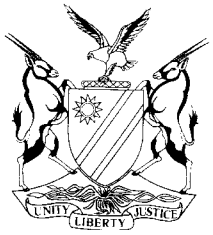

REPORTABLE

CASE NO.: I 141/10

CASE NO.: I 501/11

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MORESIA CARLOS **PLAINTIFF**
(born ENGELBRECHT)

and

ANTONIO MANUEL CARLOS **DEFENDANT**

ALFONSINE LUCIAN
(born TJONGARERO) **PLAINTIFF**

and

ALOYS BERTHOLD LUCIAN **DEFENDANT**

CORAM: **HEATHCOTE, A.J**

Heard on: **03 JUNE 2011**

Delivered on: **10 JUNE 2011**

JUDGMENT

HEATHCOTE, A.J:

[1] The above mentioned matters were set down on the unopposed divorce roll for Monday 6 June 2011. After hearing evidence, I granted restitution orders and ancillary relief, but in both matters I refused to grant the orders for forfeiture referred to below. I said that I would provide reasons for such refusal. I now do so.

[2] In the Carlos matter the Plaintiff claimed *"an order wereby Plaintiff retains sole and exclusive ownership of Erf No. 248, Liberty Island Street, Rocky Crest, Windhoek, Republic of Namibia, and be liable for all mortgage bonds repayment and associated costs".*

[3] In the Lucian matter, the Plaintiff claimed:

[3.1] "An order in terms whereof the immovable property situated at Erf No. 1687 Perhunn Street, Hochland Park, Windhoek, Republic of Namibia be transferred into the name of the Plaintiff and that should the Defendant fail and/or refuse to sign any document to give effect to such transfer within 21 days of the final order of divorce that the Deputy Sheriff be authorized to sign all such documents on his behalf.

[3.2] An order in terms whereof the immovable property situated at No. 100 Danzig Street, Lafrenz, Northern Industrial, Windhoek, Republic of Namibia be transferred into the name of the Defendant and that the Defendant shall be liable for all liabilities related to this property.

[3.3] An order in terms whereof all the movable property in the common home be awarded to Plaintiff. An order in terms whereof all the motor vehicles be transferred into the name of the Defendant and that the Defendant shall be liable for all liabilities related to this property".

[4] In both the Lucian and Carlos matters the parties were married in community of property and the Defendants maliciously deserted the Plaintiffs. Both the Plaintiffs testified that, in respect of the immovable properties they wanted to be declared forfeited, they have made all the payments in respect of the acquisition and maintenance of those properties, and the Defendants did not contribute anything towards the acquisition and maintenance of such properties. In respect of the motor vehicle referred to in the Lucian case, no evidence whatsoever was led.

[5] Before dealing with the two cases and their specific facts, it is necessary to say something about forfeiture orders. To appreciate the context, and to give clarity to reasoning and, I hope, comprehension, I shall refer to three kinds of

forfeiture orders. Firstly, what I shall term a *"general forfeiture order"*, being an order which simply reads *"the Defendant shall forfeit the benefits arising out of the marriage in community of property"*, secondly, a forfeiture order which I shall term an *"quantified forfeiture order"* (i.e. an order in terms of which the court determines the ratio with regard to which the estate should be divided to give effect to a general forfeiture order (e.g. 6:4); and lastly, what I shall term a *"specific forfeiture order"* (e.g. when a specific immovable property is declared forfeited). In his work *"The South African Law of Husband and Wife"* by HR Harloh (3rd edition) the learned author states at pg 430:

> *"Whereas an order of division (or no order at all) means equal division, irrespective of the amounts contributed to the joint estate by husband and wife, an order for forfeiture of benefits may mean equal or unequal division, depending on whether the defendant or the plaintiff has contributed more to the common fund, for an order of forfeiture, even if this is not expressly stated, amounts to an order for benefits which the guilty spouse has derived from the marriage. Since the order does not affect benefits which the innocent spouse has derived from the marriage, the estate will be divided in equal shares if the guilty spouse has contributed more to the joint estate than the innocent one, there being nothing on which the order for forfeiture could operate. If the contributions of the innocent spouse exceeded those of the guilty one, the guilty spouse will be deprived of the benefits which he has derived from the marriage."*

[6] Bluntly put, the drunken adulterous and maliciously deserting husband, who happens to be a millionaire, and who contributed far more to the joint estate than his innocent spouse, forfeits nothing, even in circumstances where the court makes a general forfeiture order against him. The practical effect of a general forfeiture order in such circumstances would be a mere division of the joint estate. Thus, he is obliged to give 50% of the joint estate to his innocent wife, but he forfeits nothing. The 50% division of the estate is a natural consequence of the law, and does not concern forfeiture at all. On the other hand, the worthless drunken gambler who has committed adultery, but has contributed far less to the value of the joint estate, is not entitled to half the estate when his wife sues him for divorce. In such circumstances, what he forfeits is the benefit which would have accrued to him (by operation of law), as a result of the fact that the parties were married in community of property.

