

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-MAT-

2017/04228

In the matter between:

P N L

PLAINTIFF

and

C L

DEFENDANT

Neutral citation: *P L v C L* (HC-MD-CIV-ACT-MAT-2017/04228) [2019] NAHCMD 342 (13 September 2019)

CORAM: **PRINSLOO J**

Heard: 27 June 2019 and 30 July 2019

Delivered: 13 September 2019

Reasons: 17 September 2019

Flynote: Matrimonial – Husband and Wife – Divorce – Specific forfeiture in respect of immovable property – Spouses married in community of property – Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be identified. It should then be alleged that the Defendant made no contribution whatsoever (or some negligible contribution) to the joint estate – Court satisfied that plaintiff had made out a case for specific forfeiture of benefit

Summary: The parties got married to each other in Windhoek in February 2012 in community of property. No children were born from the marriage. In November 2017 the plaintiff issued summons seeking a divorce. The defendant filed a notice to defend the action. The parties managed to reach settlement in respect of the divorce action and a final order of divorce was granted in June 2019. The parties were however not able to settle the ancillary relief claimed by the plaintiff, being that of specific forfeiture in respect of immovable property.

Held that the plaintiff made a good impression on this court as a witness. Her evidence was clear and detailed. The plaintiff was also able to substantiate the majority of her claims in respect of the immovable property with documentary proof. There were some expenses in respect of which the documentary proof was lacking for example in respect of the water and electricity and household expenses like food. However, the plaintiff succeeded in proving that she was solely responsible for the payment of the bond and all expenses relating to the renovation and extension of the immovable property.

Held that the defendant in turn made less of a favourable impression on the court. The defendant was extremely verbose and there were a number of instances where the defendant's evidence stands either in contradiction with his plea or in contradiction with his witness statement. In addition thereto the defendant was unable to present a single piece of documentary proof to substantiate the claims that he made regarding the payment of expenses of the communal home and the building project in respect of the

common property. The court could not find that the defendant made any meaningful contribution to the joint estate in spite of being employed. The evidence of the defendant was fraught with inconsistencies and stand to be rejected.

ORDER

Judgment in respect of the ancillary relief is granted in favour of the plaintiff in the following terms:

1. Specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf No 1289, Rocky Crest, Extension No. 2, Windhoek.
2. Each party keeps any property that he or she individually purchased and or acquired during the marriage.
3. Cost to follow the event.

JUDGMENT

PRINSLOO J

Introduction

[1] The parties before me got married to each other in Windhoek on 23 February 2012 in community of property. No children were born from the marriage. On 03 November 2017 the plaintiff issued summons seeking a divorce. The defendant filed a notice to defend the action on 17 November 2017.

[2] In her particulars of claim the plaintiff claimed the following relief:

- '1(a) An order for the restitution of conjugal rights and failing compliance therewith;
- (b) a final order for divorce
- 2. Forfeiture of the benefits arising from the marriage of in community of property;
- 3. In the event that prayer 2 hereof is not granted, an order directing that the immovable property that the Plaintiff purchased before the parties got married be and remains the sole property of the Plaintiff.
- 4. An order directing that each party keeps any property that he or she individually purchased and or acquired during the marriage.
- 5. Cost of suit (only if opposed);
- 6. Further and alternative relief.'

[3] The parties managed to reach settlement in respect of the divorce action and an order for restitution of conjugal rights was issued on 01 April 2019 and a final order of divorce was granted on 14 June 2019. The parties were however not able to settle the ancillary relief claimed by the plaintiff, which then gave rise to the proceedings before me.

[4] At this stage I must pause and indicate that it was indicated by Mr Bangamwabo, acting on behalf of the plaintiff, that the plaintiff will not persist with a claim for general forfeiture but will only pursue the alternative claim, namely the claim for specific forfeiture in respect of the immovable property.

