

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case no: HC-NLD-CIV-APP-AMC-2018/00002

In the matter between:

AUSHONA TOBIAS

APPELLANT

and

ALBERTINA KAINO HAUSIKU

RESPONDENT

Neutral citation: *Tobias v Hausiku* (HC-NLD-CIV-APP-AMC-2018/00002) [2018]
NAHCNLD 41 (23 April 2018)

Coram: CHEDA J

Heard: 10 April 2018

Delivered: 23 April 2018

Flynote: In an appeal for maintenance, appellant must prove a misdirection or irregularity on the part of the court *a quo* in arriving at the current order levied against him. The fact that one is looking after an elderly parent or indigent relative cannot take priority over his natural children and wife where applicable.

Summary: Appellant was aggrieved by the court order granted by the court *a quo* that he should pay N\$400 per month per child. He has three (3) minor children with the respondent. He takes home N\$7000± and she is not employed. He argued that he has 3 other children to look after. Children have since grown up since the previous

order. Appellant failed to show a misdirection or irregularity on the part of the court *a quo*. The appeal was dismissed with costs.

ORDER

1. The appeal is dismissed.
2. There shall be no order as to costs.

JUDGMENT

CHEDA J:

[1] On the 01st of September 2017 the magistrate sitting at Outapi granted respondent a maintenance order, of N\$400 per month for each of the three children and that they be added to appellant's Medical Aid.

[2] Appellant was aggrieved by the said order and mounted this appeal. Respondent had applied to the court for the amount to be varied upwards to N\$800 per month per child. The reasons for her application were that the children were now grown up, more money was needed for their education and that the prevailing order was then inadequate to cover children's needs.

[3] This application was opposed by the appellant, but, despite the opposition the court saw it fit and increased the maintenance to N\$400 per month per child. Appellant noted his appeal on the 31st January 2018 which was noted timeously. On appeal, he argued that the magistrate did not take into account that:

- a) he had three other children and that his wife was expecting;
- b) he looked after his sick and old mother and his sister who is also bedridden ;
- c) that his Taxi business was no longer viable and;
- d) that the economy of the country was not favourable.

[4] In addition, he submitted that it is his desire that all his children should be equally looked after financially without exception.

[5] Respondent was represented by Advocate Matota as per the s 47(3) of the Maintenance Act 9 of 2003 which provides:

‘If an appeal is noted against a person who is a child or the custodian or primary care of a child, and if that person so requests the Prosecutor-General, or a person designated by the Prosecutor-General, must, in the High Court, act on behalf of that person.’ See also *Kapitango & 2 others v The State* (CA 01/2015) [2016] NAHCNLD 6 (25/7/2016) at para 6-9. It is for that reason that Advocate Matota appeared.

[6] Advocate Matota made very valid and persuasive arguments setting out both the rationale and the substantive law relating to maintenance for that reason the court is indeed indebted to him. In fact I should add that the court was extremely impressed by his grasp and articulation of legal principles in this matter.

[7] It cannot be over emphasised that maintenance of a child by parents is a must as children are innocent in this world, harsh as it maybe. Therefore, each and every parent’s priority is to make sure that his/her children are looked after well in the circumstances. Appellant takes home N\$7000± which is not a paltry sum. His children have since grown and such growth no doubt demands more financial upkeep. In as much as appellant submitted that he is unable to increase the maintenance he has no alternative, but, to bend backwards and stretch a little bit in order to fend for his children. The reality is that he has many children whom he fathered and as such he must look after them. He must tighten his belt.

[8] There is a disturbing trend by some men who are shying away from maintaining their off-spring. This has resulted in children suffering while their fathers are wining and dining elsewhere oblivious of their parental responsibilities. These courts cannot stand spell-bound while men are basking in their economic pleasures to the total exclusion of their progeny. Failure to pay maintenance is a species of domestic

violence in the form of economic abuse and should not be allowed, see *S v EZ* 2014 (1) NR 18 (HC).

[9] The need for the support of the children is a right enshrined in Article 15(1) of the Namibian Constitution which reads:

‘Article 15 (1):

Children shall have the right from birth to a name, the right to acquire a nationality and subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents.’ (own emphasis)

[10] This point was made clearly in *S v Mentoora* 1998 (2) SACR 659 (C) and even nearer home in *S v Gaweseb* 2007 (2) NR 600 (HC) where Damaseb JP emphasised the need to secure the rights of the vulnerable children and disempowered women. This is what the court *a quo* sought to do.

[11] What should be made clear and emphasised is that a party’s obligation to maintain his/her children takes precedence over all other financial obligations, parents included and any other dependants. It is not an excuse to plead inability to maintain one’s children because there is a dependant who is indigent. Those can only receive a residue of one’s financial obligations.

[12] I, therefore, find that appellant has failed to discharge his duty to prove that the magistrate erred in receiving the maintenance upwards. It is common cause that the children’s circumstances have changed and are, therefore, entitled to a higher maintenance order to cater for their daily needs.

[13] The trial court fully examined the financial circumstances of both parties and came to the conclusion that the figure of N\$400 per month per child is indeed a just and equitable figure in the circumstances. I find that he did well by not granting respondent the N\$800 per month per child which she was asking for. This figure was not justifiable. Parties must not think that figures can be sucked from the thumb but should be justified by the applicant.

[14] Respondent as a mother has a duty to prove her claim and above all she cannot sit on her laurels and expect appellant to do everything. A woman who is able-bodied must do all she can in order to help look after the children financially. Where a woman decides to do nothing because the man will provide when she is capable of working, stands the risk of not getting the court's sympathy. Mothers should be encouraged to understand that they also have a duty to maintain their children and not depend on the children's fathers only.

[15] In *casu* I find no irregularity or misdirection by the learned magistrate in granting respondent the maintenance as these are all the reasons for the maintenance to be revised upwards.

1. The appeal is dismissed.
2. There shall be no order as to costs.

M Cheda
Judge

APPEARANCES

APPELLANT:

A Tobias
of Eluwa Clinic, Ongwediva

RESPONDENT:

L Matota
of the Prosecutor-General, Oshakati