NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 675/2011

In the matter between:

SJH **PLAINTIFF**

and

ARNH **DEFENDANT**

Neutral citation:

H v H (I 675-2011) [2013] NAHCMD 123 (7 May 2013)

Coram: VAN NIEKERK J

Heard: 26 & 27 November 2012; 21 January 2013

Delivered: 7 May 2013

Flynote: **Husband and wife** – Divorce based on adultery – Counterclaim – Adultery condoned by the defendant may not be relied upon - Refusal of marital rights and malicious desertion by defendant constitute no defence to admitted adultery by plaintiff – final order of divorce granted in favour of defendant.

Husband and wife - Divorce – Proprietary consequences – Specific forfeiture order granted in favour of defendant, subject to repayment of contributions made by plaintiff.

ORDER

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1. The plaintiff's claim is dismissed with costs.

2. There shall be judgment for the defendant against the plaintiff in the following terms:

   2.1 A final order of divorce.

   2.2 Division of the joint estate, subject thereto that the plaintiff forfeits the benefits arising from the marriage in community of property in respect of the property at Erf 844, Tsumeb, which property is hereby awarded to the defendant as her sole and exclusive property, subject further thereto that the defendant shall make payment to the plaintiff in the sum of N$9 968-00.

   2.3 An order in terms of which the custody and control of the minor child is awarded to the defendant, subject to the right of reasonable access by the plaintiff.

   2.4 An order in terms of which the plaintiff shall pay maintenance in the amount of N$300 per month for the minor child, which amount shall escalate at the rate of 100% per annum from the date of this order.

   2.5 Costs of suit.

JUDGMENT

VAN NIEKERK J:

[1] The parties were married on 26 November 1994 in community of property. One child, to whom I shall refer as M, was born to the parties during the subsistence of the marriage.

The pleadings

[2] The plaintiff alleges in his particulars of claim that the defendant acted with the fixed and malicious intent to terminate the marriage relationship in that she (i) failed to communicate with the plaintiff in a meaningful manner; (ii) does not prepare food for the plaintiff; (iii) disrespects the plaintiff; (iv) teaches the minor child to disrespect and insult and plaintiff; (v) avers that the house belong to her and not to the plaintiff; (vi) on one occasion left town for a day and refused to tell the plaintiff where she went; (vii) refuses the plaintiff marital rights; and (viii) causes the plaintiff to fear for his life. He further alleges that because of this conduct he had to move from the marital home on 3 November 2010 to avoid further physical contact with the defendant.

[3] The plaintiff relies on constructive desertion to claim the following relief:

(1) An order for restitution of conjugal rights and, failing compliance therewith, a decree of divorce.

(2) That custody and control of the minor child be awarded to the defendant.

(3) Forfeiture of the benefits of the marriage in community of property.

(4) Costs of suit.

[4] The defendant is defending the action. In her plea she denies the plaintiff's allegation regarding her failure to communicate and pleads that it is the plaintiff who fails to communicate with her, despite all her efforts to communicate with him. She denies the allegation in (ii) above and pleads that at all times during which the

plaintiff was in the common home, she ensured that he was provided with three meals a day. As to the allegation in (iii) above, she pleads that she has always maintained respect for the plaintiff and has shown him such respect. She also behaved respectfully towards him as a husband and friend. In regard to (iv) above she pleads that she has never taught the child to disrespect the plaintiff, but that it is in fact the plaintiff who is teaching the child bad manners. In respect of (v) above, she pleads that she never stated that the common home belongs to her and not the plaintiff. She alleges that she always maintained that the common home belongs to the family, i.e. the plaintiff, the defendant and the minor child. As to (vi) above the defendant denies that she ever refused to tell the plaintiff where she went to. On the single occasion that she left the common home overnight in October 2010, she drove her ill sister from Tsumeb to Windhoek at the sister's request. The plaintiff was at the time absent from the common home and as she did not know his whereabouts, she could not inform him of her whereabouts. Regarding (vii) above, the defendant denies that she refuses the plaintiff his marital rights and pleads further that she at all times during the marriage availed herself to the plaintiff, but that it is the plaintiff who refuses, alternatively is unable, to exercise his martial rights. As to (viii) above, she denies that the plaintiff fears for his life and pleads that she has never given him any reason to fear for his life. She further denies that she deserted the plaintiff in any way and pleads that he left the common home on 3 October 2010 to conduct his extra-marital affairs and adultery without hindrance.

