REPUBLIC OF NAMIBIA

CASE NO. I 105/2009

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

HARALD GUNNAR VOIGTS
APPLICANT/DEFENDANT

and

SITTA ELKE VOIGTS

(Born WALDSCHMIDT)
RESPONDENT/PLAINTIFF

CORAM: **DAMASEB, JP**

Reserved after written submissions: 3 AUGUST 2012

Delivered: 8 AUGUST 2012

JUDGMENT

DAMASEB, JP: [1] The applicant is a defendant in a divorce action brought by her husband who is the respondent in the present proceedings. She seeks condonation by way of notice of motion brought on affidavit to file a 'conditional counterclaim', alternatively leave to amend her plea to introduce the conditional counterclaim in the event that the Court grants divorce in that action which was initially brought on the basis of her alleged desertion[1] and, latterly, on the basis of her admitted adultery.[2] The applicant had proceeded to file the counterclaim on 29 June 2012 without first obtaining Court's leave or the consent of the respondent.

[2] The respondent strenuously objects to this procedure. He takes the view that in terms of rule 24 a counterclaim is possible only on one of three bases: (i) if brought with the consent of the plaintiff; (ii) if filed simultaneously with the plea, or (iii) with the leave of court on good cause shown. As regards amendment as an alternative to the counter claim procedure , the respondent's principal line of attack is that such procedure is not intended to be used to introduce a new pleading (and causes of action) but simply to put right minor defects. Both these objections raised by the respondent are valid. Fact remains though that on 10th July 2012 the applicant filed an application in the following terms:

1. Condoning the Applicant/defendant's non-compliance with rule 24 of the rules of Court and, in terms of rule 27 of the rules of Court, granting the Applicant/Defendant leave to serve and file her conditional counterclaim out of time in this present action.

[1] For which she tenders restitution.
[2] For which she seeks condonation.

2. Alternatively to paragraph 1 above granting the Applicant/Defendant leave to amend her plea file of record herein in terms of Rule 28 of the rules of Court by virtue of introducing a conditional counterclaim thereto.

3. Order that the costs of this application be costs in the cause of the aforesaid action referred to in paragraph 1 above.

4. Further and/or alternative relief.

[3] Therefore, although the applicant was not entitled to file the counterclaim either by way of counterclaim properly so called or by way of amendment before the Court's leave had been obtained or with respondent's consent, there is an application before Court seeking leave for its introduction. I find it unnecessary therefore to decide the question if it should have been filed in the first place.

[4] As the notice of motion shows, the applicant seeks condonation to pursue the counterclaim and, therefore, must show 'good cause' and prospect of success. The application is opposed both on the basis that given the rather late stage at which it was brought it discloses no good cause and that, in any event, the heads of claim relied on have no prospect of success. In the view that I take of the matter I find it unnecessary to devote a great deal of time to the allegations and counter allegations about who complied with which Court order and who did not. The question of timing of the application is however relevant to costs.

[5] Whether she does so by way of belated counterclaim or amendment, the essence of the applicant's intended new pleading is to introduce 3 separate

claims against the plaintiff to whom she is married out of community of property, but subject to an accrual system - a legal device unknown to our law but recognised in South Africa. The first claim is to seek a final order of divorce based on the respondent's admitted adultery, alternatively an order for restitution of conjugal rights based on the respondent's desertion coupled with maintenance for herself in the amount of N$ 15 000 per month and "forfeiture of the benefit derived from the marriage concluded out of community of property but subject to the accrual system'', alternatively division of the accrued estate. In essence, therefore, the applicant wants her rights under the accrual determined at the same time as the dissolution of the marriage, if it should come to that.

[6] In terms of s 2 of the Matrimonial Property Act[3] of South Africa (MPA):

> "Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract."

[7] Section 3 of the MPA sets out the effect and consequences of the accrual system as follows:

> "(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

[3]Act no 88 of 1984 (as amended).

(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse." (My underlining for emphasis)

[8] Although the device of an accrual system is foreign to our law, the parties (who solemnized their marriage in Namibia on 18th January 1985) contractually incorporated that system into their marriage contract when, in terms of clauses 7 and 8 of the ante nuptial contract, they contracted as follows:

"7. The marriage between the intended consorts shall be subject to the accrual system so that upon dissolution of the marriage be means of divorce...the one whose estate does not show any accruals or less accruals than the estate of the other...shall be granted a right to claim against the other intended consort...for an amount equal to half of the difference between the accruals of the intended consorts' different estates so that the estates of the intended consorts are of equal size after dissolution of the marriage.

