



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: I 2572/2011

In the matter between:

J P K

PLAINTIFF

(Previously B, born S)

and

F J K

DEFENDANT

Neutral citation: *Kotze v Kotze* (I 2572/2011) [2013] NAHCMD 96 (9 April 2013)

Coram: UEITELE J

Heard: 02 April 2013

Delivered: 09 April 2013

Flynote: Husband and wife - Gifts between - Necessity for husband to prove that it was a donation properly so called - Necessity to prove motive was pure liberality.

Summary: The plaintiff (wife) instituted action against the defendant (husband) for restitution of conjugal rights and failure therewith an order of divorce. The defendant counterclaimed, in claim two of his counterclaim he alleged that he donated 50% members' interest in and to a certain Close Corporation known as Crocodile Park Close Corporation, Registration Number CC 1997/1392 to the plaintiff. He contended that this was a prohibited donation which he had subsequently revoked and is seeking an order directing the plaintiff to transfer the 50% members' interest in and to Crocodile Park Close Corporation to him.

Held that the onus was on the defendant to prove the donation and that the defendant has failed to discharge the onus which rests on him.

ORDER

Absolution from the instance is granted.

JUDGMENT

UEITELE J:

[1] The plaintiff and the defendant are husband and wife. They were married out of community of property on 29 August 2005.

[2] On 16 August 2011 the plaintiff issued summons against the defendant in an action in which she claimed for an order of restitution of conjugal rights and failing

compliance therewith a final order of divorce. On 30 September 2011 the defendant gave notice that he intends to defend the action. The defendant, however, only filed his plea some four months later (i.e. on 07 February 2012).

[3] Simultaneous with the filing of the plea the defendant filed a counterclaim. In the counterclaim the defendant had two main claims. In the first claim he claimed for an order of restitution of conjugal rights and failing compliance therewith a final order of divorce.

[4] In the second claim he alleges that during the subsistence of the marriage and in June 2009 he donated 50% members' interest in and to Crocodile Park Close Corporation, Registration Number CC 1997/1392 to the plaintiff, the defendant further alleged that the plaintiff did not pay any consideration in respect of the said members' interest and that he was accordingly entitled to revoke the said donation and that he was so revoking the donation. He accordingly claimed transfer of the 50% members' interest in and to Crocodile Park Close Corporation, Registration Number CC 1997/1392.

[5] The plaintiff denied that the 50% members' interest in and to Crocodile Park Close Corporation, Registration Number CC 1997/1392 had been donated to her by the defendant, she alleges that in return for the 50% members' interest she was expected to contribute labour, funds and material towards the business operations of Crocodile Park Close Corporation.

[6] After the pleadings in the matter closed, the matter was placed on the case management roll. The matter was then set down for a case management conference on 17 October 2012 and was postponed on several occasions. On 06 February 2013 I further postponed the matter to 12 March 2013 for purposes of hearing evidence and arguments as to whether or not the transfer of the 50% members' interest in and

to Crocodile Park Close Corporation, Registration Number CC 1997/1392 to the plaintiff, was a donation.

[7] Shortly after (i.e. on 14 February 2013) my order of 06 February 2013 the plaintiff's legal practitioners of record withdrew as her legal representatives. When the matter was called on 12 March 2013 there was no appearance for the plaintiff. I then made the following order:

- '1 The matter is postponed to 27 March 2013 at 08H30 for the plaintiff to show cause why the provisions of Rule 37 (16) should not be invoked.
- 2 That the matter is set down for trial at 10H00 on 02-03 April 2013;
- 3 That the order of 12 March 2013 must be served personally on the plaintiff by the deputy sheriff.'

[8] The order of 12 March 2013 was served by the Deputy Sheriff on the plaintiff on 15 March 2013. When the matter was called on 02 April 2013 there was still no appearance for the plaintiff. I, in accordance with Rule 37(16)(c)(iii), dismissed the plaintiff's claim and allowed the defendant to lead evidence in respect of his counterclaim. Rule 37(16)(c)(iii) reads as follows:

- '(16) Without lawful excuse, if a party or his or her counsel –
- (a) fails to attend a case management conference, a status hearing, any additional case management conference or the pre –trial conference ;
 - (b) ...
 - (c) Fails to obey a case management order or the managing judge's pre-trial order;

the managing judge may enter such orders as are just, including, but not limited to the following –

- (i) an order refusing to allow the non-compliant party to support or oppose designated claims or defences, or prohibiting that party from introducing designated issues in evidence;

- (ii) an order striking out pleadings or part thereof, including any defence, exception or special plea;
- (iii) an order dismissing a claim or entering a final judgment; or
- (iv) an order requiring a non-compliant part or his or her counsel to pay the opposing party's costs caused by the non-compliance.'

[9] As regards the defendant's first claim I granted the restitution order. I, however, reserved judgment in respect of the second claim.

