

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 2808/2011

In the matter between:

**M M M**

**PLAINTIFF**

and

**J C M (BORN SIMASIKU)**

**DEFENDANT**

**Neutral citation:** *M v M* (I 2808/2011) [2013] NALCMD 275 (9 October 2013)

**Coram:** UIETELE, J

**Heard:** 1-2 July 2013

**Delivered:** 09 October 2013

**Fynote :** Husband and Wife-Divorce- whether or not the marriage between the parties has been contracted in or out of community of property.

**Summary:** The plaintiff instituted an action for divorce against the defendant. The basis of the plaintiff's action is malicious and constructive desertion. In his particulars of claim the plaintiff alleges that the marriage is out of community of property by virtue of

the provisions of section 17(6) of The Native Administration Proclamation The plaintiff further alleges that the defendant shows him no love, affection and respect, that the defendant continuously insults him, that the defendant chased him out of the common home, that the defendant has been in an adulterous relationship since 2010.

The defendant entered a notice to defend the action. In her plea she denies the plaintiff's allegations against her. With her plea she filed a counterclaim. The basis of her counterclaim is also based on malicious and constructive desertion alternatively adultery. She alleged that they discussed their marriage regime prior to the conclusion of the marriage and expressly agreed that they would be married in community of property and concluded their financial affairs accordingly during the subsistence of their marriage.

*Held* that their marriage therefore does not produce the legal consequences of marriage in community of property between the spouses, is therefore one out of community of property.

*Held further* 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.

*Held further* that in the result 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 must be dismissed.

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**ORDER**

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1. The marriage between the plaintiff and the defendant on 20 October 1995 at Oshakati, Republic of Namibia, has been concluded out of community of property.
2. The plaintiff's claim is dismissed with costs.
3. There shall be judgment for the defendant against the plaintiff in the following terms:
  - 3.1 A final order of divorce.
  - 3.2 An order in terms of which the custody and control of the minor children is awarded to the defendant, subject to the right of reasonable access by the plaintiff.
  - 3.3 An order in terms of which the plaintiff shall pay maintenance in the amount of N\$500 per month per minor child, which amount shall escalate at the rate of 20% per annum from the date of this order.
  - 3.4 That the plaintiff must pay 50% of all scholastic expenses in respect of the minor children and also in respect of the child (R K M) who is major now but who is still attending school, including all scholastic expenses for the year 2013.
  - 3.5 Cost of suit.

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## JUDGMENT

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**UIETELE, J**

### **INTRODUCTION**

[1] The plaintiff (husband) instituted an action for divorce against the defendant (wife). The basis of the plaintiff's action is malicious and constructive desertion. In his particulars of claim the plaintiff alleges that the marriage is out of community of property by virtue of the provisions of section 17(6) of The Native Administration Proclamation<sup>1</sup>. The plaintiff further alleges that the defendant shows him no love, affection and respect, and that the defendant continuously insults him, that the defendant chased him out of the common home, and that the defendant has been in an adulterous relationship since 2010.

[2] The defendant entered a notice to defend the action. In her plea she denies the plaintiff's allegation regarding her failure to show him love and affection and pleads that it is the plaintiff who fails to show her love and affection. As to the allegation that she does not show him respect and insults him, she pleads that she has always maintained respect for the plaintiff and has shown him such respect and pleads that is the plaintiff who does not respect her and who insulted her by calling her 'stupid bitch' and abnormal.

[3] As regard the allegation that she chased him out of the common home she pleads that the plaintiff left the common home out of his own accord and without reason. The defendant further pleaded that the plaintiff did not support her and the minor children. Defendant denies that she committed adultery and pleaded that it is the plaintiff who informed her that he does not love her anymore and that he has a new wife with whom he has two children. The defendant further pleaded that he informed the plaintiff that if that was case then he can stay with his new wife as long as he maintains his children.

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<sup>1</sup> No 15 of 1928.