[5] In her particulars of claim the plaintiff makes a number of averments in respect of the conduct of the defendant in order to make out a case for malicious and/or constructive desertion. Of the list of issues I will only highlight the relevant averments for purposes of this judgment as follows (in summary):

- (a) Assault on the plaintiff by kicking her;
- (b) Assault on the plaintiff's daughter and hostile behaviour towards the plaintiff's daughter on several occasions;

- (c) Depriving the plaintiff's right to consortium by not equally or meaningfully contributing to the: (a) welfare of the plaintiff, (b) liquidity and solvency of the joint estate;
- (d) Dereliction of his conjugal duty to provide financial and moral support to the plaintiff, alternatively failure to make reasonable contributions to the common household expenses in conformity with the cost of living.

[6] The basis for the specific relief sought in respect of the immovable property set out in the particulars of claim is as follows:

- (a) In 2000 and before the parties got married the plaintiff, on her own, purchased an immovable property namely, Erf No 1289, Rocky Crest, Extension No. 2, Windhoek.
- (b) During the subsistence of the marriage the defendant never contributed any monetary contribution to the immoveable property and the plaintiff alone continued to pay the bond of the property and solely maintained the property without the assistance of the defendant.
- (c) Since the parties got married the defendant did not in any meaningful way, make any financial contributions to establish and or maintain the joint estate of the parties alternatively the defendant did not in any meaningful way make any financial contribution that is required to maintain a common household that benefits both parties to a marriage, instead the defendant managed his finances and property solely on his own accord and for his sole benefit.
- (d) That the plaintiff will be severely prejudiced if the defendant is to benefit from the immovable property that the plaintiff solely purchased and maintained before the marriage.

[7] In his plea the defendant emphatically denied the allegations as set out in the plaintiff's particulars of claim. In amplification the defendant pleaded that the plaintiff allowed her minor daughter to verbally and physically assault the defendant on

numerous occasions, in her presence and she allowed her minor daughter to undermine and disrespect the defendant.

[8] The defendant pleaded that the sole cause of the divorce proceedings instituted on 08 November 2017 was a result of a single incident in which a friend of the daughter of the plaintiff, whom he refused entry into the common home, verbally insulted the defendant and thereafter physically attacked the defendant. The plaintiff intervened and also attacked the defendant. Subsequent to this incident the biological father of the minor child opened a criminal case of assault against the defendant.

[9] The defendant further denied the allegations by the plaintiff that he did not contribute to the common household and pleaded that he has contributed extensively to the joint common property financially.

[10] In conclusion the defendant pleaded that he funded the whole renovations and extension of the common property.

[11] The defendant did not file a counter claim but prayed that the court orders a division of the joint estate, ie that the plaintiff buy out the defendant's half share alternatively that the immovable property in question be sold to a third party and that the parties divide the proceeds of the sale.

The issues

[12] The issues called for determination in this matter can be formulated as follows:

- (a) Whether or not the plaintiff is to be granted a forfeiture order as prayed for in her claim for ancillary relief;
- (b) Corollary to the aforementioned issue, whether or not the defendant has made a meaningful financial contribution towards the maintenance, and upkeep of the

said immovable property, as well as the payments of the mortgage bond registered against the aforesaid property;

(c) Whether the defendant was the sole cause of the breakdown of the marriage between the parties; and

(d) Whether it is fair and just for the defendant to benefit from the joint estate, more specifically from the aforesaid immovable property.

The evidence

The plaintiff

[13] The plaintiff confirmed that the parties got married on 23 February 2012 in community of property in Windhoek, which marriage subsisted until a final order of divorce was granted on 14 June 2019. No children were born from the marriage but the plaintiff had a daughter born from an earlier relationship.

[14] The plaintiff testified that during 2017 the defendant left the common home as a result of his arrest and a protection order that was issued against him pursuant to an incident on 03 July 2017 between the defendant and the plaintiff's daughter. The plaintiff stated that during this incident her daughter was assaulted by the defendant. A video clip of the incident was presented to court depicting a physical altercation between the defendant and the daughter of the plaintiff who was 18 years old at the time of the incident.

