

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 5066/2014

In the matter between:

S T

PLAINTIFF

and

P T

DEFENDANT

Neutral citation: *S T v P T* (I 5066/2014) [2019] NAHCMD 58 (15 March 2019)

CORAM: **PRINSLOO J**

Heard: 05 March 2019 and 15 March 2019

Delivered: 15 March 2019

Reasons: 20 March 2019

Flynote: Husband and Wife – Matrimonial regime – What the intention of the parties was when they signed the ANC – The effect of an ANC – Defendant alleges she was not aware of what she was signing – Parties disputing the marital regime concluded – Court called upon to determine the intention of the parties – Court concluded that the defendant knew what she was signing.

Pre-trial report – The effect thereof- Parties to be bound by their pre-trial at hearing of the matter – Parties not allowed to deviate from the pre-trial report during trial – Unless consent by the other side is sought or the approval of the Court seized with the matter.

Summary: The plaintiff and defendant got married during 1975 at Okeruru Village in Aminius Constituency, Omaheke Region, by virtue of traditional marital regime, which regime was governed by the traditional laws of the particular traditional community. During 2012 the defendant turned 60 years old and qualified for Government pension, however when the defendant approached the relevant Ministry she was apparently advised to provide a marriage certificate to substantiate her marital status. The defendant informed the plaintiff accordingly and the parties agreed after some deliberations to enter into a civil marriage. On 23 October 2012 the parties signed a power of attorney at the offices of Kempen & Maske, Gobabis and they subsequently got married at the Magistrates Court, Gobabis on 16 November 2012.

The relationship between the parties however progressively deteriorated and in the latter part of 2014 the defendant obtained an interim protection order against the plaintiff and she moved out of the common home. On 8 December 2014 the plaintiff instituted an action for divorce against the defendant to which the defendant filed a counterclaim. It is common cause that both parties prayed for a restitution of conjugal rights order and therewith a final order of divorce, but the main contention and position adopted by the defendant is that the parties had a joint estate and that she was not aware that the marriage she entered into on 16 November 2012 was one out of community of property.

The defendant therefor prays for the estate to be declared a joint estate and for the court to make an order in terms of which the joint estate is divided equally among the parties.

Held – The defendant left the common home during 2014 and has not returned. It would therefor appear that the defendant left the common home by choice. The court is satisfied that the plaintiff has proven on a balance of probability that the defendant physically deserted the plaintiff.

Held further – It is well established in our law that a pre-trial minute is no different to any other agreement concluded consequent to deliberations between the parties or those that they may have expressly or impliedly authorised to represent them. It follows therefore that a pre-trial minute constitutes a binding agreement between the parties and the defendant is bound by the pre-trial order and the defendant cannot be allowed to rely on issues not contained in the pre-trial order.

Held further – Having considered the evidence adduced by both parties before me, the marital regime between the parties was that of out of community of property.

ORDER

1. The defendant's counter claim and defence to the plaintiff's claim is dismissed with costs.
 2. The Court grants judgment for the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before the **29th** day of **April 2019**, failing which to show cause, if any, to this Court on the **03rd** day of **June 2019** at **10H00** why:
 - a. The bonds of the marriage subsisting between the parties should not be dissolved.
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JUDGMENT

PRINSLOO J

Introduction

[1] The matter before me is a divorce matter that has a long history that started as far back as 2014. During the life span of the case the parties had different legal practitioners that filed a multitude of amended pleadings, witness statements, judicial case management reports and the like until the current legal practitioners came on board and filed amended witness statements and the appropriate case management orders to assist this court in the conduct of the matter.

Background

[2] The relationship of the parties before me spans over a period of 44 years. They got married during 1975 at Okeruru Village in Aminius Constituency, Omaheke Region, by virtue of traditional marital regime, which regime was governed by the traditional laws of the particular traditional community.

[3] During 2012 the defendant turned 60 years old and therefor qualified for Government pension, however when the defendant approached the relevant Ministry she was apparently advised to provide a marriage certificate to substantiate her marital status. The defendant informed the plaintiff accordingly and the parties agreed after some deliberations to enter into a civil marriage.

