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**REPUBLIC OF NAMIBIA**



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

**CASE NO.: I 2985 /2013**

In the matter between:

**[D.....] [S.....] (BORN J.....)**

**PLAINTIFF**

And

**[H.....] [J.....][L.....] [S.....]**

**DEFENDANT**

**Neutral citation:** *Schiffer v Schiffer* (I 2985/2013) [2015] NAHCMD 93 ( 22 April 2015)

**Coram:** UEITELE, J

**Heard:** 09-13 March 2015 & 07 April 2015

**Delivered:** 22 April 2015

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

**Flynote:**     *Husband and wife - Divorce - Proprietary rights.*

**Summary:**   This case concerns divorce proceedings instituted by the plaintiff against the defendant based on allegations of malicious desertion. The husband has entered a notice of intention to defend the action and in return also claimed an order for restitution of conjugal rights and failing compliance therewith, a decree of divorce also on the basis of malicious desertion.

On the evidence before court it is clear that the plaintiff, during August 2013 moved out of the common house. It further emerged that the plaintiff and the defendant have not lived as husband and wife since August 2013 to the date of trial.

*Held* that the plaintiff has proven on a balance of probabilities that the conduct of the defendant made cohabitation intolerable, thus entitling her to an order of restitution of conjugal rights.

*Held furthermore* that allegations in the defendant's pleadings and the evidence led at the trial do not in the view of this court, in law entitle the defendant to a specific forfeiture order, as it is in the instant case that the defendant who maliciously deserted the plaintiff.

*Held furthermore* that the plaintiff is in need of maintenance and this court is satisfied that the defendant is in the position to maintain the plaintiff.

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**ORDER**

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- 1** There shall be judgment for the plaintiff for an order of Restitution of Conjugal Rights and the defendant is ordered to return to or receive the plaintiff on or before **03 June 2015** , failing which, to show cause, if any, to this court on the **01 July 2015 at 08h30** am, why:
  - 1.1** The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
  - 1.2** The joint estate of the parties is equally divided between the parties.
  - 1.3** The plaintiff must not pay to the plaintiff rehabilitative maintenance in the amount of N\$ 3 000 (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** The defendant's counter claim is dismissed.
- 3** The defendant is ordered to pay the plaintiff's costs of suit on a party and party scale. Such costs to include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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**UEITELE, J**

**INTRODUCTION**

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[1] This case concerns divorce proceedings instituted by the wife (plaintiff) against her husband (as defendant) based on allegations of malicious desertion. The husband has entered a notice of intention to defend the action and in return also claimed an order for restitution of conjugal rights and failing compliance therewith, a decree of divorce also on the basis of malicious desertion.

[2] The background of this matter is briefly that the parties married each other at Windhoek, on 20 October 2010 in community of property. Approximately two years later, that is on 26 September 2012 a girl child, was born to the parties. A year (i.e. on 28 September 2013) after the birth of their child the plaintiff caused summons to be issued out of this court and to be served on the defendant. In the summons the plaintiff claims: an order for restitution of conjugal rights and failing compliance therewith, a final order of divorce; that the defendant forfeits the benefits arising from the marriage in community of property (but at the hearing of this matter the plaintiff amended her particulars of claim and only wants the joint estate equally divided between her and her husband); an order in terms whereof the defendant pays all tuition costs, including primary school, secondary school, extra mural activities, books and stationery, tertiary and university education, including the costs of hostel fees or alternatively accommodation (should the child show an aptitude thereof and make reasonable progress therein and insofar as such are not covered by study loans and/or bursaries) (in relation to the minor child, the parties, at the hearing of this matter informed me that the aspects relating to the minor child must stand over to await the report of a social worker); an order in terms of which the defendant pay maintenance for the plaintiff in the amount of N\$4 000.00 per month and costs of suit (only if action is defended).

[3] The allegations of misconduct (against the defendant ) as set out in the plaintiff's particulars of claim are that the defendant: has on divers occasions since conceiving the child falsely accused the plaintiff of committing adultery with various men despite

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plaintiff's denial of the truth of the accusations; falsely accused plaintiff of aborting the foetus at the beginning stage of her pregnancy and laid a charge of murder with the Namibian Police despite plaintiff's denial of the truth of the accusations; since the time of plaintiff's pregnancy the defendant had violent outburst of temper when plaintiff does not want to accompany defendant to any place or engage in any social activity; indulged in excessive smoking and drinking; subjected the plaintiff to outburst of temper during which he has humiliated her in the presence of her family and friends by treating her with disrespect; allowed his two dogs to stay in the house and refused that the plaintiff's daughter from a previous relationship, who was born before the marriage, stay with her in the house; refused to sort out their domestic problems and on various occasions obtained protection orders against plaintiff just to cancel them at later stages, regularly stayed out late without informing plaintiff of his whereabouts; threatened plaintiff on regular occasions that he would put her in jail and leave her there.

[4] As I have indicated above the defendant has defended the action, he denies the allegations of misconduct leveled against him by the plaintiff. As I said the defendant also instituted a counterclaim in terms of which he claims an order for restitution of conjugal rights and failing compliance therewith, a final order of divorce, an order that the custody and control of the minor child be awarded to him subject to the plaintiff's rights of reasonable access; an order in terms of which the plaintiff is ordered to pay maintenance for the minor child in the amount of N\$400.00 per month, that the plaintiff forfeit the benefits arising from the marriage in community of property; an order in terms whereof the defendant pays all tuition costs, including primary school, secondary school, extra mural activities, books and stationery, tertiary and university education, including the costs of hostel fees or alternatively accommodation (should the child show an aptitude thereof and make reasonable progress therein and insofar as such are not covered by study loans and/or bursaries), an order that the defendant retains the sole and exclusive ownership of the immovable property situated at N0. 28 Von Goldammer Street, Windhoek and costs of suit.

