

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 924/2016

In the matter between:

S K

PLAINTIFF

and

S L

DEFENDANT

**Neutral citation:** *S K v S L* (I 1996/2016) [2019] NAHCMD 45 (07 March 2019)

**CORAM:** PRINSLOO J

Heard: 11-14 September 2018; 12 November 2018

Delivered: 04 March 2019

Reasons: 08 March 2019

**Flynote:** Husband and Wife – Matrimonial regime – Marriages north of Police Zone – Such marriages governed by s 17(6) of the Native Administration Proclamation 15 of 1928 – Such marriages out of community of property, unless prior agreement to contrary – Parties disputing the matrimonial regime concluded – Court called upon to determine the intention of the parties – Principles relating to matrimonial regimes in the Namibian jurisdiction reiterated.

**Summary:** Where parties are married to each other north of the Police Zone, in terms of s 17(6) of Proc 15 of 1928, the marriage is out of community of property, unless there is a prior agreement to the contrary. Reliance on such prior agreement must be proved by cogent evidence. Furthermore, the court has a judicial discretion in weighing up the matrimonial misconduct of the spouses against each other in order to determine whose conduct was more blameworthy or was the real cause of the break-up of the marriage. For this determination the court looks at the evidence.

In the present matter, the plaintiff instituted divorce proceedings and the defendant filed her notice of intention to defend. In her counterclaim, the defendant disputed the marital regime concluded between the parties and submitted that they were married in community of property as opposed to out of community of property as submitted by the plaintiff in his particulars of claim. The parties further blamed one another for the breakdown of the marriage and this court was called upon to determine two primary issues, the first being the marital regime of the parties and the grounds for divorce.

*Held* that the priest who solemnized the marriage between the parties would have been crucial to give evidence in this regard, however, this court was not placed in the favorable position to receive such evidence from the priest himself as it was submitted by the defendant's counsel that he is too old to travel. Curiously enough, no affidavit was prepared by counsel to have the priest's testimony on record and this would have made a significant impact in these proceedings.

*Held further* that the fact that the descriptions on the title deeds of the said properties indicated that the parties are married in community of property is not sufficient to persuade this court that the parties are indeed married in community of property

*Held further* that the defendant testified in that the primary need for spousal maintenance was for her studies and the tutor she was utilizing to assist her in her studies. In this regard, the defendant failed to provide documentation and prove the need for maintenance.

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## ORDER

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Judgment is granted in favor of the plaintiff in the following terms:

- a) The marriage concluded between the parties is one of out of community of property by virtue of s 17 (6) of the Native Administration Proclamation 15 of 1928.
- b) Defendant's prayer for spousal maintenance is dismissed.
- c) Cost of suit.
- d) The court grants judgment for the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before **15 April 2019**, failing which to show cause, if any, to this court on **13 May 2019** at 10h00 why:
  - 1. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved.

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## JUDGMENT

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PRINSLOO J:

[1] Section 17 (6) of the Native Administration Proclamation 15 of 1928 provides that

"A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

[2] In a nutshell, s 17 (6) primarily states that marriages between 'Blacks' who marry each other north of the Police Zone, are automatically out of community of property, unless the parties specifically agree to the contrary a month prior to the marriage. In this pending action for divorce, the main bone of contention between the parties is primarily whether the matrimonial regime is one of either in or out of community of property.

#### Brief Background of the matter

[3] The parties were married on 29 August 2009 at Ewaneno Parish in the Okalongo Constituency in the Omusati Region of the Republic of Namibia and by virtue of s 17 (6) of the Native Administration Proclamation 15 of 1928, the marriage is out of community of property.

[4] As time went on, the parties had marital problems which eventually led to the plaintiff instituting divorce proceedings against the defendant and throughout the exchange of pleadings, the following became evident:

- a) The parties held different views in respect of the marital regime being out or in community of property, with the plaintiff averring that the marital regime is out of community of property while the defendant is adamant that it is in community of property.
- b) The grounds for the breakdown of the marriage became mutually destructive, i.e. a classical he said/she said scenario where both parties pointed fingers at each other and blamed each other for the breakdown, from allegations of affairs by both parties to filing of a domestic violence cases by both parties<sup>1</sup>, to the alleged discovery of remnants of traditional herbs and the practice of witchcraft by the defendant found in the common home by the plaintiff.

