

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1866/2012

In the matter between:

EMILIA NDILEMEKE KAFIDI**PLAINTIFF**

and

ABNER JOHANNES NEPUTA**DEFENDANT**

Neutral citation: *Kafidi v Neputa* I 1866/2012) [2013] NAHCMD 278 (08 October 2013)

Coram: MILLER AJ

Heard: 12 June 2013; 14 June 2013; 24 June 2013

Delivered: 08 October 2013

Flynote: Divorce proceedings and forfeiture orders. Requirements for restated.

Summary: Plaintiff sought a divorce based on defendant's adultery. Order of divorce granted. Plaintiff seeking both quantative and specific forfeiture orders. The applicable legal principles and factual requirements were restated.

Held that there was too little evidence as to the value of the joint estate at the time of the divorce and of the contributions made by each party during the subsistence of the marriage. Orders refused.

ORDER

An order of divorce. An order that the custody and control of the minor child Frans Neputa is awarded to the plaintiff. A general order of forfeiture in favour of the plaintiff. Costs of suit. The counterclaim is dismissed with costs.

JUDGMENT

MILLER AJ :

[1] Following a marriage in community of property concluded between the plaintiff and defendant on 27 December 1980, the plaintiff on 6 July 2012 instituted divorce proceedings against the defendant. This after the parties had already lived separate from one another for a period in excess of ten years.

[2] It is common cause that the defendant become engaged in an adulterous relationship with one MN from which relationship two children were born. The defendant in a counterclaim alleges that this affair with MN only started at a time after he had left the common home. The evidence of the plaintiff and her son, Philemon, is to the effect that the relationship with MN had started much earlier and in fact at a time when the plaintiff and the defendant were still living together. The veracity of their testimony in this regard is bolstered by the strange behavior of the defendant at that time.

[3] For instance the defendant used to return home late at night, not through the front entrance, but rather surreptitiously climbing over the wall of the back fence. There is further testimony from Philemon that MN was a passenger in the defendant's car long before the plaintiff and the defendant separated. On these aspects the evidence of the defendant is not persuasive and I have no difficulty in accepting the evidence of the plaintiff and Philemon on this issue. Given the admitted adultery, the probabilities are that the adulterous affair had started when the plaintiff and the defendant were still cohabiting. I reject the evidence of the defendant

on this score. The consequence is that I am not prepared to condone the defendant's adultery as prayed in the counterclaim.

[4] It follows that the plaintiff is entitled to an order for divorce.

[5] One child born from the marriage is still a minor who lives with the plaintiff. The plaintiff seeks an order awarding her the custody of that child. She seeks no maintenance for the child. This aspect remains unopposed and I will make an appropriate order in due course.

[6] The remaining issue is what is to be done to the joint estate.

[7] In that regard the plaintiff seeks the following orders:

- 1) Forfeiture by the defendant of 80% of the benefits of the joint estate, in other words a quantitative forfeiture order.
- 2) Forfeiture of the property situated at Erf 7682, Katutura, in other words a specific forfeiture order.

The authorities in relation to forfeiture orders are to be found in the judgment of Heathcote AJ in **C. v. C; L. v L** 2012 (1) NR 37.

[8] From that the following principles emerge.

- 1) When a party to a marriage in community of property commits adultery or maliciously deserts his/her spouse the Court has no discretion and must make a general forfeiture order if so requested.
- 2) When quantified or specific forfeiture orders are requested, the position is different.

In these cases evidence is required as to the value of the joint estate at the date of the divorce. Also evidence must be let about all the contribution of both the parties as well as the relevant circumstances.

[9] Admittedly there is some evidence regarding the value of the parts of the estate as is the case with the property in respect of which the specific forfeiture order is sought. Likewise there is some evidence regarding some contributions made at some stages during the course of the marriage. The picture remains far from complete, however. In addition some of the evidence regarding contributions made are estimates with little or no factual material underpin them.

[10] I find myself in the same position as van Niekerk J in *Cloete v Griegor* I 1298/2009 [2012] NAHCD 18 in which she stated

“...due to the efflux of time, there is too little evidence to determine the value of the estate today and in particular to determine the contributions of each party to the joint estate during the subsistence of the marriage”.

[11] It follows that the quantitative and specific forfeiture order sought can not be granted.

[12] I am not prepared to order a division of the joint estate and I will instead grant a general order of forfeiture

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

- 1) An order of divorce.
- 2) An order that the custody and control of the minor child Frans Neputa is awarded to the plaintiff.
- 3) A general order of forfeiture in favour of the plaintiff.
- 4) Costs of suit.
- 5) The counterclaim is dismissed with costs.

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P J MILLER
Judge

APPEARANCES

PLAINTIFF: J DIEDERICKS
Of Diedericks Incorporated

DEFENDANT: L SHIKALE
Of Shikale & Associates