[4] The defendant also instituted a counterclaim, which was amended. The basis of her counterclaim is also based on malicious and constructive desertion alternatively adultery. In her counterclaim the defendant alleges that the parties had expressly agreed that their marriage shall be one in community of property. The defendant further alleged that the plaintiff showed her no love and affection, that the plaintiff did not maintain or contribute to the common household that the plaintiff entered into an adulterous relationship with other women from which adulterous relationship two children were born and that the plaintiff left the common home in 2006. The plaintiff accordingly prayed for a final order of divorce alternative an order for the restitution of conjugal rights.

[5] In his amended plea (to the amended counter claim) the plaintiff denies the allegations of wrongful and malicious desertion and puts the defendant to the proof of the allegations. As regard the allegation that he committed adultery he admits the allegation but pleads that he only committed adultery after he was chased away from the matrimonial home by the defendant. He further admits that he fathered the children mentioned by the defendant.

[6] 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 with regard to the claims set out in their pleadings. The effect the concession is that the custody and control of the minor children is to be awarded to the defendant, subject to the plaintiff's right of reasonable access.

## **ISSUES FOR DECISION**

[7] The parties held a pretrial conference and at that pretrial conference they drafted a pretrial order which I made an order of court on 26 June 2012. In terms of that order the parties do not dispute that this court has jurisdiction in this matter and that the parties were married and are still so married. The parties are, however, not agreed as to whether the marriage is one in community or out of community of property and each party accuse the other of marital misconduct. The parties are also not in agreement as to the amount of maintenance the plaintiff must pay in respect of the minor children. The

plaintiff offered N\$600 maintenance in respect of the minor children whereas the defendant is requesting an amount of N\$700 maintenance per child per month.

[8] In such circumstances, it is clear that the main questions which arise for decision are:

- (a) What is the matrimonial property regime between the parties; and
- (b) Which party has succeeded in discharging his *onus* of proving malicious desertion which would result in the granting of a restitution order?

## THE LEGAL PRINCIPLES

### (a) *The marital regime*

[9] Before I deal with the principles governing matrimonial proprietary regime I find it appropriate to state the following principle. Once the parties are married they cannot thereafter change the proprietary consequences of their marriage, also not in regard to each other. See *Honey v Honey*<sup>2</sup>, where it was held that:

'In terms of our common law, subject to an exception to which reference will be made later, parties to a marriage cannot by postnuptial agreement change their matrimonial property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes, CJ phrased the rule thus:

"Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an *ante nuptial* contract be varied by a postnuptial agreement between the spouses, even if confirmed by the death of one of them. The only exception to the rule is afforded by an underhand deed of separation either ratified, or entitled at the time to ratification under a decree of judicial separation."

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<sup>2</sup>1992 (3) SA 609 (W) at 611A – D approved by the Supreme Court in the matter of *Mofuka v Mofuka* 2003 NR 1 (SC).

[10] The matrimonial property regime applicable under common law to a civil marriage has been summarised by Watermeyer, CJ in *Ex parte Minister of Native Affairs: In re Molefe v Molefe*<sup>3</sup>, as follows:

'In the case of a legal marriage, where no question of domicile outside of the Union is involved, the proprietary rights of the spouses resulting therefrom, must be governed by the common law of South Africa except in so far as specific provisions have been introduced by statute, which alter the common law. At common law a husband and wife can, as between themselves, by an ante-nuptial agreement, regulate their proprietary rights after marriage. Such an agreement is binding between the spouses, but is of no effect so far as persons not party thereto are concerned, unless it is duly entered into and registered in accordance of the law governing ante-nuptial contracts. (See sections. 86 and 87 of Act 47 of 1937.) If they do not regulate their proprietary rights by ante-nuptial agreement, then community of property and community of profit and loss will come into existence between them ...'

