

**REPUBLIC OF NAMIBIA**



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

Case no: I 965/2012

In the matter between:

**M S S**

**PLAINTIFF**

and

**N K S**  
**(born K)**

**DEFENDANT**

**Neutral citation:** S v S (I 965/2012) [2013] NALCMD 304 (09 October 2013)

**Coram:**        **UEITELE, J**

**Heard:**        20, 21 August 2013 & 03 October 2013

**Delivered:**   09 October 2013

**Flynote:**      Husband and wife - Divorce - Malicious desertion - Onus on plaintiff to allege and prove both *factum* of desertion and *animus deserendi*.

**Summary:**    The plaintiff and the defendant were married to each other, on 11 April 1997 at Windhoek, Republic of Namibia, in community of property. 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 in community of property. The plaintiff further alleges that the defendant shows him no love, affection, intimacy and denies him marital privileges, that the defendant interferes with his employment by attending at his consultancy and humiliating him in front of his colleagues, on various occasions locked him out of the common home, does not contribute toward the upkeep, and maintenance of the common home, employ an overly domineering attitude towards plaintiff in the household decision, and same is always decided in her favour.

The defendant also instituted a counterclaim, which was amended. The basis of her counterclaim is also based on malicious desertion. In her counterclaim the defendant alleges that the plaintiff refuses the defendant intimacy and her marital privileges. The defendant further alleged that the plaintiff stays away from the common home of the parties for extended periods. The defendant further alleges that the plaintiff makes decisions that concern both the parties alone and follows through with them without the defendant's consent. The defendant further alleges that the plaintiff is involved in an adulterous relationship with one Karen Oarabile Kwapa from Botswana. The plaintiff accordingly prayed for a final order of divorce alternative an order for the restitution of conjugal rights.

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 of the concession is that the custody and control of the minor child is to be awarded to the defendant, subject to the plaintiff's right of reasonable access. The defendant in her affidavit in terms of rule 37 (6) (b) (paragraph 3) alleges that she is no longer claiming division of the joint estate but her prayer will now be that of the plaintiff forfeits his benefits arising out of the marriage in community of property.

The plaintiff offered N\$ 2000.00 maintenance in respect of the minor children whereas the defendant is requesting an amount of N\$ 10 000.00 maintenance per child per month and she is further requesting N\$5 000.00 per month towards her maintenance

until such a time that she remarries. The parties are further also not in agreement on how the joint estate should be divided.

Held that the plaintiff has failed to discharge the onus resting on him and his claim is accordingly dismissed.

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**ORDER**

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1. The plaintiff's claim is dismissed.
2. There shall be judgment for the defendant for an order of Restitution of Conjugal Rights and the plaintiff is ordered to return to or receive the defendant on or before **20 November 2013**, failing which, to show cause, if any, to this court on the **22 January 2014 at 10h00** am, why:
  - a) The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved;
  - b) The custody and control of the minor children namely:
    - (i) M N M, a girl born on 01 May 1997;
    - (ii) F Nd M, a girl born on 24 February 2003; and
    - (iii) E M T M, a girl born on 15 May 2005

is not granted to the defendant subject to the plaintiff's right to reasonable access and visitation.

  - c) The joint estate of the parties is equally divided between the parties;
  - d) The plaintiff must not pay maintenance in the amount of N\$3 000 (Three Thousand Namibia Dollars) per month per child and also to cover 100% of

all the minor children's scholastic and tertiary expenses. This includes all costs relating to extra-mural activities, transportation to and from school and all related costs;

- e) The minor children must not remain on the defendant's medical aid and that the plaintiff will pay for the excess payments in respect of the minor children.
- f) The plaintiff must not pay to the plaintiff rehabilitative maintenance in the amount of N\$ 3000 (Three Thousand Namibia Dollars ) until when the joint estate is equally divided between the parties or for a period of twelve months from the date of the final order of divorce whichever is the shorter period
- g) The costs of suit should not be awarded to the defendant.