[5] In her counterclaim, the defendant averred that the plaintiff should not be allowed to rely on a marriage concluded out of community of property for the reasons

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<sup>1</sup> The application by the plaintiff was not granted.

that when the plaintiff entered into various sale agreements, he represented to the defendant that their marriage was in community of property.

[6] In his plea to the counterclaim, the plaintiff admitted that in terms of the said properties, they were registered in both the names of the plaintiff and the defendant, however this was done erroneously. He denied that he ever presented to the conveyancers that he and the defendant was married in community of property. The plaintiff further averred that it was never the plaintiff's intention to co-own the properties with the defendant.

### Evidence adduced

#### *Plaintiff*

[7] Grounds of divorce: In his particulars of claim the plaintiff alleges malicious intent on the part of the Defendant in that the defendant:

- a. failed to meaningfully communicate with the plaintiff.
- b. was involved in extra marital affairs, frequently left the common home at night and only return in the early hours of the morning without informing the plaintiff.
- c. neglects to contribute to the house hold necessities and the upkeep of the household despite the fact that she is gainfully employed.
- d. practiced witchcraft and used traditional herbs without the consent of the plaintiff.
- e. Plaintiff had to obtain a protection order against the defendant on 16 May 2016 as a result of the traditional herbs found in the common home of the parties.

[8] The plaintiff testified that they were happily married up until when the mother of the defendant started to interfere with their marriage. The defendant started to become aggressive towards him whereas she previously acted lovingly towards him. The plaintiff further stated that he discovered a basket of dried herbs from under their bed and when he confronted the defendant she informed him that she got the herbs from her grandmother in the North for treating infertility problems. The plaintiff stated

that the defendant brought the herbs into the house in order to bewitch him. He instructed the defendant to remove the basket from the common home. Plaintiff stated that in February 2016 he again found a basket of herbs in the house. The plaintiff testified that he had a definite issue with the herbs as practicing witchcraft is something he is fearful of as it can affect body and mind. In this regard the plaintiff stated as follows:

'I am afraid I might be redundant and maybe later feed from the dustbin and later become stupid'

[9] The plaintiff stated that his wife would frequently leave the common home at night and then only return home during the early hours of the morning and when he confronted her she told him that his status in society is lower than her status because she is a teacher and they are not of the same caliber. According to the plaintiff the defendant also frequently told him that she is seeing another man but when confronted during a family meeting she stated that although she told the plaintiff she was seeing another man, that in reality was not the case.

[10] On the issue of the protection order obtained by the defendant the plaintiff stated that he was served by the Namibian Police with the interim protection order issued on 14 July 2016 and was given 12 hours to vacate the common home. Plaintiff denied that he left the common home voluntarily in February 2016 but emphasized that he was constrained to leave the common home because of the interim protection order. The plaintiff also denied that he ever physically assaulted the defendant or abused her in any way emotionally.

[11] Marital regime: The plaintiff denied that there was any decision reached between the parties that they will get married in community of property. He stated that on the day of their wedding ceremony the priest asked them if they were previously married to which the plaintiff replied in the negative and the couple signed a declaration to this effect thereafter. During cross-examination the plaintiff testified that it was his understanding that if parties get married above the 'red line' then property rights are not included, i.e. out of community of property and that he understood that one can get in community of property but that there needs to be an agreement between the parties in this regard.

[12] The plaintiff admitted that the immovable properties, which were bought after their marriage, were registered in both his name and that of the defendant but stated that that was done erroneously by the conveyancer, who obtained the information from the marriage certificate. The plaintiff stated that on more than one occasion his wife accompanied him when he went to sign papers but stated that she went along as witness and not as a signatory to the agreements. The plaintiff testified that he never represented to the defendant that their marriage was in community of property and at all times, the plaintiff was the sole and exclusive owner of the properties and solely paid for the properties. He further stated that the defendant did not make any contribution to any of the properties or the farm.