[5] The defendant also instituted a counterclaim, which was amended on two occasions. She alleges that the plaintiff (i) engages in extra-marital affairs and that he has committed adultery on several occasions as a result of which three children, whose names she sets out, were born on the following dates: 23 May 1998, 18 June 1999 and 2 March 2004; (ii) left the common home about 3 October 2010, taking his personal belongings with him; (iii) continuously accused her of practising witchcraft and of trying to cause his death; (iv) verbally, emotionally and economically abuses

the defendant; (v) refuses to assist the defendant financially in the upkeep of the common home; (vi) refuses to financially assist in taking care of the minor child; (vii) is no longer interested in the continuation of the marriage as is demonstrated by his conduct set out in paragraphs (i) to (vi).

[6] The defendant further sets out some allegations regarding an immovable property, the matrimonial home, in respect of which she seeks a forfeiture order. I shall deal later in this judgment with the specific allegations made.

[7] Relying thereon that the plaintiff allegedly maliciously deserted her, the defendant initially claimed:

(1) An order for restitution of conjugal rights and, failing compliance therewith, a decree of divorce.

(2) Custody and control of the minor child, subject to the plaintiff's right of reasonable access.

(3) An order in terms of which the plaintiff is to pay maintenance in the amount of N$300 per month until the minor child is self-supporting with an escalation at the rate of 10% per annum from the date of the final order of divorce.

(4) An order in terms of which the plaintiff maintains the minor child on his medical aid scheme and is directed to pay for the child's tuition, transportation, school uniforms and stationery up to and including tertiary level.

(5) Forfeiture of benefits of the joint estate and, in particular, that the property at Erf 844, Tsumeb, be awarded to the defendant and that the plaintiff forfeits any benefits in respect of the said property.

(6) An order in terms of which the plaintiff is to pay maintenance to the defendant in the amount of N$4 500.00 per month for 5 years or until the defendant re-marries, whoever event occurs sooner.

(7) An order in terms of which the plaintiff is to return a Toyota 2.7 bakkie to the defendant.

(8) Costs of suit.

[8] In his plea the plaintiff denies the allegation of wrongful and malicious desertion. In regard to (i) above, he admits that he fathered the children mentioned by the defendant, but alleges that the defendant knew about the said children since their birth, that she condoned his actions and that the parties had a 'natural' relationship thereafter. In respect of (ii) above, he admits that he left the common home on or about 3 October 2010, but pleads that it was for the reasons as set out in his particulars of claim. As regards (iii), he pleads that he told the defendant that the only conclusion that he can come to due to her conduct was that she is involved in witchcraft activities, as she started to act very suspiciously, spitefully and secretively, that she was not open and honest about her movements and whereabouts and that she created the impression that she was busy with something that might cause him harm. Regarding (iv) to (vii), the plaintiff denies all the allegations and puts the defendant to the proof thereof.

Defendant's claim of adultery

[9] Both parties filed affidavits in terms of rule 37(6)(b) of the rules of this Court. In these affidavits the parties make certain concessions in regard to the claims as set out in their pleadings. The effect hereof is that it may be said that they are *ad idem* on the following:

(1) That custody and control of the minor child is to be awarded to the defendant, subject to the plaintiff's right of reasonable access.

(2) That the plaintiff shall pay maintenance for the minor child until she is self-supporting in the amount of N$300.00 per month with an escalation at the rate of 10% per annum from the date of the final order of divorce.

(3) That an order for division of the joint estate may be granted, except that the defendant will continue to seek that a specific forfeiture order in respect of the immovable property of the parties be granted in her favour. The plaintiff opposes the granting of this latter order and asks that the house be sold and the proceeds divided equally.