[7] But in which circumstances will the court grant a general forfeiture order; and which circumstances will the court grant a quantified or specific forfeiture order? A number of cases dealt with these issues. I propose to refer to them, discuss in short the merits of those matters, and then extract the legal principles. In all the matters which I refer to below (other than the Swill-case), the parties were married in community of property, and the Defendants either committed adultery or maliciously deserted the Plaintiffs.

[8] In Gates v Gates 1940 NPD 361 Selke; J, dealt with an unopposed matter were the Plaintiff/husband issued summons against his wife, claiming divorce,

dissolution of the community of property existing between the parties, and forfeiture by the wife of benefits she may have derived from the marriage in community of property. The ground of divorce was that the Defendant/wife committed adultery and was established. At the hearing, the Defendant appeared and indicated no opposition to the divorce, but wanted a liquidator to be appointed to give effect to the general forfeiture order sought. The Plaintiff indicated that he objected to the appointment of a liquidator, but would rather lead evidence to obtain a quantified forfeiture order. To save costs, the court allowed evidence to be led. In the course of his judgment, Selke; J, confirmed a number of well known principles. They were;

[8.1] If a marriage in community of property has dissolved, the division of the community of property takes place as a matter of law, irrespective of whether or not the court order mentions the division;

[8.2] Where a court grants a divorce on the basis of adultery or malicious desertion, the court has no discretion whatsoever to refuse a general forfeiture order, if asked for. When granting it, the court does not even have regard to the respective contributions made to the common estate by the respective parties;

[8.3] For purposes of granting a quantified forfeiture order, the value of the estate must be determined at the date of the divorce;

[8.4] When the court considers the respective contributions by the two parties, no distinction is to be drawn between contributions made to the joint estate before, at, or during the marriage;

[8.5] In old law, authority existed in terms of which the guilty spouse also forfeited that portion which he contributed to the estate, even though his contributions were worth much more than the innocent spouse's contributions. Such law has become obsolete.

[8.6] At pg. 364 the learned judge said:

"In order to decide, therefore, in any given case whether the decree of forfeiture operates and, if so, how, it is necessary to know in the first place the value of the joint estate as it exists at the date of the order for divorce. It is then necessary to ascertain the existing value to the joint estate of the contributions respectively made by, or on behalf of, each of the spouses";

and further

"It seems to be indisputable that although a wife may not, in a positive sense actually bring in or earn any tangible asset or money during the marriage, her services in managing the joint household, performing household duties, and caring for children have a very

real and substantial value, which may well, and usually does, exceed the bare costs of her maintenance";

and then concluded

"I think, clearly (she should) be entitled to be credited with her earnings in any computation of the value of her contributions to the joint estate".

[9] Having set out the principles above, Selke; J, then scrutinized the evidence, determined the value of the joint estate at the date of the divorce, and then determined the contributions each of the parties made to the joint estate. In doing so, he placed a value on the guilty spouse's (i.e. the wife's) contribution for looking after the children and doing household chores. He concluded that the value of the estate was £305.00. The contribution of the husband, if compared with the wife's contribution, came to a ratio of 47: 12 or 4:1. According to this ratio Selke; J, then awarded £244.00 to the Plaintiff/husband and £61.00 to the Defendant/wife. Clearly, this demonstrates how a forfeiture order should operate. The wife did not get half of the estate. She forfeited that privilege as she was the guilty party. She only obtained her actual contribution towards the joint estate (i.e. less than the actual half of the estate). The Gates-case confirms that it is possible in law to make a quantified forfeiture order after the court has been appraised of all the relevant facts, amongst others, the value of the estate at the

moment of divorce, and while taking into consideration the respective contributions made to the joint estate by the respective parties.

