

THE HIGH COURT OF SWAZILAND**P N (BORN BROLLO)**

Plaintiff

And**T P N**

Defendant

Civil Case No. 707/2003

Coram:	S.B. MAPHALALA - J
For the Plaintiff:	MR. J. HENWOOD
For the Defendant:	MR. M. MABILA

JUDGMENT(16th March 2006)

[1] On the 6^m February 2004, the Plaintiff was granted an order *pendente lite* where Respondent was to contribute to the maintenance of the Plaintiff and the minor children in the amount of E8, 000-00 on a monthly basis, payable on or before the 25th day of each month, with effect from August 2003. That the Defendant be ordered to pay all the schools fess, educational and medical related expenses in respect of the minor children, as well as the medical expenses in respect of the Plaintiff. That the Defendant be ordered to contribute to the Plaintiffs legal costs in the sum of E15 000-00; and that the Defendant be ordered to pay the costs of the application, including the costs of Counsel as certified in terms of Rule 68 (2) of the High Court Rules.

[2] The matter then appeared before me on the 27th October 2005, where the parties, *inter alia*, recorded a consent order to the effect that a final decree of divorce was to be ordered and that the agreement of settlement marked "A" be made an order of court. In the said agreement the parties agreed in a number of items including custody of children, access to the minor children, movable property and costs. On maintenance the parties were unable to reach agreement and the court was asked to determine the maintenance payable by the Defendant. This judgment pertains to this aspect of the matter.

[3] Both parties gave evidence advancing their respective positions. Plaintiff gave evidence to show that she earns E6, 168-00 and that she utilises her entire income on the welfare and support of both herself and the three (3) children who live with her in Rustenburg, South Africa. The Plaintiff gave a detailed breakdown of her expenses and how she utilises the income which evidence, whilst challenged on the issues such as rent, diesel and telephone bills remains largely uncontroverted. The Defendant's Counsel took issue with the fact that the house in which Plaintiff resides with the three (3) children is registered in a trust, the trustee of the trust being, *inter alia*, the Plaintiffs father, whilst that may be so, the Defendant could not challenge the fact that the rental paid is E4, 000-00.

[4] On the other hand evidence showed that the Defendant earns a gross salary in excess of E27, 000-00, he has a free housing and enjoys free water and electricity. He also enjoys a car allowance of E7, 000-00 with subsidised fuel. All these are in terms of his package of employment. In addition it was demonstrated that the Defendant enjoys added income from Maloma Colliers and does at least three *locums* a year. On the net income which the Defendant receives he only supports one person.

[5] It was submitted on behalf of the Plaintiff that the most appropriate order in the circumstances would be for the maintenance to be increased to E10, 000-00 per month or at least left at E8, 000-00 with an annual increase often (10%).

[6] It is trite law that a father's duty to support his children, whether legitimate or illegitimate, was established in Roman and Roman-Dutch law and has been affirmed in many decisions of our courts. The responsibility has been said to arise from "a sense of natural justice and filial and parental dutifulness and from the affection of blood". Deriving neither from implied contract nor from the parental power, it originates *ex lege* and creates an obligation *sui generis*, (see *PQR Boberg, The Law of Persons and the Family, 1977* at page 254 and the cases cited thereat).

[7] Though sometimes spoken of as though it rested solely upon the father, the duty to support a child is common to both parents, and must be shared between them according to their means, (see *Union Government vs Warneke 1911 A.D. 657*) and cases cited at folio 33 at page 254 of *Boberg (supra)*.

[8] Where the parents share a common household with their children, apportionment of the duty of support is not an issue which is likely to arise between them. On divorce, however, it may be necessary for the court to assess the relative means and earning capacity of the parties in order to determine how the non-custodian should pay to the custodian for the maintenance of the child, (see *Farell vs Hankey 1921 TPD 590* at 596).

[9] The above-cited legal authorities are relevant to the present case.

[10] In the present case after weighing the evidence of the two parties and considering the legal authorities I have cited above, it is my considered view that the maintenance of the minor children in

casu be left at E8, 000-00. I say so for a number of reasons. Firstly, it was demonstrated before me that the Defendant earns a gross salary in excess of E27, 000-00, has a free housing/accommodation, enjoys free water and electricity, enjoys a car allowance of E7, 200-00 and has subsidised fuel all in terms of his package of employment. In addition it was demonstrated that the Defendant enjoys added income from Maloma Colliers and does at least three *locums* a year. Secondly, on the net income which Defendant receives he only support one person. Thirdly, the Defendant has not stated that the current maintenance of E8, 000-00 is not affordable. In point of fact he actually stated that he could afford such amount. Fourthly, the Plaintiff has demonstrated that the amount is necessary for the maintenance of the children and that to reduce the maintenance would have severe and dire consequences for the family which is struggling already. Fifthly, the Defendant led no evidence to demonstrate that he cannot sustain himself on what he currently earns nor that the payment of maintenance at E8, 000-00 renders him unable to support himself.

[11] In the result, for the afore-going reasons Defendant is ordered to pay a sum of E8, 000-00 per month as maintenance for the minor children, payable on or before the 25th day of each month and costs.

S.B. MAPHALALA

JUDGE