[5] The allegations of misconduct (against the plaintiff) as set out in the defendant's counterclaim are that the plaintiff showed the defendant no love, respect and affection, the plaintiff absented herself from the common home on numerous occasions without any explanation for her absence; assaulted the defendant on numerous occasions; used foul language towards the defendant; entered into adulterous affairs with other men; elicited undue arguments; moved out from the common home on several occasions just to return to the common home again; requested the defendant to file for a divorce.

## **ISSUES FOR DECISION**

[6] The parties prepared a draft pre-trial order as contemplated in Rule 26 (6) dated 11 February 2015. In terms of the pre-trial order the parties remained with their accusations against each other of marital misconduct. The parties are further also not in agreement as to how the joint estate should be divided. The parties are also not in agreement as to whether the plaintiff is entitled to maintenance and the amount to which she is entitled if the court were to find that she is entitled to maintenance.

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

- 7.1 Which party has succeeded in discharging his or her *onus* of proving marital misconduct which would result in the granting of a restitution order?
- 7.2 Whether the plaintiff needs maintenance? And
- 7.3 How is the joint estate to be dealt with?

## THE APPLICABLE PRINCIPLES

[8] The legal principles to be followed in divorce matters have been encapsulated by this Court many a times and are well documented<sup>1</sup>. I will therefore not restate them in detail here. The crisp requirements for a party to succeed in obtaining a restitution order are that: first that the court must have jurisdiction; second that there must have 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.

[9] Malicious desertion is made up of two elements namely there must be the *factum* of desertion and secondly the defendant must have acted '*animo deserendi*.'<sup>2</sup> 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. Actual desertion is where one party actually leaves the matrimonial home with the intention not to return; 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 the common home dangerous or intolerable for him or her. Three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:

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<sup>1</sup>See the cases of *Kagwe v Kagwe* an unreported judgment of this Court Case No (I 1459/2011) [2013] NAHCMD 71 (delivered on 30 January 2013); *Voigts v Voigts* an unreported judgment of this Court Case No (I 1704/2009)[2013] NAHCMD 176 (delivered on 24 June 2013); *Siyambango v Siyambango* an unreported judgment of this Court Case No (I 965/2012) [2013] NAHCMD 304 (09 October 2013); *EG v MG and Another 2010 (1) NR 276 (HC)*.

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

- 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>3</sup>

[10] Marriage at common law creates community of property and profit and loss<sup>4</sup>. Hahlo<sup>5</sup> argues that this holds true not only of the first but also of the second and any further marriage of a person irrespective of whether or not there are children of a previous marriage. Community of property and profit and loss comes in being, as soon as the marriage is solemnized. Community includes all the property and rights of the spouses which belonged to either of them at time of the marriage or which were acquired by either of them during the marriage<sup>6</sup>. Assets forming part of the joint estate are owned by the spouses in equal undivided shares. Immediately and on solemnization of the marriage all assets, movable or immovable, corporeal or incorporeal which any one of the spouses brings into the marriage become common by operation of law both as regards ownership and legal possession. No delivering, transfer or cession is required.<sup>7</sup>

[11] In the matter of **Geard v Geard**<sup>8</sup>. Gutsche, J said '*Death is a divestitive fact and in a marriage in community terminates the partnership as matter of course*'. Hahlo<sup>9</sup>

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<sup>3</sup>*Supra* at page 387 and the case *Voigts v Voigts* (I 1704/2009) [2013] NAHCMD 176 (24 June 2013) at 21.

<sup>4</sup> See *Rautenbach v Groenwaldt* 1911 TPD1148 at 1149.

<sup>5</sup> Hahlo R *The South African Law of Husbands and Wife* 4<sup>th</sup> ed at 213.

<sup>6</sup> See *Peacock v Peacock* NO 1956 (3) SA 13.

<sup>7</sup> Per De Villiers, CJ in *Rosenberg v Dry Executors* 1911 AD 679 at 688-9.

<sup>8</sup> 1943 EDL 322 at 326.

<sup>9</sup> *Supra* footnote 2 at 242.



argues that on dissolution of the community, the shares become determinate and divisible. The half share of the deceased spouse devolves upon his or her heirs. The surviving spouse retains his or her share. After the debts which are charges on the joint estate have been paid the residue is divided equally between the surviving spouse and the heirs of the first dying spouse. The estate which falls to be divided between the surviving spouse and the heirs of the first dying includes all assets which form part of the community at the date of death of the first - dying spouse. On divorce, as on death, community comes automatically to an end.

[12] Where a marriage in community of property is dissolved by the court, dissolution of the community of property takes place as a matter of course, irrespective of whether or not it is expressly mentioned in the court's order. It is a long established practice to ask, as part of the relief claimed in an action for divorce where the marriage is in community of property, for a dissolution of the community and for a forfeiture of the benefits of the marriage. It is now settled law that where the court grants a divorce on the grounds of adultery, and the marriage is in community of property, if the successful plaintiff claims an order that the defendant forfeits the benefits derived from the marriage in community, the court has no discretion to refuse to grant such an order.<sup>10</sup>

## **THE PLAINTIFF'S EVIDENCE**

[13] In support of her quest to obtain an order for the restitution of conjugal rights the plaintiff testified that the reasons for the irretrievable breakdown of her marriage were (i) the ill treatment of her daughter from a previous relationship by the defendant, (ii) her pregnancy and resultant verbal and emotional abuses from the defendant, (iii) the defendant's excessive drinking habits and stay away for long periods from the common home and (iv) the defendant's lies about assaults allegedly perpetrated by plaintiff on

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<sup>10</sup>S v S 2013 (1) NR 114 (SC); also see *Gates v Gates* 1940 NPD 361 at 363; *Opperman v Opperman* 1962 (1) SA 456 (SWA) at 457H and *C v C*; *L v L* 2012 (1) NR 37 (HC).

him. The plaintiff elaborated on these reasons and I will briefly summarise the evidence below in the following paragraphs.

