REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-APP-AMC-2018/00015

In the matter between:

CLEVERLY AFRIKANER **APPELLANT**

and

CAROLINE JORINDA ROOINASIE **RESPONDENT**

Neutral citation: *Afrikaner v Rooinasie* (HC-MD-CIV-APP-AMC-2018/00015) [2019] NAHCMD 228 (3 July 2019)

Coram: ANGULA DJP
Heard: **29 March 2019**
Delivered: **3 July 2019**

Flynote: Civil Appeal – Maintenance Order – Amount ordered unreasonable and Excessive – Best interest of the child – Court *a quo* failed to take all the relevant facts into account.

Summary: This is an appeal against the maintenance order made by the maintenance court, essentially on ground that the appellant is unable to comply with the order as it is excessive and beyond his income – Appellant is earning a monthly salary of N$15 000. He has five children whom he, under the law, is obliged to

maintain – He has been ordered to pay N$6 000 in respect of two of the five children – The appellant remains legally responsible for the maintenance of the other three of his children – The appellant subsequent to the hearing before the court *a quo* got married to another woman and therefore by law responsible for his wife's maintenance as well – In addition, he is, morally and culturally, responsible for the maintenance of his elderly mother.

Held, that all children of the appellant have the legal right to be maintained, in equal amounts, by the appellant.

Held, further that the maintenance amounts must not only be reasonable and fair, but must also be affordable and must not have the potential of leading to impossibility of performance.

Held, accordingly that the appeal is upheld.

ORDER

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1. The appeal is upheld.

2. The order by the court *a quo* is set aside.

3. The matter is remitted back to the maintenance court before a different presiding officer to hear the matter *de novo*.

4. There is no order as to costs.

5. The matter is removed from the roll and regarded finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an appeal against the order of the maintenance court sitting at Windhoek, made on 15 October 2018.

[2] The appellant is Mr Cleverly Afrikaner, an adult male. He is the father of the two children in whose favour the maintenance order appealed against, was made. He is a father of three other children. In other words, the appellant is a father of five children, whom he is in law responsible to maintain.

[3] The respondent is Ms Caroline Jorinda Rooinasie, an adult female person and the mother of the two children born out of the relationship with the appellant, in respect of whom the maintenance order was made. She is gainfully employed as a receptionist at a firm in Windhoek.

Brief background

[4] The appellant and the respondent begot two daughters during the subsistence of their relationship. It would appear that shortly after this relationship ended, the maintenance of the two children became an issue. Subsequently, the appellant removed the two children from his medical aid. This act by the appellant prompted the respondent to approach the maintenance court seeking an order of maintenance in respect of her two daughters. They were 19 and 16 years respectively at the time. On 15 October 2018 the maintenance court, after holding an inquiry, ordered that appellant pays a sum of N$6 000 in respect of the maintenance of the two children and further that he re-instates the children on his medical aid fund.

[5] The appellant, aggrieved by the order, filed a notice of appeal on 13 November 2018 with the clerk of the maintenance court. The appeal is against the whole order of the maintenance court.

Grounds of appeal

[6] The grounds of appeal are rather repetitive. I will therefore summarize same so as to capture the gist of the issues for determination on this appeal.

[7] The appellant asserts that the court *a quo* erred on the facts when it, notwithstanding the respondent's evidence that she earns a monthly net salary of N$4 297.38, accepted that she spends between N$9 000 – N$10 270 on the two children in question per month. Furthermore, that the receipts submitted by the respondent, as proof of the alleged expenses in respect of maintenance for the children, did not bear the respondent's name and should not have been accepted as conclusive evidence of expenses incurred by the respondent. As a further ground of appeal, the appellant asserts that no bank statements were submitted to substantiate the respondent's version in respect of the alleged expenses on the two children.