[10] In ex parte de Beer 1952 (3) SA, TPD 288 Roper; J, had to decide the issue where a Plaintiff claimed forfeiture of benefits of the interest in a specific property (i.e. specific forfeiture order) which asset fell within the joint estate prior to the divorce. It should immediately be pointed out that in that case, the Plaintiff originally obtained a general forfeiture order, and thereafter, instituted action for the general forfeiture order to be given effect to (i.e. to obtain a specific forfeiture order). In the de-Beer-case the Defendant was described as a man who:

> *"would remain away from work for days at a time, that he was a regular drinker and addicted to gambling, and usually lost his money, and that he was in consequence very seldom able to contribute to the support of the Plaintiff and the children of the marriage"*

In turn, the Plaintiff made all the contributions in obtaining the interest in the immovable property. After having considered all the evidence, the court was prepared to grant a rule nisi calling upon the Defendant to show cause, on a return date, why the specific forfeiture order (in respect of an immovable property) should not be made. The report does not indicate what happened on the return date, but in principle, this case illustrates what should occur when a general forfeiture order is granted. If the parties cannot settle the matter, they can return to court to give effect to the general forfeiture order. After the court heard

sufficient evidence the court may then make a quantified or even a specific forfeiture order. I should say that the court may obviously also appoint a liquidator, but the liquidator will have to determine the matter in accordance with the principles of law.

[11] In Opperman v Opperman 1962 (1) SWA 456, Bardenhorst; J, in a case originating from this courts' predecessor, dealt with a similar issue. The learned judge confirmed that, where a Plaintiff establishes that the Defendant is guilty of adultery or maliciously desertion, and such Plaintiff asks for a general forfeiture order, the court has no discretion not to grant the order. Further, so he held, the court may also determine the value of the joint estate and define the portion that the guilty spouse will have to forfeit (i.e. granting a quantified forfeiture order). Nevertheless, Bardenhorst; J, after having referred to the evidence presented by affidavit, stated;

> *"From the affidavits now before me I am not in a position to define the portion that the Defendant has to forfeit and have decided to grant the parties an opportunity to place full material before the court to enable me to determine the value of the joint estate and define the portions to be forfeited by the Defendant".*

[12] In Swil v Swil 1978(1) SA WLD 790 Nestadt; J, pointed out (at 792 G-H) that the doctrine of forfeiture of benefits in cases of divorce ultimately derives from the Roman Law and was developed to provide equitable relief. Its object

and effect is to prevent the guilty spouse from benefitting from his or her own guilt. In the judgment, Nedstadt; J, also pointed out that a general forfeiture order must be granted (if so requested) as the court does not have any discretion to refuse it. Normally, once a general forfeiture order is granted, the Plaintiff may approach the court again, consequent upon the order for general forfeiture, for the court to determine the exact benefit that should be forfeited (i.e. issuing a quantified forfeiture order). During the judgment the learned judge also pointed out the following (at 794 F):

> *"I am not to be understood to say that delivery or transfer of specific property (i.e. a specific forfeiture order) cannot be sought as part of a claim for forfeiture. This can be done (albeit in exceptional circumstances)."*

The Swill-case actually concerned an application by the Defendant to compel the Plaintiff to provide further particulars in respect of an allegation which was made by the Plaintiff, that the Defendant should forfeit the benefits arising out of an ante-nuptial agreement. The question which was refused is this:

> *"What are the benefits of which Plaintiff claims forfeiture?"*

[13] *At page 793 D-G Nedstadt; J, said;*

> *"What arises for decision in this matter is whether an order for forfeiture operates, inter alia, as a directive to the defendant to*

> *actually restore the benefits acquired from the marriage or whether it is merely declaratory of the fact that the matrimonial proprietary regime is not to be governed by the ante-nuptial contract and that the guilty spouse is not to obtain any financial benefit from the marriage. The importance of the distinction is the following. In the former case I think it is clear that a defendant would be entitled to particulars of the benefits to be forfeited, at least of those benefits to be restored to the plaintiff. In principle the position would be similar to a vindicatory claim for the return of the plaintiff's property being made. A defendant would obviously be entitled to know, for the purposes of pleading exactly, what property was being claimed. In the latter case, however, the position is in my view different. It matters not what the actual benefits which the plaintiff claims are to be forfeited are; only the principle of whether or not there should be a forfeiture is in issue and this would depend purely on the plaintiff's right to a divorce. If subsequently a dispute between the parties arises as to what had to be restored or forfeited, this would have to form the subject of a fresh suit by the innocent spouse. In that action particulars of what was being claimed to be returned or forfeited would, as in the case first referred to, have to be given.*

[14] It is clear from the reasoning of the learned judge that, where a Plaintiff claims a general forfeiture order, no allegations are necessary to be made in the particulars of claim (as to the value of the estate and the respective parties'

contributions). But, where a quantified or specific forfeiture order is sought the necessary allegations should be made in the pleadings.

