

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: I 3883/2014

In the matter between:

[A.....] [E.....] [D.....] (Born NASSOUW)

**PLAINTIFF**

And

[W.....] [M.....] [D.....]

**DEFENDANT**

**Neutral citation:** [D.....] v [D.....] (I 3883/2014) [2016] NAHCMD 115  
(21 April 2016)

**Coram:** UNENGU AJ

**Heard:** 25 January 2016; 27 -28 January 2016;

**Delivered:** 21 April 2016

**Flynote:** Husband and wife – Divorce – Malicious and constructive desertion – Plaintiff instituting divorce proceedings on the grounds of malicious and construction desertion – Alleging adultery as one of the grounds – Husband and wife – Defendant in counterclaim alleging malicious and constructive desertion as grounds for divorce – Plaintiff moved out of common bedroom and obtained a protection order against

defendant – Plaintiff’s action dismissed – Defendant granted restitution order with ancillary relief.

**Summary:** Husband and wife, the plaintiff instituted divorce proceedings against the defendant on the grounds of malicious and construction with adultery as a third ground – In view of the fact that the plaintiff left the common bedroom and obtained a protection order against the defendant forcing him out of the common house of the party, the court dismissed the plaintiff’s action, condoned defendant’s adultery and granted him a restitution order with ancillary relief.

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**ORDER**

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- (1) The plaintiff’s action for divorce against the defendant is dismissed with costs.
- (2) The defendant’s adultery is condoned and the counter-claim succeeds.
- (3) The plaintiff is ordered to restore conjugal rights to the defendant on or before **07<sup>th</sup>** day of **June 2016**, failing which to show cause, if any, to this court on **05<sup>th</sup>** day of **July 2016**, at **15h15**, why:
  - (i) The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
  - (ii) The joint estate should not be divided in equal shares between the parties.
  - (iii) Custody and control of the minor child (J..... M..... D.....) Should not be awarded to the plaintiff, subject to the defendant’s right of reasonable access.
  - (iv) The defendant should not be ordered to pay maintenance of N\$300.00 per month, which amount shall increase at ten percent (10%) per annum.

- (v) The plaintiff should not be ordered to retain the minor child on her medical aid.
- (vi) The parties should not be ordered to share the school and related expenses of the child in equal shares.

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### JUDGMENT

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UNENGU AJ:

[1] The plaintiff, Ms A..... E.... D..... instituted divorce proceedings against her husband Mr W..... M..... D..... with whom she married on 1 November 1986 at Bethanie in community of property.

[2] For sake of convenience, the parties will be referred to as the plaintiff and the defendant.

[3] One minor child was born from the marriage between the plaintiff and the defendant, namely [J.....] M..... D..... born on 12 February 1996. The plaintiff wants custody and control of J..... to be awarded to her.

[4] In her particulars of claim annexed to the combined summons, as ground for the divorce the plaintiff avers that during the subsistence of the marriage between them, the defendant with the fixed and malicious intention to terminate the marriage relationship between them had committed adultery, used foul and abusive language towards her, left their common home on 4 April 2014 deserted her and never returned.

[5] The plaintiff further alleged that during the subsistence of or before the marriage, she bought an immovable property situated at Erf 6....., K..... in K..... for which she had to pay the deposit and the monthly instalments. The defendant,

according to her, contributed nothing to the purchasing of the said property and to the monthly instalments thereof. That being so, the plaintiff prayed that it will be just and equitable that she receives the immovable property as her exclusive property and that the defendant forfeits all rights in the said property by virtue of the marriage in community of property.