[8] As a further ground of appeal, the appellant asserts that the court *a quo* erred on facts and/or in law by failing to apply the principles set out in s 4 of the Maintenance Act, 9 of 2003, in that the court failed to consider the appellant's version that he maintained his children according to his means and upon requests by the children. A further ground is that the court misdirected itself when it found that the maintenance amount of N$6 000 is reasonable and fair, considering the income of both parents and the reasonable cost of living in respect the children and the parents. Finally, it is contended that the court *a quo* made the order for the appellant to pay the sum of N$6 000 in respect of two of the appellant's children, without regard to the appellant's other three children and his wife.

<u>Proceedings before the court *a quo*</u>

[9] It was the appellant's evidence that, he earns a monthly income of N$15 000; that his expenses amount to N$13 100. In support of this he attached a detailed document which was admitted into evidence as Exhibit 'E1'. It would appear that at a certain stage, the appellant decided to get married to another woman. In an effort to cut costs and in preparation for the forthcoming wedding, he removed the two children from his medical aid fund. It appears from the record of proceedings, that he removed the children without giving a reason for his decision. It was further his

evidence that he supports his mother and makes monthly contributions towards the maintenance of the two children. He strongly denied that he failed to support his daughters. He asserted that he maintained his children sporadically since 2017, upon their request, but that prior to that he maintained them on a monthly basis. It was the appellant's case that, due to his other financial obligations, he would only be able to afford to pay N$400 per child per month in maintenance.

[10] It was the respondent's evidence that she solely maintained the children for the period April 2015 – March 2018. It was also her case, that the appellant removed the children from his medical aid. It was further her evidence during the inquiry in terms of s 13 of the Maintenance Act that she pays N$1 000 monthly to Montac College in respect of the eldest of the daughters, however in her affidavit she stated that she pays N$2 000. She further testified that she pays for transport to school in respect of both children and that she also pays for the children's extra-mural activities as well as their groceries. She claimed that in total she spends N$9 000 – N$10 270 per month in respect of the two children. It was further her evidence that after the appellant removed the children from the medical aid fund, she will need N$3 000 per month in respect of their medical expenses.

[11] The two girls filed written submissions and it appears from the record that they were individually interviewed regarding the complaint of appellant's failure to maintain them. They indicated to the court during these interviews that they have financial needs which need to be met every month and not every other month. The youngest girl indicated that her monthly needs amount to roughly N$7 020, whereas the oldest girl indicated that her monthly needs amount to roughly N$3 250. In their supplementary affidavits filed of record, the two girls stated that as teenagers their monthly needs in terms of money amounts to N$10 270.

Findings by the court *a quo*

[12] The court *a quo* found that having regard to the respective amounts the two children said they need monthly, compared to the sum of N$6 000 the respondent was demanding, the sum of N$6 000 was not 'an exaggeration or selfish demand when one had regard to the costs of living in this middle income society or country'.

The court reasoned that the fact that the appellant has other children and other persons to look after should not disadvantage other dependants who do not live with him. The court further, found that even though the appellant claimed that he supports his other children, he failed to submit documentary evidence in that regard. The court further found that the appellant has the means to maintain his daughters, but neglected to do so. It reasoned that the appellant must rather cut down the payment he was making to Lewis Store in respect of his fiancé's account.

[13] Without any effort to clarify the issue of whether the amount paid to Montac College is N$2 000 or N$1 000, the court concluded that it was satisfied that the respondent had made out a case for the relief she sought. The court reasoned that, the appellant removing the children from his medical aid to save for his wedding was inconsiderate and not in the best interest of the minor children. The court reasoned further that, the appellant was earning three times what the respondent was earning and that although they both have a duty to maintain the children, such duty (at least financially) cannot be proportionate. The court relied on s 4(1)*(b)* of the Maintenance Act and maintained that, the duty to maintain must be shared between parents based on their respective means.

[14] In its justification that the amount of N$6 000 was reasonable, the court reasoned that the said amount was less by N$4 270 to the amount of N$10 270, the latter being the amount the girls claimed, they need per month as teenagers.

