

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NELSON MUCHEKENI

Petitioner

- and -

TEMPTATION MUCHEKENI

Respondent

MEMORANDUM OF JUDGMENT

[1] Ms. Muchekeni seeks interim spousal support until the conclusion of the divorce proceedings that are currently pending in this Court. Mr. Muchekeni disputes Ms. Muchekeni's entitlement to interim spousal support. He also argues that the amount of support that she seeks is excessive under the circumstances.

A) GENERAL BACKGROUND

[2] The parties have each filed two Affidavits on this Application. Neither of them has elected to cross-examine the other on these Affidavits. There are some areas of agreement between the parties, but there are also a number of areas of dispute.

[3] The parties were married in Zimbabwe in 2000. They moved to Canada in 2001. This move happened on short notice, as they, and especially Mr. Muchekeni, needed to leave Zimbabwe quickly. Both of them were eventually granted political refugee status.

[4] After they arrived in Canada, Mr. and Ms. Muchekeni lived in Toronto for a few years. During the time they lived in Toronto, they both worked. They also both took courses. Mr. Muchekeni took courses in an accounting program at the University of Toronto. There is some dispute as to what type of training Ms. Muchekeni took. She describes it as a course to obtain credentials as a nursing aid, something that was a stepping stone towards a plan she had to eventually study to become a nurse. She deposes that Mr. Muchekeni was aware of her intentions to become a nurse. Mr. Muchekeni says that Ms. Muchekeni obtained a Diploma in Personal Support Work. He deposes that he was completely unaware of her aspirations to become a nurse.

[5] In 2003 the parties moved to Yellowknife and both got work. In December 2004 they purchased a home. A few months later, in March of 2005, they separated. Mr. Muchekeni left the home. He contributed to the mortgage for the first few months after separation, but since then, Ms. Muchekeni has been making mortgage payments and has maintained the residence on her own.

[6] One factual dispute between the parties that is of some significance has to do with whether they had an agreement or plan as to how they would proceed to each upgrade their education after they arrived in Canada. Ms. Muchekeni deposes that the couple made a joint decision to have Mr. Muchekeni upgrade his education first, during which time she would support him financially. The intent was that she would upgrade her education, with his support, at some later point. Mr. Muchekeni disputes that there ever was such an agreement between them, or that Ms. Muchekeni supported him financially when they were living in Toronto.

B) ANALYSIS

1. General Principles

[7] Decisions on spousal support applications involve the exercise of considerable discretion. That discretion, however, is not exercised in a vacuum, as these applications are governed by the objectives and factors set out in the *Divorce Act*, R.S.C. 1985 c.3 (2nd Supp.).

[8] The starting point is the objectives which the *Act* stipulates a support order should serve. These objectives include (1) the recognition of economic advantage or

disadvantage arising from the marriage or its breakdown; (2) apportionment of the financial burden of child care; (3) relief of economic hardship arising from the breakdown of the marriage; (4) the promotion of the economic self-sufficiency of each spouse. *Bracklow v. Bracklow* [1999] 1 S.C.R. 420, at para. 35.

[9] Consideration must then be given to the factors set out at Subsection 15.2(4) of the *Act*:

- 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation;
 - (c) any order, agreement or arrangement relating to support of either spouse.

[10] All the factors must be considered, and the court's discretion must be exercised in a manner that equitably alleviates the adverse consequences of a marriage breakdown. *Bracklow v. Bracklow, supra*, at para. 36.

[11] These principles govern applications for interim spousal support as well as applications for final orders. But there is a significant difference in the depth of inquiry that courts will engage in depending on whether the application being considered is for a final order or for an interim order. This is so for a number of reasons. The evidentiary record in support of an interim application is never as complete as what it can be expected to be after a trial. If, as is the case here, the application is argued on the basis of affidavit material and there are factual disputes that cannot be resolved at that stage, this obviously has a bearing on the depth of analysis that can be undertaken.

[12] In addition, courts do not have the time or resources to conduct an in-depth analysis of the relevant issues at the interim stage. As this Court noted in *Chambers v. Chambers* [1998] N.W.T.J. No. 54, at para. 25:

Generally speaking courts try to make a determination that at least a triable issue as to permanent support exists and, if so, apply a means and needs analysis so as to issue a "holding" order until the trial.

[13] As a result, my role at this stage is not to make a determination as to Ms. Muchekeni's entitlement to spousal support. I must only decide whether there is at least a triable issue as to her entitlement to support.

2. Whether there is a triable case on entitlement

[14] The law recognizes three basis for entitlement for spousal support: a contractual basis, a compensatory basis and a non-compensatory basis. *Moge v. Moge* [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, *supra*. Ms. Muchekeni argues that she has a triable case on both the compensatory and the non-compensatory basis.

[15] Ms. Muchekeni's claim for spousal support on a compensatory basis is founded on her position that she supported Mr. Muchekeni while he furthered his education when the couple lived in Toronto. She argues that this assisted him in improving his employability, and is part of the reason he now has a good job. She argues that she was economically disadvantaged by the marriage breakdown because it occurred at a point in time in the relationship where the parties' situation was becoming more stable and she could have, with Mr. Muchekeni's support, gone back to school to further her education.