[6] On his part, the defendant defended the matter and filed a counter-claim against the plaintiff's claim. In the counter-claim, the defendant alleged that it is the plaintiff who, during the subsistence of their marriage, with fixed and unlawful intention to terminate the marital relationship between them wrongfully moved out of the common bedroom during the end of 2010 or beginning of 2011; refused him marital privileges since 2010 without any excuse or reason; refused to communicate with him; forced him out of the common home by obtaining a protection order against him; informed his father and family members that she (plaintiff) did not want to stay married to him any longer, that she was planning to institute divorce proceedings against him; that she showed him no love, appreciation, respect or affection; that she showed no serious intention to continue with the marriage; failed to communicate with him, alternatively, refused to discuss any problems with her; financially abused him; that, as a result thereof she has unlawfully, maliciously and constructively deserted him; that he entered into an adulterous relationship with a third party during 2013, after he was forced out of the common home and she refused to communicate with him, which relationship, he said, was for a short lived only and prayed for condonation of the adultery.

[7] In his plea to the plaintiff's particulars of claim, the defendant admitted averments in paras 1, 2, 3 and 5 of the particulars of claim. With regard to the allegation in para 4 in respect of the marital regime, he pleaded that they married in community of property. His plea is supported by the marriage certificate handed in as exhibit "A". The marriage certificate indicates that they married without ante-nuptial contract. In any event, the regime of in community of property has not been placed in dispute by the plaintiff. It is also her testimony that she married the defendant on 1 November 1986 at Bethanie in community of property.

[8] The other allegations were denied except for the adultery which the defendant admitted and pleaded that he entered into this brief relationship because of the plaintiff's conduct as she refused him marital privileges during 2010 and 2011 when she left the common bedroom.

[9] On her part the plaintiff denied all the allegations in the counter-claim and pleaded with the Court not to condone the defendant's adultery because she did not condone the adultery.

[10] At one stage before the trial of matter, the defendant's legal representative withdrew and defendant was left without legal representation. Despite the defendant acting in person, a joint draft pre-trial order in terms of Rule 26(7) was filed by the parties.

[11] In para (a) of the draft pre-trial order they indicated issues of fact to be resolved during the trial as follows:

- '1. Who caused the breakup of the marriage – the plaintiff or the defendant.
2. Whether any of the parties is eligible to benefit from a forfeiture order in respect of the immovable property situated at Erf 6..... K....., K....., or must the immovable property be sold and the proceeds divided equally between the plaintiff and the defendant.'

[12] In para (b) of the draft pre-trial order indicated no issues of law to be resolved during the trial. However, in para (c) thereof they agreed the following facts not to be in dispute:

- '1. Custody and control of the minor child be awarded to the plaintiff, subject to the defendant's right of reasonable access.

2. The defendant to pay maintenance of N\$300.00 per month, which amount shall increase at ten (10%) per annum.
3. The plaintiff to retain the minor child on her medical aid.
4. The parties to share the school and related expenses of the child in equal shares.
5. All life(sic)stock to be divided equally between the parties with the assistance and supervision of the area headman.
6. The plaintiff to retain, keep and remain on the communal land where the farming activities take place.
7. Each party to retain the movable properties currently in their respective custody and control.'

[13] Other issues in the draft pre-trial order were attended to by the parties but they are insignificant for the purpose of the judgment. Important issues in the draft order are those in dispute and those not in dispute between the parties. The pre-trial order was adopted by the Court on 18 August 2015.

[14] I must mention here that in the meantime, the defendant secured legal representation in the person of Ms Harases from Kanguuehi & Kavendjii-Inc. A duplicate draft order was filed by the legal representatives of the parties on the 2 November 2015. Needless, therefore to say that the parties are bound by the content of the draft pre-trial order which was adopted by the Court on 18 August 2015.

[15] That being the case, the plaintiff and the defendant are required to prove only those issues in dispute stated in para (a) of the draft pre-trial order.

[16] The trial of the matter took place on 25 January 2016 with Mr Grobler representing the plaintiff and Ms Harases acting on behalf of the defendant. The plaintiff and the defendant are the only witnesses who testified. Both testified by means of statements which they read into record after being sworn in.