<u>Submissions of behalf of the appellant</u>

[15] The gist of the appellant's discontent with the judgment of the court *a quo* is that, he is unable to afford to pay the maintenance amount ordered as it is excessive and unreasonable. It is submitted in the appellant's heads of argument that, considering the monthly income of the respective parents, some of the expenses such as paying for extra-mural activities like modelling, attending a private college and buying school uniform and clothes every three months, are not necessities in the circumstances. Furthermore that, at the time this appeal was heard, the eldest child who previously attended a private college was no more attending any educational institution and is over eighteen years of age, therefore the appellant is under no

obligation to maintain her. Appellant however offered to assist the eldest child of the two with a monthly contribution of N$1 250 and to assist her with obtaining employment so as to become self-supporting.

[16] It is further submitted on behalf of the appellant that the amount of N$3 000, ordered in respect of medical expenses of the two children was a thumb-suck exercise as no evidence was led on how the respondent computed and arrived at the sum of N$3 000.

[17] It is further submitted that the court *a quo* failed to consider the appellant's expenses and particularly his duty to maintain his other three children as well as his wife.

[18] Counsel submitted with reference to s 4(1) of the Maintenance Act, 2003, that parents must in accordance with their respective means, fairly share the duty to maintain their children; that, the duty to maintain one particular child does not rank higher than the duty to maintain any other child; that the duty to maintain amounts to reasonable support and not luxuries; that the amount claimed as maintenance must be quantified and clearly understood so as to avoid a claim which might be 'excessive, unreasonable and/or unnecessary'; and finally that where a parent has more than one child, all children are entitled to a fair share of that parent's resources.

[19] In the written submissions filed on his behalf, the appellant offers to pay N$1 000 per child plus N$250 as medical aid contribution for the two children.

Submissions on behalf of the respondent

[20] Generally, as to be expected, counsel for the respondent, in her written submissions, supported the findings of the court *a quo*. It is submitted that the court *a quo* was correct to find that the appellant, as the parent earning more than the mother of the two children, had to bear the greater share of the maintenance amount in respect of the children.

[21] Counsel submits further in his heads of argument that whatever contradictions there may have been in the evidence of the respondent before the court *a quo*, such contradictions were not challenged under cross-examination and for that reason were correctly accepted by the court.

[22] It is counsel's further submission that the appellant did not dispute or challenge, the alleged expensive private college attended by the older daughter. Furthermore, he argued that appellant did not challenge the evidence relating to the expenses of the respondent as they were presented before the court *a quo.* It is further pointed out that appellant failed to present evidence that he is also maintaining his other children. As regards the appellant's evidence that he was paying his fiancé furniture's account at Lewis shop, counsel argues that the appellant has no legal duty to maintain his fiancé.

<u>Issue(s) for determination</u>

[23] At the core, all of the above boil down to this one question: that is whether in light of the evidence before court *a quo*, that court misdirected itself or erred in fact and/or in law in arriving at the sum of N$6 000 as reasonable maintenance for the two children.

<u>Applicable legal principles</u>

[24] Section 47 of the Maintenance Act, 2003, provides that an appeal against a maintenance order of the maintenance court 'must be prosecuted as if it were an appeal against the decision of a magistrates' court in a civil case and the rules regulating the conduct of the proceedings of the High Court in so far as they relate to civil appeals from the magistrates' courts do, with the necessary changes, apply to such an appeal[1]'.

[25] In *Soltec CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2017), para 25 Masuku, J with approval quoted Claasen, J in *Smith v Smith* 1954 (3) SA 434 (SWA) at 438, where that court stated that –

[1] Regulation 17 of the Regulations made in terms of s 49 of the Maintenance Act, 9 of 2003.

'It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute is left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.' (Emphasis added).

[26] The above statement is referred to in view of the appellant's complaint that the court *a quo* erred in accepting certain evidence which he feels should not have been accepted. That is, whatever, the appellant did not challenge, though having had the opportunity to do so, was correctly accepted by the court *a quo.* Appellant cannot now, as an afterthought, challenge evidence which he had not previously challenged, merely because the judgment is not in his favour. There is nothing on record which suggests that the appellant was deprived of the opportunity to cross-examine the respondent and to challenge the admissibility of such evidence. That being said, the court *a quo* cannot be faulted for accepting the version of the respondent as correct.