[11] It is common cause that in Namibia the matrimonial property regime of persons domiciled 'North of the Police Zone' is regulated by section 17(6) of the Native Administration Proclamation 15 of 1928 as amended. In the *Mofuka v Mofuka*<sup>4</sup> matter Maritz, J (as he then was) said:

'The effect of this section [i.e. section 17(6) of Proclamation 15 of 1928]] on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the "Police Zone" is significant. No longer does community of property follow unless excluded-rather, the converse applies: **The marriage is out of community of property unless declared or agreed otherwise**'. {My Emphasis}.

## **(b) The grounds of divorce**

[12] In the case of *Kagwe v Kagwe*<sup>5</sup>, Geier, J said:

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<sup>3</sup> 1946 AD 315 at 318. This statement of the law was approved by this court in the matter of

<sup>4</sup>2001 NR 318 (HC) at 322A – D.

<sup>5</sup>An unreported judgment of this Court Case No. (I 1459/2011) [2013] NAHCMD 71 (delivered on 30 January 2013), at para 9.

'Three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: first that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant. The *onus* of proving both the *factum* of desertion and the *animus deserendi* rests throughout upon the plaintiff. The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.'

[13] As regards the final act of divorce there are two grounds for divorce in our common law namely, adultery and malicious desertion, with which may be included constructive desertion<sup>6</sup>. Nathan<sup>7</sup> opines that:

'Malicious desertion takes places when a spouse, without just cause, either physically leaves or remains away from the matrimonial home intending not to return to it, or otherwise so comports himself as to evince an intention to bring the marriage relationship to an end. Constructive desertion is a species of malicious desertion, it takes place when the defendant with intent to put an end to the marriage does not leave the matrimonial home himself but is guilty of conduct which either compels the other spouse to do so or renders it clear that the marriage relationship can no longer continue'.

[14] Hahlo H R<sup>8</sup> states that '*Malicious desertion is made up of two elements (a) there must be the factum of desertion (b) the defendant must have acted animus deserandi.*' Hahlo<sup>9</sup> continues and argue that there are four forms of malicious desertion in our law namely actual desertion, constructive desertion, refusal of marital privileges, and possibly, sentence of death or life imprisonment.

[15] I will in this paragraph expand these forms but what I will state in this paragraph is based on the work of Hahlo<sup>10</sup>

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<sup>6</sup> See Nathan C J M South African Divorce Handbook, Durban Butterworths, 197 at page 3.

<sup>7</sup> *Supra* at page 4.

<sup>8</sup> The South African Law of Husband and Wife 3rd Edition, Juta & Co Ltd 1969 at page 387.

<sup>9</sup> *Supra* at page 387.

<sup>10</sup> *Supra* at page 387.



- a) Actual desertion is where one party actually leaves the matrimonial home with the intention not to return;
- b) Constructive desertion, takes place when an innocent spouse leaves the matrimonial home, the defendant with the intent to bring the marital relationship to an end drives the plaintiff away by making life in common dangerous or intolerable for him or her. Hahlo proceeds and argue that three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:
  - (i) the consortium of spouse must have come to an end as the result of the plaintiff's having left the defendant;
  - (ii) it must have been the defendant's unlawful conduct that caused the plaintiff to leave;
  - (iii) the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.

#### **THE PLAINTIFF'S EVIDENCE:**

[16] In support of his quest to obtain an order for the restitution of conjugal rights the plaintiff testified that he and the defendant were married to each other, out of community of property by virtue of the Native Administrative Proclamation 15 of 1928. They were married to each other on 20 October 1995 at Oshakati, Republic of Namibia. He testified that they did not discuss the proprietary consequences of the marriage nor did they sign any declaration stating that they wanted to be married in community of property, neither did they inform the marriage officer that they wanted to be married in community of property.