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## JUDGMENT

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### UEITELE 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 in community of property. The plaintiff further alleges that the defendant shows him no love, affection, intimacy and denies him marital privileges, that the defendant interferes with his employment by attending at his consultancy and humiliating him in front of his colleagues, on various occasions locked him out of the common home, does not contribute toward the upkeep, and maintenance of the common home, employ an overly domineering attitude towards plaintiff in the household decision, and same is always decided in her favour.

[2] The defendant entered a notice to defend the action. In her plea she denies that she acted with a malicious, fixed and settled intention to terminate the marital relationship, more in particular that she shows him no love, affection, intimacy and denies him marital privileges, that the defendant interferes with his employment by attending at his consultancy and humiliating him in front of his colleagues, on various occasions locked him out of the common home, does not contribute toward the upkeep, and maintenance of the common home, employ an overly domineering attitude towards plaintiff in the household decision, and same is always decided in her favour.

[3] The defendant pleads that she has endeavored by all means to show the plaintiff love, affection, intimacy and provide him with his marital privileges as and when he requests same. She pleads further that the plaintiff is in fact the one that has recently started to not show her love, affection and intimacy as he is always on trips and when back in town, he spends his time socializing with friends. She further pleads that the plaintiff has always said that he will not mix business with his family life and as such, the defendant does not attend at his employment let alone humiliate the plaintiff in front of his colleagues. She further pleads that she has never locked the plaintiff out and that the plaintiff has once not slept at the common home as he went back home after everyone was asleep and did not make an effort to get the attention of the people in the house in order for them to open for him. Defendant further pleads that she is in fact the one that has contributed immensely to the upkeep and maintenance of the common home particularly because the plaintiff spends more time away from the common home than is there. Defendant further pleads that it is in fact the plaintiff that has an overly domineering attitude towards the defendant and has in the past made decisions alone even though they affected both parties.

[4] The defendant also instituted a counterclaim, which was amended. The basis of her counterclaim is also based on malicious desertion. In her counterclaim the defendant alleges that the plaintiff refuses the defendant intimacy and her marital privileges. The defendant further alleged that the plaintiff stays away from the common home of the parties for extended periods. The defendant further alleges that the plaintiff makes decisions that concern both the parties alone and follows through with them

without the defendant's consent. The defendant further alleges that the plaintiff is involved in an adulterous relationship with one Karen Oarabile Kwapa from Botswana. The plaintiff accordingly prayed for a final order of divorce alternative an order for the restitution of conjugal rights.

[5] The plaintiff further denied the allegations that he maliciously 'and/or' constructively deserted the defendant. In regard to the allegation that he committed adultery he denies the allegation and put the defendant to the proof of the allegation.

[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 in regard to the claims as set out in their pleadings. The effect of the concessions 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 prepared a joint report in terms of Rule 37 (5) dated 25 October 2012. In terms of that report the parties accuse the other of marital misconduct. The defendant has, however, offered to restore conjugal rights if this court were to find that she has maliciously deserted the plaintiff. 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 to pay N\$2000 maintenance per month per child, whereas the defendant is demanding N\$10 0000 maintenance per child per month and she is further demanding N\$5000 per month towards her maintenance until such a time that she remarries. The parties are further also not in agreement as to how the joint estate should be divided.

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

- 8.1 Which party has succeeded in discharging his or her *onus* of proving malicious desertion which would result in the granting of a restitution order?
- 8.2 Is the defendant's offer to restore conjugal rights genuine?
- 8.3 What is the appropriate maintenance for the minor children?
- 8.4 Does the defendant need maintenance? and
- 8.5 How is the joint estate to be dealt with?

## THE LEGAL PRINCIPLES

[9] In the case of *Kagwe v Kagwe*<sup>1</sup>, Geier, J said:

'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.'

[10] Hahlo<sup>2</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 deserendi*.' He<sup>3</sup> continues and argues 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.

