

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2021/01702

In the matter between:

**JOSA JORAM SHALI TAUYA**

**PLAINTIFF**

and

**AMALIA TAUYA (BORN SHIIMBASHIKE)**

**DEFENDANT**

**Neutral citation:** *Tauya v Tauya* (HC-MD-CIV-ACT-MAT-2021/01702) [2023]  
NAHCMD 136 (22 March 2023)

**Coram:** PARKER AJ

**Heard:** 30 - 31 January 2023 & 9 February 2023

**Delivered:** 22 March 2023

**Flynote:** Marriage – Maintenance – Spousal maintenance – When ordered – Defendant wife not proving that she was in need of maintenance – Unfair and unreasonable for court to award maintenance to the wife.

**Summary:** The parties are married to each other in community of property. The plaintiff instituted divorce proceedings; and the defendant pursued a counterclaim in which she claimed spousal maintenance from the plaintiff. The court found that the

defendant was around 44 years and she has 16 years to retire as a public servant working as a Senior Auditor in the Office of the Auditor-General on a monthly salary of N\$32 755.92. The court found that the fact that her fine academic qualification and experience stood her in a good stead to earn a living could not be controverted. The court found further that it was not the case where the claiming spouse is in the twilight of her age and career. On these facts, the court found that the defendant failed to prove that she needed spousal maintenance, in the sense that, without spousal maintenance she would be unable to maintain herself. On the evidence the court found that the defendant had, therefore, failed to discharge the onus cast on her to satisfy the court that she was in need of maintenance. Consequently, the court dismissed the counterclaim.

*Held*, the requirement that the spouse claiming spousal maintenance must prove that she or he is in need of maintenance requires him or her to establish that without such maintenance he or she was unable to maintain himself or herself.

*Held*, further, the aim of granting spousal maintenance is not to enrich the claiming spouse or to pay for his or her changed trendy lifestyle brought on by the dissolution of the marriage.

*Held*, further, the claiming spouse was not entitled to be placed in the same position with regard to maintaining herself or himself as if he or she was still married to the other party, even though he or she need not show actual necessity.

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### ORDER

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1. A final order of divorce is hereby granted.
2. The settlement agreement dated 2 November 2022 and the Addendum thereto dated 2 and 3 November 2022 are made an order of court.
3. The defendant's claim for spousal maintenance is dismissed.

4. In respect of past child maintenance, the plaintiff must, on or before 14 April 2023, pay to the defendant through her legal practitioners of record N\$29 931.19.
5. There is no order as to costs.
6. The matter is finalized and removed from the roll.

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## JUDGMENT

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PARKER AJ:

### Introduction

[1] The parties are married to each other in community of property. One child, who is still a minor, was born of the marriage. The plaintiff instituted divorce proceedings. The plaintiff's claim in convention has been largely settled between the parties.

[2] In the instant proceeding, the defendant is pursuing a counterclaim in which she seeks the following relief:

- '1. Defendant's claim be upheld with costs.
2. An order for:
  - a) Restitution of Conjugal Rights
  - b) Alternatively, final order of divorce.

### **MINOR CHILD**

3. An order that custody and control of the minor child be awarded to the Defendant subject to the Plaintiff's right of reasonable access.

4. An order that the Plaintiff pays maintenance in respect of the minor child in the amount of N\$3 866.61 per month with a 10% annual escalation.
5. An order that the parties each contribute 50% of all scholastic expenses of the minor child, including costs relating to extramural activities, pocket money, clothing, books and stationary and the costs in respect of tertiary education of the child, including the costs for accommodation as far as such costs as not covered by bursaries until the minor child is 25 years old subject to him being enrolled in a tertiary institution.
6. An order that the Plaintiff includes the minor child on his medical aid and the parties will contribute equally towards the excess payments in respect to medical, dental, surgical, hospitalization and pharmaceutical expenses occurred on doctor's prescription and also all orthodontic and/or ophthalmologic after presentation of invoices in respect of thereof.
7. An order that the Plaintiff pays the Defendant 50% of the incurred costs in respect of the minor child's scholastic expenses since November 2020 to date in the amount of N\$21 891.83.