#### *Defendant*

[13] Grounds for divorce: In her counterclaim the defendant in turn claimed that the plaintiff is the one who acted wrongful and malicious with the intention to terminate the marital relationship between the parties and alleged that the plaintiff:

- a. left the common home during February 2016 and has not returned since;
- b. informed the defendant that he will divorce her and that she will remain only with her personal belongings.
- c. abused her to the extent that the defendant had to obtain an interim protection order during July 2016.
- d. live with another woman as husband and wife.
- e. showed the defendant no respect.
- f. did not maintain the defendant properly.
- g. falsely accused the defendant of having intercourse with other men and as a result made co-habitation impossible.

[14] The defendant stated that during the course of their marriage the plaintiff physically abused her and often also verbally abused and insulted her. She stated that the plaintiff also repeatedly, during the course of their marriage, accused her of extra marital affairs, wearing inappropriate clothing and complained about the presence of her mother, whenever she visited. The defendant stated that the plaintiff

even sent the Namibian Police to inform her mother to leave the house. This issue regarding her mother greatly upset the defendant as her mother was part of the family.

[15] According to the defendant the plaintiff left the common home during February 2016. However during June 2016 the plaintiff sent the police to fetch a vehicle the defendant was using and by doing so it caused substantial embarrassment to the defendant as it happened during working hours.

[16] The defendant further stated that she obtained an interim protection order against the plaintiff as he previously threatened to kill her and the plaintiff owns fire-arms. In terms of the interim protection order the plaintiff was ordered to leave the common home.

[17] During cross-examination the defendant testified that the plaintiff threatened her per text message causing her to pay certain monies into his account in respect of a car that she used. The defendant stated that she felt abused because of this. She also felt abused as the water for the common home, where she was staying at the time, was disconnected and the defendant submitted that the disconnection was on the insistence of the plaintiff. She opened a criminal case and proceeded to obtain an interim protection order in spite of the fact that the plaintiff at that stage already left the common home four months prior, because, according to her testimony, the plaintiff was disturbing her and for the abuse stated.

[18] The defendant also stated during cross-examination that the plaintiff physically abused her whilst she was pregnant and she had a miscarriage however she did not open a criminal case for assault. She was also threatened with a fire-arm but also chose not to open a criminal case.

[19] Marital regime: The evidence of the defendant in this regard is that the parties were married in community of property and as a couple the parties signed a declaration to this effect. She stated that on the day of the wedding ceremony they were in an office with other couples and the priest approached each couple and spoke softly to them. During this conversation the priest enquired how they wished to be married and as a couple the plaintiff and defendant responded that they wish to be married in community of property. The defendant also stated that they discussed



this issue before hand and they were in agreement about wanting to get married in community of property. The defendant stated that she obtained documents from Home Affairs in support of her claim but stated that the declaration which they signed declaring their intention to get married in community of property could not be located.

[20] Spousal maintenance: The defendant prayed for spousal maintenance in the amount of N\$ 25 000 per month for a period of five years with a yearly escalation of ten per cent. The defendant stated during cross-examination that she was studying at the time when the divorce action was instituted but placed it on hold because of the divorce. She stated that she requires money to continue with her studies and the plaintiff must provide for her as he is putting her through this divorce.

[21] The defendant stated that the N\$ 25 000 would be utilized to pay N\$ 5000 per month for her studies, a tutor five days per week at a rate of N\$ 800 per session and payment for physiotherapy that she attends twice weekly because of a stress condition.

[22] Mrs Nii-Nangula Lukas testified on behalf of the defendant. Mrs Lukas is the mother of the defendant who stated that she and her husband were in the office of the priest on the plaintiff and defendant's wedding day and she heard the priest asking the couple how they would like to get married and they declared that they wish to marry in community of property.

#### Arguments advanced by the parties

##### *Plaintiff's submissions*

[23] Plaintiff's counsel submits that the defendant failed to make out her case on a balance of probabilities that the marriage was in community of property or that they had a prior agreement between themselves. The counsel highlighted that there was no signed declaration produced at trial nor was there a subpoena for the marriage officer to come to court to give evidence with regard to a declaration having been made between the parties. With the defendant submitting that a declaration was allegedly signed, counsel further reiterated that the defendant had no copy, neither

was the priest present to attest to that nor was there any documentation from the Ministry of Home Affairs.

[24] On this score, counsel submitted that the plaintiff's version is more plausible on the basis that there is simply no declaration signed by the parties and also through the evidence of both parties testifying that they did not discuss with the priest on how they intended to get married prior to the marriage.