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<sup>1</sup>An unreported judgment of this Court Case No (I 1459/2011) [2013] NAHCMD 71 (delivered on 30 January 2013), at para 9.

<sup>2</sup>Hahlo H R The South African Law of Husband and Wife 3rd Edition, Juta & Co Ltd 1969 at page 387

<sup>3</sup>*Supra* at page 387.

[11] I will in this paragraph expand these forms but what I will state in this paragraph is based on the work of Hahlo:

- 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:
  - the consortium of spouse must have come to an end as the result of the plaintiff having left the defendant;
  - it must have been the defendant's unlawful conduct that caused the plaintiff to leave;
  - the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.<sup>4</sup>

[12] It is common cause that the court has jurisdiction in this matter and that the parties were married and are still so married.

[13] In such circumstances, it is clear that the question which arises is whether the plaintiff has succeeded in discharging his *onus* of proving constructive desertion which would result in the granting of a restitution order.

## THE PLAINTIFF'S EVIDENCE

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<sup>4</sup>Also see the unreported judgment of this court in the matter of Voigts v Voigts (I 1704/2009) [2013] NAHCMD 176 (24 June 2013) at 21.



[14] In support of his quest to obtain an order for the restitution of conjugal rights the plaintiff testified that the defendant (i) shows him no love, affection, intimacy and denies him marital privileges, (ii) that the defendant interferes with his employment by attending at his consultancy and humiliating him in front of his colleagues, (iii) on various occasions locked him out of the common home, (iv) does not contribute toward the upkeep, and maintenance of the common home, (v) employ an overly domineering attitude towards plaintiff in the household decision, and same is always decided in her favour.

[15] The plaintiff elaborated on his evidence with respect to the allegation set out in (i) above that the defendant had during 2001 refused to have sexual intercourse with him. In respect of the allegations set out in (ii) above the plaintiff testified that they jointly opened a restaurant and when they had to interview staff to work in the restaurant, the defendant on a Saturday turned up at his practice and there in front of his colleagues insulted him and demand that she be part of the panel which would interview the applicants for positions in the restaurant. As regards the allegations set out in (iii) above the plaintiff testified that during February 2012 he was at the Hilton hotel with friends. Whilst at the hotel he received a sms from his wife which stated that if he does not get home soon he will sleep outside. He said that he delayed and got home by around 12 midnight by the time he got home he was locked out and he went back to the Hilton and slept at the Hilton hotel on that night.

[16] As regards the allegation set out in (iv) of paragraph 14 the plaintiff testified that the defendant did not clean their bedroom. Whenever the plaintiff raised this issue with the defendant she was hostile towards him and there were an instance where the defendant said the plaintiff has hands and can clean the bedroom himself. As regards the allegations in (v) of paragraph 14 above the plaintiff testified that there was an occasion where their daughter had to be confirmed and they wanted to hold a party for the confirmation of their daughter. The surface was gravel and they wanted to avoid dust when there a many people, so they discussed the possibility of paving the gravel surface with interlocks. The plaintiff suggested the cheaper red 'Chinese Interlocks' but

the defendant objected to the plaintiff using those interlocks. The plaintiff testified that he abandoned the idea of paving the surface area and the defendant ended up paving it with the interlocks she initially objected to. He also testified that on another occasion he wanted to effect extensions to the house by designing the girls' bedrooms each with its own bathroom. He testified that the defendant objected stating that the plaintiff was too European. He testified that during November 2012 he left the common home and is now residing at a sectional title Unit Eros Park.

[17] In cross examination the plaintiff was asked when he first experienced marital problems. The plaintiff replied that he and the defendant married each other during April 1997. After the marriage he obtained a scholarship and went to pursue his studies in England and he returned in the year 2000 and when he returned the defendant refused to have sexual intercourse with him. It was suggested to him that the defendant explained the reasons of her refusal to him, the reasons being that because she stayed alone for approximately two years, sexual intercourse became painful when he returned. He accepted and admitted that that explanation was given and that they also engaged, albeit on his initiation the service of a marital counselor and the problems were resolved.

