

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

| | |
|---|--|
| Case Title: S P v E P | Case No: HC-MD-CIV-ACT-MAT-2018/01081 |
| | Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE | Date of hearing: 13 MARCH 2019 |
| | Date of order: 25 MARCH 2019 |
| | Reasons delivered on: 25 MARCH 2019 |
| Neutral citation: <i>S P v E P</i> (HC-MD-CIV-ACT-MAT-2018/01081) [2019] NAHCMD 64 (25 March 2019) | |
| Results on merits: On the merits. | |
| <p>The order:</p> <p>Having heard Ms Katjaerua for the plaintiff and Ms Mbaeva, for the defendant, and having read the documents filed of record:</p> <p>IT IS HEREBY ORDERED THAT:</p> <ol style="list-style-type: none"> 1. The relief sought by the defendant in his counterclaim for the specific forfeiture order, to wit: erf 3001 Johan Albrecht Street, Windhoek North, Windhoek, Namibia, is hereby dismissed. 2. Cost of suit, capped in terms of Rule 32 (11) of the High Court Rules. 3. The matter is postponed to 11 April 2019 at 15h00 for a status hearing. | |
| Reasons for orders: | |
| <p><u>Introduction and brief background</u></p> <p>[1] The parties hereto were married to each on 22 December 1990 at Ruacana, Namibia, which marriage is in community of property and which marriage still subsists. The parties signed a declaration in terms of s 17 (6) of Proclamation 15 of 1928, indicating the parties' marriage in community of property.</p> | |

[2] The plaintiff in this matter issued summons on 20 March 2018 wherein, in her particulars of claim, she seeks an order for the restitution of conjugal rights against the defendant, and failing compliance therewith a final order of divorce, on the grounds as set out in her particulars of claim, and an order for the division of the joint estate, to wit: erf 3001, Johan Albrecht Street, Windhoek North, Windhoek.

[3] The defendant however filed a notice to defend the matter and subsequently filed a plea and counterclaim to the plaintiff's particulars of claim. In his counterclaim, defendant also seeks a restitution of conjugal rights against the plaintiff, and failing therewith a final order of divorce. In his counterclaim, prayer 2, the defendant seeks an order couched as follows:

'Forfeiture of benefits derived from the marriage as Plaintiff deserted Defendant and their children and furthermore made no financial contributions towards the purchase and/or settling of the outstanding debt on the property, to wit, Erf 3001 Johan Albrecht Street, Windhoek;'

The issues

[4] The issues called for determination in this matter is two folds, ie what the legal consequence of the joint estate for a marriage in community of property is and whether the defendant is entitled to a forfeiture order as prayed for in his counterclaim.

Parties' submissions

Legal consequences of the joint estate for a marriage in community of property

[5] Ms Katjaerua, counsel for the plaintiff, submitted that it is a natural consequence of the law and a benefit of a marriage in community of property that the estate is divided equally between the parties. She referred the court to my learned brother's judgment of *Mbahuura v Mbahuura*¹ wherein Parker J said that if there is no order specifically made for the division of the joint estate then, as a consequence thereof, the law provides that the parties estate be divided equally.

[6] Ms Mbaeva, counsel for the defendant, equally submitted that it is indeed a well-established principle in our law that if a marriage in community of property is disbanded, the community of property takes place as a matter of law, except where the court orders otherwise.

¹ *Mbahuura v Mbahuura* A 31/2015 [2015] NAHCMD 230 (1 October 2015).

Forfeiture of benefits

[7] With regard to the issue of forfeiture of the property, Ms Katjaerua referred the court to the landmark case of *Carlos v Carlos; Lucian v Lucian*² wherein Heathcote AJ articulated the relevant principles when a specific forfeiture order is sought. The case also sets out all the relevant information that a litigant needs to allege in his/her pleadings in order to succeed with a specific forfeiture order.

[8] Counsel submits that, considering the necessary allegations that needs to be made in the pleadings in order to succeed with a specific forfeiture order and more respectively for the defendant to succeed with a forfeiture order of erf 3001 Johan Albrecht Street, Windhoek North, Windhoek, Namibia (herein referred to as the immovable property) sought to be declared forfeited to him in the present matter, the defendant failed to properly plead and establish a claim for a specific forfeiture order. The averments which are necessary for such an order were not properly pleaded. She further submits that no allegations are made anywhere on the pleadings that the defendant is entitled to a specific forfeiture order. The defendant has dismally failed to discharge his onus in that regard.