[4] On 23 October 2012 the parties signed a power of attorney at the offices of Kempen & Maske, Gobabis and they subsequently got married at the Magistrates Court, Gobabis on 16 November 2012.

[5] However, the relationship between the parties progressively deteriorated and in the latter part of 2014 the defendant obtained an interim protection order against the defendant and she moved out of the common home.

[6] On 8 December 2014 the plaintiff instituted an action for divorce against the defendant in which he seeks:

- (a) An order for the restitution of conjugal right and failing compliance therewith;
- (b) A final order of divorce;
- (c) Cost of suit;
- (d) Further and/or alternative relief.

[7] The defendant in her amended counterclaim also claims for an order for restitution of conjugal rights and failing therewith a final order of divorce but the main contention and position adopted by the defendant in her plea is that the parties had a joint estate and that she was not aware that the marriage she entered into on 16 November 2012 was one out of community of property.

[8] The defendant therefor prays for the estate to be declared a joint estate and for the court to make an order in terms of which the joint estate is divided equally among the parties.

[9] It initially appeared that the principal issue to be decided upon was whether the parties are married in community of property or in terms of an antenuptial contract. I say this as it initially appeared to be the issues to be determined but in the subsequent proposed pre-trial order the issues for determination were clearly enumerated. The issues raised in the counterclaim were largely dealt with under the heading of statement of agreed facts, i.e. issues not in dispute, in the joint pre-trial report.

[10] I deem it necessary to deal with the pre-trial proceedings specifically as it will be the determining factor in the outcome of the proceedings *in casu*, for reasons discussed hereunder.

Pre-trial proceedings

[11] The purpose of a joint pre-trial order is to narrow down issues in dispute and to limit the scope of litigation¹. The consequences of a signed pre-trial order is that the positions taken by the parties in their respective pleadings may be reconciled or compromised.

[12] This position was reinforced in *Kanguatjivi v Kanguatjivi*² when Unengu AJ stated as follows:

[12] It is trite that pre-trial orders made by court in terms of Rule 26 of the High Court Rules are binding on the parties. It is also trite that in terms of Rule 26(10), issues and disputes not set out in the pre-trial order are not available to the parties without leave from the managing judge or court granted on good cause shown. That is important and for the benefit of litigants to know beforehand what issues are in dispute and what are not in dispute; to narrow or limiting the issues to be decided by the court before they appear.'

[13] As per the court order dated 24 May 2018 the parties were ordered to file a joint proposed pre-trial order which court order was complied with on 25 July 2019. The court made the joint proposed pre-trial an order of court and this court again confirmed the joint proposed pre-trial order with the parties at the commencement of the trial.

[14] In the pre-trial order, which was drafted in terms of Rule 26 of the Rules of Court, the parties defined the issues in dispute/ not in dispute as follows:

¹ See *File-Matrix (Pty) Ltd v Feudenberg and Others* 1998 (1) SA 606 (SCA) at 614 as referred to in *Stuurman v Mutual Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) at 337.

² (I 309/2013) [2015] NAHCMD 106 (30 April 2015) par [12].

'TAKE FURTHER NOTICE that the issues set out in rule 26(6) were dealt with as follows:

a) and b) All issues of fact and law to be resolved during the trial:

1. Whether the Defendant maliciously and constructively deserted the plaintiff?
2. Whether the Defendant signed the power of attorney in order for the ANC to be executed?
3. Whether the plaintiff maliciously deserted the Defendant?

c) All relevant facts not in dispute in the form of a statement of agreed facts:

1.1 Both parties want a divorce.

1.2 Parties were married to each other in 1975 at Okeruru Village in Aminius Constituency in the Omaheke Region, which marriage was by virtue of traditional marital regime, which marriage still subsists. The traditional marital regime is governed by the traditional laws of the particular traditional community and is similar to the civil marriage which is out of community of property. All the children born of the marriage are majors.

1.3 The Parties at all relevant times, conducted their marriage according to the regime governing their marriage in that during the subsistence of the marriage both Parties controlled and governed their respective property independently and separately from each other.

