

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3140/2009

In the matter between:

FENASTUS HOESEB

PLAINTIFF

and

SHIRLEY EUGINIA HOESEB

DEFENDANT

Neutral citation: *Hoeseb v Hoeseb* (I 3140/2009) [2013] NAHCMD 116 (30 April 2013)

Coram: MILLER AJ

Heard: 08 April 2013

Delivered: 30 April 2013

Flynote: Divorce proceedings – Marriage in community of property – Plaintiff seeking specific forfeiture order in respect of immovable properties – Applicable legal principles re-stated – Absolution from the instance granted.

Summary: The plaintiff and the defendant were married in community of property – Plaintiff instituted divorce proceedings claiming inter alia a specific forfeiture order in respect of three immovable properties forming part of the joint estate – The

defendant sought an order for absolution from the instance in respect of the forfeiture order – The court restated the applicable legal principles and found that based on the pleadings and the evidence adduced the plaintiff was in law not entitled to such an order – Absolution from the instance granted.

ORDER

The defendant is absolved from the instance in respect of prayers 2 and 3 of the particulars of claim. The plaintiff is ordered to pay the costs.

JUDGMENT

MILLER AJ :

[1] The plaintiff and the defendant became married to one another on 01 April 1995. The marriage was one in community of property.

[2] On 14 September 2009 the plaintiff caused summons to be issued against the defendant seeking *inter alia* an order for the dissolution of the marriage and certain other relief.

[3] For the purposes of this judgment it is necessary to set out the plaintiff's particulars of claim in full. They read as follows:

'PARTICULARS OF CLAIM

1. The PLAINTIFF is FENASTUS HOESEB, a adult male currently residing at Nampower Court Unit 1, Van Rensburg Plein, Pionierspark, Windhoek, Republic of Namibia and employed at Nampower, National Control Building, Windhoek, Republic of Namibia.

2. The DEFENDANT is SHIRLEY EUGINIA HOESEB (born SHIVANGULULA), a adult female currently residing at Gavin Ralley Post Ganduate Village No. 80, Grahamstown, Republic of South Africa, whose full and further particulars are to the plaintiff unknown.
3. The parties are *domiciled* within the jurisdiction of the above Honourable Court.
4. The parties hereto were married to each other on the 1st of April 1995 at Windhoek in community of property which marriage still subsists.
5. No children were born of the marriage between the parties.
6. During the subsistence of the marriage between the parties the defendant wrongfully, maliciously and with the settled intention of terminating the marriage between the parties, left the common home during July 2008.
7. In the premises the defendant has wrongfully and maliciously deserted the plaintiff in which desertion she still persists.
8. During the subsistence of the marriage, the parties purchased the immovable properties being:
 - 8.1 (a) Section 1 Nampower Court, which immovable property is held by Certificate of Registered Sectional Title No. 35/1998(1) and is registered in both plaintiff and defendant's name.
 - (b) Erf 276, Prosperita, purchased by Mr. Hoeseb on 31 May 2002, (see Annexure "A" annexured hereto).
 - 8.2 Prior to the marriage between the parties the plaintiff purchased the immovable property, to wit Erf 264, Katutura, which immovable property is held by Title Deed No. T1087/1993 and is registered in the name of the plaintiff.
9. Plaintiff has been solely responsible for payments of the purchase price of the aforesaid immovable properties as set out in paragraphs 8.1 and 8.2 supra in the form of the payment of monthly bond installments, transfer costs and other costs connected to the aforesaid immovable properties and continues so to pay the said bond repayments.
10. Plaintiff is entitled to forfeiture of the matrimonial benefit by virtue of the defendant's conduct aforesaid and is, in particular entitled to be awarded all defendant's rights under title to and interest in the immovable properties, to wit:
 - 10.1 Unit 1, Nampower Court, Windhoek, Republic of Namibia
 - 10.2 Erf 264, Katutura
 - 10.3 Erf 276, Prosperita, Windhoek

WHEREFORE PLAINTIFF CLAIMS:

1. (a) An order for the restitution of conjugal rights and failing compliance therewith;
(b) a decree of divorce.
2. An order directing that the defendant forfeit the benefits arising from the marriage in community of the immovable properties, to wit
 - 2.1 Unit 1, Nampower Court, Windhoek, Republic of Namibia
 - 2.2 Erf 264, Katutura
 - 2.3 Erf 276, Prosperita, Windhoekwhich properties shall become the sole and exclusively property of the plaintiff, subject to the existing and other encumbrances on the property.
3. An order directing the defendant to sign all necessary documents to give and effect transfer of the properties as set out in paragraph 8.1 into the name of the plaintiff, within 14 (fourteen) days of a final decree of divorce granted in this matter, failing which the Deputy Sheriff for the district of Windhoek is authorized to sign all documents necessary to effect such transfer.
4. Division of the remainder of the joint estate.
5. Costs of suit (only if defended).
6. Further and/or alternative relief.