[15] The plaintiff testified that during the subsistence of the marriage there was not only verbal and emotional abuse but also physical abuse. The plaintiff related to the court an incident during 2014 during which the defendant physically assaulted her, which assault caused her to sustain injuries. In this regard the plaintiff submitted a number of photographs showing marks on her throat and her back. Plaintiff testified that she reported this incident to the authorities but the defendant was not arrested. She further stated during cross- examination that although she applied for a protection order

her protection order was deferred in favour of the protection order that was granted in respect of her daughter. She did not pursue the protection order any further once the divorce was finalized as the defendant was out of her life.

[16] However, as a result of the incident on 03 July 2019 her daughter went to report the incident to the social workers and the couple was called in to be interviewed by a social worker. Hereafter the defendant was arrested and was served with a protection order after his release from the cells.

[17] In respect of the immovable property the plaintiff testified that prior to her marriage to the defendant she bought the immovable property in question, which was transferred and registered in her name during 1999. The witness stated that she obtained a home loan through First National Bank but during 2013 she moved the loan from First National Bank to First Capital Housing Fund. The plaintiff stated that she obtained an increase in her home loan in the process and decided to renovate and extend the property. The contractor appointed to do the renovations failed to complete the work and apparently left with the money. A tender was then awarded to the defendant to complete the renovations to the house however the defendant had no funds to complete the project. The plaintiff stated that she held a policy at Old Mutual and the said policy paid out an amount of N\$ 90 206.44, which she then used in order to finish the renovation/extension.

[18] The plaintiff testified that the defendant made no contributions to the communal home or the payment of the bond of the house. She testified that during 2012 to 2014 the defendant was working in Walvis Bay and there after moved to Windhoek and during 2015 to 2016 he was working in Windhoek and studying at the time at the University of Namibia.

[19] The plaintiff testified that when the issue of the defendant's contribution to the common household came up the defendant would say that he did not have any money.

She testified that she was hesitant to belabour the issue of out of fear that she would be beaten by the defendant.

[20] In support of her claims that she paid the bond, without the assistance of the defendant, the plaintiff submitted her loan account with First Capital Housing Fund as well as her salary advise which shows the monthly deductions from her salary in favour of the said home loan.

[21] The plaintiff testified that as the defendant made no contributions to the common household or to the bond payment he should not benefit from the joint estate.

[22] In addition thereto the plaintiff testified that the defendant's abusive behaviour towards her and her daughter caused the breakdown of their marriage.

[23] During cross-examination the witness was confronted with the fact that she was studying at Southern Business School and that as a result of her paying for her tuition the defendant had to pay the common household expenses. The plaintiff conceded that she studied on a part-time basis but that her studies were subsidized by the Ministry of Health and Social Service with whom she is employed. The witness conceded that the relevant documentation in regard to the subsidization of her tuition fees was not discovered but stated that she made same available to her counsel.

[24] The plaintiff further insisted that she paid the expenses of the common household as well as taxi money for herself and her daughter to work and school respectively.

[25] The plaintiff further added on the issue of the defendant's contribution to the household that for half of the time that they were married the defendant was working and residing in Walvis Bay. She confirmed that the defendant had a construction business but denied that the defendant made any contributions, in spite of the said business.

[26] The plaintiff was also confronted with the marital regime within which the parties got married and the plaintiff testified that she wanted to get married out of community of property, however the defendant informed her that the cost involved in getting married out of community of property was approximately N\$ 20 000 and whereas she was unable to afford such an amount she agreed that they get married in community of property.

Frieda Kalulwa

[27] Ms Kalulwa is a qualified property valuer with an Honors degree in Property Science obtained from the University of Science and Technology in April 2015. Ms Kalulwa is currently employed with DF & J Property Valuations Consultants CC on a part-time basis but in full time employment with the Ministry of Land Reform as a valuer.

[28] Ms Kalulwa testified as an expert witness on behalf of the plaintiff. She stated that she inspected the property at Erf 1289, Rocky Crest, Windhoek, on 23 July 2018.

[29] She testified that she was requested to do an evaluation on the urban property. She attended to the property and considered the interior as well as the exterior of the property and took the necessary measurements and pictures.

[30] The witness testified that there are three different methods of determining the market value of immovable property, namely:

- (a) Direct sales comparison method;
- (b) Depreciated replacement cost method; and
- (c) Income capitalization method.