1.4 During the subsistence of the marriage the Defendant's livestock, as well as other assets, including income derived from such assets, was managed separately as Defendant's own property and for her benefit only and to give effect thereof the Parties conducted separate banking accounts.

1.5 The Parties, on 23rd of October 2012, at Gobabis executed a power of attorney in which they reflected their intention to enter into an antenuptial contract to have a civil marriage out of community of property, which has similar proprietary consequences as the customary marital regime as the result of the following:

- i) The Defendant turned 60 years of age on 3rd August 2012;
- ii) Defendant as a result of attaining the age of 60 became entitled to old-age subsidy (Government pension);
- iii) Defendant approached the relevant Ministry and was advised to provide a marriage certificate to substantiate the marital status;

- iv) The communique was conveyed to the Plaintiff as the result the Parties as the result the Parties agrees to have a civil marriage with similar proprietary consequences as the customary regime and the power of attorney was executed at the offices of Kempen & Maske in Gobabis on 23rd October 2012;
- v) The Defendant knew what the nature of the documents were that she signed for and in respect of the registration of the antenuptial contract and the conditions of which she was acquainted with i.e. that the power of attorney executed by the Parties, were executed for the registration of antenuptial contract;
- vi) The Parties were married to each other out of community of property and the marriage still subsist.'

[15] At this point I will pause to point out that if one have regard to the pleadings and the pre-trial order, it is quite clear that both documents are contravening one another. However, in my view it is the natural consequence of the joint pre-trial order that certain aspects of the pre-trial order may contradict certain aspects of the pleadings and one should not lose sight of the fact that a pre-trial agreement in compliance with Rule 26 is a compromise between the parties³.

[16] With specific reference to the pre-trial order, it became apparent during the trial that the evidence of the defendant is contrary to the statement of agreed facts, as set out in the pre-trial order. I will return to this specific issue later during this judgment.

Evidence of the parties

The plaintiff

[17] The evidence of the plaintiff is simply that for the duration of their marriage, both traditional and civil, the parties conducted their estates and affairs separate from one another. At first it was in terms of the Otjiherero tradition and subsequently by civil marriage whereby it was out of community of property.

³ Jin Casings & Tyre Supplies CC v E Hambabi t/a Alpha Tyres (I 1522/2008) [2014] NAHCMD 73 (6 March 2014) at par [13]. Also See Farmer v Kriessbach I 1408/2010 – I 1539/2010 [2013] NAHCMD 128 (16 May 2013) (Unreported).

[18] However, as head of the household he would provide for the needs of the defendant but should she sell some of her livestock she would be the only one to benefit from such a sale. The plaintiff testified that when the parties entered into their traditional union, the defendant already had her own earmark for her livestock. Thus, as the parties increase their respective herds the livestock of the defendant would get her earmark, although it would carry the brand mark of the plaintiff as required, seeing that he is the owner of the farm.

[19] The plaintiff further testified that the parties entered into a civil marriage at the instance of the defendant as she turned 60 and wanted to benefit from the Government pension system. After some discussions the plaintiff agreed to enter into a civil marriage, provided that they marry out of community of property as he was responsible for the property and livestock of other people, which he wanted to exclude from his estate. He then made the necessary arrangements and the parties went to town on a pre-arranged date to sign the necessary documentation at the offices of the legal practitioners, Kempen and Maske in Gobabis. He stated that a lady at the offices of Kempen and Maske Legal Practitioners explained the documents they were required to sign and she confirmed with the parties that they indeed want to get married out of community of property. After the explanation both the defendant and plaintiff signed the power of attorney. The plaintiff received a letter from the offices of Kempen and Maske Legal Practitioners, which he subsequently took to the Magistrates Court to make an appointment and the parties hereafter got married in terms of civil law on 16 November 2012.