[9] Counsel further submits that the fact that the defendant merely makes mention of the property, that is, seeking the forfeiture of the immovable property in his prayer in his counterclaim, does not rescue the defendant in any manner. Furthermore, she submitted that defendant's allegations that the plaintiff made no financial contribution towards the purchase and/or settling of the outstanding debt on the immovable property does not assist him in the court granting a specific forfeiture order.

[10] Counsel, in conclusion, submits that the defendant has failed to lay down any basis for a specific order and prays for the court to grant an order for the equal division of the joint estate, including the immovable property.

[11] Ms Mbaeva, counsel for the defendant, submits that the defendant bought the immovable property in his own name and has made all payments himself towards the house. Counsel submits that the reason why the plaintiff submitted her payslip to the Bank when the house was purchased was because the parties are married and that it was a requirement of the Bank that the income of the plaintiff was reflected. She argues that the fact that the plaintiff submitted her payslip did not mean that the parties purchased the immovable property together as there was no joint application of the loan for purchasing the immovable property. She further submits that plaintiff made no contribution towards the upkeep of the house or its maintenance and

² *Carlos v Carlos; Lucian v Lucian* (I 141/10) [2011] NAHC 156 (10 June 2011).

has also not made any payments towards any expenses relating to the house. She argued that the plaintiff was the one who left the common home and caused the breakdown of the marriage by maliciously deserting her home and children. If plaintiff is to share in the property to which she has made no contribution she would be receiving an undue benefit.

[12] Defendant does not agree with plaintiff's submission that no allegations are made in the pleading that the defendant is entitled to the forfeiture of the property in question. Counsel submits that if you have regard to the defendant's plea he clearly states that the cause of the breakdown of the marriage is due to the malicious desertion by the plaintiff, that he identified in his prayer the property that must be forfeited and the reason why the property should not form part of the joint estate. Counsel further submits that the fact that the defendant failed to plead the value of the property in his counterclaim is not fatal as the court has a discretion to grant a specific or quantified forfeiture order on the day the restitution is granted, if the necessary evidence is led at trial.

[13] In conclusion, counsel submits that, plaintiff maliciously deserted her matrimonial home, husband and children. There was and there is no conditions present in the home which led the plaintiff to leave the home (property). Defendant is left to take care of the property as well as their two children. Plaintiff did not make any contributions towards the purchase of the immovable property, the maintenance or upkeep of the said property, despite being gainfully employed. Further, she does not make any payments towards the loan and she will therefore benefit unduly from the sale of the immovable property. Plaintiff therefore cannot benefit unduly from her misconduct.

Applicable law

[14] The different types of forfeiture orders and the principles to be applied in an application for forfeiture of benefits was summarized by the then acting judge of the High Court, Heathcote AJ in *Carlos v Carlos Lucian v Lucian*.

[15] Heathcote AJ differentiated between three kinds of forfeiture orders as follows:

'Firstly, what I shall term a "general forfeiture order", being an order which simply reads "the Defendant shall forfeit the benefits arising out of the marriage in community of property", secondly, a forfeiture order which I shall term a "quantified forfeiture order" (i.e. an order in terms of which the court determines the ratio with regard to which the estate should be divided to give effect to a general forfeiture order (e.g. 6:4); and lastly, what I shall term a "specific

forfeiture order" (e.g. when a specific immovable property is declared forfeited).³

[16] With regard to the legal principles applicable in Namibia to forfeiture orders, Heathcote AJ, as he then was, elucidated the common law and its principles as follows:

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

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

[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 lead 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 indentified. 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);

[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);

³ Para 5.

[22.9] It is of no significance or assistance, if the Plaintiff merely leads evidence that, in respect of a specific property he or she had made all the bond payments and the like. What about the Defendant's contributions towards the joint estate or other movable or immovable property in the joint estate? . . .'