[10] As I indicated above I allowed the defendant to give evidence in respect of his claims. The defendant's evidence was rather very short he testified as follows:

- a) That he married the plaintiff out of community of property on 29 August 2005 at Otjiwarongo, Republic of Namibia. No children were born from the marriage between the parties.
- b) That the parties are no longer living together. The plaintiff left the common home in August 2011. Shortly after leaving the common home plaintiff instituted divorce proceedings against him. Plaintiff took all her personal belongings when she left the common home, the plaintiff has not shown any interest to continue with the relationship;
- c) That during 2000 he held 100 % members interest in Crocodile Park Close Corporation. During 2009 he donated 50 % members' interest to the plaintiff.
- d) That the plaintiff received N\$6000 salary from Crocodile Park Close Corporation and her duties were book keeping, VAT reconciliation and dealing with the receiver of revenue;
- e) That since plaintiff left the common home she did not do any work for Crocodile Park Close Corporation;
- f) That when plaintiff left the common home she transferred N\$147 000 from Crocodile Park Close Corporation into her personal account;
- g) That the plaintiff did not pay any monies to acquire the 50% members' interest in Crocodile Park Close Corporation.

[11] After leading the defendant to give the above evidence Mr Strydom who appeared for the defendant submitted that a case has been made out and I should grant the order as prayed for in Claim 2 of defendant's counterclaim. I alerted Mr. Strydom to the fact that the statement by the defendant that he had donated 50% members' interest to the plaintiff is, in my opinion, not evidence at all but conclusions of law by the defendant without explaining the reasons or providing the grounds therefor. A statement of that sort by a witness does not, in my view, determine an enquiry as to the existence or non-existence of a donation. That enquiry must be determined in relation to the factual testimony, from which the Court must draw the proper legal conclusions.

[12] Mr Strydom thereafter probed the defendant for him to explain what his motive was when he transferred the 50% members' interest in Crocodile Park Close Corporation to the plaintiff.

[13] The defendant's explanation was again terse he simply testified that he transferred the 50% members' interest in Crocodile Park Close Corporation to the plaintiff because of the marriage. He testified that thought he would have a lifelong marriage with the plaintiff. He further testified that now that the marriage has broken down he has revoked the 50% members' interest in Crocodile Park Close Corporation donation and is claiming for the 50% members' interest to be transferred to him.

[14] In view of the evidence by the defendant the questions which I am called upon to decide in this matter is whether the defendant donated the 50% members' interest in and to Crocodile Park Close Corporation, Registration Number CC 1997/1392 to the plaintiff and whether that donation is revocable.

[15] One of the consequences of a marriage is that donations between spouses are prohibited. There is, however, a well-recognised exception to the general rule of our law that donations between spouses *stante matrimonio* are prohibited. This is set out by Hahlo¹ as follows:

¹ Hahlo H R : *The South African Law of Husband and Wife* Juta 3rd edition at page 132

'Gifts made by one spouse to the other on birthdays, wedding anniversaries and other festive occasions when it is customary to make gifts do not fall within the prohibition, provided they do not exceed the bounds of moderation, having regard to the means and social standing of the parties.'

[16] In the case of *Avis v Verseput*², Tindall, J.A considered the law relating to revocation of donations and defined a donation as follows:

'A donation is said to be properly so called when a person gives something with the intention that he desires it immediately to become the property of the donee and under no circumstances to revert to himself and he makes the donation for no other reason than in order to exercise his liberality and generosity.'

[17] The question which had to be decided in the *Avis v Verseput* case was whether a 'donation' which the appellant claimed to revoke was revocable. Tindall, J.A., reviewed the authorities to determine what donations were revocable in Roman Dutch law. In his view, the only donations which are revocable are donations properly so called; that is, donations which are made from sheer liberality. The learned Judge summarized his opinion as follows³:

'In my opinion the question whether a donation promised verbally arose from sheer liberality or not is one of fact which can be proved by a balance of probabilities. Of course the Court cannot profess to be able to divine what was in the donor's mind. But the proved facts may in a particular case be strong enough to justify an inference as to the donor's real motive. I use the word motive in its ordinary sense - that which moves or induces a person to act in a certain way, a reason which influences a person's volition; see Shorter Oxford Dictionary. In my opinion the Roman-Dutch authorities, in saying that a genuine donation is one made out of pure liberality, mean

² 1943 AD 331

³ At page 366

a donation in which the donor's motive (using the word in the above sense) is liberality, that is, that liberality is the reason which influences him to make the gift. '

[18] Watermeyer ACJ in that case (the *Avis v Verseput* case) also considered the authorities and made the following remarks⁴:

'The motive for a pure donation apart from those cases where the donor seeks publicity or personal advancement is usually sentiment, affection or charity.'

[19] In the case of *Smith's Trustee v Smith*⁵, It has been held that the *onus* is on the party alleging the existence of a donation to prove the donation. In the present case, in order to succeed in his claim it was necessary for the defendant to prove on a balance of probabilities that when he arranged for the 50% members' interest in and to Crocodile Park Close Corporation, CC 1997/1392 to be registered in the name of the plaintiff he made a *donation properly* so called, that is, that his motive was pure liberality. Has the defendant succeeded to discharge that onus?

[20] I am of the opinion that the defendant has failed to discharge the onus which rests on him. I say so for the following reasons. Of course I am unable to divine what was in the defendant's mind when he caused the 50% members' interest to be registered in the plaintiff's name. The defendant's testimony that when he caused the 50% members' interest to be transferred to the plaintiff, he was motivated by the wish to have a lifelong marriage with the plaintiff does not assist me to make a factual finding as to what his motive was. I am therefor of the view that I must therefore grant absolution from the instance.

[21] I accordingly make the following order: Absolution from the instance is granted.

⁴ At page 353

⁵ 1927 AD 482

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF

NO APPEARANCE

DEFENDANT

J A N STRYDOM

Instructed by Engling, Stritter & Partners