*The ill treatment of her daughter from a previous relationship by the defendant*

[14] The plaintiff testified that she has a minor daughter (who was approximately eight years old at the time of her marriage to the defendant and I will refer to her as Ms AJ in this judgment) from a previous relationship. She testified that the defendant knew about the minor child and before the marriage he had promised to love and care for AJ and the plaintiff for the rest of their lives and had pretended to be the most loving father. She proceeded to testify that, three months after the marriage she suggested that AJ should come and stay with them. The defendant's reaction to that suggestion was that, he wanted to know where AJ would be sleeping despite the fact that, their house has three spare bedrooms. When she suggested that the girl sleeps in the guest room he replied that the first room was for his family whenever they visited, the second room was for his dogs as he considered that his dogs were part of his family and that there was no way the dogs would sleep outside and the third room was to be used as a store room for his things.

[15] The plaintiff further testified that on one occasion her grandmother came to visit them and the grandmother insisted that AJ must come along with her as she did not want to stay alone at home when the plaintiff and the defendant were not at home. When the grandmother returned the defendant approached the plaintiff and informed her that AJ's holiday is over and AJ must return to Wanaheda. The plaintiff obliged but insisted that AJ must visit them at least over the weekends. She testified that from the first weekend that AJ visited them the defendant complained about everything which AJ touched in the house, the defendant would follow AJ to the kitchen and castigate her for eating cheese and salami from the fridge, defendant would also prohibit AJ from watching television alleging that it was too early for her to watch television despite the

fact that, it would be around 11H00. She testified that the only good thing in the eyes of the defendant that, AJ would do is when she would pick up dog's poo in the yard.

[16] The plaintiff further testified that she could no longer 'stomach' the humiliation and abuses that her daughter was experiencing at the hands of the defendant and suggested that AJ rather stay with plaintiff's sister in Wanaheda and that she would then visit her regularly. The defendant agreed to that, but the visits to her daughter became another source of friction between her and the defendant. She testified that whenever she took the family vehicle to go and visit AJ the defendant would complain that she was wasting fuel and unnecessarily clocking up more mileage on the family car. She further testified that the defendant had a tracking system installed in the vehicle that she was using to monitor her every move, but she pretended not to know. However, when he was intoxicated he would tell her that he knew her every move and that he had people following her and that those people informed him of whom she visited. She testified that on one or two occasions while she was visiting AJ in Wanaheda, the defendant would arrive there unannounced just to make sure whether the plaintiff was indeed there and he would insist that they return together at the time of his choosing. The defendant allegedly even went to the extent of suggesting that the plaintiff's visits to her daughter should be limited to her dropping food to AJ and for plaintiff to return immediately home.

[17] Plaintiff testified that she felt offended and humiliated by the defendant's approach and she informed the defendant that she would not compromise on the visits to AJ and that she would at least spend time (up to about 18H00 or 19H00) with her daughter, which was normally the time that the defendant would come home from his drinking sprees. She further testified that her stance of visiting AJ until about 19H00 elicited the following reaction from the defendant whenever she arrived home. The defendant insisted that she tell him whether she enjoyed sex with other men, and

defendant will constantly accuse her of engaging in extra marital affairs. She testified that the insults and false accusations increased and she could no longer bear it.

*Her pregnancy and the resultant verbal and emotional abuses from the defendant*

[18] The plaintiff furthermore testified that during January 2012, she informed the defendant that she had fallen pregnant and he immediately denied that he was the father. She testified that the defendant thereafter constantly harassed and humiliated her by: accusing her of being a bitch and sleeping around with other men; telling her that her pregnancy was the result of adultery. She testified that defendant would ask her to accompany him to the bars on his frequent drinking sprees and whenever she refused he accused her of not wanting to go with him because the child she was carrying was not his.

[19] The plaintiff testified that during April 2012 she travelled to Otjiwarongo to sell some cattle as she needed money to pay her grandmother's water bill in Khorixas. On her return the defendant asked her how the baby was doing and in return she asked him what he cared even if she was no longer pregnant as he had indicated that the child was not his. A few days after that conversation the police visited their house with the intention of arresting her for allegedly carrying out an illegal abortion. She testified that she was asked by the police officers (both male and female) to remove her T-Shirt for the police officers to see whether she was still pregnant and upon discovering that she was still pregnant she was left alone. On the same day she was served with a protection order and she was asked to leave the common home. She testified that on 18 August 2012 the defendant withdrew the protection order and the defendant apologised to her.

[20] The plaintiff furthermore testified that on the day (i.e. on 20 September 2012) she gave birth to their daughter (to whom I will refer in this judgment as CR), the defendant visited her in the hospital and insisted that they should take a paternity test to establish

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the identity of the CR's father. She refused suggesting that the child was too small and that they should wait for a few more days. She alleges that the defendant also then threatened to throw the baby and herself into the street as she would not be welcomed in their house and the baby was not his unless she agreed to do the paternity test. She testified that on 31 October 2012 the results of the paternity test came back confirming the defendant to be the father of CR.