[17] Heathcote AJ in his judgment at para [8.6] also referred to the case of *Gates v Gates* with approval, wherein he quoted the learned judge Selke J, stating that:

'It seems to be indisputable that although a wife may not, in a positive sense actually bring in or earn any tangible asset or money during the marriage, her services in managing the joint household, performing household duties, and caring for children have a very real and substantial value, which may well, and usually does exceed the bare costs of her maintenance.'⁴

[18] Heathcote further held at para [14] of his judgment that:

'It is clear from the reasoning of the learned judge that, where a Plaintiff claims a general forfeiture order, no allegations are necessary to be made in the particulars of claim (as to the value of the estate and the respective parties' contributions). But, where a quantified or specific forfeiture order is sought the necessary allegations should be made in the pleadings.'

Application of the law to the facts

[19] From the submissions made by the parties as alluded to above, it is common cause that the parties are married to each other in community of property and it is not a disputed fact by the parties. It is therefore not necessary for me to pronounce myself on the effect of the legal consequences of the joint estate of a marriage in community of property. I will therefore deal with and concentrate on the pertinent issue, which is the forfeiture of benefits.

[20] In considering the facts and submissions made by both parties, the question to be addressed is whether the defendant is entitled to a forfeiture order as prayed for in its counterclaim.

[21] It is important to note that a forfeiture order cannot be granted automatically and must be specifically requested in the summons and or counterclaim. As held in the *Carlos* case the court, in exercising its discretion, can grant a specific forfeiture order. However, this order is only granted in exceptional circumstances, and these exceptional circumstances require that the party must have made the necessary

⁴ *Gates v Gates* 1940 NPD 361 at 364.

allegations in the particulars of claim and in this case, the defendant must have made the necessary allegations in his counterclaim. The following are the necessary allegations to be made:

1. The value of the estate should be alleged.
2. The specific asset sought to be declared forfeited should be identified.
3. The defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. It is necessary for the party to allege that no contribution was made to the joint estate, not that no contribution was made to the acquisition or maintenance of the specific asset (my own emphasis).

[22] The above allegations must be substantiated with the necessary evidence at trial.

[23] In the analysis of the counterclaim filed by the defendant, it is evident that no averments were made regarding the value of the estate at the time. No such evidence was also led at the hearing. Furthermore, no averments were made in the counterclaim that the plaintiff made no contribution to the joint estate. The only allegation made is in prayer 2 wherein the defendant alleges that the plaintiff 'made no financial contribution towards the purchase and/or settling of the outstanding debt on the property ...' As Heathcote AJ correctly puts it, the court will not accept such an argument. A party must clearly allege that the other party did not contribute to the joint estate (my own emphasis). It is evident from the plaintiff's plea to the defendant's counterclaim that she contributed to the joint estate and pleads as follows:

'... Plaintiff, pleads that she was always employed as a nurse during the time of their marriage. She earns currently a salary of approximately N\$ 12 622.75 as her net pay (that is the take home salary, after deductions), it is worth noting that in the past years the net amount was less than the current amount and as such has only increased over the years. With her salary, Plaintiff would pay for the following joint necessities: school fees of their children, groceries for the whole household, alarm system and made a good contribution to the purchase of some various furniture in the common home.'

[24] The above averments were not disputed by the defendant at the hearing and should therefore be evident that the plaintiff did contribute to the joint estate during the marriage, although she did not contribute to the property as alleged by the defendant. What is important is that a sufficient and notable contribution was made to the joint estate. Furthermore, no evidence was led on behalf of the defendant that he contributed anything towards the joint estate.

[25] In conclusion, no sufficient evidence was placed before me and led to establish exceptional

circumstances to grant the specific forfeiture order as sought by the defendant in his counterclaim. All the requirements necessary to sustain a specific forfeiture order were not pleaded nor was the evidence led and I see no reason why I should deviate from what was held down in the authoritative judgment of *Carlos*.

[26] In the result, the relief sought by the defendant in his counterclaim for the specific forfeiture order, to wit: erf 3001 Johan Albrecht Street, Windhoek North, Windhoek, Namibia, is hereby dismissed and cost is granted in favour of the plaintiff, capped in terms of Rule 32 (11) of the High Court Rules. The matter is therefore postponed to **11 April 2019** at **15h00** for a status hearing.

| | |
|--|--|
| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Applicant | Respondent |
| <i>Ms L Mbaeva</i> <i>Of</i> <i>Brockeroff Legal Practitioners</i> | <i>Ms E Katjaerua</i> <i>Of</i> <i>Katjaerua Legal Practitioners</i> |