

REPUBLIC OF NAMIBIA



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

CASE NO.: I 201 /2013

In the matter between:

J K M **PLAINTIFF**

And

J P M **DEFENDANT**

Neutral citation: *M v M* (I 201/2013) [2014] NAHCMD 173 (04 June 2014)

Coram: UEITELE J

Heard: 16 - 17 JANUARY 2014

Delivered: 04 June 2014

Flynote: Husband and wife- Divorce- Claims by plaintiff - counterclaim by defendant - Malicious desertion- Married in community of property- Division of the joint estate.

Summary: The parties were married in community of property at Ontananga, Oshikoto Region, Republic of Namibia, on 07 September 2002, which marriage still subsists.

The plaintiff alleges in his particular of claim that during the subsistence of their marriage defendant engaged in wrongful and unlawful conduct with the fixed and malicious intention to terminate the marital relationship between the parties. Plaintiff prays for an order for the restitution of conjugal rights and failing compliance therewith a final order of divorce; and an order that each party retains the property in his/her possession as their sole and exclusive property.

Defendant entered her notice to defend and filed a plea and counterclaim respectively. Defendant also alleges that during the subsistence of their marriage, plaintiff engaged in wrongful and unlawful conduct with the fixed and malicious intention to terminate the marital relationship between the parties. The defendant also prays for an order for the restitution of conjugal rights and failing compliance therewith a final order of divorce and an order for the division of the joint estate.

The issue to be determined is who is responsible for the breakdown of the marriage.

Held that plaintiff succeeded in discharging his overall onus in respect of some of the relied upon grounds of divorce.

Held further that on the facts before Court, and on the Court's impressions of the defendant's personality and temperament, the defendant had either the actual or the constructive intention of putting an end to her marriage with the plaintiff, or of cohabitating between her and the plaintiff. *Held further* that the defendant's conduct amounts to malicious and constructive desertion of the plaintiff.

Held further that it is now a well-established principle of our law that if a marriage in community of property is dissolved, the equal division of the community of property takes place as a matter of law. The court 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.

ORDER

The Court grants judgment to the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return or receive the plaintiff on or before the 16th day of July 2014, failing which to show cause, if any, to this court on the 13th day of August 2014 at 08h30 why:

- 1.1 The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
- 1.2 The joint estate of the parties should not be equally divided between the parties; and
- 1.3 Each party should not bear its own legal costs.

JUDGMENT

UEITELE, J

INTRODUCTION

[1] The parties (the husband is the plaintiff in this action and the wife is the defendant) were married on 07 September 2002 at Ontananga, Oshikoto Region, Republic of Namibia. In the initial pleadings there was a dispute between the parties as to whether the marriage was in or out of community of property. The plaintiff later

conceded that the marriage was in community of property. No children were born to the parties during the subsistence of the marriage.

THE PLEADINGS

[2] On 23 January 2013 the plaintiff issued summons out of this court and caused them to be served on the defendant on 13 February 2013. In his particulars of claim the plaintiff alleges that the defendant acted with the fixed and malicious intent to terminate the marriage relationship in that she (i) conducted herself in a manner which caused him to move out of the marital home; (ii) refused to communicate with the plaintiff; and she refused to show plaintiff any love and affection.

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

- '(a) An order for restitution of conjugal rights and, failing compliance therewith, a final order of divorce.
- (b) An order that each party retains the property in his/her possession as their sole and exclusive property.
- (c) Costs of suit.'

[4] The defendant is defending the action. In her plea she denies the plaintiff's allegation regarding her failure to communicate and pleads that, there was no meaningful communication between the parties because the parties were not living together as husband and wife as the plaintiff had moved out of the common home during September/November 2011. The defendant further pleads that the reason why there is no meaningful communication between the parties is because every time they communicate the plaintiff uses foul language towards her. Regarding the allegation that she did not show the plaintiff any love and affection she pleaded that it is in fact the plaintiff who has failed to show her any love and affection, she further pleaded that the plaintiff has moved out of the common home and has failed to attempt to salvage the

relationship and that the plaintiff has in fact shown the defendant that he does not want to continue with the marital relationship.