*The defendant's excessive drinking habits and stay away from the common home*

[21] The plaintiff testified that the defendant adopted the habit of going to the bars at around 16h00 every afternoon every day and that he would stay at the bars until around 19h00 or 20h00 and at times later. She testified that as soon as he entered the house from his drinking sprees the defendant would start to insult her by calling her a bitch and accusing her of having extra marital affairs. She alleges that when she denied the accusations he would say he was an old man and there was no way a beautiful lady like her could not attract the attention of a younger man.

[22] The plaintiff testified that one particular night the defendant did not come home until around midnight. She drove around looking for him. She found him driving from Zumwartz bar in the company of a woman. She testified that she tried to follow him but the defendant drove fast and made sure she could not catch up him. She alleges that she went home and the defendant arrived after an hour or so upon which an altercation ensued. She alleges that she asked him who the female was and he replied that it was his friend's girlfriend that he gave a lift to Wanaheda. She testified that during the quarrel they held each other by the throats and thereafter the defendant removed his T-shirt and realising that it had wrinkles, he said that 'this is the best evidence I needed and I will make sure you rot in jail'. She testified that she told the defendant that she would cut his T- shirt with a pair of scissor so that he could have better evidence. She testified that when the altercation took place they were in the kitchen so she opened a

cup-board drawer and took out a pair scissors, the defendant grabbed her and during the ensuing struggle she cut her little finger and he sustained a small cut wound to his hand. She alleges that the defendant took pictures of the blood stains.

*The defendant's lies about assaults allegedly perpetrated by plaintiff on him*

[23] The plaintiff testified that the defendant on numerous occasions told her that he will make sure that the plaintiff was locked up and rot in jail. She testified that one day the defendant concocted a story that she allegedly approached him from behind, pointed a gun at him and threatened to kill him. She testified that the defendant reported the alleged incident to the police and another protection order was issued against her. She testified that, what actually happened on that day in question was that she and the defendant argued. She then found the defendant's pistol left unattended on the bed in their bedroom. She went to the defendant who was in his office at the time and said to him that he accuses her of being a violent person and a murderer yet he left his firearm unattended. She denied having ever pointed a firearm at the defendant. She further testified that the defendant later withdrew the protection order and admitted to having lied about the alleged firearm pointing.

[24] The plaintiff furthermore testified that one day she gave CR a biscuit for her to keep herself busy while she prepared food for both the defendant and her. While she was in the kitchen she heard aloud cry from CR (who was 11 months old at the time) and upon inspection she discovered that the dogs had grabbed the biscuits from CR. She then took a small stick the size of a 30cm ruler and bit the dogs with it and chased them out of the house. The defendant observed all these and came to her, grabbed her by her throat and said to her "you bitch leave my dogs alone". She testified that in the process she hit the defendant with the stick on his elbow. The defendant then used the incident and opened a case of assault against her. As a result she was arrested and detained for a few weeks. She further testified that the defendant did not only lay false

charges of assault against her but he also caused the false allegation of husband (the defendant) battering (being battered by the plaintiff) to be reported in the local newspapers especially the editions of the German newspaper the “Algemaine Zeitung” and the “Informante” newspaper. The plaintiff furthermore testified that the defendant got sterilised without her knowledge.

[25] The plaintiff testified that after she got married to the defendant the defendant instructed her to resign from her employment and promised to pay her the N\$ 5 500.00 that she was earning. She testified that the defendant initially only gave her N\$ 4 000.00 per months and later stopped giving her that amount.

## **THE DEFENDANT’S CASE**

### ***Mr Plaatjie’s evidence***

[26] The witness was called as an expert witness. He testified that he is employed by Mobile Telecommunications Company (MTC) as a fraud manager. He testified that he has 15 years’ work experience, of that 5 years as a fraud manager. He holds a qualification of national diploma in business computing and he has undergone various global communication system training. He testified that every cell phone has its unique serial number (IMEI). He testified that for a cell phone that takes two sim cards, it will have two IMEI numbers because it is regarded as 2 cell phones in one. He testified that if a sim card of a tango card is duplicated it will cause immediate clash. He further testified that contract holders can be issued with two sim cards with the same cell phone number.

### ***Mr Schiffer's evidence***

[27] The defendant testified that at some point during their co-habitation he realised that his wife (the plaintiff) was cheating on him. He testified that the first incident, which at the time seemed unimportant, occurred during September/October 2010, when the plaintiff informed him that she was going to Walvis Bay to obtain a driver learner's licence. He testified that he never saw her study for the driver learner's examination from the prescribed book. He alleges that when he asked her why she was not studying, she told him that she could drive; she did not need to study for the learner's examination. The defendant testified that the plaintiff remained in Walvis Bay for approximately four days. He testified that when she returned she had a driver learner's license and her whole body was covered with swollen bite marks. He alleges that the marks were located over her entire body; on her legs, buttocks, breasts, belly and neck. He testified that the marks were bigger than a mosquito bite, around a thumb nail size. He alleges that she informed him that she slept in the location at Walvis Bay and that she was bitten by sand fleas which were common in the location. He testified that since he was concerned about this, he did some research and found out that the sand flea problem is found only in dunes and beaches of Namibian coasts and that they come out at night to feed. He thus concluded that the plaintiff must have been naked when the fleas bit her.