#### **SPOUSAL MAINTENANCE**

8. An order that the Plaintiff pays spousal maintenance to the Defendant in the amount of N\$3000.00 per month for a period of 6 years from the date of final order of divorce.

#### **MOVABLE PROPERTY**

9. An order that each party retains as their sole and exclusive property the furniture currently in their possession.
10. An order that the Plaintiff retains the white Ford Ranger double cab with registration number: N6696SH as his sole and exclusive property.
11. An order that the Defendant retains as her sole and exclusive property the white Nissan Qasqai with registration number N78043W.
12. An order that the camping trailer with its equipment be sold and the proceeds thereof be jointly divided between the parties.

#### **IMMOVABLE PROPERTY**

13. An order that Plaintiff retain the Village House, situated at Eloala Village, Outapi, Namibia, as his sole and exclusive property.

14. An order that the Defendant retains as her sole and exclusive property, immovable property situated at Erf 1006, Osona Village, Okahandja, Namibia. Further ordering that the Defendant shall be liable for all debts and bonds registered over the immovable property from date of final divorce order.

15. An order that the Plaintiff sign all relevant documents necessary to the transfer of his share of the immovable property within 14 days of being called to do so.

16. An order that Plaintiff retains the immovable property situated at Erf 1505, Unit No.2, Grace Court, Extension 28, Khomasdahl Windhoek, Namibia subject to the Defendant being compensated in the amount of N\$200 000.00

17. An order that the Defendant retains as her sole and exclusive property the Village House, situated at Tsandi Town Village, Omusati Region, Namibia. Further ordering the Plaintiff to consent to and ensure that the immovable property is solely registered in the Defendants name by virtue of any customary law and/or statute.

Alternatively

18. An order that the Plaintiff relinquish his right in terms of Section 26(1) of the Communal Land Reform Act, No.5 of 2002 in respects of communal property described as Tsandi Village Council to enable the Defendant to apply for a customary land right in respects of communal property situated at Tsandi Village Council in terms of Section 22 of the Act.

19. Costs of Suit.

20. Further and/or alternative relief.'

[3] The plaintiff (ie the defendant in reconvention) has opposed the counterclaim. For the sake of clarity and neatness, even in the counterclaim, I shall continue to refer to the parties as plaintiff and defendant where the context allows.

[4] The plaintiff has opposed the counterclaim and prays the court to dismiss the counterclaim and grant the following relief:

- '1. Final order of divorce.
2. An order that the settlement agreement dated 2 November 2022 and the Addendum thereto dated 2 and 3 November 2022 be made an order of court.
3. Costs of suit.'

[5] The burden of the court is, therefore, to determine the dispute in paras 3 and 4 of the counterclaim that divides the parties. I now proceed to consider paragraph 3 which concerns spousal maintenance.

#### Spousal maintenance

[6] The court granting a divorce may, notwithstanding the dissolution of the marriage, make an order against the guilty spouse for any period until the death or remarriage of the innocent spouse, for the maintenance of the innocent party. The spouse claiming spousal maintenance bears the onus of showing that an order for maintenance should be made.<sup>1</sup>

[7] It is noted at the threshold that the defendant's assertion that she is the innocent party was not disputed by the plaintiff. I shall, therefore, pursue the enquiry on the basis that the defendant is the innocent party in her claim for spousal maintenance.

[8] The exercise of the court's discretion involves two stages. At the first stage the court should determine whether the claiming spouse has shown that an order for maintenance ought to be made because of his or her inability to earn money for his or her own maintenance. The second stage concerns the amount of maintenance.

[9] It is only when the court has decided the claiming spouse has discharged the said onus at the first stage that the court is entitled to go on to the second stage. It is at the second stage that the court will have regard to the following factors: (a) the

<sup>1</sup> CJ Nathan *South Africa Divorce Handbook* (1970) at 31 and the cases there cited.

period for which the marriage has existed; and (b) the attitude of the opposing party.<sup>2</sup> Under no circumstance should the two stages be conflated.

