



CASE NO.: (P) I 474/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NABOTH UUSHONA

PLAINTIFF

And

ELINA IIPINGE

DEFENDANT

Coram: SILUNGWE, A. J.

Heard on: 7th – 10th October, 2009, 26th, 27th, et 30th April, 2010

Delivered on: 6 July 2011

JUDGMENT

SILUNGWE, A.J,

- [1] In this action, the plaintiff, a Welder, seeks an order against the defendant – his wife – for restitution of conjugal rights and, failing compliance therewith, a final order of divorce. A further order is sought for the ancillary relief of forfeiture of benefits arising out of their marriage in community of property, namely, an immovable property situated at Erf.; 2793 Gadhafi Street, Okuryangava, Windhoek, which became their common home.
- [2] In reconvention, the defendant too claims similar reliefs. Additionally, she claims an equal division of movable property between the parties as well as maintenance.
- [3] It is common cause that the parties were married to each other in community of property at Oshakati on December 21, 2000, and that no children were born between them, either before or during the subsistence of the marriage. Furthermore, and prior to the marriage, the plaintiff, utilizing a loan obtained from the National Housing Enterprise, purchased a piece of land upon which the common home is located, at a cost of N\$22,500.00. Construction commenced in 2001 while the parties resided in a shack on the piece of land aforesaid. Subsequently, the parties experienced some marital problems which culminated in the plaintiff's departure from the common home on October 9, 2006, and to which he has since not returned.
- [4] The plaintiff's claim (in convention) and that of the defendant's in reconvention are based on constructive desertion. In his particulars of claim, the plaintiff alleges in paragraph 6, which is

the bone of contention, that the defendant acted with a malicious, fixed and settled intention to terminate the marital relationship in that she:

1. *made false and injurious allegations to the Namibian Police that he had assaulted her whereupon the Windhoek Magistrate's Court issued an interdict (protection order) against him;*
2. *made false and injurious accusations against him alleging that he and his family were practicing witchcraft;*
3. *by virtue of her false allegations contained in sub-paragraphs 1 and 2 above, she brought feelings of shame and indignity upon him;*
4. *shows no love or affection to him during the subsistence of the marriage;*
5. *shows no intention of continuing the marriage; and*
6. *constantly quarrels and fails to communicate with him.*

[5] In her amended plea and counterclaims, the defendant denies the plaintiff's allegations aforesaid and contends that, during the subsistence of their marriage, the plaintiff, with the determined intention to end the marital relationship between the parties "wrongfully and maliciously" deserted her in that –

1. *He physically assaulted the defendant so severely during the 2001 that she a miscarriage and had to be hospitalized for the two weeks;*
2. *He verbally advised her;*
3. *He refused to grant her marital privileges;*
4. *During October 2006, he broke a bone in her arm;*
5. *He ordered her to leave the common house on numerous occasions;*
6. *His actions compelled her to obtain a protection order against him to save her life;*
7. *He left the common house on 10th October, 2006 and has since not returned.*

[6] Both parties have led evidence in support of their respective claims. The plaintiff alone has testified on his own behalf. As for the defendant, not only has she testified on her own behalf, but she has also called one witness, namely, Justine lipinge (Justine), her young sister.

[7] In his testimony, the plaintiff avers, inter alia, that after their marriage, he and the defendant enjoyed a harmonious relationship for one and a half years. It is, however, not clear from his evidence whether the onset of their marital problems commenced in June or July 2002. He alleges that the defendant used to insult him calling him a poor man, gay and accusing him and his relatives of being witchcraft practitioners. He claims that the defendant made false allegations against him to the

effect that he had beaten her and broken her arm which resulted in his being locked up overnight by the police. As previously alluded to, and this is common cause, the defendant obtained (ex parte, on May 10, 2005) the Interim Protection Order (Exhibit F) against the plaintiff but the latter maintains that he never assaulted the defendant in the year 2005. The plaintiff then left the matrimonial home, taking his personal belongings with him. He subsequently rejoined the defendant in 2006 (apparently in January) and thereafter lived together with her until December 9, 2006, when he once again left the common home and has since not returned to live there. The defendant's version is fundamentally at variance with that of the plaintiff.

[8] It is revealed by the plaintiff that hatred does exist between the parties and that fights have occurred between them (during their uneasy co-existence) some of which "were provoked by" the defendant. The plaintiff is, however, silent as to how the other fights with the defendant came about.

[9] The plaintiff denies the defendant's allegations (in her pleadings) that she suffered a miscarriage in 2001 as a result of having fallen victim of an assault at his hands. He admits, however, that the defendant was confined to the Windhoek Central Hospital.