[5] The defendant also instituted a counterclaim. In the counterclaim the defendant alleges that the plaintiff (i) failed to show her love and affection; (ii) removed various movable properties from the common home without the Defendant's consent; (iii) he transferred the parties' immovable property into someone else's name; (iv) fails to constructively communicate with her; (v) moved out of the common home during September or November 2011 and has since not returned; (vi) refuses to attempt to salvage the marriage relationship.

[6] Relying on the allegations set out above the defendant alleges that the plaintiff maliciously deserted her, the defendant initially claimed:

- '(a) An order for restitution of conjugal rights and, failing compliance therewith, a final order of divorce.
- (b) An order for the division of the joint estate.
- (c) Costs of suit.'

[7] In his plea the plaintiff denies the allegation of wrongful and malicious desertion. In regard to the allegation that he showed the defendant no love and affection he pleaded that it was him who always showed the defendant love and affection and that it was the defendant who did not show the plaintiff love and affection. In respect of the allegation that he removed various movable properties from the common home; he denies that he did so with the settled and unlawful intention to terminate the marital relationship between him and the defendant; he alleges that he moved the movable properties from the house in Onguta to their kitchen and common bedroom at Ontananga Village which is the recognized marital home, he further pleads that he removed the movable properties from the house which they resided in Onguta, Oluno, Ondangwa at the request of the owner of the said house.

[8] As regards the allegation that he transferred the parties' immovable property into someone else's name, he pleads that the parties never owned any immovable property. He alleges that the plaintiff was the custodian of his mother's house located in Onguta, Oluno, Ondangwa and as such the house was lawfully transferred into his mother's name as the rightful owner. Regarding the allegation that he failed to constructively communicate with the defendant the plaintiff denies all the allegations and puts the defendant to the proof thereof. Regarding the allegation that he moved out of the common home during September or November 2011 the defendant admits having moved out of the common home but denies that he moved out of the common home with the settled intention to terminate the marital relationship between him and the defendant. He pleads that the defendant obtained a protection order against him and in an attempt to adhere to the terms of the protection order against him and avoid infringement thereof, the plaintiff moved out of the house at Onguta.

[9] Regarding the allegation that the plaintiff refuses to attempt to salvage the marital relationship the plaintiff denies all the allegations and puts the defendant to the proof thereof. He pleads further that he attempted to salvage the marriage by distancing himself from the plaintiff to allow for peaceful communication.

[10] The parties filed a draft pre-trial order, which was made an order of court on 27 November 2013. In the draft pretrial order the parties identified the issues to be resolved during the trial as follows:

- '1.1 Whether the defendant moved out of the common home without informing plaintiff of her reasons;
- 1.2** whether the defendant refused to communicate with the plaintiff;
- 1.3** whether the defendant failed to show the plaintiff any love and affection;
- 1.4** whether the plaintiff showed the defendant no love and affection;
- 1.5** whether the plaintiff transferred the parties' immovable property into someone else's name;

1.6 whether the plaintiff uses foul and abusive language towards the defendant and

1.7 whether plaintiff moved out of common home during September or November 2011 and since not returned.'

THE APPLICABLE PRINCIPLES

[11] In the matter of *Kagwe v Kagwe*¹ 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.'

[12] In the present matter it is common cause that the court has jurisdiction and that the parties were married and are still so married.

[13] I am of the view that there is no doubt that the marriage relationship between the plaintiff and the defendant has irretrievably broken down, but the crux of the dispute (which is encapsulated in the issues identified by the parties in the pretrial order which I quoted above) between the parties is as to who is responsible for the breakdown of the marriage. In order to answer that question I intend to evaluate the evidence that was placed before me during the trial.