[10] It follows, as a matter of course, that if at the first stage the court finds that the claiming spouse has not discharged the aforementioned onus, the determination of the amount of maintenance does not arise.<sup>3</sup>

[11] The test at the first stage is whether the claiming spouse is in need of maintenance. Thus, as I said in *Platt v Platt*, the claiming spouse must prove on a balance of probabilities that he (or she) is in need of it.<sup>4</sup> The next level of the enquiry is therefore, to determine whether the defendant has proved on a balance of probabilities that she is in need of maintenance.

[12] On the evidence, I find that the defendant is around 44 years old; and she has 16 years to go to reach the age of retirement in the public service. She has a very high academic qualification by any standard. She has a Masters degree in finance and investment. She presently occupies the position of Senior Auditor in the office of the Auditor-General and earns a monthly salary of N\$32 755.92.

[13] The conclusion that her fine qualification and experience stand her in a good stead to earn a living cannot be controverted.<sup>5</sup> Doubtless, her age and qualification and experience are very weighty considerations to take into account in the court's exercise of discretion. Indeed, this was not the case where the claiming spouse is in the twilight of her age and career.

[14] The parties lived together as husband and wife for some four years. There is no evidence that during those years the plaintiff gave a regular monthly allowance or suchlike allowance to the defendant to top up the remuneration she received from her employer to enable her to maintain herself. I do not see any good reason why that should change upon the dissolution of the marriage.

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<sup>2</sup> *Croes v Croes* 1960 (4) SA 211.

<sup>3</sup> *DK v DK* 2010 (2) NR 761 (HC) para 63.

<sup>4</sup> *Platt v Platt* [2014] NAHCMD 86 (13 March 2014).

<sup>5</sup> See *DK v DK* footnote 3 loc cit.

[15] The essence of the proposition of law on spousal maintenance is 'need'. Therefore, to succeed, the defendant, like any other claiming spouse for spousal maintenance, must satisfy the court that without spousal support, she is incapable of maintaining herself.

[16] In her attempt to discharge the onus cast on her, the defendant testified that the plaintiff used to assist her financially from time to time. In my view, that did not amount to a regular payment of some allowances to her during the subsistence of the marriage. In any case, the claiming party is not entitled to be placed in the same position with regard to maintenance as if she was still married to the other party, even though she need not show actual necessity.<sup>6</sup>

[17] The requirement that the claiming spouse must prove that she or he needs maintenance requires him or her to establish that without spousal maintenance he or she is unable to maintain himself or herself. It may be due to his or her old age, lack of good, competitive qualifications and experience that would militate against her ability to earn a living to fend for himself or herself. In that regard, it should be underlined that the aim of granting spousal maintenance is not to enrich the claiming spouse or to pay for his or her changed trendy lifestyle brought on by the dissolution of the marriage.

[18] On the evidence, I conclude that the defendant has not discharged the onus cast on her to satisfy the court she is in need of spousal maintenance. The counterclaim for spousal should, therefore, be rejected. I proceed to consider the defendant's counterclaim which concerns past maintenance of the minor child of the family.

#### Past maintenance of the minor child

[19] The second leg of defendant's counterclaim relates to the amount of money that has been spent by the defendant to maintain the minor child since the plaintiff's desertion in November 2020 to date. The starting point is this. It is well settled that the burden of supporting children is common to both spouses and must be borne by

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<sup>6</sup> CJ Nathan *South Africa Divorce Handbook*, footnote 1 loc cit.



them in proportion to their means.<sup>7</sup> That much the plaintiff accepts. Plaintiff's beef (to use a pedestrian language) is that the amount claimed by the defendant is exorbitant. To make his point, plaintiff's counsel (Mr Lombaard) sought to challenge the figures placed before the court by the defendant.

[20] For instance, in Mr Lombaard's view, too much food was given to the minor child in his school lunch-box. I take no respectable look at such view. Mr Lombaard did not point out to the court the power the court has, either at common law or in statute law, to determine how much a five-year old Namibian child should eat.

[21] Counsel also put great store on the defendant's testimony that she spent N\$1500 a month to pay for 'house care' of the minor child. The caretaker happened to be a niece of the defendant. This piece of evidence turns on nothing. The plaintiff's evidence was that during their marriage, there had always been relatives of either the plaintiff or the defendant who assisted in taking care of the child in the matrimonial home.