His evidence-in-chief is that the confinement was for a period of one week but, under cross-examination, the confinement is said to have lasted for two weeks! He stated that, upon returning home but finding that the defendant was not there, he telephoned

her; she responded that she was hospitalized and requested him to bring a blanket, a night gown, *et cetera*, for her. Answering the plaintiff, the defendant said that a doctor had told her that she was pregnant. The plaintiff cannot confirm whether or not the defendant was pregnant as he had neither seen the pregnancy nor been told about it. I pose here to mention that it is not at every stage of development that a pregnancy is physically noticeable; what is more in the present case is that there is no evidence on record as regards the degree of the said pregnancy.

[10] The testimony of the plaintiff shows that a different incident occurred in September 2006 regarding the parties' common home. The exact date of the incident in question is not clear as two different dates are assigned thereto, namely the 6th (examination-in-chief) and the 15th (under cross-examination). Upon his return home from work on that occasion, the plaintiff allegedly saw something resembling blood smeared over the front door.

When he asked the defendant about it, she replied that she did not know but she subsequently said that a dog might have been responsible for that. Consequently, an argument ensued between the parties.

[11] The plaintiff's allegation in the preceding paragraph (para 10) is strongly countered by the defendant who claims that it is false.

[12] The plaintiff further alleges in his evidence that, after work on October 9, 2006, he was at home watching television when the defendant returned home and shortly afterwards started insulting him saying that he was “poor, gay and a wizard”. Besides that, the defendant allegedly threw away the food he was cooking. He was not amused and so he went and called the police. He further testifies that he and the defendant were the only ones living in the main house as Justine lipinge (Justine) (his sister-in-law) who had been living with the parties since January 2006, was residing in the shack and was not present in the matrimonial home when the altercation took place.

[13] Conversely, however, the defendant’s version regarding the events of October 9, 2006, is that when she returned home, from work (as an adult literacy teacher), she found the plaintiff in the sitting room watching television and greeted him but he did not respond; she then went into their bedroom and put her books down. The plaintiff followed her there and told her that he didn’t want to live with her as she was not a woman since she had not brought forth a child for him, whereupon he assaulted her. Thereafter she went into the sitting room but even there the plaintiff followed and continued to assault her: he held her by the head and pushed her against a chair causing her to yell. She says that he twisted her arm behind her back and she thereby sustained an injury. That apart, she was slapped. Justine came out of her bedroom (which was part of the two bedroomed matrimonial home). The defendant then made a phone call to Wanaheda Police Station. Justine saw the defendant making a

phone call though she did not hear what was said. She later saw the police arrive. Justine confirms the defendant's evidence that she (Justine) was actually living inside the matrimonial house, which is in marked contrast to the plaintiff's testimony that Justine was living in the shack. On the strength of the plaintiff's own evidence, however, his assertion that Justine was at the material time residing in the shack is a blatant and indisputable falsehood as the earlier part of his testimony under cross-examination manifestly shows that the shack aforesaid was demolished and replaced with a garage when construction of the house was accomplished.

[14] As regards the plaintiff's allegation that, in the evening of October 9, 2006, the defendant threw away the food that he was cooking, this is controverted by the defendant and Justine, the latter adding that the plaintiff was not known to cook food at the couple's residence since such responsibility was the preserve of the defendant.

[15] It is not in dispute that, following the incident that occurred in the evening of October 9, 2006, the plaintiff packed his personal belongings, left the matrimonial home and has since not returned to live there with the defendant.

[16] Besides what has hitherto been adverted to, and the date of marriage between the parties (which is common cause), the defendant's version may briefly be stated thus. Sometime in the relatively early stages of their marriage, the defendant returned

from “Ovamboland” only to find her bags and clothes scattered in the shack where she and the plaintiff were then residing (prior to the construction and completion of the matrimonial house). When she inquired about that state of affairs, the plaintiff replied that a woman with whom he had a child (prior to their marriage) was responsible for that situation. On asking as to why another woman had been brought there, the plaintiff became incensed and consequently assaulted the defendant which, in turn, led to her hospital admission and the miscarriage previously referred to. She remained in hospital for a fortnight.

[17] The defendant further alleges that the plaintiff used to tell her that he did not wish to live with her as she was barren and could thus not bear children for him. She maintains that she never referred to the plaintiff and his relatives as practitioners of witchcraft, neither did she accuse him of being gay or infertile. She denies the plaintiff’s allegation that she assaulted him and conversely claims that it was him who used to inflict assaults upon her. For instance, she draws attention to an incident that occurred at night in the year 2003 when she was told that she should no longer park her taxi at home. She was assaulted and “kicked” out of the matrimonial home. He threw out some tyres and threatened her with a panga and a hammer. On that occasion, she ended up spending the night at the home of her uncle’s cousin, Neganga. She thereafter reported the matter to the Ministry of Woman and Child Welfare. Consequently, the plaintiff was summoned there and spoken to by a Ms Mulalukwa, an official of the Ministry. The plaintiff said he would not do it again. The

plaintiff denies having threatened the defendant as alleged adding that he does not keep such weapons at home.