[18] It was further suggested in cross examination to the plaintiff that the defendant would deny that she had interfered with his business because the plaintiff had made it clear that he does not want to mix his business with his family matters and that the aspect in which she thought she had a say related to the restaurant in which she was a co-owner. It was also suggested that the confrontation that the plaintiff alleges to have taken place in the presence of his colleagues did not take place but it was actually over the telephone and it was with the plaintiff's cousin that the defendant took up the matter of the applicants who had to be interviewed for the positions in the restaurant. The plaintiff did not counter this suggestion. As regards the incident that the defendant locked the plaintiff out of the house it was suggested to the plaintiff that he came home when everybody was asleep and he did not knock or rang the bell for him to be opened.

[19] It was furthermore suggested that when the defendant realized the deterioration of the marriage she attempted to correct matters and even went to the extent of

securing the services of professional counselor but the plaintiff had shown no interest in trying to salvage the marriage. The plaintiff admitted that the defendant had sought to mend her was but had opted for spiritual healing to the extent that in the evenings she would pray near to his ears and this was disturbing his sleep. He further testified that because of the lack of sleep he decided to move out of the common house.

[20] The plaintiff testified that he does not think the offer is genuine and further that he is no longer prepared to accept restoration of conjugal rights offered as it would only be temporary and defendant will revert to her conduct.

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

[21] The defendant testified that their marriage although with some challenges was considerable a very happy one. She testified that she and the plaintiff have always made decisions together, attended gatherings together, attending to the needs and expenses of both the children and the household together. She testified that before she was served with the summons for the divorce, the plaintiff on a day (she could not recall the exact day) was laying on the bed, he called her and said 'Ndapewa I think we must separate'. She testified that she thought that it was a joke as everything was well between them. She testified that during that month, the plaintiff even sent her a bouquet of flowers. It is only when she received the summons for the divorce that she realized that the statement that her husband had made was not meant to be a joke.

[22] The defendant in her plea and in her evidence denied the allegations made by the plaintiff against her, she labelled them as baseless, without substance and untrue. She substantiated her denials by testifying that she endeavoured by all means to show the plaintiff love, affection, intimacy and provide him with his marital privileges. As regards the allegation that she denied the plaintiff his conjugal rights she testified that the plaintiff had during 1998 left the country for his studies in the United Kingdom which was for a period of 2 years. He had at the time left her nursing Magreth, an infant and when he returned she had to readjust to providing him with his marital privileges which was at first difficult (she testified that 'love making proved to be painful and that is why she initially refused sexual

contact). She testified this incident happened approximately 13 years ago and that they went for psychological counselling which helped them to restore their sexual live.

[23] The defendant testified that the plaintiff started showing a loss of interest in her when he started travelling more frequently particularly to Botswana and Johannesburg. When he returned from his trips, he would go socializing with his friends until the very late hours of the night or in the morning hours. She testified that though they continued to share a bed even after the institution of the divorce action against her, the plaintiff started to sleep a distance from. She testified that she have by all means shown the plaintiff love and have on numerous occasions attempted to salvage their marital relationship but notwithstanding her attempts to salvage and reconcile with the plaintiff, the plaintiff refuses her attempts and has moved out of the common home.

[24] As regards the allegations that she interferes with his employment by attending on his consultancy and humiliating him in front of his colleagues she vehemently deny that allegation. She testified that the plaintiff has always maintained that he does not want to mix business with his family life. She testified that she always stayed away from his work unless of course attending to a matter but definitely not to interfere with his work or to humiliate him. She testified that the occasion referred to by the plaintiff that she went to his work place and insulted him in front of his colleagues is actually inaccurate. She testified that when they opened the restaurant they had agreed that she would be part of the recruiting team. The plaintiff travelled and left all the instructions for the recruitment with his cousin. When he returned from the trip they went together to the restaurant and that is where she questioned him why she was excluded from the recruitment process when it was not the initial agreement. She went on to state that after she confronted the plaintiff he called his cousin and they spoke over the phone. She testified that there were no colleagues or other staff members of the plaintiff present when these events occurred.