[25] With respect to the properties that reflect the names of both parties, counsel submitted that this confusion was created by the bank officials and the conveyancer that handled the said properties. Counsel further submitted that this is a common mistake as banks do not understand 'northern marriages'.

[26] With respect to the allegation made by the defendant that the parties agreed that their marriage would be in community of property, counsel submitted that it was never pleaded by the defendant in her pleas or counterclaim as well as in her evidence. Counsel submits that this was an afterthought and on that basis, the marriage concluded between the parties must be automatically out of community of property as per s 17 (6) of the Proclamation.

[27] With respect to the maintenance in the amount of N\$25 000 per month for a period of five years, with an escalation of ten per cent as prayed for by the defendant in her counterclaim, counsel submitted that the defendant has not placed any evidence before the court in order to prove that she is in need of maintenance. During cross-examination, the defendant testified that majority of the maintenance she requires is to pay for her studies and tutor she was utilizing before the divorce action was instituted by the plaintiff. In this regard, counsel submitted that the defendant wishes to be placed in the position she benefited during the marriage.

[28] Drawing to a close, counsel for the plaintiff reiterates that as is evident before this court, both parties are playing the "blame game" as to who is responsible for the breakdown of the marriage and resultantly have placed two mutually destructive versions before court. In this regard, counsel submitted that the version to be believed should be that of the plaintiff on the basis that the defendant testified that the plaintiff left the common home during February 2016, however, counsel

submitted, the defendant went on to file a case of domestic violence and sought and obtained a protection order, removing the plaintiff from the common home four months after he had allegedly left the common home.

[29] Counsel further submitted that in the plaintiff's testimony, he stated that in terms of the interim protection order, he was ordered to leave the common home and moved out of the common home. Counsel submitted that this is a clear indication that the plaintiff only left the common home in July 2016 after the protection order was served on him.

[30] In conclusion, counsel submitted that the defendant had a tendency of exaggeration in that she obtained a protection order for apparent abuse, which abuse, counsel submits, was through a text message.

#### *Defendant's submissions*

[31] Counsel for the defendant submitted that the plaintiff contradicts the marriage certificate when he pleaded that the parties are married out of community of property and that he is prohibited from testifying as to the marital regime other than what has been reflected in his marriage certificate. Counsel further submitted that it was never denied that at the wedding ceremony, the parties had indicated to the priest that they get married in community of property.

[32] Counsel further submits that both parties answered in the affirmative when asked if they were getting married in or out of community of property and the priest then proceeded to let the parties sign the documents. Counsel further submitted that the defendant and her mother testified to this fact. Upon enquiries as to the signed declaration, the priest allegedly replied that the book containing the declaration had been sent to Windhoek and it could not be traced in Windhoek. Counsel submitted that the evidence was never to the effect that the declaration was not signed. Counsel further submitted that the priest was also too old to travel to Windhoek to give testimony in this regard.

[33] Counsel further submitted that the parties had come to an agreement prior to the marriage as to their marital regime and are bound by whatever property regime they have chosen.

[34] With respect to maintenance, counsel submitted that in terms of s 5 of Matrimonial Affairs Ordinance 25 of 1955, the guilty spouse may be ordered to pay maintenance to the innocent spouse.

[35] In concluding, counsel further submits that if one has regard to the grounds for divorce as pleaded by the plaintiff, the grounds raised are not in actual fact grounds for divorce. Counsel makes the following highlights in this respect:

- a) The defendant practiced witchcraft. Counsel submitted that this is not a ground for divorce. Counsel further submitted that plaintiff testified that the defendant had put a basket with herbs under the bed because she is infertile. The defendant testified that she is not in actual fact infertile as she had fallen pregnant twice and had lost the babies during pregnancy.
- b) Plaintiff pleaded that the defendant had extra-marital affairs. Counsel submitted that the plaintiff's best evidence in this regard was that his neighbor told him about it and that a suspicious car was parked in front of the common home or in the yard. Counsel submitted that this was a long shot to prove extra-marital affairs in this way.