[18] Another incident of assault against her was allegedly perpetrated by the plaintiff sometime in 2005. On that occasion, the defendant returned home from Ovamboland at the behest of the plaintiff who had complained against her school-going female cousin. Upon enquiry, the plaintiff told the defendant that the girl was naughty, finishing food at home and that he no longer wanted her to live there. When the defendant enquired further as to where the girl would go since she had been entrusted to her to enable her (the girl) to attend school, the plaintiff assaulted her (the defendant) and sent the girl packing, whereupon the latter packed her bags and departed. The defendant approached the Child and Woman Abuse Centre and complained about the plaintiff's abusive conduct with the consequence that she subsequently obtained the interim protection order to which reference has already been made. In the circumstances, the plaintiff took his bags and left the matrimonial home. Afterwards, however, the parties resumed living together again, following a pastor's intervention.

[19] As the incidents of September and October, 2006, have previously been discussed, it is unnecessary to repeat them.

[20] It is trite law that for the plaintiff to obtain restitution order, it must be proved that (a) the court has jurisdiction; (b) there has been, and still is, a marriage (between the parties); and (c) there has

been malicious desertion by the defendant. The burden of proving the fact of desertion as well as the intention of desertion rests upon the plaintiff. See: Hahlo, the South African Law of Husband and Wife, 4th Ed., at 408; *Paris Kabey Vatilifa V Ruusa Nangula Katilfa* Case No. (P) I 3276 of 2006; *Nicolais Shapumba Shikongo v Magnus Shikongo (born Samson)* Case No. 1704 of 2005. In these proceedings, the court's jurisdiction and the fact and the subsistence of the marriage between the parties are not an issue. The issue is whether the plaintiff has proved that the defendant is guilty of malicious desertion. The phraseology "malicious desertion" was articulated as follows by Heever, J in the case of *Williams V Williams* 1994 OPD at 202:

"The expression malicious desertion only means that there is desertion without cause. To say that desertion is not malicious requires special justification. Special justification may either be extra-conjugal or conjugal; extra-conjugal where for example, such a party has a sick parent or is herself ill and has to have a holiday, or urgent business to perform. On the other hand, where the absence is justified on the ground of conjugal relations, it amounts to an averment that the other spouse has been guilty of conduct to justify departure from the household".

[21] In the instant case, it is common cause that the plaintiff departed from the matrimonial home on October 9, 2006, and has since not returned. According to Hahlo, supra, at 389:

"There is no fundamental difference between actual and constructive desertion. Desertion is not the withdrawal from a place but from a state of things, and it does not matter therefore, on which side of the front door, so to speak, the spouses are found when they part. The spouse who really deserted is the one who compelled the desertion"

[22] The consequential question that immediately arises is which of the parties “really deserted” the other? In answering this question, it is opportune to consider first the events that occurred between the parties in the evening of October 9, 2006. Having evaluated the evidence before me, I am persuaded to accepted the version of the defence. It is not in dispute that the police visited the parties’ home that evening. The defendant’s testimony in the regard is that she made a phone call to the police and Justine confirms her evidence to the extent that she observed her making use of the phone though she could not hear what was said over the phone. In the circumstances, the plaintiff’s evidence that he went out and made a report to the police cannot reasonably be true. Moreover, the defendant is categorical that Justine was living in the matrimonial home. On the contrary, however, the plaintiff maintains under cross-examination that Justine was, at the time, living in the shack; but subsequently contradicts himself that the shack had been demolished and replaced with a garage. Justine could thus not have been living in a structure that was no longer in existence!

[23] As previously shown, the plaintiff has given conflicting evidence regarding the duration of the defendant’s hospitalization.;

[24] It clearly emerges from the evidence that, although the initial part of the marriage yielded a harmonious relationship between the parties, their subsequent marital co-existence has been characterized by turbulence; noticeably, one of the contributing

factors to this state of affairs has been the defendant's inability to bear children for the plaintiff.

[25] Having heard and observed the parties, as well as Justine, I am not persuaded by the plaintiff whom I find to be economical with the truth, as earlier illustrated. In my view, it is the plaintiff, as opposed to the defendant, who is guilty of malicious desertion. Further, it is evident that he is not interested in the continuation of the marriage; he has thus fallen short of discharging the onus of proof which rests upon him. In the result, his action for restitution of conjugal rights fails.