[17] In support of his allegations the plaintiff referred to documents which were discovered by the defendant and which they signed when they got married. The first document which was admitted in evidence as 'Exhibit I' is a document headed *DECLARATION FOR THE PURPOSES OF A MARRIAGE IN TERMS IN TERMS OF SECTION*

17 OF PROCLAMATION 15 OF 1928' by the Department of Civic Affairs in the Ministry of Home Affairs on which the plaintiff signed, *inter alia* declaring under oath that '*he is a male persons as described in section 17(1) and that there is no customary union existing between him and any other woman other than the one he intends to marry.*' The plaintiff signed that document before a Commissioner of oaths (whose rank and designation is given as that of a Magistrate) on 20 October 1995.

[18] The second document which was admitted in evidence as Exhibit 'J' is a form by the Department of Civic Affairs in the Ministry of Home Affairs on which the defendant, using her maiden name, *inter alia* declared under oath that the personal particulars of herself and her "prospective husband" (the respondent) are correct; that they are not within the prohibited degrees of relationship; and that there is no lawful impediment to their marriage. The defendant signed that document before a Commissioner of oaths (whose rank and designation is given as that of a Magistrate) on 20 October 1995,

[19] The third document which was admitted in evidence as Exhibit 'K' is a form by the Department of Civic Affairs in the Ministry of Home Affairs which bears the heading '**MARRIAGE IN COMMUNITY OF PROPERTY**' followed by a second heading underneath, '*DECLARATION IN TERMS OF SECTION 17 (6) OF PROCLAMATION 15 OF 1928*'. It records the full names of the bridegroom and bride's forenames and maiden name and states: '*We ..... declare under oath/solemnly declare that the (sic) marriage in community of property and subsequent hereditary rights have been explained to us by ..... We hereby notify you that it is our intention and desire that community of profit and loss shall result from our marriage.*' The declaration was not signed and a line was drawn over the document. There was an attempt to complete this document and it appears that that the attempt was made on 10 October 1995.

[20] The plaintiff further testified that that they did not conduct their affairs as if they were married in community of property, he testified that he owns a house which he purchased in August 2008, after he left the common home. She has not paid anything for this house.

[21] Without providing any details he stated that the defendant shows him no love, affection and respect, that they did not have any meaningful communication. He, however, testified that he has children with another lady, and his wife could not accept these children. He testified that the defendant told him that his other children were not allowed to visit him while she was still alive and these caused a lot of fights. He stated that the plaintiff chased him out of the common home in August 2007, after giving him a letter stating that she is divorcing him, and that she has been in an adulterous relationship with another man since 2010 and that she informed him of the said adulterous relationship by means of a sms. I asked him whether he had copies of the letter, but admitted that he did not have a copy of the letter. He further testified that she told him that she found another person who is a good husband for her and that she no longer cares about him.

[22] He testified that he and the defendant approached the maintenance court in Oshakati in January 2013. The court looked at his financial position in detail. His net pay per month is N\$ 4 663.10. An order was made that he should pay N\$400 per month for the 2 (two) minor children, as this is the amount that he can afford. The court also ordered that he should pay N\$400 extra each month to make up for the arrears. He will continue to pay the aforesaid amounts as ordered by the court. He testified that he has ten (10) children.

[23] After I questioned him about the ten children he testified that the ten children were born during 1998, 1990 (two were born in this year to two different mothers), 1991, 1995 (two were born in this year one by the defendant and the other one by another woman), 2000, 2001, 2005 and 2013. He further testified that he is currently in an adulterous relationship, but he said that it started only after he was chased away from the matrimonial house by the defendant. He denied contributing to the breakdown of the marriage and he prayed to the court for the condonation of his adultery.

#### **THE DEFENDANT'S EVIDENCE:**

[24] The defendant testified that between 1993 and 1995 she was in a customary union with the plaintiff. She testified that they were married traditionally prior to their civil

marriage, in 1993 at Oshakati at her father's residence and they concluded their affairs as if they had a joint estate, as this is the typical consequence of a traditional marriage.