#### Applicable law

#### *Marital regime*

[36] Our Supreme Court in *Mofuka v Mofuka*<sup>2</sup> laid down the principles clearly wherein Strydom ACJ made the following observations:

'Before dealing with these submissions it is in my opinion necessary to bear in mind the following principles. Firstly, that once the parties are married they cannot thereafter change the proprietary consequences of their marriage, also not in regard to each other. The following was stated in *Honey v Honey* 1992 (3) SA 609 (W) at 611A - D, namely:

'In terms of our common law, subject to an exception to which reference will be made later, parties to a marriage cannot by postnuptial agreement change their matrimonial

<sup>2</sup> *Mofuka v Mofuka* 2003 NR 1 (SC).

property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes CJ phrased the rule thus:

"Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an antenuptial contract be varied by a postnuptial agreement between the spouses, even if confirmed by the death of one of them. The only exception to the rule is afforded by an underhand deed of separation either ratified, or entitled at the time to ratification under a decree of judicial separation."

The exception referred to by Innes CJ does not apply in the present instance.

Secondly, the parties must prove that they have entered into an agreement concerning their matrimonial property system either expressly or by implication. To say that they had come to some or other understanding or that that was their impression or intention would not be enough. The Court must be satisfied that, on the evidence, it is probable that the parties concluded an agreement prior to their marriage.'

#### *Mutually destructive testimonies*

[37] In *National Employers Mutual General Insurance Association v Gany*<sup>3</sup> at 199, Wessels JA made the following observation:

'....Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of a litigant upon whom the onus rests, is the true version and that in this case, absolute reliance can be placed upon the story as told by A.'

[38] In *Mulenamaswe v Mulenamaswe*<sup>4</sup> Ueitele J encountered the same issues as with the present matter and in terms whereof the evidence adduced by the parties were mutually destructive, Ueitele J made the following observations:

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

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<sup>3</sup> *National Employers Mutual General Insurance Association v Gany* 1931 AD 187.

<sup>4</sup> *Mulenamaswe v Mulenamaswe* (I 2808/2011) [2013] NALCMD 275 (9 October 2013).

- (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 probabilities<sup>5</sup>;
- (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.<sup>6</sup>

[35] In this matter I am of the view that the version of the plaintiff, as regards the proprietary regime governing the marriage, is more probable than that of the defendant. I say so for the following reasons; the contemporaneous documents such as the declaration in terms of section 17 of Proclamation 15 of 1928 clearly indicate that the parties did not make a declaration to the marriage officer. Secondly the defendant contradicts herself as to whether they agreed or did not agree prior to the conclusion of the marriage as to whether they want to be married in or out of community of property.'

#### *Grounds for divorce*

[39] It is trite that our law, as it stands, recognizes four grounds of divorce, i.e. adultery; malicious desertion; incurable insanity, which has existed for not less than seven years, and imprisonment for five years after the defendant's spouse has been declared a habitual criminal.<sup>7</sup>

[40] Further, in *AN v FN*<sup>8</sup> Unengu AJ expounds further the grounds for divorce as accepted in our jurisdiction as follows:

'[14] In the case of *Kagwe v Kagwe*, the court stated the following:

'Three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: first that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant. The onus of proving both the factum of desertion and the animus deserendi rests throughout upon the plaintiff. The restitution order will not be made if

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<sup>5</sup> 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.

<sup>6</sup> Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone Case No SA 13/2008 (unreported) at 16-17 para 24).

<sup>7</sup> NS v RH 2011 (2) NR 486 (HC).

<sup>8</sup> AN v FN (I 1839/2015) [2017] NAHCMD 154 (6 June 2017).

after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.<sup>9</sup>

[15] There are two grounds for divorce in our common law namely:

- 1) adultery and
- 2) malicious desertion, which includes constructive desertion.

[16] Since the parties do not rely on adultery as a ground of divorce, I will not deal with that ground.

'Nathan opines that:

"Malicious desertion takes places when a spouse, without just cause, either physically leaves or remains away from the matrimonial home intending not to return to it, or otherwise so comports himself as to evince an intention to bring the marriage relationship to an end. Constructive desertion is a species of malicious desertion, it takes place when the defendant with intent to put an end to the marriage does not leave the matrimonial home himself but is guilty of conduct which either compels the other spouse to do so or renders it clear that the marriage relationship can no longer continue".<sup>10</sup>

[17] *Hahlo* states that malicious desertion consists of two elements, namely:<sup>11</sup>

- a) *factum of desertion* and
- b) *animo deserandi*.