DATED AT WINDHOEK THIS 10TH SEPTEMBER 2009.'

[4] The defendant entered an appearance to defend the action instituted against her and in due course filed a plea together with a counterclaim. In the counterclaim the defendant also seeks an order for the dissolution of the marriage together with an order for the division of the joint estate.

[5] When the matter proceeded to trial it became apparent that the only issue of any consequence remaining was the plaintiffs' claim that the defendant should forfeit the benefits arising from the marriage in community of property in respect of the three immovable properties forming part of the joint estate.

[6] In a recent judgment C.V.C; L v L 2012 (1) NR 37, Heathcote AJ embarked on an extensive and thorough review of the law relating to both general and specific forfeiture orders relating to divorce proceedings in marriages in community of

property. Following that exercise Heathcote AJ formulated the relevant principles which apply.

[7] Since the plaintiff in the present case seeks a specific forfeiture order in respect of the immovable properties I will refer only to the principles stated by Heathcote AJ in respect of specific forfeiture orders. They are correctly stated by Heathcote to be the following at p. 46 and p. 47 of the judgment.

[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% of 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 led at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim ie 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 identified. 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 (ie 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 one of the plaintiffs in the 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.'

[8] As I had indicated I agree with those remarks.

[9] I now turn to consider the pleadings and the evidence of the plaintiff. It is immediately apparent from the pleadings that they lack any allegations as to the value of the estate nor is there any allegation that the defendant had made no or a negligible contribution to the joint estate. The pleadings contain only the bare allegation that the plaintiff has been solely responsible for the repayment of the purchase price of the properties through bond repayments and the fact that the plaintiff paid for the transfer and other costs. That allegation standing by itself and absent any further allegations does not in my view in law entitle a plaintiff to a specific forfeiture order even in cases where it is alleged, as it is in the instant case

that the defendant maliciously deserted the plaintiff. It is as Heathcote AJ put it "... relief based on an equitable wish rather than legal ground."

[10] The evidence of the plaintiff takes the matter no further. He states in evidence that the defendant maliciously deserted him in 2008. On that occasion she had returned with him from Grahamstown where she was studying. She requested to be taken to the mother's home and he left her there. According to him she never returned to the common home to resume their marriage.

[11] With references to the assets and the value of the joint estate the evidence is sparse and not complete. In the main the following documents were produced in evidence:

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- a) A tax invoice for a Mercedes-Benz which reflecting a purchase price of N\$229, 800.00.
- b) A valuation certificate in respect of Erf 276, Prosperity at a value of N\$1, 356.000.00.
- c) A valuation certificate in respect of Unit 1 on Erf 1106, Pionierspark at a value of N\$1, 200.000.00.’

[12] The plaintiff included a list of assets which he stated the plaintiff removed from the common home, including the Mercedes Benz and two other vehicles. He states that the value of these assets, some of which were sold, is N\$900. 987.28.

[13] What I was not told is whether or not this was the sum total of all the assets forming part of the joint estate, nor was there any evidence of the value of the joint estate as a whole. It appears from the evidence that there are further assets in what was the matrimonial home, where the plaintiff still resides. What they are and what the value of those is, I do not know.

[14] Significantly the plaintiff testifies that during the subsistence of the marriage the defendant contributed to the joint estate by purchasing furniture, bedding and

clothing. Again I have no evidence of the value of those contributions, but they can by no means in my view be described as trifling.

[15] At the close of the plaintiffs' case, Mr. Tjombe, who appeared for the defendant sought an order for absolution from the instance in respect of the plaintiffs' claim for an order of forfeiture.

[16] In applying the applicable legal principles to the facts adduced by the plaintiff I find that in respect of the forfeiture order no reasonable court may find for the plaintiff on that issue.

[17] In the result I make the following orders:

- (1) The defendant is absolved from the instance in respect of prayers 2 and 3 of the particulars of claim.
- (2) The plaintiff is ordered to pay the costs.

P J MILLER
Judge

APPEARANCES

PLAINTIFF :

Z J GROBLER

Of Grobler & Company, Windhoek

DEFENDANTS:

N TJOMBE

Of Tjombe-Elago Law Firm, Windhoek

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