[27] Insofar as the court of appeal is concerned, the principle is that where there was no misdirection of fact by the trier of fact, the presumption is that his or her conclusion is correct and that the court of appeal will only reverse a conclusion on fact if convinced that it is palpably wrong. However, if the court of appeal is merely in doubt as to the correctness of the conclusion it must uphold the decision of the trier of fact[2]'.

[28] In other words, this court is not called upon to interfere with the decision of the trier of fact merely because it would have come to a different conclusion. The

[2] *Reuters v Namibia Breweries Ltd* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NAHCMD 20 (08 August 2018) para. 7.

conclusion of the trier of fact must on the evidence before it, be so wrong that to not interfere would offend justice.

[29] In the present matter, the respondent correctly argues that the appellant cannot base his arguments on facts which were not before the court *a quo*. In this connection, insofar as the appellant introduces the fact that he has a duty to maintain his new wife; that the college attended by one of the children is expensive; that he is willing to pay N$1 000 in maintenance in respect of the children in addition to N$250 per child in respect of medical expenses – these constitute new facts which were not placed before and were consequently considered by the court *a quo*. The court *a quo* therefore cannot be said to have erred and/or misdirected itself on the facts in this regard.

[30] Section 47 of the Maintenance Act, provides that –

> '(1) Where a beneficiary is a child, the maintenance court must, in determining the nature or amount of maintenance payable to that beneficiary, have regard to the following principles -
>
> (a) both parents of the child are primarily responsible for the maintenance of that child;
>
> (b) the parents must, in accordance with their respective means, fairly share the duty to maintain their child or children;
>
> (c) the parental duty to maintain one particular child does not rank any higher than the duty to maintain any other child of that parent or any other person;
>
> (d) where a parent has more than one child, all the children are entitled to a fair share of that parent's resources; and (underlined for emphasis); and
>
> (e) the duty of a parent to maintain a child has priority over all other commitments of the parent except those commitments which are necessary to enable the parent to support himself or herself or any other person in respect of whom the parent has a legal duty to maintain' (underlined for emphasis).

[31] The court *a quo* correctly held that the responsibility to maintain a child rests with both parents, according to their respective means and that the duty to maintain a child has priority over any other duty. However, in coming to its conclusion, the court erred in fact and/or law, when it neglected to consider the effect of its order considering the monthly salary of the appellant and the amount of maintenance ordered in respect of two or five children of the appellant, particularly in light of s 47(1)*(c)*, *(d)* and *(e)*.

[32] It is important that the maintenance amount must be reasonable, fair and affordable in the circumstances of a given case. In other words, the amount must not be excessive so as to lead to impossibility of performance. What is reasonable depends upon circumstances such as the means of the parents, the living standards they have adopted and the social position of the family.

[33] The court *a quo* accepted that the monthly salary of the appellant is N$15 000. The appellant's rental agreement filed of record indicated that he pays rent of N$6 500. He indicated that he maintains his elderly mother in the amount of N$1 000 per month. He has groceries to buy and although appellant was not married at the time, the court *a quo* had knowledge that he was engaged at the time of the maintenance enquiry. If one adds up, the monthly maintenance of N$6 000 as ordered by the court *a quo* with the appellant's monthly rental of N$6 500, those two expenses alone add up to a sum of N$12 500. This for all intends and purposes leaves the appellant with only N$2 500 to meet his other needs. Keeping in mind the fact that the appellant has three other children, who according to the law, are equally entitled to maintenance by the appellant and furthermore keeping in mind the principle that the duty to maintain one child does not rank any higher than the duty to maintain any other child of that parent or any other person, how would the appellant be expected to maintain the other three children, his elderly mother and as well as meet his other financial obligations, such as buying groceries and other necessities?