[17] As just pointed out above, the issues in dispute are rather few; these are who, between the plaintiff and the defendant caused the break-up of the marriage and whether the immovable property at Erf 6....., K..... in K..... must be transferred into the name of the plaintiff and the defendant to forfeit his share in the property or must the property be sold and the proceeds divided equally between the plaintiff and the defendant.

[18] Briefly the plaintiff testified that she married the defendant for almost 28 year and one child, namely J..... M..... D..... was born from the marriage now 19 years old (born on 12 February 1996). She said that it was a happy marriage for most part of the time until in 2011 when the defendant started to use foul and abusive language towards her; started to have an adulterous relationship with another woman and left the common home on 10 April 2012 for Mariental where the defendant is working as a security guard.

[19] Meanwhile, the defendant testified among others, that two children were born in his marriage and the plaintiff. Immanuel Dreyer is 25 years old while J..... M..... D..... is still minor of 19 years. According to him, it is the plaintiff who, with the fixed and unlawful intention to terminate the marital relationship moved out of the common bedroom during the end of 2011 until February 2012 and refused him his marital privileges since 2010 without any valid excuse. She also obtained a protection order forcing him to move out of the common home.

[20] In any event the plaintiff in her testimony does not deny moving out of the common bedroom living the defendant alone when she put up in the room where the two boys were sleeping. Her explanation for leaving the bedroom is to wake up the boys for school. This is a flimsy, ridiculous and incredible excuse which I, under no circumstances, will accept as plausible explanation for her moving out of their bedroom.

[21] The plaintiff had other options available to her to wake up the boys than to move in the same room with them in the process depriving the defendant of the comfort and company of his wife by sleeping alone. She also admitted in cross-examination by Ms Harases that she obtained a protection order against the defendant without a valid reason. Consequently and in view of the protection order the defendant had to move out of the common home in compliance with the court order. Plaintiff again failed to give a satisfactory explanation for the necessity of the protection order under cross-examination. She attempted to explain or justify the protection order that it was obtained against the defendant because he assaulted her.

[22] In her pleading, the plaintiff never alleged or pleaded assaults on her by the defendant as one of the conducts which led to the breakup of their marriage. I think Ms Harass is quite correct to question the motive for the protection order against her client.

[23] A question arises as whether or not the defendant, through his conduct, including the adulterous relationship with a third party was the cause of the breakup of the marriage. The plaintiff must prove on a balance of probabilities her claim so as the defendant on the same scale his counter-claim with regard the cause for the breakup of the marriage.

[24] I find it strange that the plaintiff in her testimony during the trial, prayed for a final order of divorce on the ground of the adulterous relationship of the defendant with a third party – while the relief sought in the particulars of claim, although adultery was listed as one of the grounds for the divorce, is an order for the restitution of conjugal rights to restore conjugal rights failure to do so a final order of divorce. She also indicated in her plea that the court should not condone the adultery of the defendant as requested. In the particulars of claim, the plaintiff only stated that the defendant committed adultery without elaborating when the adultery took place, where, with whom, how she became aware of the adultery and whether or not she had condoned it.



[25] In the case of *Peila v Peila*<sup>1</sup>, Botha JA said the following in respect of a court's approach to condonation of adultery:

' . . . in speaking of the Court's discretion in matrimonial proceedings, that it may 'condone' a party's adultery – the word 'condonation' is also used in Rule 18(8) of the Rules of Court – it is clear that a Court does not , in the exercise of its discretion, 'condone' – in any of the recognised senses of that word – a party's adultery. The adultery remains as a fact and it remains unlawful. Whatever the Court does, *it does not overlook or treat as non-existent the adultery of the other spouse, and it does not extinguish a defence or cause of action based on such adultery. The Court merely weighs up a matrimonial misconduct of the one spouse against that of the other and decides whose conduct was the more blameworthy or caused the break-up of the marriage. It may then grant relief to a party even though that party has been guilty of adultery.* But whether a Court would do so, would necessarily depend upon the peculiar facts of each case as determined at the trial.' (emphasis added).