[25] She also denied the allegation that she on numerous occasions locked the plaintiff out of the common home. She testified that the only time that the plaintiff did not sleep at the common home was when he had gone socializing and stayed out until very late. She testified that she remembered that (on the day the plaintiff did not sleep at home) the

plaintiff had to travel to Swakopmund with work the following day, so when she realized that it was late (at around 21h00) she telephoned the plaintiff and asked him to come home earlier. The plaintiff replied that he will be home in thirty minutes, but when by 23h00 he was not yet home she went to bed. So she testified that when the plaintiff came home he did not make serious attempts for the people in the house to open for him as he did not ring the bell which could have caught the attention of everyone else. She testified that the plaintiff instead phoned on her mobile phone but because she was asleep and no one heard the phones ring, no one opened for him. So she stated that the reason why no one opened for him was not because she had intentionally locked him out, but it was because she did not hear the phone ring. She testified that when the plaintiff brought up that issue she apologized to him.

[26] As regards the allegations that she does not contribute towards the upkeep and maintenance of the common home she also denies that allegation. She testified that the plaintiff and she had always shared their responsibilities equally until the plaintiff started going on long trips outside the country and during those times he neglected his duties. During the times that the plaintiff was outside of the country she solely had to attend to the upkeep and maintenance of both the common home and the children including her stepson. She testified that the situation has intensified now that the plaintiff has moved out of the common home as she really only ask him for assistance when she is completely stuck. She testified that the plaintiff however earns much more than her and has always had a bigger chunk of the responsibilities same having been shared in accordance with their means. She testified that in accordance with her means, she is the one who has immensely contributed to the upkeep and maintenance of the common home. As regards the allegation that she has an overly domineering attitude towards him and household decisions are always in her favour which allegation she also denies. She testified that in fact, the plaintiff is the one that has an overly domineering attitude towards her and has made decisions alone even though they affected the both of them.

[27] She testified that their marriage was a very blessed and happy one until the plaintiff started travelling more and spending longer periods on his trips. Further the plaintiff would

on his return socialize with friends instead of spend time with his family. The above soon led to a refusal of affection, intimacy and my marital privileges towards her. The defendant testified that one day whilst cleaning up the room she stumbled upon a booking for flight tickets. One ticket had the plaintiff's details and the other ticket had a female's details for which had been booked from Gaborone to Johannesburg. She stated that when she confronted the plaintiff he just destroyed those tickets. She further testified that on a given day which she could not recall the plaintiff out of the 'blue' just said to her 'Ndapewa my wife I have never committed any adultery except on one occasion with a certain lady.'

[28] The defendant denied that the plaintiff informed her of his reason why he is moving out of the common home. She testified that he went on a trip to Cape Town and on his return he never came back home. He just telephoned her from the airport and told her that he is no longer coming back home. She further stated that she heard for the first time in Court that her prayer sessions were disturbing the plaintiff, she testified that he had never discussed that aspect with her. The defendant further testified that she is still willing to reconcile with the Plaintiff as she believes that their marriage was founded on solid love, trust, acceptance, understanding and most importantly faith. She further testified that her faith and religious beliefs do not allow her to divorce the plaintiff and testified that she wants to remain true to her vow to 'to love the plaintiff till death do us part' she consequently offered to unconditionally and *bona fide* restore conjugal rights to the plaintiff.