[28] The defendant testified that around the end of January 2012, the plaintiff phoned him and simply told him that she needed money for an abortion. He testified that he was shocked and put down the phone. He testified that he later send her a sms enquiring whether he heard her correctly that, she wanted to abort their child. He testified that he told her that he will not allow an abortion as he was also part of the decision. He further testified that at some point during April 2012, she returned from Otjiwarongo and while they were in the kitchen, he asked her how the trip from Otjiwarongo was and how Junior (the name they agreed to call the baby) was doing, she replied that there was no

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Junior anymore. He alleges that in shock he asked her what happened, whether she had a miscarriage, to which she replied that for an abortion one does not need a hospital.

[29] He testified that after that conversation with the plaintiff he consulted his lawyer who advised him to report the matter to the police and to apply for a protection order which he did. He testified that the plaintiff was not formally served with the protection order and he thus withdrew it. He testified that it turned out that the plaintiff did not abort their child and after the baby was born, the plaintiff told him that they can start over and forget everything. He alleges that she gave him a form to indicate that he acknowledged fatherhood of CR. He testified that he told her that they should rather do a DNA test.

[30] The defendant testified that the plaintiff physically attacked him on a number of occasions. The defendant presented a number of photos which he claimed reflect violent incidents during which the plaintiff physically attacked him. The photos which were admitted in evidence as exhibits K1 to K2 depicted a cut on the defendant's small finger and blood that dropped on the floor.

[31] The defendant testified that the plaintiff at some point during 2011 pointed a firearm at his head and threatened to shoot him during an argument they had. He testified that after the argument he went to his office, which was behind their house. The plaintiff came to him and started shouting at him. He tried to calm her down, he saw that one of her hand was behind her back, when he moved from his desk to approach her to calm her down she immediately pointed a firearm in his face threatening to shoot him and he jumped out of the office and went to hide in the garage, she followed him and found him in the garage and she apologised. He testified that he was scared because the plaintiff had prior to that incident received shooting training.

[32] The defendant testified that an alleged friend of the plaintiff (a certain Belinda Smith) informed him of an incident which points to the plaintiff being unfaithful to him. I disallowed the testimony with regard to the alleged statement by Belinda Smith because Ms Belinda Smith was not called as a witness and what she allegedly told the defendant would amount to inadmissible hearsay evidence. He testified that after Belinda alerted him of his wife's alleged unfaithfulness, he decided to obtain evidence that his wife was cheating on him. He accordingly during June 2012, installed a GPS product, called Tramigo in the Toyota Rav 4, which car the plaintiff was driving at the time. He testified that he is an expert in the software used in Tramigo due to that he has knowledge in software developing and training.

[33] The defendant testified that around late December 2012, the plaintiff went to Khorixas. He alleges that he was informed about the movements of the Rav through reports he received from the GPS unit in the vehicle to the handset. He testified that he compiled a map of the movements of the Toyota Rav 4. The report that he obtained from the tracking system indicated that the Toyota Rav 4 vehicle was being driven around at night anything between 22H00 to 01H00 am and being parked at bottles stores and isolated spots in Khorixas. He testified that he wanted to build evidence about what the plaintiff was doing and he alleges that he did not confront her with the accounts of her movements while she was in Khorixas.

[34] He testified that he obtained photos which indicate that she had a relationship with a man named Leonard Katti Nambadi the photos were handed up as exhibits F1 to F5 ( I provisionally admitted the photos as exhibits). I am of the view that in view of the conclusion I have arrived in this matter I do not find it necessary to make a ruling on the admissibility or inadmissibility of those photos. He explained that photo exhibit F1 he obtained from Mr Leonard Katti Nambadi's face book profile. He testified that a certain lady called him and told him that she was concerned with things that were happening in the house where the plaintiff was renting. He alleges that the lady informed him that she

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had photos on her phone which she obtained from the plaintiff's bedroom. He alleges that he asked her to go to his office to copy them on this computer. He alleges that he copied the photos on his computer and printed them out. He alleges that the necklace with a heart pendent she was wearing in one of the photos is a present he gave her for her birthday in 2011. He alleges that the photo was taken after he bought her the necklace and he denies that her version that the photo was taken during 2007 or 2008 before they got married.

[35] The defendant testified that around April 2012, he made a back-up of her phone to his computer as she wanted to hand in her phone for repairs. He alleges that the reason for this was due to the fact that, she did not want to lose her traditional music and for that reason he suggested they back - up all her data on the computer and they did. He testified that this back-up still exists and it includes her complete list of directory contacts, with all the phone numbers in her address book. The defendant testified that on page 7 of the address book, the name Katti appeared with cell phone number +264 812522979. He testified that after he discovered the photos of the plaintiff with Mr Nambadi, he requested a private investigator Mr Mayanga to investigate further. He testified that he provided Mr Mayanga with a new cell phone and number +264 815929356 and he made several calls to the plaintiff and to Nambidi. I disallowed the evidence of Mr Mayanga first, because Mr Nambadi was not be called to confirm the alleged conversation between him and Mayanga and secondly that evidence was improperly obtained.

[36] The defendant testified that the plaintiff stayed out habitually late. He alleges that this was indicated by the GPS system referred to earlier. He alleges that once, he went to Club Thriller in Katutura around 04h00 in the morning since the GPS indicated that she was there and he saw the Toyota Rav 4 with his own eyes parked there. The defendant testified that the plaintiff left the common home at least 8 times. He alleges that on many occasions she told him to divorce her, as she was no longer prepared to

be married to him. He testified that she finally left the common home on 03 August 2014.

[37] On the treatment of AJ he testified that, he was never hostile towards AJ. He testified that he assisted her with her school work during the month he stayed with them. He testified that during AJ's stay he brought up the issue of him bringing his child from his previous relationship. He testified that the plaintiff was not happy about it. He testified that to avoid a house with a bad atmosphere he decided to leave it. He testified that, he then spoke to plaintiff's grandfather about AJ's stay at their house, and he informed him that a child from a previous relationship should not live with them.