[22] The defendant's evidence was that when she could, she paid the N\$1500 to the caretaker, but if she could not pay due to a lack of money, the caretaker did not insist on being paid. This is understandable. I did not hear the defendant say that the caretaker is an employee in terms of the Labour Act 11 of 2007. And the plaintiff did not testify that either he or the defendant did not give any moneys to the relatives who assisted in taking care of the minor child. Neither would such evidence have been accepted by the court. The reason is that it is inconceivable that the relatives of parents (parties) who are live-in child minders of the minor children of such parents would not be given any moneys by the parents to maintain themselves.

[23] If no payslips in respect of such payment of moneys to such child minders were not placed before the court, as is in the instant proceeding, the reason is not far to see. It is because, in my opinion, such child minders are not employees in terms of the Labour Act 11 of 2007.

[24] In the instant matter, the only qualification that I can think of is this. On her own version, the defendant testified that there were some months when she did not

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<sup>7</sup> *Kemp v Kemp* 1958 (3) SA 736 (N); approved by the court in *AP v PP* 2014 (3) NR 671.

pay the N\$1500 to the child minder due to lack of money. I find that this piece of evidence stood uncontradicted at the close of the defendant's case.

[25] I give short thrift to the plaintiff's testimony. Plaintiff spoke with two voices: He denied he and the defendant made use of a nanny, but he testified that family members assisted them from time to time. As I have found previously, it was not the evidence of the defendant that what plaintiff calls 'nannies' were domestic workers in terms of the Labour Act. I did not hear the plaintiff to say that the child minders were only fed on food, but they never washed or wore clothes or put creams like Vaseline on their bodies, and so they did not need to be given any moneys for their maintenance.

[26] The plaintiff's double speech is rejected. It is self-serving and fallacious. It does not contradict the defendant's version on the point under consideration. I accept the defendant's testimony about payment of moneys to the child minder. But, I think, in the circumstances, two-thirds of the amount claimed by the defendant would be fair and reasonable, considering her version that at times she could not pay the N\$1500 to the child minder. I find the amount of N\$1500 per month to be reasonable as it compares favourably to the statutorily prescribed monthly wage of domestic workers.<sup>8</sup>

[27] Mr Lombaard submitted that while the plaintiff did not dispute the amounts for the items: (a) stationery and uniform; (b) graduation fee; (c) school fees (2021); (d) school fees (2022), (e) school fees (2023), the plaintiff denied the amount in respect of the caretaker (2021-2022). I have considered the issue of caretaker previously. Two-thirds of the amount claimed (N\$36 000) is N\$24 000. If N\$24 000 is added to the undisputed amount of N\$35 862.39, we have N\$59 862.39. One half of that amount is N\$29 931.19; and the plaintiff is liable to pay the amount to the defendant for past child maintenance of the minor child. In the nature of the dispute and on the facts of the case, I think this is one of the cases where, in the interest of fairness, the court should not order costs against any party.

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<sup>8</sup> See Wage order for setting minimum wage and supplemental minimum conditions of employment for domestic workers: Labour Act, 2007 GN No. 258 of 2017.

[28] Based on these reasons, I hold that the defendant has not made out a case for spousal maintenance, but has succeeded in her claim for past child maintenance. In the result, I make the following order:

1. A final order of divorce is hereby granted.
2. The settlement agreement dated 2 November 2022 and the Addendum thereto dated 2 and 3 November 2022 are made an order of court.
3. The defendant's claim for spousal maintenance is dismissed.
4. In respect of past child maintenance, the plaintiff must, on or before 14 April 2023, pay to the defendant through her legal practitioners of record N\$29 931.19.
5. There is no order as to costs.
6. The matter is finalized and removed from the roll.

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C PARKER  
Acting Judge

APPEARANCES

PLAINTIFF:

J LOMBAARD

PD Theron & Associates, Windhoek

DEFENDANT:

F VERNANDES

Shikongo Law Chambers, Windhoek