[29] The defendant requested that should her claim to restore conjugal rights fail she prayed for an amount of N\$ 10 000 maintenance per child per month which amount will be utilized towards the children's maintenance. She testified that the children have gotten used to a luxurious lifestyle which lifestyle can continue as their father will continue to earn the same and possibly an even better salary. She stated that the amount of N\$2 000 per child per month proposed by the plaintiff is way too little to cover the children's monthly expenses which are as follows:

(i) Groceries including lunch boxes

N\$8 000;

(ii)	Municipal account	N\$1 700;
(iii)	Nanny	N\$1 000;
(iv)	Toiletries	N\$2 000;
(v)	Hair Maintenance	N\$1 500;
(vi)	Extra mural together with fun day activities per term	N\$1 500;
(vii)	Birthday attendance and gifts	N\$ 700;
(viii)	Clothing	N\$2 000;
(ix)	Telephone and internet	N\$1 300;
(x)	DSTV	N\$ 630;
(xi)	Transport to and from school	N\$4 500;
(xii)	Petrol	N\$ 900.

[30] The defendant further testified that the plaintiff has also maintained her during their marriage and she has also gotten used to a certain lifestyle which lifestyle she will not be able to afford on her salary. She thus also prayed that he pays an amount of N\$ 5 000 per month towards her rehabilitative maintenance which payment should be effected until such a time that she remarries.

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

[31] I now turn to consider whether or not the plaintiff has discharged his onus in this matter. When I consider of that aspect I keep in mind what was said by Van Blerk, JA<sup>5</sup> when he said:

'Where a husband institutes an action against his wife for restitution of conjugal rights on the ground of malicious desertion, then it is necessary for the husband to aver in his declaration the *factum* of desertion and the *animus deserendi* (that is to say the intention to terminate the marital relationship without justification therefor). It is also necessary for him to prove both elements in order to obtain the relief for which he asks. Unless he is relieved of the burden of proof by admissions made in the plea.'

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<sup>5</sup>Voigts v Voigts (I 1704/2009)[2013] NAHCMD 176 (24 June 2013); Van Vuuren v Van Vuuren 1959 (3) SA 765 (A).

[32] Mr Rukoro who appeared for the plaintiff submitted that the conduct between parties in general is the determinant of the failure or continuance of the marital bond. I agree with this submission. He further submitted that the defendant's conduct was the cause of the breakdown of the marital relationship between the parties. Her conduct, although not constituting adultery is sufficient to justify a finding of constructive desertion. I have difficulties in accepting this part of his submission.

[33] Before I advance my reasons for the difficulties that I have, I find it appropriate to indicate that for the plaintiff to discharge the onus resting on him, he must prove that it is the defendant's conduct that drove him away from the marriage. The conduct, said Geier, J in the *Kagwe*<sup>6</sup> matter:

'...need not to have amounted to a matrimonial offence such as cruelty or adultery but ... it must exceed in gravity such behaviour vexatious and trying though it maybe, as every spouse bargains to endure when accepting the other 'for better or for worse'. The ordinary wear and tear of conjugal life does not itself suffice'.

[34] I now return to the difficulties I mentioned in paragraph 33 above. The defendant contradicted most of the evidence presented by the plaintiff. It thus follows that I am faced by two mutually destructive versions. For the plaintiff to succeed he must demonstrate to the court that the balance of probabilities favour him. 'If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'<sup>7</sup>

[35] I am of the view that in this matter the probabilities are evenly balance and I am not satisfied that the plaintiff's evidence is true and that of the defendant false. I say so for the following reason: The defendant filed her witness statement on 07 August 2013 and the hearing was scheduled for 20 August 2013. The plaintiff thus had sufficient time

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<sup>6</sup>*Supra* footnote 1 at para [52].

<sup>7</sup>*National Employers General Insurance v Jagers* 1984 (4) SA 437 (C) at 440 E-G; *Motor Vehicle Accident Fund of Namibia v Kulobone* (SA 13/2008) [2009] NASC 1 (5 February 2009).



to consider and deal with the defendant's evidence, but he did not contradict her or dispute the larger part of the evidence presented by the defendant. The only aspect that he denied is the allegation that he committed adultery with another woman. Even in her cross-examination the defendant was not shaken or contradicted. I therefore have no reason to disbelieve her evidence.

