NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1298/2009

In the matter between:

NEVILLE GEROME CLOETE **PLAINTIFF**

and

BELINDA NAOMI GRIQUA **DEFENDANT**

Neutral citation: *Cloete v Griqua* (I 1298/2009) [2012] NAHCMD 18 (9 October 2012)

Coram: VAN NIEKERK J
Heard: 5 October 2011; 17 November 2011; 6 December 2011
Delivered: 9 October 2012

Flynote: **Husband and wife** – Proprietary consequences – Forfeiture of benefits of marriage in community of property - Making of specific forfeiture order requires evidence of value of estate at time of divorce and of all contributions made by spouses – Evidence not sufficient to make such order – Equal division made

regarding proceeds of sale of immovable property sold after the final order of divorce.

Summary: The parties were previously married in community of property. The defendant obtained a final order of divorce which included a general forfeiture of benefits order. A specific immovable property was also declared forfeited. Several years after the divorce the defendant sold another immovable property which previously formed part of the common estate. In respect of this property the plaintiff had always paid the bond instalments both during and after the marriage. The plaintiff obtained no share of the proceeds. He instituted action against the defendant, claiming that the house never formed part of the joint estate. This is clearly untenable in law. The defendant defended the action claiming that she became the sole owner of the property on the date of the final divorce order based on the general forfeiture order. This view was also based on a legal misconception. When both the errors of law were pointed out by the court, the parties agreed to provide calculations and proposals to the court as to how the proceeds of the sale of the immovable property should be divided. The plaintiff proposed an equal division, whereas the defendant tired to give effect to the general forfeiture order based on contributions by the parties during the marriage. As there was not sufficient evidence about the value of the common estate at the time of the divorce and about the contributions by the parties, the court divided the proceeds equally taking into account the contributions by the parties after the final order of divorce.

ORDER

Judgment is given for the plaintiff against the defendant in the sum of N$128 205-69. Interest at the rate of 20% per annum is to be charged from 1 April 2012 on any amount not yet paid. The defendant is ordered to pay the plaintiff’s costs of suit.

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] The parties were previously married in community of property. On 17 April 1998 the defendant obtained a final order of divorce against the plaintiff. As part of the final order the plaintiff was ordered to forfeit the benefits arising from the marriage in community of property. The plaintiff also forfeited any benefit in a specific immovable property, namely a house at 818 Geelsysie Street, Khomasdal, Windhoek.

[2] During the subsistence of the marriage the plaintiff bought his parents' house situated at Erf 2334, Khomasdal. He paid all the monthly instalments during and after the marriage. In September 2006 the defendant sold this house for N$240 000. Before and during the sale of the house the parties were engaged in litigation regarding the sale of the property in question. It is not necessary to deal with the details of this litigation**.**

[3] In the matter before me the plaintiff initially claimed payment of the purchase price on the basis, inter alia, that he was the sole owner of the house at Erf 2334 and that the agreement between him and the defendant was that, although the property was registered in both their names by virtue of the marriage in community of property, the house would not form part of the common estate. Clearly this is untenable in law and when same was pointed out to the parties during the trial, it was accepted that in fact the parties were joint owners of the house during the subsistence of the marriage.

[4] The defendant's case was also based on a legal misconception and this is that, by virtue of the order of forfeiture of benefits, she became the sole owner of the house upon dissolution of the marriage. It is trite that what the guilty party forfeits is not his own contribution, but the benefit of sharing in the contributions made by the innocent party to the extent that such contributions exceed those made by the guilty party (*NS v RH* 2011 (2) NR 486 (HC) 497A-F; *C v C* 2012 (1) NR 37

[5], [22.3]). Furthermore, a general forfeiture order does not operate upon a specific asset unless this is specifically claimed and the necessary allegations and proof for the relief sought are provided (*C v C supra* [22.5] – [22.7]). In this case such an order was never made in relation to the property at Erf 2334. When all these aspects were pointed out to the parties, it became common cause that the defendant was never the sole owner of the house at Erf 2334 and that she was not entitled to sell the house for her sole benefit.

[5] In light of these developments it was agreed that the parties would present calculations supported by documents to the court to determine how the proceeds of the sale of the house should be divided.

[6] The defendant's calculations take into account certain alleged contributions made by the parties during the subsistence of the marriage, some of which are based on estimations. I agree with Mr *Grobler* on behalf of the plaintiff that as a result of the efflux of time there is too little evidence to determine the value of the estate at the time of the divorce and to determine the contribution of each party to the joint estate during the subsistence of the marriage. This would have been necessary in order to determine if the general forfeiture order would have had practical effect (*C v C supra* [22.6]). In the circumstances it seems the most reasonable, practical and fair to assume that the proceeds of the sale of the house at Erf 2334 be divided on an equal basis and that the payments on the bond since the divorce up to the time of sale be shared equally.

[7] Although the sale price was N$240 000, the defendant received only N$128 726.99 after certain expenses were deducted. The defendant was unable to provide details of the expenses, except for the amount used to settle the balance on plaintiff's bond, which was N$94 593.52. In the circumstances I can unfortunately not merely assume that all the expenses were indeed incurred in relation to the sale of the property. The balance on plaintiff's bond included an amount of N$ 8191.05 was used solely for the benefit of the plaintiff. It seems to me then that the amount is to be calculated as follows:

N$240 000.00 (sale price of house)

	-	N$ 94 593.52 (settlement of bond)
	=	N$145 406.48 (profit)
-	-	N$127 387.00 (instalments paid by plaintiff)
	=	N$ 18 019.48 ÷ 2
	=	N$ 9 009.74
-	-	N$ 8 191.05 (used for benefit of plaintiff)
	=	N$ 818.69
	+	N$127 387.00 (instalments paid by plaintiff)
	=	N$128 205.69 (to be paid by defendant)

[8] By agreement between the parties *mora* interest would run with effect from 1 April 2012 on any amount not yet paid. As the plaintiff had to institute action to obtain this judgment, the defendant ought to pay his legal costs.

[9] The result is then that judgment is given for the plaintiff against the defendant in the sum of N$128 205.69. Interest at the rate of 20% per annum is to be charged from 1 April 2012 on any amount not yet paid. The defendant is ordered to pay the plaintiff's costs of suit.

_____

K van Niekerk

Judge

APPEARANCE

PLAINTIFF:	Mr Z Grobler
	Of Grobler & Co, Windhoek
DEFENDANT:	Mr B B Isaacks
	Of Isaacks and Benz Incorporated, Windhoek