[10] Of further significance in the plaintiff's affidavit to which he deposed on 17 October 2012 while he was still legally represented, is a statement that, apart from the minor child born of the marriage, he has seven other children to support. The affidavit originally read that he has six other children to support, but it was amended by hand to refer to seven other children. The plaintiff and his witness signed next to this amendment. From the evidence led, it is common cause that (i) two of these children were born before the conclusion of the marriage; (ii) three of these children were born on 23 May 1998, 18 June 1999 and 2 March 2004, respectively, as mentioned in the defendant's amended counterclaim; and (iii) a sixth child was born some time after he left the common home for good in October 2010. In spite of what is stated in the affidavit, the evidence is not clear on the seventh 'other' child. At times it was put to the plaintiff that he has seven children, to which he agreed. It seemed, though, that counsel for the defendant was referring, not to children born outside the marriage, but to all the plaintiff's children, including the child born of the marriage. On the other hand, it was also put to him that he fathered five children. This was stated in the context that these were children conceived with other women while has was married. He initially only admitted to three such children, but later

admitted that another child was born after he left the common home, i.e. the sixth child. The plaintiff stated at one stage that when he made the affidavit, 'the child' was not yet born and that is why he did not mention this child. Apart from the fact that this does not make sense (because he does mention seven 'other' children), it is not clear whether he is referring to the sixth or the seventh child born outside the marriage.

[11] Be that as it may, it is on the evidence common cause that the plaintiff fathered at least one other child from an adulterous relationship which was not mentioned in the pleadings. On the other hand, based on his affidavit, there must be yet another such child, not mentioned in the pleadings either. The significance of this is that the plaintiff, in effect admitted committing adultery on at least two occasions after he left the common home. However, the plaintiff did not include mention of these facts by way of an amendment to his particulars of claim, neither does he pray for condonation for such adultery.

[12] After the evidence by the plaintiff and by the defendant was led, Ms *Angula* for the defendant prayed for a final order of divorce, based on the plaintiff's admitted adultery, without moving for leave to amend the defendant's counterclaim, which prays for a restitution order. I do not think there is any prejudice for the plaintiff if the Court should grant a final order, because he clearly is eager to finalize the divorce as soon as possible, although he desires it on the basis of the allegations in his particulars of claim.

[13] I understood Ms *Angula* to base the defendant's case for adultery also on the adultery which took place in respect of the children born on 23 May 1998, 18 June 1999 and 2 March 2004 respectively. However, as the plaintiff pleaded, it is clear that the defendant condoned this adultery. The plaintiff testified that after the fact of these children's existence was discovered, the parties forgave 'each other' and lived peacefully in the common home for some time. This evidence was not disputed.

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The plaintiff did testify, though, that the defendant consistently denied him marital rights since 1998, which evidence was disputed by the defendant. In fact, the defendant testified that she always availed herself to the plaintiff for him to exercise his marital rights. The only condition that she set was that he should use a condom, because she knew that he had engaged in sexual relations with other women and she desired to protect herself from HIV-AIDS. She also testified that even on the very day that the plaintiff deserted the common home, they were sexually intimate. In Hahlo, *The South African Law of Husband and Wife*, (4th ed) p373 it is stated: 'Condonation may be express or implied. Sexual intercourse with full knowledge of the other spouse's adultery is, normally, conclusive evidence of condonation .....'. Although the defendant did not expressly state in evidence that she condoned these instances of adultery, I find that on her own version, she probably did so. The result is that that the offences committed by the plaintiff in respect of these instances of adultery are wiped out and may not be relied upon (Hahlo, *supra*, at p372).

[14] The plaintiff's stance throughout about the adultery he committed is that he had no choice but to enter into such relationships because the defendant denied him marital rights and also that he had by then already left the common home as a result of her intolerable conduct. Hahlo, *supra,* with reference to *Voet* 24.2.7 and *Hasler* (1896) 13 SC 377, states at p. 368 that it is not a good defence to an action for divorce on the ground of adultery, *inter alia*, (i) to allege that the other party refused, without good reason, to afford marital privileges; or (ii) to allege that the adultery took place after the other party had maliciously deserted the plaintiff (see also *Harris v Harris* 1949 (1) SA 254 (AD) at 263; *NS v RH* 2011 (2) NR 486 HC at 495C-F). The result is that the plaintiff has not shown any defence to the defendant's amended counterclaim, that a final order of divorce should be granted in favour of the defendant's counterclaim and that the plaintiff's claim for restitution of conjugal rights should be dismissed.