[36] It will be remember that what the plaintiff had to proof is not only that the defendant constructively disserted him, but that her conduct which forced him to move out of the matrimonial home is attributable to a fixed intention to put an end to the marriage. The plaintiff has not put a shred of evidence before me to demonstrate that defendant's conduct was aimed at putting an end to the marriage. I am of the view that the conduct of the defendant is what has been termed the 'ordinary wear and tear of conjugal life'. I therefore find that the plaintiff has not discharged the onus resting on him and his claim for restitution of conjugal rights can therefore not succeed.

[37] It is, however, clear that the parties have not lived together as husband and wife since October/November 2012 and that it is the plaintiff who has moved out of the common house. After the parties presented their evidence and closed their respective cases I indicated to the parties (especially in light of the fact that the defendant offered to restore conjugal rights, which offer I found to be genuine and also in view of the fact that it is the '*... policy of the courts ... to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social life, the family*') that I will postpone the legal submissions to enable the parties to seek further professional assistance in the form of marriage counseling to see whether they can reconcile their differences.

[38] The plaintiff has indicated that he does not think that any counseling will be of assistance now and that he will not accept the offer by the defendant to restore conjugal rights. It thus follows that from the plaintiff side, the marriage was 'irretrievably broken down' and that there are no reasonable prospects for the resumption of a joint and further harmonious married life. It cannot be in the interest of public policy to insist on

the maintenance of a union which only one partner seemingly wishes to perpetuate.<sup>8</sup> I am thus of the view that the defendant has made out her case that the plaintiff is the one who has maliciously deserted her.

### **Ancillary claims**

[39] I now turn to the other outstanding issues. I will start with the proprietary claims. In her counterclaim the defendant prayed for a 'quantified forfeiture order' but in her submissions Ms Shikale-Ambodo who appeared for the defendant conceded that the defendant has not made out a case to warrant a 'quantified forfeiture order.' It is now a well-established principle of law that if a marriage in community of property is dissolved, the community of property takes place as a matter of law. I will therefore not add or subtract from the operation of the law and order that the joint estate of the parties be equally divided between them. The parties must appoint a liquidator to assist them in the division of the joint estate.

[40] As regards the maintenance of the 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\$ 2 000 per month per child, but the defendant is demanding N\$ 10 000 per month per child. Parker, J<sup>9</sup> held that:

'it must be remembered that in making an award of maintenance of the minor child the court takes into account that the burden of supporting the child is common to both spouses and must be borne by them in proportion to their means. (See *Kemp v Kemp* 1958 (3) SA 736.) And the duty to support should be considered in correlation with the means at the parents' disposal. (See Erwin Spiro, *Law of Parent and Child*, 4th ed (1985): p 398.) In the instant case, the means at the disposal of the parties is their individual income from their respective remuneration payable by their respective employers. As I have set it out previously, the defendant's income is about 24 per cent of the plaintiff's. But, as I have observed previously, the plaintiff is going to be responsible for all the scholastic expenses of the minor child. Moreover, the plaintiff is going to lose

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<sup>8</sup>See Geier J in Kagwa (*supra*) foot note 1

<sup>9</sup>Hamukwaya v Hamukwaya (I 3241/2012) [2013] NAHCMD 201 (18 July 2013).

to the defendant any interest he has in the property. What this means is that the plaintiff may rent accommodation and pay for the rental or purchase a dwelling house and most probably will have to service a mortgage bond repayment in respect thereof. And so the means of the parties should be considered in correlation with this fact about housing and the scholastic expenses in order to get the correct picture discussed in this judgment.'