[31] The witness further stated that she did a market analyses by finding four similar properties in the surrounding area, even though it is difficult to find properties

with comparable or exact measurements. After finding the four similar properties she applied the direct sales comparison method and determined the probable market value of the property to be N\$ 1 390 000 (one million three hundred and ninety thousand Namibian Dollars). An inspection and valuation report to this effect was received into evidence certifying the value of the property.

The defendant

[32] The defendant testified that he and the plaintiff entered into a customary union in 2010 after he paid the required lobola, however the plaintiff felt that she wanted them to get married at court and wanted a ring as a sign of respect. The plaintiff then made enquiries and discussed the matter with her brother, who apparently explained to the plaintiff that they can get married either in community of property or with an ante nuptial agreement. As a couple they discussed these options and the plaintiff chose for them to get married in community of property, where after they got married in community of property on 23 February 2012 in Windhoek.

[33] The defendant testified that during 2013 the plaintiff commenced with her studies at Southern Business School and as a result of her studies he carried all the expenses of the common household. He testified that the agreement between the two of them was to the effect that she would pay for her own studies and service the bond over the immovable property and he would buy her text books needed for her studies, in addition to the household expenses. The household expenses consisted of water, electricity, food and transport for her school going daughter (as well as for the defendant's son).

[34] During 2013 the couple, as they were then, decided to extend the common home and the defendant stated that he then proceeded to arrange for the relevant plans to be drawn up and he paid the fees of one Ms Monde, who was the drafter of the plans.

[35] The witness stated that he had a construction company trading under the name of Mmvingu Trading Enterprises CC and through his company he tendered for the

contract for the extension of the common home at First Capital Housing Enterprise CC. Mmvingu Trading Enterprises CC got the tender but the defendant had to appoint a subcontractor because he did not have the specific machinery to do the foundation of the extension. The witness further stated that he paid for the foundation of the extension which had to be financed privately.

[36] It is further the evidence of the defendant that one Mr Louw was subcontracting in respect of the tender that Mmvingu Trading Enterprises CC received but that the money was paid out to Mr Louw, who absconded with the money, leaving a mere N\$ 55 000. The defendant testified that he then had to secure other contractors to complete the extension of the house which was then financed by the pay-out received from the plaintiff's Old Mutual policy.

[37] When confronted during cross-examination regarding proof of these payments the defendant testified that because of the protection order obtained by the plaintiff he was evicted from the matrimonial home and all the receipts remained behind in his file at the house.

[38] On the issue of domestic violence the witness emphatically denies any form of domestic violence during the existence of the marriage directed to either his ex-wife or her daughter. Instead, so he testified, the plaintiff's daughter was disrespectful and aggressive towards him.

[39] In reply to the video recording that was presented to court depicting a physical altercation between the defendant and plaintiff's daughter the defendant stated that he never assaulted the plaintiff's daughter but that she attacked him with a broom stick and he took off his belt which he used to hit the broom stick that she held to scare her off.

[40] Subsequent to this incident the biological father of the plaintiff's daughter laid charges with the Namibian police and the defendant was arrested. The defendant stated that as a result of his arrest on the charges laid against him he was detained and

subsequently lost his employment and his business. After he was released from the police cells he could not return to the matrimonial home due to the bail conditions that prevented him from doing so.

[41] In respect of the relief sought by the plaintiff for the specific forfeiture of the immovable property defendant submitted that he is entitled to the division of the joint estate as he was instrumental in completing the extension to the house and he contributed financially thereto. The defendant further testified that after the extension to the house was completed the plaintiff approached him and told him that she no longer feels married to him and that her family is saying that he (the defendant) only married the plaintiff for the house. The defendant denied this allegation stating that when he came to know her he did not know that she had a house and when they got married in community of property it was at the insistence of the plaintiff. The defendant reiterated that he is entitled to share in the benefits of the joint estate and submitted that it would be unjust to order the relief that the plaintiff is seeking.

Analyses of the evidence and evaluation thereof

[42] The issue pertaining to the divorce was settled and a final order of divorce was granted which then leaves the issue of the ancillary relief sought to be decided.