The proprietary claims

[15] I now turn to the proprietary claims of the parties. As a result of the case management process and in an effort to narrow the issues between them, the parties came to the common ground that, apart from the house, the estate should be divided equally. The defendant accordingly amended her counterclaim to allege in this regard:

> '6. During the subsistence of the marriage between the parties, the Defendant purchased, due to Government subsidy availed to her, a property at Erf 844, Tsumeb. A mortgage bond is registered over the property with First National Bank. The Defendant pays the monthly loan repayment and maintains the property. The plaintiff contributed a negligible amount to the joint household. It is in the Defendant's interest, and in view of the Plaintiff's fault, in breaking down the marital relationship, that the said property be awarded to Defendant and Plaintiff to forfeit the benefits arising out of the marital relationship between the parties.'

[16] In order to grant the defendant the specific forfeiture order she seeks, I think I should determine whether, had it not been for the agreement regarding an equal division on the remainder of the estate, I would have made a general forfeiture order. It is trite that the Court has no discretion but to grant a general forfeiture if it is claimed in a matter where a divorce is granted on the basis of adultery or malicious desertion (*C v C; L v L* 2012 (1) NR 37 HC 41B). The defendant, in whose favour I have already decided to grant a divorce based on the plaintiff's adultery, claims a general forfeiture order in her amended counterclaim, which prayer I would therefore have granted. As far as a specific forfeiture order is concerned, this may be granted in exceptional circumstances provided the necessary allegations are made in the pleadings and the required evidence is led (*C v C; L v L supra* at p47A-B).

[17] At this stage it is necessary to consider certain aspects of the testimony by both parties, as well as their credibility in more detail. I shall concentrate mostly on evidence relevant to the aspect of the estate and the defendant's claim for forfeiture.

[18] The plaintiff appeared in person at the trial and testified as the only witness in his case about the parties' relationship, the grounds for divorce and certain aspects of the common estate. His account was wide ranging, verbose, inclined to self-praise and tended to ramble. His memory proved to be faulty on several occasions. In certain instances he was untruthful or was shown up to have been deceitful. As I have alluded to before, he also initially failed to disclose in evidence the existence of further children apart from those referred to in the pleadings and at first denied their existence when cross examined. The result is that I did not form a favourable impression about his credibility. The defendant, who testified as the only witness in her case, on the other hand, made a good impression on me. Where there are disputes of fact on issues where the plaintiff's evidence is uncorroborated, I prefer to accept the defendant's evidence, unless the probabilities indicate otherwise.

[19] At first they stayed in a house in Wanaheda, Windhoek, which he bought and paid for entirely from his salary at about N$980.00 per month. At that time he was employed by Government. He said that the defendant too little to contribute to the payment of this house. During 1999 and 2000 the defendant studied fulltime to become a registered nurse. The plaintiff testified that he was transferred to Grootfontein during 2007. His memory may be faulty here, because the documentary evidence showed that they sold the Wanaheda house during about August to October 2006. I understood that the house was sold because he was transferred, which must then have been during 2006. Be that as it may, the defendant at first refused to follow him, but they could not afford to rent a house in Grootfontein while also having the house in Wanaheda. However, the defendant could not obtain an immediate transfer and therefore she stayed and worked in

Windhoek, while the plaintiff stayed in Grootfontein with his children. At the end of 2008 (or is it 2007?) the defendant was transferred to Tsumeb and joined the rest of the family.

[20] He said they divided the 'commission', by which I understand him to say the proceeds from the sale of the Wanaheda house, on an equal basis. There was about N$100 000 available after the home loan was settled. According to him he bought a 2.7 litre bakkie for himself for N$69 000 and a maroon Hyundai sedan for the defendant for the price of N$67 000. The plaintiff testified that he added N$20 000 which he received as a refund from the Receiver of Revenue to make up the purchase price of the second vehicle.