Plaintiff's evidence

[14] The plaintiff testified that, his main reason for instituting divorce action is that cohabitation with the defendant has become intolerable because of the defendant's behaviour. He testified that the cause of the intolerable situation is:

¹An unreported judgment of this Court Case No. (I 1459/2011) [2013] NAHCMD 71 delivered on 30 January 2013.

- (a) That the defendant does not show him love and respect in that, during the subsistence of the marriage the defendant would absent herself from the marital home for long periods, at times two weeks or a month without the plaintiff knowing the whereabouts of the defendant. He testified that during 2004 the defendant left the marital home for no reason and absented herself from the marital home for a period fourteen days. After that she made it a habit to leave the marital home without informing the plaintiff of her whereabouts. He testified that during April or May or June 2012 the defendant left the marital for a period in excess of thirty days without informing the plaintiff and the plaintiff only heard from other people that she was in Windhoek. The plaintiff further testified that the defendant had no respect for the plaintiff's parents. The plaintiff had even gone to the extent of convening meetings between his parents and the defendant's parents in order to salvage his marriage but all his efforts did not bear the desired results.
- (b) That the defendant refused to go to their traditional homestead and plough during the rainy season. He testified that whenever he requested the defendant to go to their traditional homestead at Ontananga Village, the defendant would become very argumentative. The defendant further used foul language towards the plaintiff.

[15] The plaintiff further testified that other factors which made cohabitation with the defendant intolerable are that, during the subsistence of the marriage the defendant made attempts to have him arrested by making false allegations of criminal activities against him. He cited three incidences which he testified as instances of unfounded allegations of criminal activities. The first instance was that the defendant informed the plaintiff's supervisors that plaintiff stole items from his place of employment. The reports were investigated and found to be false so testified the plaintiff. The second instance was that the defendant made false reports of domestic violence allegedly committed by the plaintiff against her. As a result of the report the Magistrates Court for the district of Ondangwa issued a protection order against the plaintiff in terms of which the plaintiff was prohibited from physically abusing the defendant, or from chasing the defendant

away from the marital home and he was also ordered to surrender his shotgun to the police.

[16] The third instance, was that during 2012 the plaintiff came from his place of employment in Ohangwena on his way to Tsumeb and passed through the marital home in Onguta (Ondangwa) he did not find the defendant at home and he found the locks changed, he removed those locks in order to gain access to the house and replaced them with other locks and left the keys for the defendant at the neighbours. The next thing to happen was that the defendant laid charges of theft against the plaintiff and the plaintiff was arrested for allegedly stealing money belonging to the defendant. He was released on bail and is still facing charges of theft.

[17] In his testimony he denied the allegation that he deserted the marital home and has since not returned. He testified that the reason why he left the common home was work commitment. He testified that he was based in Ohangwena and his work further required of him to travel between different towns in the North of Namibia.

Defendant's evidence

[18] The Defendant in support of her allegations testified that the plaintiff failed to show her love and affection. She testified that she left the marital home on two occasions: the first time she moved out of the marital home was as a result of the plaintiff's nieces that basically treated her like their slave and used foul and abusive language towards her. The second time when she left the marital home was when she went to her brother who was sick in Walvisbay and who was later transferred to Windhoek where he passed away.

[19] The defendant further testified that the plaintiff intimidated her, harassed her and threatened her. He particularly did so when he demanded that she vacate the parties' marital home as from 2011. As a result of the intimidation, harassment and threats she laid charges of domestic violence against the plaintiff and obtained a protection order against the plaintiff. She further testified that the plaintiff was also instructing her to go clean up and cut the grass that had grown in his mother's field at Ontananga Village. She further

testified that when plaintiff demanded that she leaves the marital home he used foul and abusive language towards her, as a result she was scared to communicate with plaintiff.