[38] On the dog incident, the defendant testified that the plaintiff attacked the dogs with a stick and that when he tried to grab the stick from her, she kept hitting him on the shoulder while he was holding their baby in the one hand. He alleges that in the process of this assault the baby was slightly hurt. He testified that he went to the doctor for medical attention with their daughter.

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

[39] What emerges from the evidence placed before me is that the plaintiff, during August 2013 moved out of the common house. It further emerges that the plaintiff and the defendant have not lived as husband and wife since August 2013 to the date of trial. The question which must be answered is thus "who is to be blamed for this state of affairs?" The plaintiff blames the defendant and the defendant in turn blames the plaintiff.

[40] Mr. Denk who appeared for the defendant submitted that the evidence produced on behalf of the plaintiff is demonstrably vague, riddled with inconsistencies, contradictions and is factually incredible. He further submitted that the plaintiff made

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deliberate false statements under oath and that the Court should not attach much weight to her evidence as it was in the main untrue. He submitted that for that reason, the evidence of the defendant should be preferred and that of the plaintiff be rejected. Relying on the case of **Smit v Arthur**<sup>11</sup> he submitted that on a conspectus of all facts and circumstances in this case, the balance of probabilities indicates that the plaintiff committed adultery with Mr. Nambadi. I have difficulties in accepting these submissions by Mr. Denk.

[41] The difficulties I have with Mr. Denk's submissions are that the defendant did not seriously contradict most of the evidence presented by the plaintiff.

- (a) With respect to the alleged ill-treatment of AJ by the defendant the plaintiff's evidence was clear and concise. The defendant never denied or contradicted the evidence by the plaintiff, all he said is that he had fun with AJ when she stayed with them during the grandmother's visit. He however failed to explain to this court why AJ could not live with them when her mother (and at times him) had to travel daily between Pioneers Park and Wanaheda to take and drop AJ to and from school, if he was the caring and loving father figure he attempted to portray in Court. I am satisfied that on a balance of probabilities the version of the plaintiff is to be preferred over that of the defendant.
- (b) With respect to the evidence that the defendant humiliated and insulted the plaintiff. I find the probabilities pointing to that direction. I say so for the following reason, apart from the fact that the defendant did not deny or contradict the evidence by the plaintiff on this score the possibility of the defendant having accused his wife of being a bitch and sleeping around with other men is fortified by the following evidence of the defendant: He testified without contextualizing the situation that:

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<sup>11</sup> 1976 (3) SA 378 (A).

'The plaintiff said to me on many occasions words to the effect:

"I was fucking a nice guy..."

After wards she would say :

"That is what you would want hear, right."

One of the probable inferences I draw from the above quoted testimony is that it corroborates the plaintiff's testimony that the defendant persistently accused her of being a bitch and sleeping around with other men.

- (c) With respect to the initial denial of paternity of CR by the defendant. I am not convinced by the defendant that the reason why he took the paternity test with respect to CR was the fact that, the plaintiff had asked him to sign a paper acknowledging that he is the father of CR. The plaintiff's testimony that the defendant denied paternity from the date that she made her pregnancy known was not contradicted by the defendant.
- (d) The defendant admitted to having applied for a protection order when he suspected that his wife had committed abortion. I fail to see how an abortion could possibly have been domestic violence perpetrated by the plaintiff against the defendant. The defendant testified that the plaintiff had left the common home on eight different occasions but he does not give details (as to when, and the reasons why) the plaintiff left the common home. The plaintiff's testimony was that she was subjected to a lot of verbal and emotional abuses by the defendant, thus driving her out of the common home. She testified that on one occasion the defendant arranged for a security company to remove her belongings from the common home. All these evidence was not contradicted by the defendant.
- (e) The plaintiff testified that she ultimately left the common home and instituted divorce proceedings when the defendant laid false charges of assault against her

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and she was arrested and incarcerated for a period of over twelve days. As regards the assaults allegedly perpetrated by the plaintiff on him, the defendant testified of two occasions. The one occasion was where he submitted photos (Exhibit K1) of his small finger having sustained a cut and the other occasion is when he was allegedly hit with a broom stick. The defendant's version of how he sustained the cut on the finger tends to corroborate the plaintiff's evidence. He testified that an altercation ensued after he came home after dropping his friend's girlfriend in Wanaheda. In the process of the altercation the plaintiff picked a pair scissors and wanted to cut his T Shirt (Mr. Denk who appeared for the defendant argued that this was incredulous on the part of the plaintiff but she is being corroborated by the defendant) and as they were grabbing for the scissor he sustained a cut. I am thus not convinced that the plaintiff had attacked and assaulted the defendant on that occasion.

[42] On the occasion which the plaintiff allegedly hit the defendant with a broken broomstick the defendant's version is that, the plaintiff had not been sleeping home (she was doing night shift at work). He told the nanny (in the absence of the plaintiff) that when she (the nanny) cleans the house there are two areas which she should not touch or enter namely the main bedroom and the main bathroom. When the plaintiff returned home she found the bathroom dirty and she started scolding the nanny. The defendant intervened and told the plaintiff that the nanny did not do anything wrong as he is the one who instructed her not to clean the bathroom. The defendant testified that his intervention drew a barrage of insults from the plaintiff and also accusations that he is sleeping with the nanny that is why he is siding with her. After this argument the defendant heard the plaintiff screaming and the defendant's dogs were running. The plaintiff had a broken broomstick about 40 cm in her hand. At this juncture the defendant went to the living room and saw CR sitting in the dirt busy eating stones. He testified that plaintiff was so engrossed in a telephone conversation that she did not notice that CR was eating stones. The defendant picked up CR and when he turned he saw the

plaintiff again with the stick “hitting and hitting and hitting” his dogs on the head. Whilst holding CR in his arm he tried to grab the stick from plaintiff. At that occasion CR got hurt and plaintiff then accused the defendant of hurting CR. The plaintiff then started beating the defendant with the stick while he had CR in his arm. The plaintiff assaulted the defendant on the elbow and wrist. A bone in the wrist was fractured and swollen. Thereafter the defendant laid a criminal charge of assault against the Plaintiff whereupon she was arrested and was detained for approximately 12 days. He then also applied for a protection order as he was concerned that the plaintiff would take revenge once she leaves the prison.