[21] However, the defendant firmly denied this testimony, alleging that the plaintiff only bought the bakkie for himself and did not share the proceeds with her. At this stage the plaintiff rather comically insisted that he had bought a 'Daihatsu Hyundai' for the defendant, a make of vehicle that I accept, on the defendant's evidence, does not exist. The defendant testified that she had earlier bought a Daihatsu vehicle for N$40 000.00 with the proceeds of a low income house she had bought before her marriage, but sold shortly after her marriage for N$60 000. The balance of the money she used for the joint household. This evidence was not disputed in any material way and I accept it. The defendant also confronted the plaintiff with documentary evidence, about which she later also testified and which the plaintiff conceded to be correct, which proved that the plaintiff had sold the Daihatsu to a family member of the defendant on 26 June 2008 for N$33 000 and that the very next day he purchased the Hyundai for the defendant for N$28 500. I therefore accept the defendant's version that the Hyundai was not purchased with the proceeds from the Wanaheda house and that it did not cost N$67 000. The plaintiff later swopped this vehicle for a Hyundai 10 seater bus registered in the defendant's name.

[22] The plaintiff says that he and the plaintiff applied for a home loan of N$235 000.00 at the Tsumeb branch of First National Bank. At the time the defendant qualified for a loan of only N$145 000.00 on the basis of her employment as an assistant nurse, her salary being N$3 900.00 per month. As I understand his evidence, in order to obtain a loan for the full amount, the plaintiff also became a party to the loan agreement. However, the bank insisted on deducting the whole instalment from only one bank account namely the defendant's bank account, where after she had only N$1 900 left. The understanding between the parties was allegedly that the plaintiff would then 'supplement' the defendant's income by making his contribution for the loan to her in cash.

[23] This evidence is vehemently denied by the defendant, who testified that she qualified for the loan and also obtained a housing subsidy from the public service, her employer, which also provided collateral for the loan. The reasons why the bond and the house was registered in both their names, is because they are married in community of property.

[24] The plaintiff was also confronted with correspondence by his erstwhile legal practitioners in which his instructions were said to be that the defendant paid about N$1 600 per month towards the home loan instalment of N$3 000, while he paid about N$1 400 per month. The plaintiff confirmed these instructions to be correct. However, if the instalment was N$3 000, the defendant would only have N$900 left, which does not tally with his evidence. These instructions also contradict other instructions which he gave, namely that the defendant settled the home loan instalment every month, while he paid for water consumed on the property, groceries and other family expenses. The plaintiff also deviated from these instructions during his testimony, because he was at times adamant that he never paid less than 1 400 into the bank account of the defendant as his contribution to the home loan and that, in addition, he insisted in buying the groceries himself and paying for the water and

electricity himself because the defendant did not always use all the money for the purpose for which it was intended.

[25] As part of his instructions the plaintiff attempted to show that he made the monthly contributions towards the home loan and the joint household by producing copies of his bank statements on which he marked certain entries as proof thereof. During cross-examination he was confronted with these statements, which provide evidence that he attempted to mislead by marking entries which were unrelated to the defendant as if he had made payment of quite large amounts to her during 2010. His reaction varied between insisting that his version is correct, being evasive or glossing over the matter without any apology. In the one case he stubbornly insisted that a cash deposit by the defendant of N$1500 into his bank account during 2008 was in fact a payment from his account to her. Of these entries there is only one which is admitted by the defendant and which I am also willing to accept and that is a scheduled payment of N$500.00 which occurred on 30 September 2010, which was for bread and petrol.

[26] The plaintiff also produced copies of certain bank deposit slips in an attempt to support his version. I shall deal with these in some detail to indicate which of them I am prepared to accept as proof of a contribution by him and my reasons for doing so.

[27] The first deposit slip shows a payment of N$700 into the defendant's bank account on 25 September 2008. The defendant says this was money which he returned to her after she had paid his tax advisor for services rendered. I accept the defendant's version.

[28] The plaintiff relies on a bank deposit slip indicating that he paid N$1400 into the defendant's bank account on 28 January 2009. She disputes this payment and drew attention to the fact that it seems that certain alterations were made on the

document. She invited the plaintiff to produce the original, which he failed to do. In the premises I am not willing to take his word for it that the deposit was actually made in that amount.

