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REPORTABLE

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: I 394/2012

In the matter between:

**E[...]** **N[...]**  
(born S[...])

**PLAINTIFF**

and

**S[...]** **L[...]** **N[...]**

**DEFENDANT**

**Neutral citation:** *N[...]* v *N[...]* (I 394/2012) [2014] NAHCMD 47 (14 February 2014)

**Coram:** PARKER AJ

**Heard:** 25 November 2013

**Delivered: 14 February 2014**

**Flynote:** Husband and Wife – Matrimonial property regime – Marriages governed by Proc 15 of 1928 – Such marriages presumed to be out of community of property – However, within one month before solemnization of marriage parties may declare before marriage officer that they wish their marriage to be in community of property – In that case such marriage will be in community of property.

**Summary:** Husband and Wife – Matrimonial property regime – Marriages governed by Proc 15 of 1928 – Such marriages presumed to be out of community of property – However, within one month before solemnization of marriage parties may declare before marriage officer that they wish their marriage to be in community of property – In that case such marriage will be in community of property – In instant case marriage governed by Proc 15 of 1928 and no declaration was made as such – Consequently, court found that the parties' marriage is out of community of property – Court concluded that what appears in mortgagee Bank's documents based on conveyancer's papers to the effect that the marriage is in community of property does not bind the court because it is offensive of a written law (ie Proc 15 of 1928) – Court found further that property in Windhoek was bought by the plaintiff and paid for by monthly instalments deducted from the plaintiff's salary from 1997 until defendant took over payment in 2008 with loan taken from the mortgagee Bank – Court concluded therefore that that arrangement did not give ownership of the property to the defendant – Consequently, on the facts and in the circumstances of the case the court held that it is fair and just that the property in Windhoek be awarded to the plaintiff as the sole and exclusive owner of that property and by parity of reasoning the Onembanda house (in 'the North') be awarded to the defendant.

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**ORDER**  
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- (1) The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
- (b) Each party shall retain any movable property he or she acquired before or during the subsistence of the marriage.
- (c) The custody and control of the minor child L[...] K[...] N[...] is awarded to the plaintiff subject to the defendant's right to reasonable access to the minor child.
- (d) The defendant shall pay child maintenance in respect of the minor child in the amount of N\$600 per month, with escalation of 10 per cent per annum.
- (e) The defendant shall pay 50 per cent of all school fees, including tertiary level school fees, other tuition costs, costs of extra-mural activities and costs of school books and stationery.
- (f) The Windhoek house Erf 9[...], A[...] Street, N[...], K[...], Windhoek, is awarded to the plaintiff as the sole and exclusive owner of that property; and in that behalf, the defendant and the plaintiff must do all that is necessary and required by signing all documents to effect transfer of that property into the name of the plaintiff; and if the defendant fails or refuses to so act, the Deputy Sheriff responsible for Windhoek is hereby authorized to sign all such documents in the shortest possible time for purposes of transfer of the property into the name of the plaintiff.
- (g) The O[...] house at O[...] village (in one of the northern regions of Namibia) is awarded to the defendant as the sole and exclusive owner of that property.
- (h) Each party is to pay his or her costs of suit.

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## JUDGMENT

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PARKER AJ:

[1] In this matrimonial matter the plaintiff instituted a divorce action against the defendant in which she seeks an order for restitution of conjugal rights and, failing which, a final order of divorce. As ancillary relief the plaintiff prays that (a) she be awarded custody and control of the minor child (born out of marriage between the parties), subject to the defendant's right to reasonable access to the child, (b) the defendant pays 50 per cent of all school fees in respect of the minor child, (c) the joint estate be divided and (d) the defendant pays child maintenance of N\$600 per month, with escalation of 10 per cent per annum.

[2] The defendant pleaded to the claim and instituted a counterclaim in which he, like the plaintiff, seeks an order for restitution of conjugal rights and, failing which, a final order of divorce. The defendant does not oppose the plaintiff's prayer for an order (a) awarding custody and control of the minor child to the plaintiff, subject to the defendant's right to reasonable access to the minor child, (b) that the defendant pays N\$600 child maintenance per month, (c) that the defendant pays 50 per cent of school fees (including other tuition costs) at tertiary school level, costs of extra-mural activities, books and stationery.