[20] The defendant further testified that during 2013 and after the plaintiff had instituted the divorce action, the plaintiff went to the marital home (without informing the defendant) whilst she was in Windhoek and he removed the locks to the house and replaced them with other locks. She stated that when she returned to the marital home she found new locks on the house, she in turn broke down the locks and changed the locks and when she gained access to the house, she discovered that some of her valuables including money was stolen from the marital home. She then approached the police and laid charges of theft against the plaintiff. The plaintiff further stated that after she laid criminal charges against the plaintiff the police advised her to move out of the marital home. She heeded the advice and only left with a bag containing a few of her personal belongings and a fridge and television that belong to her brother.

[21] As regards the allegation that the defendant failed to attend to the parties' traditional homestead, the defendant testified that she ploughed the parties' field without any physical assistance from the plaintiff until 2011. The defendant only stopped going to the traditional homestead and to plough the field when the plaintiff moved out of the marital home.

DID THE PLAINTIFF DISCHARGE HIS ONUS?

[22] I now turn to consider whether or not the plaintiff has discharged the *onus* resting on him in this matter. The evidence of the plaintiff and that of the defendant is, in relation to the crucial facts that have a direct bearing on the question of who committed marital misconduct, 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 probabilities²; and

² *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.

- (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.³

[23] It is with those principles in mind that I now have to decide whether the plaintiff is guilty of marital misconduct or the defendant is guilty of marital misconduct. Ms Shilongo who represented the plaintiff urged the court to find that the defendant is guilty of marital misconduct. Her submission is based on the fact that the defendant laid criminal charges against the plaintiff. She submitted that:

'The said conduct [i.e. laying of criminal charges] of the Defendant further shows that she is no longer interested in the continuation of the marriage to the Plaintiff. We submit that in light of the protection order and the criminal case pending against the Plaintiff, Defendant is making marriage life intolerable. Plaintiff was forced to move out of the common home to avoid further allegation of domestic violence and possible accusation of theft.

We acknowledge that opening up a criminal case and reporting a case of domestic violence is lawful, however when a wife resorts to such conduct, the Plaintiff would be justified to stay away from the Defendant until such time as the alleged theft is proven and the condition in the protection order are complied with.'

[24] Ms Shikale who represented the defendant on the other hand urged the court to find that the plaintiff is guilty of marital misconduct. She submitted that:

'23 With respect to the issue of who led to the termination of the marital relationship, the Defendant testified that it is the Plaintiff as he;

23.1 failed to show her love and affection;

³ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39 - 17 para 51.

- 23.2 removed various movable properties from the common home without the Defendant's consent;
- 23.3 changed the details at the Town Council and at Nored Electricity without informing her;
- 23.4 fails to constructively communicate with her;
- 23.5 moved out of the common home during September or November 2011 and has since not returned;
- 23.6 refuses to attempt to salvage the marital relationship.'

[25] I am of the view that the plaintiff's evidence as regards cohabitation that has become intolerable (because of no love and affection, failure of constructive communication) between him and the defendant has been detailed but has been countered by the defendant effectively and accordingly I cannot make finding in this regard on the probabilities in favour of the plaintiff.

[26] This leaves the only ground of divorce the allegation by the plaintiff that the defendant acted with the fixed and malicious intent to terminate the marriage relationship in that she conducted herself in a manner which caused him to move out of the marital home. On the evidence before me it is clear, that the parties were actually separated and no longer lived under one roof nor shared a bed since September 2011. The plaintiff testified that this state of affairs is a direct consequence of the defendant's action of falsely accusing him of theft at his work place, thefts of her money from the marital home and acts of domestic violence. The defendant did not deny or contradict the plaintiff's evidence as regards the allegation that she made false report of theft (at his work place) against him. I thus accept that the defendant falsely made reports of theft (at his work place) against the plaintiff.

[27] As regards the allegation of domestic violence the plaintiff, in evidence submitted the documents which served to support the application for a protection order as exhibits,

the documents were marked as Exhibit 'B'. To the application there was a sworn declaration in support of the application for a protection order. What emanates from the sworn declaration is the following: The defendant alleges that during the subsistence of her marriage to the plaintiff there were no problems at all until 25 January 2012; That on 25 and 26 January 2012 the plaintiff called the defendant from Engela and instructed her to leave 'his house'; On 31 January 2012 the plaintiff send his cousin to the defendant to inform the defendant that she must leave his house; On 05 February 2012 the plaintiff again called the defendant and informed the defendant that she must leave his house; and that the charges of the alleged domestic violence were laid on 05 February 2012.