[43] In light thereof I intend to concentrate mostly on the evidence relevant to the aspect of the estate and the plaintiff's claim for specific forfeiture of the immovable property.

[44] In order to determine the issues as set out in paragraph 12 above it is necessary to consider the evidence advanced by the parties in that regard and also to consider the credibility of the witnesses.

Mutually destructive testimonies

[45] It is clear from the conflicting accounts testified to by the plaintiff and the defendant that their evidence is at complete variance.

[46] In *Mulenamaswe v Mulenamaswe*¹ Ueitele J made the following observations in respect of mutually destructive evidence:

‘ . . . The following legal principles are now well settled in our law namely that:

- (a) where the evidence of the parties’ presented to the court is mutually destructive the court must decide as to which version to belief on probabilities²;
- (b) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.’³

[47] From the onset I must point out that the court did not have the benefit of independent witnesses. The property valuer, Ms Kalulwa testified in the capacity of an expert witness and her evidence stands undisputed. As for the remainder of the evidence it is a question of he said she said. Therefore the court must consider which of the versions are favoured by the probabilities

[48] The plaintiff made a good impression on this court as a witness. Her evidence was clear and detailed. The plaintiff was also able to substantiate the majority of her claims in respect of the immovable property with documentary proof. There were some expenses in respect of which the documentary proof was lacking for example in respect of the water and electricity and household expenses like food.

[49] The defendant in turn made less of a favourable impression on the court. The defendant was extremely verbose and there were a number of instances where the defendant’s evidence stands either in contradiction with his plea or in contradiction with

¹ (I 2808/2011) [2013] NALCMD 275 (9 October 2013) para 34.

² *National Employers’ General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

³ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 16-17 para 24).

his witness statement. In addition thereto the defendant was unable to present a single piece of documentary proof to substantiate the claims that he made regarding the payment of expenses of the communal home and the building project in respect of the common property.

[50] The instances in which the defendant's plea and witness statement read into the record as part of his evidence in chief are at odds with the testimony he gave in amplification of his witness statement are as follows:

- (a) The one issue that stood out is the fact that the defendant pleaded that he funded the whole renovation and extension of the common property. However in his witness statement he stated that one Mr Louw disappeared with the money paid out by First Capital Housing Fund and that the extension on the property was completed through the money received on an Old Mutual Policy (assuming that of the plaintiff). During his oral evidence the defendant made an about turn by saying that it was not the Old Mutual policy funds that funded the extension but it was indeed his company, Mmvingu Trading Enterprises CC.
 - i. What is interesting is that what is contained in the witness statement of the defendant in effect corroborated the plaintiff's version, who testified that the money received in respect of the policy was used to complete the building of the extension to the house.
- (b) In his witness statement the defendant indicated that he commenced payment towards the expenses of the common household as of 2013 until 2017 which amounted to N\$ 60 000. During his oral evidence the defendant chose to elaborate on the N\$ 60 000 and testified that he paid between N\$ 20 000 to N\$ 25 000 for the foundation of the extension of the house and water and lights. This is then quite clear that the N\$ 60 000 was not spent in respect of maintaining the common household.
 - i. What is interesting is that for the best part of that period the defendant was actually working and residing in Walvis Bay and not in Windhoek. This evidence of the plaintiff in this regard stands undisputed.

(c) The defendant pleaded that the sole cause for the divorce proceedings to be instituted was as a result of 'a single incident in which a friend of the daughter of the Plaintiff, whom I refused entry into our common home verbally assaulted me and thereafter physically attacked me, thereafter the Plaintiff intervened and also attacked me.' (my emphasises)