[43] The problem with this piece of evidence is that it was, firstly not contained in the defendant's written witness statement which was read into the record as his evidence in chief. Secondly the plaintiff was not confronted with this piece of evidence for her to comment there on. Thirdly I am grabbling with an inherent contradiction in the defendant's testimony, he alleges in his evidence that, the plaintiff was hitting dogs with the stick and that she was so engrossed in a telephone conversation that she did not notice that CR was eating stones. Fourthly the defendant did not submit any medical evidence as regards his fractured elbow and swollen arm despite the fact that he testified that he went to a doctor after the assault. I am of the view that, even if I accept on a generous interpretation of the defendant's evidence that the plaintiff may at times have committed acts of some violence against the defendant during their numerous arguments and fights, I am not able on the available evidence to conclude that these assaults were of such a nature and consistency that it can be concluded on a balance of probabilities that she had the malicious intent thereby to end the marriage. For these reasons, I reject the defendant's evidence on the allegations of assaults perpetrated against him.

[44] As I indicated above Mr. Denk relying on ***Smit v Arthur*** submitted that the balance of probabilities indicates that the plaintiff committed adultery with Mr. Nambadi.

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He tabulates the following aspects as the circumstantial evidence which point to adultery:

- (a) The plaintiff's admission that before she got married to the defendant Mr. Nambadi was her boyfriend and that she had a sexual relationship with him while he was her boyfriend.
- (b) The plaintiff kept Mr. Nambadi's cellphone number despite the fact that she was married to the defendant.
- (c) The defendant's evidence that there were occasions that the plaintiff did not stay at home and that at one occasion she left the common home and was "*sleeping over and over and over and over at her work place*".
- (d) Defendant's evidence that the photo where the plaintiff and Mr. Nambadi were together (Exh F3) cannot be more than a year old or even less. The defendant identified a necklace with a heart-shaped pendant, with an embedded diamond at the end, which he bought to the plaintiff as a gift on the photo where the plaintiff and defendant were together. He could not recall whether it was a birthday or Christmas gift in 2011.
- (e) The defendant's version that he obtained one of the photos (Exhibit F1), from the Whatsapp profile of Mr. Nambadi in 2015 shows the plaintiff and Mr. Nambadi together on a beach which was according to the plaintiff in Walvisbay. The photograph clearly depicts that Mr. Nambadi who is having the plaintiff in his arms, is cupping her breast with his hand.
- (f) The fact that in the photos depicting Mr. Nambadi and the Plaintiff (eg Exh F3), she looked markedly older than a photo taken in 2010 taken of her and the Defendant shortly before they got married (Exh G).

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- (g) The fact that plaintiff admitted that she kept photos of her and Mr. Nambadi on the table next to her bed in the room she was renting.
- (h) Plaintiff's version that she never called Nambadi; yet when her IMEI number **35899605309965** was revealed in Court that IMEI number appeared in Plaintiff's call records, handed up to Court as from 16 May 2014 up to 5 March 2015. This clearly proved that the plaintiff during the period after she already left the common home was using her phone with its unique IMEI number to continue conversing with Mr. Nambadi.

[45] I must state that I totally fail to see how all the above factors go to prove adultery. As regards the photos which the defendant submitted as exhibits the plaintiff testified that they were taken before her marriage to defendant. The defendant has not laid the basis on which this court can accept and conclude that the photos were taken a year or six months ago. I am furthermore of the view that the case of **Smit v Arthur** in no way assists the defendant in this matter because that case is on its facts are distinguishable from the present case. In that case the appellate court said the following:<sup>12</sup>

'I do not think that the Court a quo, when it considered whether an inference of adultery should be drawn, assigned sufficient weight to the duration of their close association and to their conduct, behaviour and habits during that lengthy period of time; nor to the circumstances that they were experienced, mature people, accustomed to marriage and the sexual privileges which went with it and that they had, because of their mutually reciprocated love and desire, virtually jettisoned their respective spouses. Mrs. Smit had grown a cold to her husband as the respondent had to his wife. The evidence of the independent witnesses I have mentioned very strongly suggests that the respondent and Mrs. Smit lost few opportunities of being together, not only in public, but especially in

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<sup>12</sup> Per Miller, AJA at 384-385.

private, alone, in the comfort and seclusion of the respondent's home after his wife had left him, and in Mrs. Smit's home, at night, while her husband was away. Opportunities for indulging their desires were created by them; it is very pertinent to ask: for what purpose did they create such opportunities?'

In the present matter there was no evidence to show that the plaintiff and Nambadi desired one another, had the opportunity of gratifying their desire and showed willingness to do so.