[18] Furthermore, there are four forms of malicious desertion, namely:<sup>12</sup>

- 1) Actual desertion - where one party actually leaves the matrimonial home with the intention not to return.
- 2) Constructive desertion - 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 matrimonial home dangerous or intolerable for him or her. *Hahlo* proceeds and argues that three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:

<sup>9</sup> (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), paragraph 9.

<sup>10</sup> *Likando v Likando* (I 1384/2011) [2013] NAHCMD 265 (30 September 2013), paragraph 11 – 13.

<sup>11</sup> *Halo*, H R (3<sup>rd</sup> Ed).1969.The South African Law of Husband and Wife.Cape Town: Juta & Co Ltd, page 387.

<sup>12</sup> *Likando* case, paragraph 13.

- (i) the consortium of spouse must have come to an end as the result of the plaintiff's having left the defendant;
  - (ii) it must have been the defendant's unlawful conduct that caused the plaintiff to leave; and
  - (iii) the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.
- 3) Refusal of marital privileges, and possibly,
- 4) Sentence of death or life imprisonment.'

[41] The above primarily sets the grounds commonly recognized by this court in terms of divorces and same has not to date changed. Although Damaseb JP has in HV v SV (2) 2014 (3) NR 842 (HC) expressed that the divorce law of Namibia is archaic and is demonstrably in need of reform, the status quo remains as above.

### Conclusion

[42] It is quite clear that the crux of this matter remains whether the parties were married in community of property or not and one would imagine that this is not a difficult question to answer. In the present matter, the defendant alleges that she was made to believe that the marriage was in community of property and testified to same throughout her evidence. What is also clear is that the alleged declaration signed could not be traced, although the defendant is adamant that both parties signed it in the presence of the priest. Apart from this, the first time that the defendant indicated that they discussed the issue of marriage in community of property, as a couple, was during cross-examination. When confronted with the omissions in this regard the defendant indicated that she either forgot about it or did not think of informing her legal practitioner accordingly.

[43] The priest would then have been crucial to give evidence in this regard, however, this court was not placed in the favorable position to receive such evidence from the priest himself as it was submitted by the defendant's counsel that he is too old to travel. Curiously enough, no affidavit was prepared by counsel to have the



priest's testimony on record and this would have made a significant impact in these proceedings.

[44] On the marriage certificate, it clearly indicates "without ANC", i.e. without an ante-nuptial contract which, simply put, means that there is no contract dividing the assets accumulated by the married couple. This would have meant that the parties are married in community of property, however, because the parties were married in the 'Police Zone', s 17 (6) of the Native Proclamation 15 of 1928 comes into operation wherein it provides that if no declaration is made by the parties that they wish to have their matrimony in community of property, such would automatically be out of community of property. Case law also suggests that the declaration may also be made on the date of solemnization before the marriage officer.

[45] The fact that the descriptions on the title deeds of the said properties indicated that the parties are married in community of property is not sufficient to persuade this court that the parties are indeed married in community of property.

[46] Apart from the property registered in the joint names of the parties there is no evidence before me that the parties conducted their estates as a joint one. The contributions made to the common house hold by the defendant was limited. In fact the defendant assisted her mother and sister with contributions from her salary and that appears to be one of the reasons why the defendant requires spousal maintenance for her studies.

[47] On a balance of probabilities and in respect of the contradictory versions of what happened on the date of the marriage, I accept the version of the plaintiff, namely that nothing was discussed and that no declaration was made that they wanted to be married in community of property. This corresponds with what appears on the marriage certificate, namely that they were not married with an ante-nuptial contract.

[48] On the aspect for grounds for divorce, this matter is a classic example of where a marriage has irretrievably broken down based on fault by both parties. Each party has to some extent contributed to the breakdown of the marriage as both parties pointed fingers at each other for one or another thing that they view as the

cause of the breakdown of the marriage. Seemingly, this court cannot also force parties to be together if no hope exists in the parties' reconciliation.

[49] A dispute however did arise on the aspect of when the plaintiff left the common home. The defendant submitted that the plaintiff left during February 2016 whereas the plaintiff submits that he left the common home as a result of the interim protection order granted in July 2016.