- i. From the plea of the defendant it would appear that that it was the friend of the plaintiff's daughter that verbally assaulted and attacked the defendant and not the plaintiff's daughter personally as was alleged during the evidence of the defendant. The defendant's plea and his evidence is absolutely light years apart.
- ii. In his plea the defendant alleges that the plaintiff intervened and also attacked him, which pre-supposes that the plaintiff was at the scene of the incident complained of, however the plaintiff's undisputed evidence was that she was called regarding the incident and when she got home the gate was locked and she had to wait 10 minutes to get access to the property.
- iii. The defendant also alleged in his oral evidence that the plaintiff's daughter attacked him with a broom stick but this allegation appears nowhere in his witness statement. Instead the defendant alleges that the plaintiff's daughter insulted him and pushed him against the gate of the house three times and when he reprimanded her she held on to his collar and continued her insults. The defendant then took his belt and disciplined her.
- iv. In contradiction thereto the defendant stated during cross-examination that he actually took off his belt and hit on the broomstick the plaintiff's daughter had to scare her and that in actual fact he did not beat her. The defendant also repeatedly said that the plaintiff's daughter was not the victim in this incident.
- v. Having had the opportunity to see the video, which is a very short clip, it is very difficult to interpret it as the defendant and plaintiff's daughter were not speaking English. But what was clear was that the defendant had the upper hand of the situation as the plaintiff's daughter was retreating (with

a broom in her hand) and the defendant advancing towards her with a belt in his hand striking three times at her. It is possible that at least two of those blows struck the broomstick. It is evident that the video ties in with the admission in the defendant's witness statement that he took off his belt and disciplined the minor.

General discussion

On allegations of domestic violence

[51] The plaintiff was taken to task during cross-examination regarding the allegation of domestic violence and it was put to her that because she did not report it, it cannot be true. The plaintiff however presented pictures in court of injuries to her neck and back. As the pictures were close-up pictures of the bruises and not showing the plaintiff's face fully it was put to the plaintiff that there is nothing to show that it was injuries that she sustained. The plaintiff however stuck to her guns in this regard in spite of thorough cross-examination. The witness was able to furnish the court with the details of the incident as well as photos in support thereof. The defendant's version of the incident on the other hand is a bare denial.

[52] Having regard to the evidence adduced I am satisfied that the plaintiff is the person in the pictures. Further, taking into consideration the evidence of the plaintiff and having considered the defendant's witness statement and the video clip admitted into evidence, I am satisfied that there was domestic violence present during the marriage of the couple. I am further satisfied with the explanation advanced by the plaintiff that she attempted to make the marriage work but that the incident involving her minor daughter and the defendant was the last straw that broke the proverbial camel's back.

On failure to provide meaningfully to contribute to the joint estate

[53] The defendant dismally failed in showing that he paid anything towards the common household or payment towards the immovable property. He complained that his file with all his documents was at the house at the time when he was arrested and he is no longer in possession of the file as it was left at the common home. There was however no application for specific discovery nor was there any attempt on the part of the defendant to obtain copies to support his allegations.

[54] It is also so that a certain amount of criticism can be levelled against the plaintiff for not having documentary proof of what she spent on the common household however having regard to the fact that the defendant was working and residing in Walvis Bay for half of their married life, it causes the probabilities to favour the plaintiffs version for that period of time. Then when the defendant moved back to Windhoek it is the testimony of the plaintiff that the defendant enrolled at the University of Namibia and when he was requested to contribute to the common home the defendant would say that he did not have money.

[55] The plaintiff was cross-examined on whether she can prove that the defendant paid for his tuition fees but it was never denied that the defendant was enrolled at the University of Namibia or that he paid tuition fees. Again the probabilities favors the plaintiff's case. As for the plaintiff's studies that the defendant relies on to argue that he paid for the common household expenses, such argument is however negated by the version of the plaintiff that her studies were subsidized by her employer, the Ministry of Health and Social Services.

[56] The evidence of the plaintiff's payment towards the immovable property stands undisputed. The plaintiff submitted detailed proof relating to the said payments, which included banks statements, bond statements, salary advices, etc. I am accordingly satisfied that the plaintiff was the only person servicing the bond, first with First National Bank and thereafter with First Capital Housing Fund.

[57] I am further satisfied that the policy money received from Old Mutual by the plaintiff was used to pay towards the completion of the extension to the house and find this to be common cause as was conceded in the defendant's witness statement. The about turn that the defendant made in court when he testified in amplification did not impress this court as it was clearly untrue.