[28] On the plaintiff's own evidence the plaintiff had left or deserted the matrimonial home during September 2011 and was living in Engela since then. I therefore find it improbable that the laying of the charges of domestic violence was motivated by the plaintiff harassing and intimidating the defendant as testified by the defendant. I cannot discount the possibility that the laying of the charges of domestic violence was motivated by malice and to get back at the plaintiff whom the defendant regarded as having deserted her. I also consider the laying of criminal charges of theft of her money to be malicious and motivated by nothing else but vengeance. I say so for the following reasons. The plaintiff testified that when he went to Engela he had a set of keys which gave him access to the marital home. When he came back he found that the defendant had altered the locks. He removed those locks and bought new locks and gave a set of the keys of the locks to the defendant. The defendant for a second time changed the locks. It was after the second occasion that he broke the locks replaced them with other locks and left the keys for the replaced locks at the neighbours for the defendant. It is thus improbable that the plaintiff would after stealing the defendant's money leave the keys with neighbours for defendant. I therefore find that the laying of false criminal charges against the plaintiff by the defendant constitutes a serious breach of conjugal obligations.

[29] My finding that the defendant was guilty of a breach of conjugal obligations does not end the matter, because I have indicated above that to constitute malicious

desertion the conduct complained of must be such that it is consistent only with an intention to put an end to cohabitation, a desire no longer to be bound by the *frenum conjugalis*⁴. On the facts before me, and on my impressions of the defendant's personality and temperament, I am satisfied that she had either the actual or the constructive intention of putting an end to her marriage with the plaintiff, or of cohabitation between her and the plaintiff. I therefore find that on a balance of probabilities the defendant's conduct 'drove' the plaintiff out of the marriage. To put it beyond doubt I find that the defendant's conduct amounts to malicious and constructive desertion of the plaintiff.

[30] I now turn to the other outstanding issues. I will start with the proprietary claims. In his claim the plaintiff prayed that each party retains the property in his or her possession. I cannot accede to that request because it is now a well-established principle of our law that if a marriage in community of property is dissolved, the equal division of 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.

[31] The final issue that is up for determination is the question of costs. The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.⁵ It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one.⁶

⁴ See *Webber v Webber*, 1915 AD 239 at 246.

⁵ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

⁶ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

[32] In this matter, the Plaintiff had pleaded in his particulars of claim that the parties are married out of community of property and on that basis prayed that the Court directs that each party retain the property in their possessions as their sole and exclusive property. The defendant on the other hand pleaded from the get go that the marriage between the parties is one in community of property and has prayed for a division of the joint estate. Consequently, the contentious issue and one of the matters that are listed by the parties in the parties' draft pre-trial order (which I made an order of this Court) as an issue of law to be resolved during the trial was whether the parties are married in or out community of property. On the trial day the plaintiff conceded that the parties were married in community of property. I agree with Ms Shikale –Ambodo when she submitted that the concession made by the plaintiff was much too late, if that concession had been made earlier settlement of the matter would have been reached easier. These considerations have an impact on the way in which I will exercise my discretion regarding the costs order which I will make.

[33] In the result the following order is made:

The Court grants judgment to the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return or receive the plaintiff on or before the 16th day of July 2014, failing which to show cause, if any, to this court on the 13th day of August 2014 at 08h30 why:

- 1.1 The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
- 1.2 The joint estate of the parties should not be equally divided between the parties;
and
- 1.3 Each party should not bear its own legal costs.

SFI Ueitele
Judge

APPEARANCES:

PLAINTIFF:

N SHILONGO
Of Sisa Namandje & Co Inc

DEFENDANT:

SHIKALE – AMBODO
Of Shikale & Associates