[20] Plaintiff testified that the defendant knew, at all times why they attended the offices of the legal practitioners that day, as they previously had a discussion of the subject matter-and were in agreement regarding the fact that they will get married out of community of property. The plaintiff emphasized again that he never intended to enter into a civil marriage but that it was at the insistence of the defendant.-

[21] In reply to certain averments made by the defendant in her witness statement the plaintiff confirmed that he requested the defendant to allow him to take a second wife in terms of Otjiherero custom but the defendant refused. He stated that in terms of the said custom if his wife refuses him to take another wife he would not be allowed to do so. After the refusal the relationship between the plaintiff and the defendant deteriorated substantially. The plaintiff stated that they had a family meeting to resolve the issues in respect of their relationship and even a traditional councillor was involved, who advised them to go home and sort out their issues. The plaintiff then donated two cows and two calves to the defendant as she alleged during this meeting that he was not maintaining her. Plaintiff states that thereafter he was under the impression that the issue was resolved, however he was summonsed by social services to whom the defendant also complained to that he is not maintaining her. The social worker apparently referred the parties back home to have a family discussion and to try and resolve the issues. Subsequently the defendant however left the communal home.

[22] The defendant also apparently obtained an interim protection order against the plaintiff but there was no proof before court that the said interim order was ever served on him. The plaintiff however denied any abuse on his part and stated that the defendant was the one who was not interested in the continuation of the marriage and she insulted and belittled him and in spite of the family meeting the parties had, the defendant did not change her attitude.

[23] The plaintiff therefore seeks an order of divorce and for the court not to grant the counterclaim on the division of the joint estate as the parties were not married in community of property and had no joint estate.

The defendant

[24] The defendant was insisting from the beginning of her examination in chief that their marriage was in community of property without even her being prompted by her counsel.

[25] The defendant proceeded to testify that after they got married they combined their various livestock in sustenance of their joint estate. She stated that as a couple they conducted their assets, livestock and joint household for their joint benefit and thus they entered into a joint partnership agreement.

[26] The defendant confirmed that she approached Home Affairs in respect of obtaining old age pension and she was advised that she must either have a marriage certificate issued by the traditional authority or the church, or have a yellow marriage certificate. She thereafter informed the plaintiff about the information she obtained from Home Affairs and he initially did not say anything but later agreed that they can enter into a civil marriage. On 23 October 2012 she was suffering from high blood pressure and the plaintiff took her to the doctor in town. After her visit to the doctor the plaintiff collected her and took her to the office of Kempen and Maske Legal Practitioners where she was informed that she had to sign certain documents but the nature and the contents thereof was not explained to her. She testified that she signed the documents as she was required by the plaintiff to do so. The defendant further testified that she was illiterate and did not know that what she signed was a power of attorney to register an ante-nuptial contract.

[27] The defendant stated that the plaintiff thereafter received a document from the offices of the legal practitioners, which the plaintiff handed in at the Magistrate's office and they subsequently got married on 16 November 2012.

[28] The defendant stated that the plaintiff's attitude started to change towards her after the parties signed the power of attorney. He then asked her to allow him to take a second wife, which request she refused. Thereafter the plaintiff stopped maintaining her and he started to alienate their joint property without sharing any of the proceeds with her.

[29] Because of the hardships she faced, the defendant proceeded to report a case against the plaintiff with the Women and Child Protection Unit in Gobabis on 13 October 2014, which lead to the granting of an interim protection order.

[30] During cross-examination the defendant was confronted regarding her evidence that she was illiterate and therefore had no knowledge of the contents of the documentation she signed. In this regard the defendant was presented with the affidavit she deposed to during her application for an interim protection order and on the strength of which an interim protection order was granted in her favour, which is clearly signed by the defendant. The defendant confirmed that the affidavit presented to her was the one she deposed to but could not explain the signature appearing on each page of the affidavit.

[31] The defendant was also questioned as to the marital custom in terms of which they managed their property during the 37 years of their customary union and the defendant was adamant that it was as if it is in community of property. The defendant denied that the custom that applied is as if the parties are married out of community of property. The defendant was however unable to tell this court to which royal house they belonged to or who their Chief was.

[32] The defendant prayed in her counterclaim that the court finds that the parties had a joint estate and that the court grants an order dividing the joint estate.

Pre-trial order as opposed to the evidence adduced

[33] As is evident the evidence of the defendant is contrary to the pre-trial order. Counsel for the defendant did not apply for an amendment to the pre-trial order and it is well established in our law that a pre-trial order is no different to any other agreement concluded consequent to deliberations between the parties or those that they may have expressly or impliedly authorised to represent them. It follows therefore that a joint proposed pre-trial order constitutes a binding agreement between the parties.