[15] In Steenberg v Steenberg 1963 (4) CPD 870, Rosenow; J, granted a specific forfeiture order in respect of a specific immovable property purchased and paid by the Plaintiff who was married in community of property. The report is a very synoptic one. The learned judge said towards the end of the judgment;

> *"The evidence showed that the property had been purchased under the hire-purchase agreement which had been signed by the husband, but that the Plaintiff (the wife) had paid for it out of her own earnings, and that the husband had not made any contribution."*

[16] Having said that, the court granted a specific forfeiture order in respect of the specific immovable property. In my view, if the phrase *"and that the husband had not made any contribution"* is to be understood to mean; any contribution whatsoever, towards the joint estate, I have no query with the result. But, if the phrase *"and that the husband had not made any contribution"*, only refers to contributions made towards the specific immovable property, I respectfully disagree with the result. According to this short judgment, the court heard no evidence whatsoever as to the value of the estate at the time of the divorce, or whether or not the husband made other contributions in respect of the acquisition

of any other immovable or movable property which vested in the joint estate immediately before the divorce order was granted.

[17] In Matyila v Matyila 1987(3) SA 230 WLD the court dealt with forfeiture of benefits arising out of a marriage in community of property, based on the provisions of section 9(1) of Act 70 of 1979. This Act is not applicable in Namibia. Nevertheless it is helpful to quote the sections. It stipulates as follows:

> *"When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage, the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made the one party will, in relation to the order, be unduly benefited."*

[18] Dealing with this section, and with reference to case law, Van Zyl; J, stated the following;

> *"The said section requires <u>allegations</u> of fact in regard to –*
>
> (a) *The duration of the marriage;*
>
> (b) *The circumstances which gave rise to its breakdown;*

(c) *Any substantial misconduct on the part of either of the parties.*

In addition, so the court held, it should be alleged that undue benefit may accrue to one party in relation to the other party, should an order of forfeiture not be granted. This case also illustrates that it is necessary to make the necessary allegations in the pleadings where specific or quantified forfeiture is sought.

[19] It seems to me that, what the provisions of the Divorce Act 70 of 1979 had in mind, was to alleviate the common law onus for a person to obtain a specific order of forfeiture in respect of specific immovable or movable properties. I find support for this view in Persad v Persad and Another 1989 (4) SA 685 DCLD, where Didcott; J, also dealt with the provisions of section 9 of the Divorce Act, 70 of 1979. Dealing with the Defendant's behaviour the learned judge described him as follows:

> *"Throughout the period Plaintiff, who was employed, paid from her wages every cent of the rental for the house. The same went for all the other household expenses. The first defendant contributed nothing to the payment of either. For he earned nothing. Though well able to work, he chose not to do so and never sought employment. Idle and dissolute, a layabout and a drunkard, he sponged on his wife and lived off her industry. Neither of them had any possessions worth mentioning, any money of which to speak or, except for the occupation of the house and the plaintiff's job, anything in life that mattered materially".*

[20] Applying section 9 of the Divorce Act, to the facts of the Persad-case (where the Plaintiff also asked for the forfeiture of a specific right title and interest in and to an immovable property; (i.e. a specific forfeiture order)), the learned judge then said the following at 689 E;

> *"For, as I understand the statute, it left untouched the concept of a forfeiture of property, not altering what was then envisaged or encompassed by the notion in the eyes of the common law, but merely defining and adumbrating the circumstances in which the court was empowered to order a forfeiture".*

[21] Clearly, therefore, in the absence of the applicability of the Divorce Act, 70 of 1979 in Namibia, the common law and its principles, in as far as forfeiture orders are concerned, still apply and should find application in respect of each and every divorce case, even if unopposed.

[22] From the aforementioned authorities, I would venture to suggest, the legal principles applicable in Namibia are these;

[22.1] When parties are married in community of property, and the Defendant commits adultery or maliciously deserts the Plaintiff, the court has no discretion but to grant a general forfeiture order, if so requested. The court will grant such general forfeiture order without

enquiring as to the value of the estate at the date of divorce, or the value of the respective parties' contributions.

[22.2] Even if a general forfeiture order is granted, it may have the effect, in certain circumstances, that the property is simply equally divided. That would be in circumstances where the so called *"guilty spouse"* has contributed much more to the joint estate than the contributions of the so called *"innocent spouse".*

[22.3] A general forfeiture order will only have a practical effect if the guilty spouse contributed less to the joint estate than the innocent spouse did. In short, the guilty spouse cannot insist on half of the value of the joint estate. The benefit of a marriage in community of property is that, in the normal course, each party is entitled to half of the estate. But, a guilty party in divorce proceedings forfeits that benefit.