[29] On 26 February 2009 the plaintiff deposited N$1 500.00 into the defendant's bank account. He says it was a contribution towards paying the home loan. She says it was for groceries and municipal accounts. In my view it does not matter, I accept this payment as a contribution by the plaintiff towards the joint household.

[30] The plaintiff also produced a deposit slip indicating that he paid the sum of N$2 000 into the defendant's sister's bank account on 23 July 2009. His explanation for this payment is that the money was actually for the house, but the sister was having problems and so he and the defendant decided to help her by paying the money into the sister's account. The defendant, on the other hand testified that the money was a repayment of a loan by the sister to the plaintiff, who once borrowed money from her to pay for petrol on a trip to Windhoek. I prefer to accept the defendant's version, which is also more probable.

[31] The plaintiff produced a deposit slip completed and signed by the defendant, indicating that she is the depositor, of N$3 500.00 into her bank account. The deposit was made in Eenhana. His explanation is that they were in the North where he had to attend a workshop. He received transport money from his employer. He told the defendant that they should rather deposit the money as they were bound to spend it. He gave the money to the defendant, who completed the slip. This payment was meant to be his contribution for two months towards the home loan repayment. The defendant denied this version and stated that this was her money which she withdrew from a Nampost savings account into which she had deposited a tax refund cheque. She completed the bank deposit slip and gave the slip and money to the plaintiff to deposit into her bank account as the bank was close to his work. He was supposed to do so in Tsumeb, but left for the North on business and

therefore made the deposit at Eenhana instead. I prefer to accept the defendant's version, which is also more probable than the plaintiff's.

[32] On 22 October 2009 the plaintiff paid a deposit of N$1 000 for electrical work to be done on an outside room at their house which they intended to rent out. The defendant does not dispute this payment, which I accept as a contribution by the plaintiff. The defendant also agrees that the plaintiff made a further payment for this electrical work in 26 November 2009 of N$3 900.00 of which she contributed N$1 000.00. The plaintiff disputes that she did so, but I accept her evidence.

[33] In respect of deposits of N$1 500.00 each made on 26 November 2009 and 17 December 2009 I accept that the plaintiff made a contribution, whether it be for the home loan or the household. I further accept that on 30 September 2010 a scheduled payment of N$500.00 was made from the plaintiff's bank account to the defendant's bank account, which I consider as a contribution.

[34] The parties are agreed that the current value of the house is about N$480 000.00 and that N$185 000.00 is still payable on the bond. They agree that the furniture is worth about N$50 000.00. The plaintiff has a vehicle worth about N$70 000. The defendant's Hyundai 10 seater bus which is not in a running condition was not valued during evidence, but I accept that it has some value which is not insignificant.

[35] There is also the traditional homestead of the parties, on which they built a two bedroom house with a kitchen and lounge, as well as other loose standing structures and established a ploughing field, planted fruit trees and erected some fencing. The defendant values this at about N$140 000. There is also a right to occupy a commercial plot at Ondobe on which the parties had intended to erect flats to rent out. The plaintiff did not disclose these assets in his rule 37(6)(b) affidavit, nor did he testify in chief about these. When confronted with these properties in cross-

examination, he was evasive and vague, pretending not to know much about them, but not denying their existence outright. At a later stage he disputed the value of the traditional homestead, but did not offer any other valuation. During argument he indicated that he would be satisfied to 'take' the plot when the estate is divided. The defendant also testified that there is a traditional farm for which the parties paid N$500 to occupy the land. They contributed equally to fence the property and kept livestock there for some time. The expenditure incurred was about N$5 000. The plaintiff denied any knowledge of this farm. I accept the defendant's testimony on this issue. The defendant testified that these three properties should go to the plaintiff, because he is the husband.