[25] She testified that she was married to the plaintiff on 20 October 1995 at Oshakati. She stated that before they got married she received forms from Government Institutions Pension Fund (GIPF). There was a part that asked whether you are married or not and where you indicate the spouse's details. She filed it and was later contacted by GIPF to bring proof of marriage. She did not have such proof as a result she approached the plaintiff and informed him about the problem. Thereafter they went to the magistrate, got married and obtained a marriage certificate. She testified that they discussed their marriage regime prior to the conclusion of the marriage and expressly agreed that they would be married in community of property and concluded their financial affairs accordingly during the subsistence of their marriage.

[26] The defendant further testified that three children were born to her and the defendant, the first child was born in 1988, (prior to the marriage) and the other two were born in 1995 and 2000 respectively. She testified that when they got married the plaintiff was unemployed and she was thus the one maintaining the common house and the plaintiff. She however testified that in her tradition whatever belongs to the wife also belonged to the husband. On a question from her legal representative whether they discussed the proprietary regime that will govern their marriage she replied in the negative. She testified that all that they discussed is that they have to get married she added that she did not see *'anything bad because I was the only one who was working. I knew that whatever is mine is for my husband. Everything was for both of us.'*

[27] The defendant further testified that the plaintiff remained unemployed until around 1997 when he completed his studies and thereafter obtained a teaching job in Ombalantu which was approximately one hundred kilometers away from Ongwediva where she was residing but he would come home over weekends. She testified that the only asset which she recalls the plaintiff bought was a television set and a bed. She testified that at one point the plaintiff got a back pay and he used that back pay to purchase a vehicle.

[28] The defendant further testified that she was not aware of the children fathered by the plaintiff, she testified that she only heard about them from his relatives and when she heard about the children fathered by the plaintiff she questioned him as to whether those children were the reasons for him not to bring money home. She testified that when she posed those questions to him, he started accusing her of being in love with money and that she is a thief. She testified that her quarrels with the defendant started when she was told by his family members that he fathered children with other women. The defendant denied the allegation by the plaintiff that she did not show him any love and affection and testified that it was indeed the plaintiff who did not show her love and affection. As regards the allegation that she always insulted him she also denied that she stated that if she insulted him that would be for a reason. She denied that she chased the plaintiff out of the matrimonial home she stated that the plaintiff actually left the common home in 2006 out of his own will, returned in 2007 and thereafter left permanently.

[29] As regards the allegation that she told the plaintiff that she got a new husband she denied that. She actually testified and said that on a given day (which she cannot recall) the plaintiff told her that he found himself a new wife and did not want to be married to her anymore she testified that her reply to that statement was that if it is the case then it is fine with her as long as he maintained his children. She further testified that the plaintiff did not show her any love or affection he did not maintain the children or contribute to the expenses of the common house to the extent that she was forced to institute maintenance proceedings against him in the Magistrates' Court for the District of Oshakati.

[30] On the first occasion (when she approached the Magistrates Court) she got an order compelling the plaintiff to pay maintenance in the amount of N\$ 400 in respect of each minor child but he did not honour that order and she was compelled to go back to the maintenance court in January 2013. She also testified that the plaintiff is the one who was involved in adulterous relationship from which two children were born.

## **HAS THE PLAINTIFF DISCHARGED THE ONUS RESTING ON HIM**

[31] I have indicated above that there are three issues which I am called upon to decide namely whether the marriage between the plaintiff and the defendant is one in or out of community of property, who between the plaintiff and the defendant was responsible for the breakdown of the marriage and the amount of maintenance payable in respect of the minor children.

[32] The plaintiff testified on the circumstances surrounding his marriage with the defendant. On his evidence, they did not make a joint declaration to a magistrate or marriage officer as contemplated in section 17(6) of the Native Administration Proclamation. Ms. Delport who appeared for the defendant in essence argued that even if the parties did not sign a declaration they agreed either expressly or tacitly that their marriage will be one in community of property.