[16] Ms. Muchekeni is now enrolled full time in a nursing program at Aurora College, and is completing the first year of the four year program. She argues that her decision to go back to school full time is reasonable because it will ultimately enable her to attain the same level of economic self-sufficiency that Mr. Muchekeni has. She argues that she needs spousal support on a temporary basis because she is in an increasingly precarious financial position and because the number of hours she is currently forced to work to support herself, on evenings and week-ends, is detrimental to her studies.

[17] Mr. Muchekeni disputes that Ms. Muchekeni supported him when he was studying in Toronto. His position is that both of them studied part-time and worked full-time during that period of time. He deposes that neither of them made sufficient money to support the other going to school full time at that point or at any other point in their relationship. He argues that the parties' financial situation at the time of separation was still precarious, and that it would not have been possible for Ms. Muchekeni to go back to school full time then. He also argues that her decision to become a full time student was not a reasonable one given her financial situation, and that it is not

something that he should have to support. Mr. Muchekeni argues that if Ms. Muchekeni finds herself in a precarious financial situation now, it is the result of bad decisions on her part, and not a consequence of the relationship or its breakdown.

[18] The extent to which the parties' respective positions will prevail at trial will in large measure depend on the findings of facts that are made about some of the things that transpired during the relationship. Some areas of dispute, it seems to me, may be particularly significant: the extent to which Ms. Muchekeni supported Mr. Muchekeni during the time he was attending the University of Toronto; whether the question of Ms. Muchekeni's going back to school to undertake nursing studies was discussed during the relationship; whether there was an agreement between the parties that they would, each in turn, upgrade their education with the financial support of the other. The findings that are made about those issues will have a significant bearing on Ms. Muchekeni's entitlement to spousal support on a compensatory basis. At this stage, what I have is conflicting affidavit evidence on those topics. If Ms. Muchekeni's version is accepted, she may well be found to be entitled to spousal support on a compensatory basis. For that reason, I conclude that there is at least a triable case on that issue.

[19] Having concluded that there is a triable case for support on a compensatory basis, I do not need to go on to examine whether there also exists a triable case for support on a non-compensatory basis.

3. Quantum

[20] As this Court said in *Chambers v. Chambers, supra*, once the determination has been made that there is a triable case, the Court must apply a means and needs analysis to determine what level of support should be ordered on an interim basis. The evidence that is relevant to this means and needs analysis comes from the parties' financial statements and other evidence in their Affidavits about their financial situation and personal circumstances.

[21] The financial statements show a significant deficit between each party's monthly income and expenses. Mr. Muchekeni's financial statement includes areas that could be the subject of adjustments. For example, there are monthly allowances for a \$300.00 reserve for vacations, \$1,000.00 to support his family in Zimbabwe, and \$200.00 in entertainment and recreation. There is also an allowance for \$200.00 in

RRSP contributions. Mr. Muchekeni also acknowledges that he lives with his girlfriend, that she is working full time, and that she is not contributing anything towards rent because of other financial obligations that she has. He expects her to continue living with him until October of 2008, when her work visa expires.

[22] Ms. Muchekeni's financial statements shows little room for adjustment, with the exception perhaps of her monthly allowance of \$180.00 for hairdresser expenses, and the fact that she could increase her rental income by renting another room in the matrimonial home.

[23] As I have already stated, the Court's role, at the interim stage, is not to engage in an in-depth analysis of the objectives and factors set out in the *Act*, but those objectives and factors must be considered, and I have done so. I have taken into consideration the fact that this was a relatively short marriage; that Mr. Muchekeni's training and skills appear to have enabled him to secure employment at a reasonable income rate, whereas Ms. Muchekeni has been, it seems, confined to low-paying jobs; that Ms. Muchekeni's current educational pursuits will promote her economic self-sufficiency.

[24] I have also taken into account that Ms. Muchekeni's need, although a relevant consideration, is not the sole consideration. It is also important that I take into account Mr. Muchekeni's means. The amount of spousal support of \$1,000.00 that is being sought may well be in line with Ms. Muchekeni's need, but in my view, it is disproportionate to Mr. Muchekeni's means, even taking into consideration the adjustments that he can make to his budget.

[25] However, I am not persuaded that the amount of support should be as low as what Mr. Muchekeni suggests. I have been referred to calculations made pursuant to the *Spousal Support Advisory Guidelines* that suggest that any spousal support order made in the circumstances of this case should be of a very modest amount. While I accept that the *Guidelines* are used by some courts and may be helpful, I find that in the circumstances of this case, support in the amounts suggested through the *Guidelines* calculations would not achieve the objectives of the *Act*.

[26] Balancing all these considerations, I conclude that Mr. Muchekeni should pay Ms. Muchekeni interim spousal support in the amount of \$700.00 per month, commencing April 1st, 2008, and on the first day of each month thereafter, until a final

Order is made disposing of the issues between the parties. An Order will issue to that effect.

[27] As for Mr. Muchekeni's Application for an appraisal of the matrimonial home, with the cost shared equally between the parties, the parties agreed that it could be adjourned for the time being. That Application is therefore adjourned *sine die*, and can be brought back before the Court on seven days' notice.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
9th day of April 2008

Counsel for the Petitioner: Margo Nightingale

Counsel for the Respondent: Elaine Keenan Bengts

S-0001-DV-2006-103786

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