit contrariwise.

[9] Be that as it may, it is the plaintiff's position that he is unable to pay N\$5,000.00, and I presume that that applies also to the new amount of

N\$4,031.00. And in support of his position the plaintiff submitted his Pay-slip (Exh A) which shows the amounts I have set out previously. Apart from his remuneration from his employer, the evidence establishes that the plaintiff earns between N\$500 – N\$800 per month from selling chicken. Added to all this should be N\$50,000.00 that will surely come to the plaintiff *qua* 'veteran' from the Ministry of Veteran Affairs in terms of the Veterans Act, 2008 (Act No. 2 of 2008). The income from his chicken trade and the payment from the Ministry of Veteran Affairs, I must note, were omitted from the plaintiff's rule 37(6)(b) affidavit. But this Court can not overlook such income in the present proceedings. Ms Schulz submitted that the Court should also take into account the fact that there are other children, apart from the children of the family, whom the plaintiff is looking after. This is not stated in the plaintiff's rule 37(6)(b) affidavit; and so in virtue of rule 37 I shall not take cognizance of it. In any case, no evidence relating thereto has been placed before the Court. But I accept the plaintiff's evidence that Taimi visits him from time to time and on those occasions he gives her amounts of money that he could afford. I assume that this father-and-daughter arrangement will continue. In ordering the amount of maintenance contained in the order below I have taken this arrangement into account, as well as the aforementioned N\$1,400.00 ordered by the lower court.

[10] It has been said authoritatively that in making an order for the maintenance of a child of the family the Court ought to take into account that the duty of supporting a child of the dissolved marriage is common to the divorced parents, and the incidence of the duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time (*Kemp v Kemp* 1958 (3) SA 736 (D); *Ex parte Pienaar* 1964 (1) SA 600 (T)). Accordingly, I accept the submission by both counsel on the point that it is the

duty of both parents in the instant case to support the children; 'but we must also bear in mind that it is according to their means,' Ms Angula added. The court ought to also take into account the needs of the children, the social status of the parties, and the length of time for which the maintenance should be paid (CJM Nathan, *South African Divorce Handbook*, 1970: p 37). I respectfully accept the aforementioned case law and textual authority as laying down the correct approach under the law to be followed when a court is considering the maintenance of children of the dissolved marriage, and so I adopt them.

[11] Having carefully considered the evidence as a whole against the backdrop of the authorities discussed above, I have come to the conclusion that the order respecting maintenance of the children of the family I have made below is reasonable and fair and it meets the justice of the case. Lest I forget, I note that I have not dealt with moveable property of the family because such property is not itemized in the parties' joint proposed pre-trial order as one of the issues of law or fact to be resolved during the trial. In any case, no oral evidence was adduced thereanent. As to costs, I make no order as to costs. In the nature of the case, it would be just and fair that each party pays his or her own costs.

[12] Whereupon, I make the following order:

1. The bonds of marriage subsisting between the plaintiff and defendant are hereby dissolved.
2. By agreement between the parties, custody and control of the children are awarded to the defendant, and the plaintiff shall have reasonable access to the children.

3. The plaintiff must pay N\$7,550.00 to redeem the debt owed to Triumphant College by the parties in respect of Taimi.
4. The plaintiff must pay as maintenance for the children **N\$2,431.00** per month, broken down as follows –

Taimi	1,634.00	
Emilia	1,797.00	
Johanna	200.00	
Ndinelago	<u>200.00</u>	
Sub-Total	3,831.00	
	<u>-1,400.00</u>	(the lower court maintenance order)
Total:	2,431.00	
	=====	

5. There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF: Ms F Schulz

Instructed by: PD Theron Associates

COUNSEL ON BEHALF OF THE DEFENDANT: Ms A Angula

Instructed by: Sisa Namandje & Co. Inc.