[33] The difficulty I have with Ms. Delport's argument is that the alleged agreement is not borne out by the evidence of the defendant. The defendant in her statement which was read into the record as her evidence in chief initially testified that she and the plaintiff discussed the proprietary regime which will govern their marriage, but when she was questioned by Ms Delport she admitted that the marriage officer did not explain to them the different proprietary regimes applicable to marriages in Namibia or did not agree as to the proprietary regime which will govern their marriage. The plaintiff submitted documents which were discovered by the defendant and from those documents it is quite clear that parties did not make declaration as contemplated in section 17(6) of Proclamation 15 of 1928.

[34] In this matter the evidence demonstrates, that the two versions of the plaintiff and the defendant are mutually destructive. The following legal principles are now well settled in our law namely that:

- (a) where the evidence of the parties' presented to the court is mutually destructive the court must decide as to which version to belief on probabilities<sup>11</sup>;
- (b) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.<sup>12</sup>

[35] In this matter I am of the view that the version of the plaintiff, as regards the proprietary regime governing the marriage, is more probable than that of the defendant. I say so for the following reasons; the contemporaneous documents such as the declaration in terms of section 17 of Proclamation 15 of 1928 clearly indicate that the parties did not make a declaration to the marriage officer. Secondly the defendant contradicts herself as to whether they agreed or did not agree prior to the conclusion of the marriage as to whether they want to be married in or out of community of property.

[36] I therefore find that the parties did not make any declaration to the marriage officer. Ms Delport submitted that by the conduct of the parties a tacit agreement that the parties will be married in community of property can be inferred. The simple answer to that submission is the provision of section 17(6) of the Native Administrative Proclamation and the principles I set out in paragraph 8 of this judgment. Section 17(6) of the Proclamation (as amended by s.6 of Act 27 of 1985) provides as follows:

‘A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their

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<sup>11</sup> National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at H 440E – G: Also see Harold Schmidt t/a Prestige Home Innovations v Heita 2006 (2) NR at 556.

<sup>12</sup> Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone Case No SA 13/2008 (unreported) at 16-17 para 24).

intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.’ {My Emphasis}

[37] It therefore follows that if the defendant is to rely on an agreement the agreement must have been concluded prior to the marriage. The parties in this matter being Blacks domiciled and married in Oshakati which is regarded as being ‘North of the Police Zone’ after 31 July 1950, the proprietary consequences of their marriage are regulated by that section. They did not make a declaration to the marriage officer and they also did not agree prior to the marriage as to the type of marriage they want. Their marriage therefore does not produce the legal consequences of marriage in community of property between the spouses, is therefore one out of community of property.

[38] I will now turn to the question of who was responsible for the brake down of the marriage. On the evidence which was placed before me it is common cause that the plaintiff fathered five other children from an adulterous relationship of which only two were mentioned in the pleadings. The significance of this is that the plaintiff, in effect admitted committing adultery on at least three occasions after the defendant initially condoned his adultery. However, the plaintiff did not mention these facts by way of an amendment to his particulars of claim. The plaintiff in his pleadings did also not make mention that his is still continuing to commit adultery.

[39] The plaintiff’s stance throughout about the adultery he committed and which he still continues to commit is that he did so after he was chased away from the common home by the defendant. Apart from the fact that I am not satisfied that the plaintiff has discharged the *onus* resting on him as regards the allegation that he was chased from the matrimonial home ,Hahlo<sup>13</sup>, with reference to *Voet* 24.2.7 and *Hasler* (1896) 13 SC 377, states 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

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<sup>13</sup> Hahlo, H R: The South African Law of Husband and Wife, 4<sup>th</sup> ed p373.



had maliciously deserted the plaintiff;<sup>14</sup> The result is that the plaintiff has not shown any defence to the defendant's amended counterclaim. He has also not made out a case for me to condone his adultery. I am accordingly of the view 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 must be dismissed.