8. The above-mentioned right to claim comes into existence upon the dissolution of the marriage..." (My underlining for emphasis)

[9] The point at which the right of action ripens to bring a claim based on an accrual has been discussed in a number of South African decisions where that system is statutorily recognised. I need to point out at the outset that it is not suggested by the applicant that the accrual system incorporated into their marital contract is anything other than the legal device created under the South African Act. Mr Corbett for the respondent has drawn my attention to the following decisions: *Reeder v Softline Ltd and another 2001 (2) SA*

844(W); Le Roux v Le Roux [2010] JOL 26003(NCK); Van Sly v Van der Mere 1986 1 ALL SA 142 (NC); Van Onselen NO V Kgengewenyane 1997(2) SA 423(B).

[10] The *ratio* discernible from all these cases is that the right of action to seek division of the accrued estate arises on dissolution of marriage and not before. In the most recent of the cases referred to above *Le Roux v Le Roux*[4], the following is stated:

> "[16] In Odendaal v Odendaal 2002 (1) SA 763(WLD) it was held that "Section 3(2) makes it clear that the indebtedness created by s3 (1) only arises at dissolution..."
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> [17] The provisions of section 3 are in my view clear and unambiguous and their ordinary grammatical meaning is simply that no such claim will arise until such time as the marriage is dissolved.
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> ...
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> [19] Mr. Van Rooyen conceded that, if a claim like this cannot be addressed as part of the issues in the divorce action, and the parties may not be able to come to an agreement in this regard after the dissolution of the marriage, they would have to go to the expense of further litigation to enforce such a claim.
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> [20] Although this would, on the face of it, appear to be impractical and could result in a piecemeal adjudication of issues that originates from one and the same parties, it could not in my view be described as an absurd result.
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> [21] As pointed out by Mr van Rooyen, the position is not much different in the case of a marriage in community of property. In such a case the court would not, in the absence of a written agreement regarding the division of the joint estate (see section 7(1) of the Divorce Act, 70 of 1979), or possibly a partial forfeiture order (see section 9 of both Acts), make an order dividing

[4] *[2010] JOL 26003(NCK), unreported.*

the joint estate on any specific basis. The only order which could then in such a case be made, is an order that the joint estate be divided (although that would be unnecessary, because the right to an equal division of the joint estate would, in the absence of a forfeiture order, follow from an order dissolving a marriage in community of property...

[22] Should the spouses then not be able to divide the joint estate by agreement, the court would have to be approached, for the appointment of a liquidator or receiver (except possibly where such an appointment had already been made by agreement in the divorce proceedings) and possibly again for further directions in the cause of such liquidation ...'' (My underlining for emphasis).

[11] Mr Strydom for the applicant has not referred me to any authority from the South African Courts which comes to a different conclusion, i.e. that such right of action is capable of enforcement before dissolution of marriage and is susceptible of adjudication at the same time as the dissolution of the marriage. Therefore, the part of the counterclaim based on the accrual must be disallowed. The applicant has no prospect of success on that claim at this stage of the proceedings and the question of condonation in respect thereof does not arise. It is trite that where there is no prospect of success, condonation cannot be granted.[5]

[12] The other claim sought to be introduced is founded on a donation allegedly made by the applicant to the respondent equivalent to N$450,000 which, she alleges, she realized by selling immovable property she owned and 'donating' the proceeds therefrom to the applicant for the benefit of his farming business. The respondent counters this claim by stating that it too is

[5] *Telecom Namibia Ltd v Michael Nangolo and 34 Others*, LC 23/2009, para 5 subpara 9; *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A).

not competent because donations between married spouses are not allowed under Namibian Law. In terms of section 22 of the MPA donations between spouses *stante matrimonio* are no longer prohibited.[6] That law however is not applicable in Namibia and as such the common law position prevails.[7] At common law donations between spouses is not allowed although that rule works substantial hardship to married women.[8]

[13] No allegation is made that the alleged donation falls within any of the recognised exceptions. Based as it is on an alleged transaction that is impermissible under our law, the cause of action relied on by the applicant to found recovery from the respondent of the N$450 000 is bad in law and cannot be sustained in this Court. The alleged donation by the applicant to the respondent is therefore unenforceable, whether it is brought by way of a conditional counter claim or amendment. She enjoys no prospect on that claim and that finding renders it unnecessary to consider the question of condonation for its late filing.