[26] Therefore, on the facts of this case presented at the trial and following what Botha JA said in the *Peila v Peila* case above, I am satisfied that, even though the defendant had been guilty of adultery, it is the plaintiff's conduct which is more blameworthy or caused the break-up of the marriage. In the result, I decided to use my discretion in favour of condoning the defendant's adultery.

[27] Next to be considered is the issue of whether the property at Erf 650, Krönlein Keetmanshoop be transferred exclusively in the name of the plaintiff or must be sold and the proceeds divided equally between the plaintiff and the defendant.

[28] I have pointed out above that plaintiff and the defendant married in community of property. It is clear from exhibit "A" (the marriage certificate) that indeed they married at Bethanie on 1 November 1986 without an ante-nuptial contract. Much have been said by the plaintiff both in her pleadings as well as in her testimony during the trial that she bought the said property alone and still paying the monthly instalments to service the mortgage bond on the property without the assistance of the defendant.

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<sup>1</sup>1972 1) SA 399 (A) at 407C-F.

[29] Again, the plaintiff was dishonest and deliberately attempted to mislead the Court that the defendant contributed absolutely nothing to the household expenses of the couple from the day of the marriage, to date. However, the truth came out during cross-examination by Ms Harases when plaintiff recoiled and conceded that the defendant not only spent money on food, clothes and other accounts from shops, but also spent money on improvements of the house which the plaintiff suddenly offered to refund the defendant. The plaintiff also had access to his bank account wherefrom she withdrawn money for the house expenses.

[30] In his submission Mr Grobler referred the Court to the Supreme Court matter of *S v S* 2013 (1) NR 114 at 123 para 22C-D where Mainga JA quoting from the matter of *Gates v Gates* 1940 NPD 361 at 363 said the following:

'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 forfeit the benefits derived from the marriage in community of property, the court has no discretion to refuse to such an order.'

Mr Grobler referred the Court to the abovementioned part of the judgment in anticipation that his client (plaintiff) will succeed on the ground of adultery.

[31] But even if the plaintiff was successful on the ground of adultery, the court would not have granted the order the plaintiff had requested to grant her, for the reasons that:

- (i) The plaintiff did not claim for an order that defendant forfeits the benefits derived from the marriage in community of property; and
- (ii) The plaintiff sought a specific forfeiture order in respect of the immovable property situated at Erf 6..... K..... K..... However, in view of conclusions made above, the order sought by the plaintiff cannot and will not be granted.

[32] Given the fact that all the other relief sought by the litigants in their respective particulars of claims and the conclusions I have reached above, I make the following order:

- (1) The plaintiff's action for divorce against the defendant is dismissed with costs.
- (2) The defendant's adultery is condoned and the counter-claim succeeds.
- (3) The plaintiff is ordered to restore conjugal rights to the defendant on or before **07<sup>th</sup>** day of **June 2016**, failing which to show cause, if any, to this court on **05<sup>th</sup>** day of **July 2016**, at **15h15**, why:
  - (i) The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
  - (ii) The joint estate should not be divided in equal shares between the parties.
  - (iii) Custody and control of the minor child (Jaco Moses Dreyer) should not be awarded to the plaintiff, subject to the defendant's right of reasonable access.
  - (iv) The defendant should not be ordered to pay maintenance of N\$300.00 per month, which amount shall increase at ten percent (10%) per annum.
  - (v) The plaintiff should not be ordered to retain the minor child on her medical aid.
  - (vi) The parties should not be ordered to share the school and related expenses of the child in equal shares.

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E P UNENGU  
Acting Judge

APPEARANCES

PLAINTIFF: ZJ Grobler  
of Grobler & Co.

DEFENDANT: Ms Harases  
of Kangueehi & Kavendjii-Inc.