[40] I now return to the only other outstanding issue and it is the maintenance of the two minor children. There is now doubt that there is a legal duty resting upon both the parents to equally maintain their minor children. The plaintiff says he can only afford N\$600 for both the minor children, the defendant on the other hand is demanding N\$700 per month per child. The plaintiff did not give evidence as regard his income and expenditure. I exercised my discretion and recalled the plaintiff and asked him questions relating to his income and expenditure. From his evidence the following came out. He earns N\$14 634.72, his total deductions are N\$ 9 455-65, his net pay is N\$5 179-07.

[41] The defendant further testified that he currently resides in Rundu and as a result he lets the residence in Katima Mulilo in the amount of N\$1 500 per month. His monthly expenses include rent for his accommodation in Rundu in the amount of N\$500, electricity in the amount of N\$200, food in the amount of N\$700, transport to town in the amount of N\$500, maintenance for his three child (with the current woman) staying in Rundu town in the amount of N\$700. He spends about N\$200 per month on formula milk on his baby that he has with the woman residing in Rundu.

[42] My calculations gave me a total monthly expenditure of approximately N\$3 000 per month. The plaintiff's disposable income (including the rental income of N\$1500) is approximately N\$6 600 per month. Which leaves him with an amount of N\$3 600 after I deducted the monthly expenditure. The plaintiff thereafter informed the Court that he has other personal loans from cash loan in the amount of N\$2 600 but he failed submit any documentary evidence of that expenditure. He further testified that as per the maintenance court order he is paying N\$400 maintenance per child per month.

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<sup>14</sup>See also the matter of *H v H* (I 675/2011) [2013] NAHCMD 123 ( an unreported judgment of this Court delivered on 7 May 2013) *Harris v Harris* 1949 (1) SA 254 (AD) at 263; *NS v RH* 2011 (2) NR 486 HC at 495C-F.

[43] The defendant on the other hand testified that she earn gross income of N\$4 740. Her deductions amount to N\$1 060 leaving her with a disposal income of approximately N\$3 600. She testified that from that amount she has to take care of all the children's (including the one who is a major now as he is still attending school), daily needs, their educational needs and their medical needs without any assistance from the plaintiff. I agree with the defendant that the maintenance of N\$600 offered by the plaintiff in respect of the children is very low. However, it is clear that the plaintiff has seven other children to support. I therefore of the view that a fair amount which the plaintiff can afford to pay towards the maintenance of the minor children is the amount of N\$500 per month per child. I must stress here that they payment of the amount of N\$ 500 maintenance does not absolve the plaintiff from his obligation to contribute equally to the educational and medical expense of his children including the child who is major now but who is still attending school.

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

- 1 The marriage between the plaintiff and the defendant on 20 October 1995 at Oshakati, Republic of Namibia, has been concluded out of community of property.
- 2 The plaintiff's claim is dismissed with costs.
- 3 There shall be judgment for the defendant against the plaintiff in the following terms:
  - 3.1 A final order of divorce.
  - 3.2 An order in terms of which the custody and control of the minor children is awarded to the defendant, subject to the right of reasonable access by the plaintiff.

- 3.3 An order in terms of which the plaintiff shall pay maintenance in the amount of N\$500 per month per minor child, which amount shall escalate at the rate of 20% per annum from the date of this order.
- 3.4 That the plaintiff must pay 50% of all scholastic expenses in respect of the minor children and also in respect of the child (Ricky Kabajani Mulenamaswe) who is major now but who is still attending school, including all scholastic expenses for the year 2013.
- 3.5 Costs of suit.

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SFI Ueitele  
Judge

## APPEARANCES

### **PLAINTIFF:**

de Bruyn  
Of Nederlof Inc

### **DEFENDANT:**

A Delport  
Of Delport Attorneys