[36] As Ms *Angula* pointed out in her heads of argument, both parties used the income derived from the sale of houses they each had paid for to purchase vehicles which were registered in their own names, but I accept that in the nature of a marriage in community of property these vehicles were also used for the joint benefit of the parties and their household. It seems to me that when the parties moved to Tsumeb and the house there was purchased, they started a new phase in their life which can be separated from their earlier life in the sense that by then the funds from these earlier dispositions of immovable property was complete. They both did not provide specific details of their income and contributions to the household during this earlier phase, but rather concentrated on the next phase. In the circumstances of this case and bearing in mind that the defendant is willing to relinquish any claim to the properties in the communal area and that they are to share the rest of the estate equally, I think it would be appropriate to consider the various contributions of the parties since April 2007 in the determination of whether the Tsumeb property should be forfeited.

[37] Adding up the payments which I am willing to accept (see paragraphs [27] – [33] *supra)*, it means that the total sum of the contributions made by the plaintiff either

towards the repayment of the home loan or the joint household the amounts to N$8 900. What is significant is that the plaintiff, with very few exceptions, was unable to prove his allegation that he made the monthly payment of at least N$1400 towards the home loan repayment. He also proved hardly any payments of other expenses of the joint household. I also note that most of the payments proved were made during 2009.

[38] I pause to note here that during argument the plaintiff handed in a bundle of documents to support what amounted, in some instances, to new factual information about certain expenses he incurred during the marriage. Some of these documents were discovered earlier and used during the trial. However, I shall ignore those documents which were not discovered and used, as well as any new facts he mentioned during the argument.

[39] it is clear that the defendant paid all the instalments since the house was bought and continues doing so. This amounts to N$ 39 247.56 per year at N$3270.63 per month. She has about N$3 200.00 per month left to pay for other expenses of the household and the maintenance of the child. It is common cause that she uses the rental income to supplement her income. She also regularly works overtime at the hospital, which further increases her income. She clearly has been in a financial position to make the payments without the assistance of the plaintiff, as well as to provide for herself and the minor child. It is further common cause that since October 2010 when the plaintiff left the matrimonial home, each party has been paying for their own living expenses. During this period the plaintiff did not pay any maintenance for the minor child, nor did he pay any school fees for her. The only payment he made was a contribution towards the costs of her confirmation during 2011. He says he paid N$2 000 into the child's account. The defendant says it is only N$ 1 000.

[40] Based on the contributions by both parties, it is clear that the defendant has made by far the greater contribution. In my view she has made out a case for the forfeiture of the property, but subject to her paying back to the plaintiff his contributions. The parties value the house at N$480 000.00 Bearing in mind that the purchase price was N$235 000 in 2007, the value has escalated at roughly 12% per year. I shall award the plaintiff a return of 12% for one year on his proved total contribution of N$8900.00. The defendant must therefore pay him the sum of N$9 968.00.

[41] As far as the custody of the minor child is concerned, I am satisfied that she should remain in the custody of the defendant with whom she has been residing since the plaintiff left the common home. I agree with the defendant that the maintenance of N$300.00 offered by the plaintiff in respect of the child is very low. However, it is clear that the plaintiff has seven other children to support and that his salary, being commission based on sales from insurance policies, fluctuates from month to month. The defendant has reluctantly accepted this amount subject to a yearly escalation. In the circumstances I shall include the agreement on this issue in the order to be made.

[42] The result is that I make the following order:

1. The plaintiff's claim is dismissed with costs.

2. There shall be judgment for the defendant against the plaintiff in the following terms:

    2.1 A final order of divorce.

    2.2 Division of the joint estate, subject thereto that the plaintiff forfeits the benefits arising from the marriage in community of property in respect of the property at Erf 844, Tsumeb, which property is hereby awarded

to the defendant as her sole and exclusive property, subject further thereto that the defendant shall make payment to the plaintiff in the sum of N$9 968-00.

2.3 An order in terms of which the custody and control of the minor child is awarded to the defendant, subject to the right of reasonable access by the plaintiff.

2.4 An order in terms of which the plaintiff shall pay maintenance in the amount of N$300 per month for the minor child, which amount shall escalate at the rate of 100% per annum from the date of this order.

2.5 Costs of suit.

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K van Niekerk

Judge

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APPEARANCE

For the plaintiff: In person

For the defendant: Ms E M Angula

of AngulaColeman