[50] This is common cause and it is further common cause that the plaintiff subsequently agreed that the interim order remains in place pending the finalization of the divorce action. Given the prevailing court order the plaintiff could not return home as he was prohibited from doing so. The question that begged an answer is whether that court order was the plaintiff's own doing? Did the plaintiff make himself guilty of the acts as alleged by the defendant? The plaintiff denied all the allegations levelled against him by the defendant in this regard. It was therefore necessary to consider the version of the defendant in this regard and if one carefully consider the version of the defendant then it is clear that her version in many respects is fanciful and without merit. When it came down to the wire in cross-examination it appeared that defendant embellished her evidence. This is specifically with reference as to when the plaintiff moved out of the house and the so-called abuse that the defendant suffered at the hands of the plaintiff that caused her to apply for an interim protection order.

[51] It is interesting that the defendant applied for an interim protection order four months after the plaintiff allegedly moved out of the common home on his own volition, as alleged by the defendant, yet in the affidavit filed in support of the application the address where the plaintiff could be located for service of the protection order is the common home of the parties. The defendant also pertinently stated in her evidence that the plaintiff was ordered to leave the common home in terms of the interim protection order and he moved out of the common home.

[52] Defendant alleged that she was physically abused to the extent that she had a miscarriage and on occasion(s) she was threatened with a fire-arm, in which instances she did not file any criminal charges, yet when the plaintiff allegedly requested money from the defendant via text message to pay towards a vehicle she

was using, the defendant chose to lay criminal charges and to apply for a protection order. The defendant makes generalized statements regarding the alleged physical abuse not only before this court but also in her affidavit in support of the application for a protection order. However, the defendant does not state a date and/or time and/or place or even the details of the alleged abuse even when she had the opportunity during her *viva voce* evidence. The text message to which the defendant referred in her evidence which purportedly contained a threat from the plaintiff was not presented to court. The allegations regarding abuse made by the defendant is not substantiated in any way.

[53] Therefore, having regard to my aforementioned discussion of the issues, it seems more probable that the plaintiff left the common home in July 2016 as opposed to February 2016.

[54] On the aspect of spousal maintenance, in *DK v DK*<sup>13</sup> 2010 (2) NR 761 (HC) Ueitele J made the following observations:

[63] It is trite that when the legislature confers discretion on the court that discretion must be exercised judicially. One of the guiding principles is that the court will only grant maintenance if it is proven on a balance of probabilities that the party who asks for maintenance is in need of it — *Van Wyk supra*; *Hossack v Hossack* 1956 (3) SA 159 (W); *Portinho v Portinho* 1981 (2) SA 595 (T) at 597G – H where Van Dijkhorst J said:

'In my view the test to be applied is whether on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in s 7(2) come into play. If on the probabilities it is not shown that maintenance is or will not be needed no award thereof (whatever its size) can be made.'

[64] In *Hossack v Hossack supra* at 165B – F Ludorf J stated that maintenance is not to be granted as a matter of course. Factors taken into account in relation to the question as to whether maintenance should be granted at all and in regard to the amount thereof —

'. . . includes such considerations as the period that the marriage has endured, the age of the innocent spouse and her qualifications for earning a living as well as the conduct of the guilty spouse'.

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<sup>13</sup> *DK v DK* 2010 (2) NR 761 (HC).

[55] The defendant testified in that the primary need for spousal maintenance was for her studies and an almost full-time tutor she was utilizing to assist her in her studies. In this regard, the defendant failed to provide documentation and prove the need for maintenance.

[56] In the result, I order as follows:

Judgment is granted in favor of the plaintiff in the following terms:

- a) The marriage concluded between the parties is one out of community of property by virtue of s 17 (6) of the Native Administration Proclamation 15 of 1928.
- b) Defendant's prayer for spousal maintenance is dismissed.
- c) Cost of suit.
- d) The court grants judgment for the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before **15 April 2019**, failing which to show cause, if any, to this court on **13 May 2019** at **10h00** why:
  1. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved.

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JS Prinsloo  
Judge

APPEARANCES

PLAINTIFF:

E Angula  
AngulaCo Inc.

DEFENDANT:

M Petherbridge  
Petherbridge Law Chambers