[3] The matter was subjected to the judicial case management processes which culminated in the issuance of a pre-trial conference order. It is indicated in the order that: (a) the issue of custody and control of the minor child is not in dispute and both parties agree that custody and control be awarded to the plaintiff and the defendant to have right of reasonable access (b) the defendant agrees to pay 50 per cent of the school fees of the minor child (c) the defendant further agrees to pay maintenance in the amount of N\$600 per month for the minor child.

[4] Furthermore, it is indicated in the pre-trial conference order that two relevant issues are in dispute, namely (a) whether the parties own two immovable property, that

is, one at O[...] village which is the home of the defendant in one of the northern regions of the country ('the O[...] house') and the other at Erf 9[...], A[...] Street, N[...], K[...], Windhoek ('the Windhoek house'). The O[...] house is situated within the boundaries of the defendant's father's homestead. I shall return to this important fact in due course. With the meeting of minds of the parties on three issues mentioned in paras 1 and 2 of this judgment, only one relevant issue of fact remains to be determined; and the issue concerns the plaintiff's prayer in her particulars of claim that the joint estate be divided between the parties and the defendant's desire to retain both the O[...] house and the Windhoek house.

[5] It would seem the plaintiff's desire was based on the plaintiff's contention that the marriage between her and the defendant is in community of property. In any case, the defendant denies that their marriage is in community of property. Consequently, as regards the parties' proposal for expediting the trial, the pre-trial conference order indicates that the parties agree that the only aspect that should be adjudicated are the issues of the matrimonial property regime governing the marriage and who should be awarded the Windhoek house. Curiously and inexplicably the pre-trial order is silent as such about the O[...] house.

[6] As to the matrimonial property regime; it is clear from the marriage certificate (Exh 'A') that the marriage is out of community of property, and I do so find. There is no evidence that within one month before solemnisation of their marriage, the parties declared that they desired that their marriage be in community of property (*Nakashololo v Nakashololo* 2007 (1) NR 27 (HC)) It would seem that the plaintiff was misled into thinking that their marriage is in community of property by the details in the Deed of Transfer and repeated in the mortgage bond granted by Standard Bank qua mortgagee. Doubtless, there has been a misapplication of the law by the conveyancer, who settled the deed of transfer respecting the Windhoek house by referring to the matrimonial property regime as being one of community of property. Of course, what the Bank and the conveyancer said or did does not bind the court because their view is offensive of a written law which governs the parties' marriage, namely, s 17(6) of Proc 15 of 1928. In

any case, the Registrar of Deeds got it right when he entered the following on the Deed of Transfer: 'The marital status of within mentioned Transferees is Amended to read as: Married which marriage does not have the legal consequences of a marriage in community of property by virtue of the provisions of Proc 15 of 1928'.

[7] Having decided that the matrimonial property regime at play in this case is one of marriage out of community of property, I proceed to consider the parties' separate conflicting claims to the Windhoek house. On the evidence given by the parties in each party's affidavit filed in terms of rule 37(6)(b) of the rules of court and orally during the trial, I make the following important factual findings.

[8] In 1997 or thereabout the plaintiff bought the Windhoek house from National Housing Enterprise (NHE). The house was initially a two-bedroom house and she made the first payment on 30 June 1997. The purchase price of the house was N\$91 840, but the 'Amount Finance' appearing on the National Housing Enterprise's 'Statement of Account' is N\$99 030. The plaintiff – and the plaintiff alone – paid for the Windhoek house by monthly instalments deducted directly from remuneration she received from her employer, Ministry of Safety and Security, under NHE account number 1321562 until 21 July 2008. The reason for the stoppage will become apparent shortly.

[9] In 2008 the parties extended the Windhoek house, resulting in the Windhoek house becoming an '11-room house'. For that reason the plaintiff could no longer pay the monthly instalment in respect of the house. Meanwhile, in July 2008 the parties had taken a loan secured by a mortgage bond on the Windhoek house from Standard Bank ('the Bank') in an amount of N\$300 000. The evidence indicates that since March 2012 the monthly loan recovery amount has been N\$2 936,82. And since July 2008 the defendant alone has been making the repayment on the bond. As at April 2013 the balance on the loan stood at N\$262 636,80, and a Valuation Certificate submitted as part of the evidence before the court (Exh 'D' 21) indicates that the most probable market value of the Windhoek house is N\$300 000.