[22.4] Once a general forfeiture order is granted, the court may either appoint a liquidator, who would then liquidate the estate in accordance with the law, or any one of the parties can approach the court to give practical effect to the general forfeiture order by issuing a quantified forfeiture order.

[22.5] When the court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led. The fact that a husband or wife does not work, does not mean that he/she did not contribute. Value should be given to the maintenance provided to the children, household chores and the like. It would be readily quantifiable with reference to the reasonable costs which would have been incurred to hire a third party to do such work, had the spouse who provided the services, not been available during the marriage. Of course, he/she would then possibly have contributed more to the estate, but these difficulties must be determined on a case by case basis. Only in such circumstances can the forfeiture order be equitable;

[22.6] When a court considers a request to grant a quantified forfeiture order, evidence produced should include the value of the joint estate at the time of the divorce, the specific contributions made to the joint estate by each party, and all the relevant circumstances. The court will then determine the ratio of the portion each former spouse should receive with reference to their respective contributions. If the guilty spouse has only contributed 10% to the joint estate that is the percentage he or she receives. If, however, the 10% contributor is the innocent spouse, he or she still receives

50% of the joint estate. The same method as applied in the Gates' case should find application.

[22.7] The court, of course, has a discretion to grant a specific or quantified forfeiture order on the same day the restitution order is granted, if the necessary evidence is lead at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim i.e. the value of the property at the time of divorce, the value of the respective contributions made by the parties; and the ratio which the Plaintiff suggests should find application (where a quantified forfeiture order is sought). Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be indentified. It should then be alleged that the Defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. (Note: this is not the same as alleging that no contribution was made to the acquisition or maintenance of the specific asset). I am of the view that it is only fair that Defendants also, in unopposed divorce actions, (by and large getting divorced in circumstances where the Defendant is illiterate and would not even understand the concept of forfeiture of benefits) should be provided with such details;

[22.8] In exceptional circumstances, and if the necessary allegations were made and the required evidence led, it is possible for a court to make a forfeiture order in respect of a specific immovable or movable property (i.e. a specific forfeiture order). I say that this would only find application in exceptional circumstances, because it is not always that the guilty Defendant is so useless that the Plaintiff would be able to say that he/she has made no contribution whatsoever, or a really insignificant contribution, (to the extent that it can for all practical intents and purposes be ignored);

[22.9] It is of no significance or assistance, if the Plaintiff merely leads evidence that, in respect of a specific property he or she had made all the bond payments and the like. What about the Defendant's contributions towards the joint estate or other movable or immovable property in the joint estate?

[22.10] It is also not a valid argument, to submit, (as counsel for the one of the Plaintiff's in this case did), that the matter is unopposed. The question which arises is, does the Defendant know what is claimed?; and in any event, the court has no discretion to act contrary to the law simply because the matter is not opposed. No opposition does not constitute an agreement. Any Defendant is entitled to assume, even if he/she does not oppose, that a court will only grant a default judgment within the confines of the law.

[23] I now turn to the facts of the two unopposed divorce cases which I have heard. No evidence whatsoever was led as to the value of the estates at the time. Also, no evidence whatsoever was led as to the contributions of the Defendants towards the estates. In the one case, there was evidence that the Defendant did not make any contribution towards the specific immovable properties which the Plaintiff claimed should be forfeited. But that does not mean that the Defendants', in both cases, never made a sufficient or notable contribution towards the joint estate during the marriage. In fact, in both cases the Plaintiffs alleged and testified that the Defendants were earning enough money to pay substantial amounts of maintenance towards the minor children. Surely, they are not drunkards, idly lying around and gambling, whenever they find the moment to do so. In short, insufficient evidence was led to establish exceptional circumstances to grant the specific forfeiture orders sought.

[24] Lastly, I should deal with the prayer contained in the Lucian matter which stated; *"An order in terms whereof all the movable property in the common home be awarded to Plaintiff. An order in terms whereof all the motor vehicles be transferred into the name of the Defendant and that the Defendant shall be liable for all liabilities related to this property".*

[25] This relief appears to be based on an equitable wish, rather than legal ground. Such matters are to be dealt with in agreements. The court has no power

to dish out assets as if such assets are playing cards, while at the same time ceding debts and transferring obligations.

[26] In the above mentioned circumstances, I declined to grant the specific forfeiture orders.

[27] Lastly, given the importance this judgment may have on forfeiture orders sought on a weekly basis in the unopposed Motion Court, I request the Registrar to forward a copy of this judgment to the Law Society, in order to be made available to its members.

Dated at WINDHOEK on this 10th day of JUNE 2011.

_____

HEATHCOTE, A.J