Applicable law and application of the law to the facts

[58] If a marriage in community of property has dissolved, the division of the community of property takes place as a matter of law, irrespective of whether or not the court order mentions the division.

[59] The plaintiff seeks a specific forfeiture order in respect of the property situated in Windhoek. A specific forfeiture order is an order where a particular *res* is forfeited to the plaintiff.⁴ When such a specific forfeiture order is sought, a court requires a litigant to set out all the relevant information⁵

[60] In *C v C; L v L*⁶, 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. As far as a specific forfeiture order is concerned, this may be granted in exceptional circumstances provided the necessary allegations are made in the pleadings and the required evidence is led.⁷

⁴ Hahlo HR: *The South African Law of Husband and Wife* 5th ed. See also *Steenberg v Steenberg* 1963 (4) SA 870 (C).

⁵ *Ex parte Deputy Sheriff, Salisbury: In re Doyle v Salgo* 1957 (3) SA 740 (SR) at 742D; *NS v RH* 2011 (2) NR 486 (HC).

⁶ 2012 (1) NR 37.

⁷ *C v C; L v L* *ibid* at 47A-B:

[22.7] The court, of course, has a discretion to grant a specific or quantified forfeiture order on the same day the restitution order is granted, if the necessary evidence is led at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim i.e. the value of the property at the time of divorce, the value of the respective contributions made by the parties; and the ratio which the Plaintiff suggests should find application (where a quantified forfeiture order is sought). Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be identified. It should then be alleged that the Defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. (Note: this is not the same as alleging that no contribution was made to the acquisition or maintenance of the specific asset);

[61] I fully endorsed the principles laid down in the judgment and moreover I respectfully associate myself with the stated principles.

[62] In applying these principles to the facts I am satisfied that the plaintiff has proven the following on a balance of probabilities:

- (d) The value of the immovable property at the time of the divorce;
- (e) That specific asset sought to be declared forfeited was sufficiently identified; and
- (f) Evidence regarding the contributions of each party.

[63] With regards to the conspectus of the evidence before me I am satisfied that the plaintiff succeeded in proving that she was solely responsible for the payment of the bond and all expenses relating to the renovation and extension of the immovable property. The bond payments were made from the time that the plaintiff bought the house in 1999, a good 13 years prior to her marriage to the defendant, to date.

[64] For reasons discussed above I cannot find that the defendant made any meaningful contribution to the joint estate in spite being employed. The evidence of the defendant was fraught with inconsistencies and stand to be rejected.

[65] Further, with the evidence on record I am satisfied that the plaintiff has proven on a balance of probabilities that the defendant was solely responsible for the breaking down of the marriage between the parties because of physical abuse towards the plaintiff and her daughter.

[22.8] In exceptional circumstances, and if the necessary allegations were made and the required evidence led, it is possible for a court to make a forfeiture order in respect of a specific immovable or movable property (i.e. a specific forfeiture order). I say that this would only find application in exceptional circumstances, because it is not always that the guilty Defendant is so useless that the Plaintiff would be able to say that he/she has made no contribution whatsoever, or a really insignificant contribution, (to the extent that it can for all practical intents and purposes be ignored);'

[66] The only issue remaining to consider is the issue of costs. Counsel for the plaintiff argued for a punitive cost order and it was submitted that the defendant was forewarned as far back as January 2019 that his case was meritless and without any prospects of success.

[67] The issue of cost is and remains in the discretion of the court. Matrimonial matters are generally guided by the same principles as any other matter. Cost will follow the successful outcome of the event. I see no reason to impose a punitive cost order on the defendant.

[68] In the result I make the following orders:

Judgment in respect of the ancillary relief is granted in favour of the plaintiff in the following terms:

1. Specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf No 1289, Rocky Crest, extension No. 2, Windhoek.
2. Each party keeps any property that he or she individually purchased and or acquired during the marriage.
3. Cost to follow the event.

JS Prinsloo

Judge

APPEARANCES:

PLAINTIFF: F Bangamwabo
Of FB Law Chambers

DEFENDANT: M Siyomunje
Of Siyomunje Law Chambers