[10] It emerges indubitably from the evidence that the Windhoek house was purchased by the plaintiff and she paid for it by instalment payments deducted directly from her salary until 21 July 2008. The evidence does not account for the defendant's contention that he acquired an immovable property, namely Erf 9[...], A[...] Street (ie the Windhoek house). The defendant does not tell the court when he, if he did, 'acquired' the Windhoek house. There is not one iota of evidence tending to show that he bought the Windhoek house. There is overwhelming, unchallenged and unchallengeable evidence that it was the plaintiff – and the plaintiff alone – who bought the Windhoek house from NHE. I reject the defendant's unqualified evidence that he made instalment payments on the house to the Bank. What I have accepted is that the defendant has been making such payments to the Bank since July 2008; and I have discussed previously how it came about that the defendant made those payments. All this does not detract from the finding I have made that the Windhoek house was bought by the plaintiff.

[11] For these reasons I reject the defendant's bold but unproven assertion that the Windhoek house 'belongs' to him and that the plaintiff has no right to it. The factual findings I have made and the evidence I have accepted do not account for the defendant's assertion.

[12] I now proceed to consider the O[...] house. I am prepared to accept the evidence that the defendant acquired the O[...] house. I also accept the evidence that the plaintiff spent N\$30 000 in order to make improvements to that house and an additional N\$3 000 to develop the cultivated crop field at the O[...] house and to employ someone to look after the parties' livestock at that house. Thus, while the plaintiff has established the amount of money she spent to bring about improvements to the O[...] house and its crop field, no such amount has been established by the defendant as the amount he might have spent to bring about improvements to the Windhoek house. In sum, while the plaintiff paid for the improvements to the O[...] house, the defendant has been paying for improvements to the Windhoek house.

[13] On the facts and in the circumstances of the case, I hold the firm view that it is fair and just that the Windhoek house be awarded to the plaintiff, and by a parity of reasoning, that the O[...] house be awarded to the defendant. The upshot is that the plaintiff must have to take over the repayment of the balance of the loan the parties took from Standard Bank respecting the Windhoek house, which, as I have mentioned previously, stood at N\$262 638,80 as at 3 April 2013.

[14] The evidence is overwhelming that the defendant has committed adultery with two women. On that score and in the circumstances of the case I think divorce should be granted immediately. (See C J M Nathan, *South African Divorce Handbook* (1970): p 43.)

[15] Based on all these reasoning and conclusions, I make the following order; and the order disposes of both the plaintiff's claim and the defendant's counterclaim:

- (2) The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
- (b) Each party shall retain any movable property he or she acquired before or during the subsistence of the marriage.
- (c) The custody and control of the minor child L[...] K[...] N[...] is awarded to the plaintiff subject to the defendant's right to reasonable access to the minor child.
- (d) The defendant shall pay child maintenance in respect of the minor child in the amount of N\$600 per month, with escalation of 10 per cent per annum.
- (e) The defendant shall pay 50 per cent of all school fees, including tertiary level school fees, other tuition costs, costs of extra-mural activities and costs of school books and stationery.



- (f) The Windhoek house Erf 9[...], A[...] Street, N[...], K[...], Windhoek, is awarded to the plaintiff as the sole and exclusive owner of that property; and in that behalf, the defendant and the plaintiff must do all that is necessary and required by signing all documents to effect transfer of that property into the name of the plaintiff; and if the defendant fails or refuses to so act, the Deputy Sheriff responsible for Windhoek is hereby authorized to sign all such documents in the shortest possible time for purposes of transfer of the property into the name of the plaintiff.
- (g) The O[...] house at O[...] village (in one of the northern regions of Namibia) is awarded to the defendant as the sole and exclusive owner of that property.
- (h) Each party is to pay his or her costs of suit.

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C Parker  
Acting Judge

APPEARANCES

PLAINTIFF : F Schulz  
Of PD Theron & Associates, Windhoek

DEFENDANT: A N Feris  
Of Sisa Namandje & Co. Inc., Windhoek