[26] This brings me to the defendant's counterclaim. In the light of the pleadings and the evidence adduced, coupled with the findings that have already been made, I find that the defendant's version is essentially credible and I am satisfied that the defendant has discharged her onus of proof. It is apparent to me that the marriage is not only a shell but also that the defendant too is not interested in its continuation due to the plaintiff's abusive conduct.

[27] I now turn to the ancillary reliefs sought by the defendant. In this regard, the immovable property situated at Erf 2793, Gadhafi Street aforesaid, occupies centre stage. As previously shown, it is not in dispute that the Erf was procured by the plaintiff prior to the marriage; and that the construction of the matrimonial house commenced in 2001. Whereas the plaintiff testified that the construction was finalized in 2003, the defendant maintains that

the completion occurred in 2004. Be that as it may, the bone of contention is whether it was the plaintiff who was solely responsible for the construction of the house, to the exclusion of the defendant, as he claims.

[28] In his testimony, the plaintiff alleges that the defendant made no contribution towards the construction of the house, and that he alone bore the entire contribution. In contrast, however, the defendant asserts that, in large measure, she contributed to the construction of the house, adding that the plaintiff's contribution was limited to the laying of the foundation, acquisition of some blocks, tiling and installation of burglar bars as well as ceiling. The defendant has named Haimba and Tangeni as some of the men that she used to accomplish the construction of the house. Besides, she has produced invoices and receipts as exhibits in respect of some of the building materials that she acquired from Builders' Warehouse. In a nutshell, the defendant's version is that both parties made their respective contributions towards the construction of the house save that her contribution significantly outbalanced that of the plaintiff.

[29] Although the plaintiff insinuates that the defendant could not have made any contribution towards the construction of the house as she then had no income, he subsequently concedes that, with effect from 2001, she earned income from her business of trading in secondhand clothes. Moreover, it is not in dispute that the defendant acquired a taxi in 2002 which she subsequently operated as such until 2006 when it broke down.

Further, she inherited a sum of N\$10,000.00 from her grandfather, the late Cosmas Hinyama who passed away in 1999; and she received a gift of N\$35,000.00 from her uncle Johannes Titus, as appreciation for having qualified as a motor vehicle mechanic, which evidence I find credible. It is not in dispute that she additionally earned some income from her part-time jobs with the Electoral Commission of Namibia and the Ministry of Education (as an Adult Literacy Teacher). The defendant contends that she utilized her personal financial resources to make the said contributions.

[30] On the basis of the foregoing evidence, I have no hesitation in coming to the conclusion that both parties made their respective contributions towards the constructions and completion of the house.

[31] Although it is trite law that the court has no discretion to withhold an order for forfeiture of benefits of a marriage contracted in community of property, once such order is demanded by the innocent party, it nevertheless has a discretion to decide whether it should itself determine the value of the joint estate and define the portion that the guilty spouse will have to forfeit. See *Gates v Gates* 1940 NPD 361; *Opperman V Opperman*_1962 (1) SA 456 (SWA) at 457-458. An examination of the evidence in the matter clearly shows that there is insufficient material to enable the court to determine the value of the joint estate and define the portion to be forfeited by the plaintiff. In the circumstances, the President, alternatively the Vice President, if any, or the Chief Executive of

the Law Society of Namibia, is hereby appointed to designate a liquidator to ascertain the value of the joint immovable estate situated at 2793 Gadhafi Street, aforesaid, and to define the portion to be forfeited by the plaintiff; as well as to define an equal division of the joint immovable estate.

[32] In the result, the following order is made:

1. The plaintiff's action for restitution of conjugal rights is refused;
2. In view of the finding that the plaintiff has no intention of continuing with the marriage, which is seemingly shared by the defendant, the latter's counterclaim is granted to the following extent:
 - 2.1 a decree of divorce is awarded to the defendant;
 - 2.2 the President, alternatively, the Vice President, if any, alternatively, the Director, of the Law Society of Namibia is hereby appointed to designate a liquidator-
 - 2.2.1 to ascertain the value of the joint immovable estate and to define the portion to be forfeited by the plaintiff; and

2.3 to define an equal division of the joint movable estate;

3. The plaintiff is to pay the costs of the suit.

SILUNGWE, A. J

ON BEHALF OF PLAINTIFF : Mr A. E. J. Kamanja
INSTRUCTED BY : Sisa Namandje & Co

ON BEHALF OF DEFENDANT : Mr B. L. Maasdorp
INSTRUCTED BY : Bazuin Inc.