[14] The last claim relates to what is alleged to be applicant's financial contribution, *stante matrimonio*, to the joint household. It is premised on s.15 of the Married Person's Equality Act[9] which provides:

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[6] Hahlo, HR, The South African Law of Husband & Wife (5th Ed.), p. 148.
[7] In the Zimbabwean Supreme court case of ***MICHAEL TAYLOR V HEATHER MARGARET TAYLOR, Judgment No. SC 70/07, delivered on 15 September 2008*** it was pointed out at page 6 of the majority judgment that in the case of donations between spouses the common law position has been that a donation *inter vivos* between spouses is prohibited subject to certain exceptions.
[8] *Brink v Kitshofff NO* 1996 (4) 197 (CC), para [23] at 211I-J-212A-B; Lee & Honore, Family Things and Succession, 2nd (Ed Erasmus) p. 45.
[9] Act 1 of 1996

"**15 Liability of spouses married out of community of property for household necessaries**

(1) Spouses married out of community of property are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household.

(2) Unless the parties agree otherwise, a spouse married out of community of property before or after the commencement of this Act is liable to contribute to necessaries for the joint household pro rata according to his or her financial means, and, in the case of a marriage subsisting at the commencement of this Act, a spouse shall, notwithstanding the provisions of section 3 of the Matrimonial Affairs Ordinance, 1955 (Ordinance 25 of 1955) which were in force immediately before the commencement of this Act, be deemed to have been so liable as from the beginning of such marriage.

(3) A spouse married out of community of property has a right of recourse against the other spouse in so far as he or she has contributed more in respect of necessaries for the joint household than for which he or she is liable in terms of subsection (2), and, in the case of a marriage subsisting at the date of commencement of this Act, such right of recourse is enforceable also with respect to the period of the marriage before the commencement of this Act..." (My underlining for emphasis).

[15] The applicant claims that she contributed in the order of N$250,000 towards the expenses of the joint estate and that she is entitled to reimbursement thereof by the respondent. She makes no allegation that such contribution was disproportionate to her financial means - an allegation that is necessary to make for a claim under subsection (3) of s 15 to succeed. If it was not a contribution towards necessaries of the joint household, there is no conceivable basis on which that amount can be claimed any way as it would then be, it appears to me, an impermissible

donation *inter vivos*. The respondent justifiably retorts that in terms of s 15, such a claim can only be sustained if it is alleged and shown that the claimant contributed more than his or her *pro rata* share; that no such allegation is made and that the claim is excipiable.

[16] In terms of rule 23 of the High Court Rules, an opposing party may deliver an exception to any pleading that is either (i) vague and embarrassing, or (ii) lacks averments which are necessary to sustain an action or defence; provided that where the exception is made on the basis that a pleading is 'vague and embarrassing ', the exceptee be afforded the opportunity of removing the cause of complaint within the specified time frames.[10] It is as yet uncertain on which basis the respondent will except to the claim if it were brought. I see no reason why that issue should at this stage be finally determined. In any event, with the imposition of very strict timelines for the further exchange of pleadings, in tandem with an appropriate costs order, the prejudice to the respondent can be cured in view particularly of the fact that an earlier date for trial that had been assigned for the matter was vacated at the behest of the Court.

[17] The present potential defect in the proposed pleading, such as it is, is curable by a rather simple and obvious amendment so as to allow for the

[10] Rule 23(1) reads:

"(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he or she shall within the periods allowed as aforesaid by notice afford his or her opponent an opportunity of removing the cause of complaint within 14 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, delver his or her exception."

proper ventilation of all issues between the parties. True, the particular claim sought to be introduced either by way of conditional counterclaim or amendment is sought way too late in the day. I am satisfied that it is not a prejudice that cannot be cured by way of an appropriate costs order. The scope of it is very limited and rather uncomplicated. I am therefore prepared to grant leave to the applicant to introduce the claim in respect of it by way of conditional counterclaim on the strength of the present application before me. It would be setting a dangerous precedent to allow introduction of what are otherwise new causes of action by way of the rule 28 amendment procedure. I do not propose to consider that as an option in this case, especially because it is possible to deal with the matter on counterclaim basis. The same considerations apply to the claim for divorce based either on the respondent's admitted adultery or desertion. He admits both the adultery and having ceased living with the applicant and living instead in open adultery with his new lover. I see no prejudice if the applicant were allowed to introduce a claim for divorce on either basis, including a claim for her maintenance. It would allow for a full ventilation of all issues between the parties and is founded on largely common cause facts.

[18] Given the rather belated stage at which the present application was brought, it should come as little surprise to the applicant that the respondent has opposed it. He is entitled to his costs for opposing it. There really is no satisfactory explanation why it was brought only now. It is apposite to mention that the intention to amend the applicant's pleadings was foreshadowed as far back as March 2011. Nothing was done since then.