[34] In *Stuurman v Mutual Federal Insurance Company of Namibia Ltd*⁴ the Supreme Court expressed itself with regard to agreements made by parties on how they want to conduct their matters:

[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) ([1998] 1 All F SA 239) at 614B-D:

“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding.”[Footnote omitted].

In *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F-H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D): H

“. . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement.” ‘

[35] In *Jin Casings & Tyre Supplies CC v E Hambabi t/a Alpha Tyres*⁵, Parker AJ at para [12] on the above issues said:

‘It follows that in my judgment the defendant is bound by the pre-trial conference order; and if the order is not to the defendant’s liking the defendant has no one to blame but himself.’

⁴ 2009 (1) NR 331 (SC) at 337 para 21.

⁵ (I 1522/2008) [2014] NAHCMD 73 (6 March 2014).

[36] It was agreed in the pre-trial order in no uncertain terms that the parties managed their property separate from each other and for their own benefit and that they have been doing so from the onset of their marriage in 1975. The traditional marital regime is agreed to be similar to civil marriage which is out of community of property. It was further agreed that the power of attorney reflect the intention of the parties to enter into an antenuptial contract.

[37] Having considered the principles relating to pre-trial agreements and other agreements alike as it was laid down in the *Stuurman* case and the cases cited therein it follows in my judgment the defendant is bound by the pre-trial order and the defendant cannot be allowed to rely on issues not contained in the pre-trial order.

Issues for determination

[38] This court will therefore limit this judgment to the issues the parties referred to the court for determination.

Whether the Defendant maliciously and constructively deserted the plaintiff?

[39] 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 after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.'⁶

[40] It is common cause that the court has jurisdiction in this matter and that the parties were married and are still so married.

⁶ (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), paragraph 9.

[41] However, was there malicious desertion by the defendant? In the authoritative work of Nathan C J M *South African Divorce Handbook*⁷ the learned author 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.’

[42] Furthermore, there are four forms of malicious desertion, namely:⁸

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*⁹ proceeds and argues that three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:
 - (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

⁷ Nathan C J M *South African Divorce Handbook* at 4. Referred to in *Likando v Likando* (I 1384/2011) [2013] NAHCMD 265 (30 September 2013), paragraph 11 – 13.

⁸ *Likando* case, para 13.

⁹ H R Hahlo 3rd ed 1969 *The South African Law of Husband and Wife*, Cape Town, Juta & Co Ltd, at 387.

4. Sentence of death or life imprisonment.

[43] Having regard to the aforementioned the court must find if the plaintiff has succeeded in discharging his onus of proving constructive desertion which would result in the granting of a restitution order.

[44] The reason why the defendant left the common home is critical in establishing whether or not she is the guilty party or whether the plaintiff is the guilty party.

[45] It is common cause that the defendant left the common home during 2014 and to date has not returned. It is necessary to note that the defendant did not counter any of the grounds of divorce raised by the plaintiff and same was not placed in dispute either in the pre-trial agreement or during cross-examination for that matter. The issue raised by the defendant that the plaintiff did not maintain her was countered by the plaintiff during his evidence and appears to have no merits. It would therefor appear that the defendant left the common home by choice.

[46] The court is quite satisfied that the plaintiff has proven on a balance of probability that the defendant physically deserted the plaintiff.

Whether the Defendant signed the power of attorney in order for the ANC to be executed?

[47] Plaintiff's counsel drew the court's attention to the *caveat subscriptor* rule which is a general rule that holds a person who signs a contractual document against them which signifies his/her consent and/or agreement to the contents of a document¹⁰.