[46] I am thus satisfied that the plaintiff has proven on a balance of probability that the conduct of the defendant made cohabitation intolerable. It will be remembered that what the plaintiff had to prove is not only that the defendant constructively deserted him, but that his conduct which forced her to move out of the matrimonial home is attributable to a fixed intention to put an end to the marriage. In the present matter, I accepted that the defendant humiliated and insulted the plaintiff, that he has laid false charges of assault against the plaintiff. I am left with no option but to conclude that the defendant persisted in his conduct reckless of the consequences. I thus find that the plaintiff has proven the *animus deserendi* on the part of the defendant. ***Viljoen v Viljoen***<sup>13</sup>.

[47] The defendant alleged in his pleadings that plaintiff did not show love and affection towards him, that the plaintiff assaulted the defendant numerous occasions, that the plaintiff used foul and abusive language towards the defendant, that the plaintiff elicited undue arguments, that the plaintiff moved out of the common home on several occasions just to return to the common home again, that the plaintiff requested the defendant to file for divorce and that the plaintiff entered into adulterous relationships with other men. The defendant did not lead evidence in respect of the allegations relating: to the lack of love and affection, to the use of foul and abusive language, and to the elicitation of undue arguments. As regards the allegation of adultery and assaults, I

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<sup>13</sup> 1968 (3) SA 581 at 596.

found that the defendant did not prove them. That being the case, the counter-claim of the defendant is dismissed.

## THE ANCILLARY CLAIMS

[48] I now turn to the other outstanding issues. I will start with the proprietary claims. In her particulars of claim the plaintiff prayed for a 'quantified forfeiture order' but as I indicated earlier in this judgment the plaintiff during her testimony amended her particulars of claim and prayed for an order ordering the joint estate to be equally divided between the parties. The defendant, however, persisted with his claim for a 'quantified forfeiture order'.

[49] It is now a well-established principle of or law that if a marriage in community of property is dissolved, the community of property takes place as a matter of law except where the court directs otherwise. In the matter of **C.V.C; L v L**<sup>14</sup> Heathcote, AJ embarked on an extensive and thorough review of the law relating to both general and specific forfeiture orders relating to divorce proceedings in marriages in community of property. Following that exercise Heathcote, AJ formulated the relevant principles which apply and stated that:

[22.5] When the court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led. The fact that a husband or wife does not work, does not mean that he/she did not contribute. Value should be given to the maintenance provided to the children, household chores and the like. It would be readily quantifiable with reference to the reasonable costs which would have been incurred to hire a third party to do such work, had the spouse who provided the services, not been available during the marriage. Of course, he/she would then possibly have contributed more to the estate, but these difficulties must be

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<sup>14</sup> *Supra* at footnote 10.

determined on a case by case basis. Only in such circumstances can the forfeiture order be equitable.

[22.6] When a court considers a request to grant a quantified forfeiture order, evidence produced should include the value of the joint estate at the time of the divorce, the specific contributions made to the joint estate by each party, and all the relevant circumstances. The court will then determine the ratio of the portion each former spouse should receive with reference to their respective contributions. If the guilty spouse has only contributed 10% to the joint estate that is the percentage he or she receives. If, however, the 10% contributor is the innocent spouse, he or she still receives 50% of the joint estate. The same method as applied in the Gates' case should find application.'

[50] It is apparent from the defendant's pleadings that they lack any allegations as to the value of the estate nor is there any allegation that the plaintiff had made no or a negligible contributions to the joint estate. That allegations in the defendant's pleadings do not in my view in law entitle a defendant to a specific forfeiture order even in cases where it is alleged, as it is in the instant case that the defendant maliciously deserted the plaintiff. It is as Heathcote, AJ put it "...relief based on an equitable wish rather than legal ground." 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.

[51] 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>15</sup> *In Oberholzer v Oberholzer*:<sup>16</sup>

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<sup>15</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>16</sup>1947 (3) SA 294 at 297.

‘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.’

[52] The plaintiff has testified that she is currently unemployed and has no income. I am thus of the view that plaintiff 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 the capacity to be employed and the defendant has offered, to pay all educational, medical and tuition cost for CR and for the extramural activities of the child, I am of the view that an amount of N\$3000 per month for the maintenance of the plaintiff is reasonable.

[53] The plaintiff 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 defendant’s obligation to maintain the plaintiff must cease when the joint estate has been fully divided amongst the parties or for a period of twelve months from the date of the final order of divorce whichever is the shorter period.

[53] That brings me to the issue of the costs. The award of costs in matrimonial matters is generally guided by the same principles as in other matters. The main factors taken into account are: The discretion of the Court in regard to costs; and the successful party should, as a general rule, be awarded his/her costs. The court may deviate from these general principles only if good reasons do exist to do so<sup>17</sup>. In this case no such reasons have been advanced to me. In the result I make the following orders:

- 1 There shall be judgment for the plaintiff for an order of Restitution of Conjugal Rights and the defendant is ordered to return to or receive the plaintiff on or

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<sup>17</sup> See the LJM Nathan *South African Divorce Handbook* at 38.

before **03 June 2015** , failing which, to show cause, if any, to this court on the **01 July 2015 at 08h30** am, why:

- 1.1** The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
- 1.2** The joint estate of the parties is equally divided between the parties.
- 1.3** The plaintiff must not pay to the plaintiff rehabilitative maintenance in the amount of N\$ 3 000 (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** The defendant's counter claim is dismissed.
- 3** The defendant is ordered to pay the plaintiff's costs of suit on a party and party scale. Such costs to include the costs of one instructing and one instructed counsel.

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SFI Ueitele  
Judge

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APPEARANCES:

**PLAINTIFF:**

S Rukoro

Instructed by Dr Weder, Kauta & Hoveka Inc

**DEFENDANT:**

AHG Denk

Instructed by Tjitemisa & Associates