[34] In my view, the court *a quo* proceeded from a wrong premise in determining the reasonable maintenance amount payable. It simply accepted the say so of the girls that they 'need' N$10 270 as money to live on per month. The court reasoned as follows at para 12:

'In their supplementary application his daughters stated that as teenage girls their needs in terms of money is N$10 270 per month. Clearly, complainant in demanding N$6 000 per month for both is less with N$4 270 when compared to the claim instituted by defendant's daughter against him. This less amount of N$4 270 is almost complainant's net salary per month of N$4 297.38.'

[35] The test is not, what are the 'wants' (which 'wants' the court *a quo* referred to as 'need(s)' in his decision) of the children? The true test is, what is the reasonable amount of maintenance necessary to sustain and meet the needs of the children monthly? This was clearly explained by Hahlo follows:

'In deciding how much to award, the court will take the usual factors into account, more particularly, the needs of the child and the financial circumstances and social position of the parents[3]. The needs, referred to by the court *a quo* border on luxuries. The court *a quo* simply accepted the amount demanded by the two girls and without any interrogation as the basis to justify the amount of N$6 000 demanded by the respondent. No assessment of the 'needs' was conducted. The court further failed to enquire what the necessities are that the girls would spend such a huge amount on this was a relevant consideration is assessing the reasonableness of the amount claimed.'

[36] The second error committed by the court *a quo* is this*:* In its quest to justify the amount demanded by the respondent it made a finding of fact, without evidence, that the society, presumably in which the parties are living is a middle income society or country. It is common cause that the appellant is an artisan, a boiler-maker whereas the respondent is a mere receptionist with net salary of some N$4 000. In any event, the court must judge the needs and abilities of the parties according to their peculiar means or according to the means of the society or the country where they happen to live. To make such a finding, the court required some expert evidence, say of an economist. This finding was fundamentally flawed and for that reason alone the determination of the maintenance amount stands to be set aside.

[37] This court is in full agreement with appellant's ground of appeal, that the court *a quo* failed to take into account or properly balance the competing interests with regard to the appellant's monthly income proportionately amongst his dependants. I

[3] H R Hahlo, *The South African Law of Husband and Wife*, 5 ed (1985) at 408.

say this for the reason that despite the reasoning that the court accepted that the appellant has the duty to maintain his five children proportionately, it made an order on the demand of the two children which is disproportionate and to the prejudice of the other three children. This is a vitiating misdirection and for this reasons also the order for the maintenance amount is liable to be set aside.

[38] Closely related to the foregoing misdirection is the fact that the court *a quo* failed to accept or reject the evidence by the appellant that he maintains the other three children. The court reasoned that the appellant did not produce documentary evidence. In this court's view, that was a wrong approach to the assessment of the evidence that was before court. The court *a quo* ought to have considered the oral evidence before it as to whether it was sufficient and credible. Instead, the appellant's oral evidence was left without being assessed where after the court *a quo* made a negative finding against the appellant that he does not maintain his other children. In my view, this constitutes a further serious misdirection.

[39] As regards the issue of retaining the two children of his medical aid scheme, the appellant makes an offer in his heads of argument to pay 'medical aid for Liah and Shariffa in the sum of N$250'. It is not clear to this court which medical aid fund the said amount will be paid to, if it were to be accepted. It is also not clear from the record how much was deducted from the appellant's salary in respect of his two daughters as contribution to the medical aid fund prior to him removing them from the fund as beneficiaries. This expense was also not properly considered by the court *a quo*. It ought to have been taken into account.

[40] In light of the findings made above, I have arrived at the conclusion that the appeal succeeds. In the result, I make the following order:

1. The appeal is upheld.

2. The order by the court *a quo* is set aside.

3. The matter is remitted back to the maintenance court before a different presiding officer to hear the matter *de novo*.

4. There is no order as to costs.

5. The matter is removed from the roll and regarded finalized.

H Angula

Deputy-Judge President

APPEARANCES:

APPELLANT:	E KATJAERUA Of Katjaerua Legal Practitioners, Windhoek
RESPONDENT:	S P NYASHANU Of Shikongo Law Chambers, Windhoek