There has been either dereliction of duty on the part of applicant's legal practitioners to comply with Court orders in this case as quite rightly pointed out by the respondent, or the applicant's failed personally to infuse urgency in pursuing whatever claims she allegedly has against the respondent. She concedes in her papers that she had not given instructions for the claims to have been brought earlier. She really has only herself to blame for not doing so and must carry the costs burden that comes with it. The dereliction of duty on the applicant's legal practitioners is exemplified by the following communication I was compelled to direct to the parties on 6 August 2012:

> "1. Argument in the opposed application for condonation by the defendant to introduce 3 claims by way of conditional counter claim, alternatively by way of amendment, was deferred on two occasions at the request of the defendant's counsel for reasons known to all parties and which it is not necessary to repeat here. I made clear at our meeting on 31 July that I was going on recess and that it is not desirable to delay this matter any further by giving a new date for argument which would in the circumstances only be in the third term. At my request, the two counsels agreed to waive the parties' right to oral argument and to file supplementary heads of argument on or before noon on 3 August 2012, whereafter argument would be deemed reserved.
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> 2. By the deadline for supplementary heads of argument, only the respondent's counsel filed their supplementary heads and the applicant's counsel failed to do so and no explanation had been given for that failure. That failure had the consequence that I was not able to finalize the ruling on Saturday (4/8) before I could leave town on leave so that the judgment could be delivered during the course of this week. The defendant is deemed therefore to have waived the right to file the supplementary heads of argument which had arisen from the waiver of the right to make oral argument.

3. The parties are advised that I have therefore taken the file with me on leave and will finalize the ruling in the next two days. Depending on my ability to e-mail the ruling, judgment will be delivered sometime this week on a date to be advised by my clerk. Judgment shall in any event be either on Wednesday or Friday at 10 am, and this must serve as sufficient notice for the parties to note judgment on either of those dates, to be confirmed also in the registrar's day cause list."

[19] I must express the nagging feeling I have since assuming management of this file that the applicant is at pains to drag out finalization of this divorce action and to make the dispute look larger than it actually is. I said as much in the ruling on the rule 43 application. The issues to be decided in this case are straightforward and should be brought to trial without further delay.

[20] Based on all of the foregoing, I come to the conclusion that the application to bring conditional counterclaims based on the accrual, and alleged donation must fail as they have no prospect of success. In respect of the alleged contribution to necessaries for the joint household, and to the extent that the applicant moves to remove the cause of complaint, same has some basis in law. The claim for divorce on the respondent's admitted adultery, alternatively desertion is based on what are largely common cause facts and there is no prejudice to the respondent by their introduction, subject to strict adherence to deadlines to be set in this order. The laxity on applicant's (or her legal practitioners') part to timeously file the claims contained in the present pleadings deserve censure by way of a punitive costs order.

[21] I therefore make the following orders:

A. **In respect of the application:**

1. The application for condonation for the late filing of conditional counterclaims based on the accrual and donation, is refused, with costs, including the costs of one instructing and one instructed counsel, on the scale as between attorney and own client.
2. The application for condonation for the late filing of a conditional counterclaim for divorce based on adultery or desertion, coupled with a claim for maintenance and alleged contribution towards the necessaries for the common household is allowed; but costs are awarded to the respondent for opposing same on the scale as between attorney and own client and shall include the costs of one instructing and one instructed counsel.

B. In respect of case management:

1. Within 5 days from this order, applicant shall file a conditional claim in terms of paragraph 2 of Part A of this order.

2. Within 5 days from such claim being filed, the respondent shall plead thereto, unless he wishes to seek further particulars to such claim – in which event he shall seek further particulars within 5 days of such claim. The applicant shall then provide the particulars requested within 5 days of such request being received and the respondent shall thereupon file his plea within 10 days. The applicant may replicate to such plea within 10 days.

3. The parties shall convene a party's conference within 5 days of the date on which the applicant would have filed its replication and generate a joint case management report and submit same to the

managing judge no later than 3 days of such meeting, whereafter the managing judge shall give further directions.

4. Any failure to comply with the directions hereinabove shall render the non-compliant party liable for sanctions either at the instance of the other party or the court acting *mero motu*, including an order dismissing any claim or defence of the non-compliant party and allowing the innocent party to proceed unopposed.

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DAMASEB JP

ON BEHALF OF THE APPLICANT: **Mr Albert Strydom**

Instructed by: **THEUNISSEN, LOUW & PARTNERS**

ON BEHALF OF THE RESPONDENT: **Mr Andrew Corbett**

Instructed by: **BEHRENS & PFEIFFER**