[41] In the present matter the plaintiff has offered to cover 100% of all the minor children's scholastic and tertiary expenses. These include all costs relating to extra-mural activities, transportation to and from school and all related costs. The plaintiff has furthermore offered to pay for the excess payments in respect of the minor children medical expenses. According to the defendant's evidence the costs of these activities (i.e. the scholastic and tertiary education expenses, transportation and cost of extra mural activities) will amount to approximately N\$ 6 900. If the plaintiff has undertaken to cover these costs, that amount must be discounted when one considers the maintenance demand by the defendant. I am therefore of the view that in accordance with his means an amount of N\$ 3000 per month per child will be a fair amount.

[42] As regards the rehabilitative maintenance this court's approach to maintenance, after the marriage is dissolved by divorce is that a party is entitled to an order of maintenance in his or her favour if he or she, on a balance of probabilities proves that he or she needs it.<sup>10</sup> *In Oberholzer v Oberholzer*<sup>11</sup>.

'Now the duty to maintain is facultative, it depends upon the reasonable requirements or needs of the party claiming it and the ability of the party from whom it is claimed to furnish it.'

[43] The defendant has testified that she earns N\$13 000 per month and that her monthly expenses are approximately N\$16 440 per month. I am thus of the view that defendant is in need of maintenance and I am also satisfied that plaintiff is in the position to maintain the defendant. But taking into consideration that the plaintiff has

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<sup>10</sup>See the unreported judgment by Damaseb, JP in the matter of Neil Ronald Samuels v Petronella Samuels delivered on 26 March 2010. Also see *Van Wyk v Van Wyk* 1954(4) SA 594 at 595 A-H.

<sup>11</sup>1947 (3) SA 294 at 297.

offered to pay maintenance for the children, to pay all educational, medical and tuition cost for the minor children and for the extramural activities of the children. I am of the view that an amount of N\$3000 per month for the maintenance of the defendant is reasonable.

[44] The defendant claims maintenance until she remarries. I am hesitant to award maintenance for an indefinite period and would restrict the maintenance to a specific period. In view of the order that I made that the joint estate be divided equally I am of the view that the plaintiff's obligation to maintain the defendant must cease when the joint estate has been fully divided amongst the parties or until when the defendant remarries whichever occurs first.

[45] In order to give a complete coherent order, I here repeat the orders that I have granted:

- 1 The plaintiff's claim is dismissed.
- 2 There shall be judgment for the defendant for an order of Restitution of Conjugal Rights and the plaintiff is ordered to return to or receive the defendant on or before **20 November 2013**, failing which, to show cause, if any, to this court on the **22 January 2014 at 10h00** am, why:
  - 2.1 The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
  - 2.2 The custody and control of the minor children namely:
    - (a) M N M, a girl born on 01 May 1997;
    - (b) F N M, a girl born on 24 February 2003; and
    - (c) E M T M, a girl born on 15 May 2005

is not granted to the defendant subject to the plaintiff's right to reasonable access and visitation.

- 2.3** The joint estate of the parties is equally divided between the parties.
- 2.4** The plaintiff must not pay maintenance in the amount of N\$3000 (Three Thousand Namibia Dollars) per month per child and also to cover 100% of all the minor children's scholastic and tertiary expenses. This includes all costs relating to extra-mural activities, transportation to and from school and all related costs.
- 2.5** The minor children must not remain on the defendant's medical aid and that the plaintiff will pay for the excess payments in respect of the minor children.
- 2.6** The plaintiff must not pay to the plaintiff rehabilitative maintenance in the amount of N\$ 3000 (Three Thousand Namibia Dollars) until when the joint estate is equally divided between the parties or for a period of twelve months from the date of the final order of divorce whichever is the shorter period.
- 2.7** The costs of suit should not be awarded to the defendant.

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SFI Ueitele  
Judge

APPEARANCES

PLAINTIFF:

R. Rukoro

Of LorentzAngula Incorporated

DEFENDANT:

L. Shikale-Ambondo

Of Shikale & Associates