[48] In *Standard Bank Namibia Limited v Alex Mabuku Kamwi*¹¹ it was held that:

¹⁰ *Standard Bank Namibia Limited v Alex Mabuku Kamwi* (I 2149/2008 [2013] NAHCMD 63 (7 March 2013) (Unreported)

¹¹ *Ibid.*

[20] It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but himself. (R H Christie, *The Law of Contract in South Africa*, 5th ed (2006): pp 174 – 175). This is the *caveat subscriptor* rule which Ms Williams reminded the court about. And the true basis of the principle is the doctrine of quasi mutual assent; the question is simply whether the other party (in this case the plaintiff) is reasonably entitled to assume that the signatory (in this case the defendant), by signing the document, was signifying his intention to be bound by it (see Christie, *The Law of Contract in South Africa*, *ibid.*, p. 175). The only qualification to the rule is where the signatory had been misled either as to the nature of the document or as to its contents. (Christie *The Law of Contract in South Africa*, *ibid.*, p 179)

[49] It is common cause when one have regard to the statement of the agreed facts that the parties on 23rd of October 2012, at Gobabis, executed a power of attorney in which they reflected their intention to enter into an antenuptial contract to have a civil marriage out of community of property. It was also confirmed in the proposed pre-trial order that the defendant knew what the nature of the documents were that she signed for. She was aware of the registration of the antenuptial contract as well as the conditions of which she was acquainted with i.e. that the power of attorney executed by the parties, was executed for the registration of an antenuptial contract.

[50] On her own version the defendant confirmed that she signed the power of attorney at the offices of Kempen and Maske Legal Practitioners.

[51] As with the *Kamwi* case I find that on the facts the full force of the *caveat subscriptor* rule must apply in this proceeding, and so I apply it. The plaintiff and defendant signified their intention to conduct their marriage as one out of community of property and signed a power of attorney with the intention to have an ante-nuptial contract executed on their behalf. It was set out in the statement of agreed facts that ‘the Defendant knew what the nature of the documents were that she signed for and in respect for and in respect of the registration of the antenuptial contract and the

conditions of which she was acquainted with i.e. that the power of attorney executed by the Parties, were executed for the registration of antenuptial contract'.

[52] The defendant knew exactly what she and the plaintiff were doing at the offices of the legal practitioner as she was the one who initiated the civil marriage.

[53] One should keep in mind that the parties were married for 37 years already and there was no reason to enter into a civil marriage. According to the defendant the offices of Home Affairs required a marriage certificate either from the traditional authority, a church or the 'yellow' marriage certificate. Having regard to this there would actually be no need to have a civil marriage. There is nothing that precludes people living with a life partner from getting pension.

[54] The defendant cannot now resile from that statement in the pre-trial order by means of her evidence. In any event the fact that the defendant wants this court to believe that she is illiterate is highly questionable giving the fact that she was able to properly sign her affidavit deposed to obtain her interim protection order.

Whether the plaintiff maliciously deserted the Defendant?

[55] The defendant testified that the plaintiff's attitude towards her changed after the power of attorney was signed and after she refused the plaintiff to take in a second wife. She obtained an interim interdict on an *ex parte* basis but this interim interdict was never served on the plaintiff and averments contained therein was never tested before a court having jurisdiction. There is no evidence before this court in support of the contention that the plaintiff did not support and maintain the defendant. When the defendant made that allegation, the plaintiff donated two cows and two calves to the defendant and then in 2014 the defendant moved out of the common home.

[56] It is undisputed that prior to the defendant moving out of the common home the parties attended a family meeting to address the issues regarding their marriage but this meeting does not seem to have had any change.

Conclusion

[57] It is a sad day that a marriage of almost 44 years must come to this point where a court of law must separate the bond of marriage between an elderly couple. The couple is in the sunset of their lives and is supposed to enjoy the fruits of their years of labour and spend time with their children and grandchildren. Be that as it may, the court is bound to make a decision with regard to the issues before it.

[58] My order is therefor as follows:

1. The defendant's counter claim and defence to the plaintiff's claim is dismissed with costs.
2. The Court grants judgment for the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before the **29th** day of **April 2019**, failing which to show cause, if any, to this Court on the **03rd** day of **June 2019** at **10H00** why:
 - a. The bonds of the marriage subsisting between the parties should not be dissolved.

J.S. Prinsloo
Judge

APPEARANCES

PLAINTIFF:

Hans Inc.

A-DN Hans - Kaumbi

Ueitele &

DEFENDANT:

M Siyomunji
Siyomunji Law Chambers