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REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3179/2015

In the matter between:

[M.....] NEGONGO

PLAINTIFF

And

[J.....] NEGONGO

DEFENDANT

Neutral citation: *Negongo v Negongo* (I 3179-2015) [2016] NAHCMD 230 (9 August 2016)

Coram: VAN WYK, ACTING

Heard: 4 July 2016

Delivered: 9 August 2016

Flynote: Divorce proceedings – s 5(1) of *Matrimonial Affairs Ordinance* – spousal maintenance granted.

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.

Held, that rehabilitative spousal maintenance can be determined without hearing the grounds of divorce.

ORDER

1. The plaintiff is directed to pay to the defendant rehabilitative maintenance in the amount of N\$ 2000.00 per month, commencing on date of final order of divorce and ending 12 months thereafter, or ending 31 December 2017, whichever date is the first.
2. Final order of divorce in this matter shall stay the currently operative spousal maintenance order obtained on 15 August 2015.
3. Each party to bear its own cost in respect of determination of spousal maintenance.
4. The matter is postponed to 6 September 2016 for a status hearing.

JUDGMENT

VAN WYK, AJ:

[1] In this matter the plaintiff is an adult male, diesel mechanic residing at Erf 6...., F.... A...., in O..... Defendant is an adult female, self-employed as seamstress, residing at A.... L..... between O..... and O.....

[2] The parties were married on 27 August 2011, in K....., and are still so married. No children were born from the marriage. The marital relationship broke down in 2014 and the parties did not share a common home as from December 2014. There is a pending divorce action, which was mediated on 30 March 2016.

[3] The defendant is 36 years old and plaintiff is 35 years old. The grounds of divorce remained contested as per the pleadings, each party contending that the other caused the breakdown of the marriage.

[4] The division of the assets between the parties were settled in mediation. The issue of spousal maintenance, so it was agreed in mediation, would be determined by petitions in court, as was done on 4 July 2016.

[5] Defendant claimed spousal maintenance in the amount of N\$ 2000.00 per month in respect of herself, for a period of 5 years or until such time as she may remarry, whichever occurs first. Counsel for the plaintiff offered payment of rehabilitative spousal maintenance in the amount of N\$ 2000.00 per month for a period of 12 months during her address in court.

[6] Although the *Married Persons Equality Act 1 of 1996*, repealed certain sections of *the Matrimonial Affairs Ordinance 25 of 1955, Section 5(1)* of the ordinance remains in force and effect in Namibia. *Section 5* of the ordinance provides as follows:

5 (1) 'The Court granting a divorce may, notwithstanding the dissolution of the marriage –

- (a) Make such an order against the guilty spouse for the maintenance of the innocence spouse for any period until death or until remarriage of the innocence spouse, whichever, event may first occur, as the Court may deem fit.'

[7] I respectfully associate myself with the decision of Ueitele AJ, in *BA De Klerk v CR De Klerk*,¹ wherein it was stated that s 5 of the ordinance does not prevent the High Court of Namibia from granting an order of maintenance in favour of the guilty spouse who is in need thereof:

'[67] I accordingly find that section 5 of Ordinance 25 of 1955 does not prevent the court from granting an order of maintenance in favour of a guilty spouse who is in need of it.'

[8] In the case currently under my scrutiny, the parties did not lead evidence on the guilt of either party and restricted their submissions in this regard by repeating the averments in the pleadings. Hence, I was not requested to make a factual determination on the guilt of the parties. I hold that judging spousal maintenance in the absence of determining the guilt of either party, is not out of line with the reasoning in above stated decision of *De Klerk*, where the guilt of the parties was not a determining factor in granting rehabilitative maintenance.

[9] Of further importance to me was the fact that plaintiff is agreeable in principle to pay an amount of rehabilitative maintenance and is only contesting the duration of such an order. Hence, in determining what would be a reasonable duration of such order for such rehabilitative maintenance, I considered the following factors: the existing or prospective means of the parties, their respective earning capacities, their respective financial needs and obligations; the age of the parties and the duration of the marriage. The above stated criteria is trite law in Namibia.²

[10] In this case, defendant is 36 years old, she did not complete high school, but she is computer literate and has a small sewing business for traditional attire. She needs to

¹ Case number I 841/2009

² *Neil Ronald Samuels v Petronella Samuels*, Case No 1.902/2008, paragraphs 32- 33

be resident in an area with electricity for her to conduct her business. In terms of the mediation report, the common home of the parties at A....., where defendant is currently still residing, will become the sole property of the plaintiff and he will take occupation thereof in December 2016, at which time defendant must vacate the property. She is currently conducting her business from such property. Upon her vacating the property, she will have to rent an appropriate place to stay and so conduct her self-employment.

[11] Furthermore, in terms of the mediation report, she will receive N\$ 20,000.00 in respect of her share of the common home, on or before 30 November 2016. Defendant will also retain all movables in the common home.

[12] It is so, that she will have to craft a new life for herself after the divorce; she may use the proceeds of the common home to reposition herself - finding a new home, and a suitable place of business. On 31 December 2016, when she leaves the common home, she would have received the amount of N\$ 20,000.00. I find that she will not be entirely destitute and entirely without any financial fallback position as a result of the divorce. It is the stark reality that divorces changes the personal circumstances of both parties. It is the effect of these changes on her circumstances which the defendant is trying to defer for as long as possible with her claim for 5 years of spousal maintenance. And it is in this respect that the law fails her expectation. It is the statement in the *Samuels* matter *supra*, which particularly confirmed my inclination in this matter:

‘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’³

[13] I find the offer of a period of 12 months in respect of rehabilitative maintenance is in fact a very reasonable offer in her circumstances to reposition her life to such an

³ *Samuels* decision *supra*, paragraph 33

extent that she can find a suitable living and working arrangement which will also afford her an opportunity to conduct her current means of earning a living or find another.

[14] Hence my order is the following:

1. The plaintiff is directed to pay to the defendant rehabilitative maintenance in the amount of N\$ 2000.00 per month, commencing on date of final order of divorce and ending 12 months thereafter, or ending 31 December 2017, whichever date is the first.
2. Payment in terms of this order shall replace the currently operative spousal maintenance court order so obtained by defendant on 15 August 2015.
3. Each party to bear its own cost in respect of determination of spousal maintenance.
4. The matter is postponed to 6 September 2016 for a status hearing.

L VAN WYK
ACTING JUDGE

APPEARANCES

PLAINTIFF:

A Delport
Delport Nederlof Attorneys

DEFENDANT:

L Shikale

Shikale & Associates