



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

CASE NO: I 1833/2011

In the matter between:

LINDA IPINGE

PLAINTIFF

And

MALAKIA N LUKAS

FIRST DEFENDANT

FRIEDA NAKUUMBA

SECOND DEFENDANT

Neutral citation: *Ipinge v Nakuumba* (I 1833/2011) [2020] NAHCMD 45 (11 February 2020)

CORAM: E ANGULA AJ

Heard: 14 September 2016; 17-21 October 2016; 22-23 November 2016; 2, 9-15 April 2019; 15 July 2019; 21 November 2019; 8 December 2019;

Delivered: 11 February 2020

MARRIAGE — Whether the parties were married in community of property or out of community of property in terms of s 17 (6) of the Native Proclamation 15 of 1928 — Matrimonial property regime — Marriages governed by Native Administration Proclamation 15 of 1928 — Marriage presumed to be out of community of property unless parties within one month before marriage declared that they desired marriage to be in community of property — Proc 15 of 1928, s 17(6) — secondary documentary evidence corroborative of the plaintiffs' version. A written declaration was clearly made by the parties in front of the pastor and filed with Home Affairs — marriage between the parties is in community of marriage.

SPOUSAL MAINTANANCE — Parties have **not** lived together for 20 years — Both parties have retired and no evidence that defendant is employed to afford to pay the plaintiff maintenance — the duty to pay maintenance, and the quantum thereof, is dependent on the ability of the guilty party to pay, the ability of the innocent party to earn an income for her own maintenance, and the period for which the marriage lasted — that the circumstances of the parties and their respective ages render this matter inappropriate for the grant of maintenance in favour of the plaintiff as requested — court declined to exercise its discretion in favour of the innocent party.

FORFEITURE ORDER — Applicable principles — when parties are married to each other in community of property, and the defendant commits adultery or maliciously deserts the plaintiff, the court has no discretion but to grant a general forfeiture order, if so requested. The court will grant such general forfeiture order without enquiring as to the value of the estate at the date of divorce, or the value of the respective parties' contributions.

Summary: The issue for determination is whether the plaintiff and first defendant are married in or out community of property. The parties agreed that the marriage was solemnised between them on 10 December 1970, 49 years ago. The plaintiff caused to

be admitted into evidence a marriage certificate, certified copies of a declaration under s 22(3) of Native Administration Act 1927, a duplicate original marriage register and a certificate of Banns of Marriage. Both parties testified on their behalves and the Executive Director of the Ministry of Home Affairs, Mr. Maritz gave testimony to the documents admitted into evidence by the plaintiff. At the end of the case, the court evaluated the evidence in view of the contradictions and inconsistencies in the plaintiff case. The court considered the fact that the parties were married some 49 years ago and are of old age. The evidence of the plaintiff cannot be said to be unreliable as she maintained that the defendant proposed to be married in community of property and both herself, the defendant and the pastor were present when the declaration was written out and signed. Although the defendant denied any knowledge of the declaration and disputed that he signed the documents, it cannot be said that the defendant was not a credible witness because it was obvious that he was old and did not have clear recollection of the events that unfolded during the time of the marriage. Plaintiff herself relied on the document to recollect what had transpired. The defendant denied any knowledge of a marriage register, but confirmed the validity of the duplicate marriage certificate, which was sourced from the marriage register. Defendant did not deny that he proposed to be married in community of property to the plaintiff. The marriage was held to be in community of property in terms of the proclamation. Maintenance of the plaintiff was refused and a general forfeiture order was granted in favour of the plaintiff on grounds of defendant's adultery.

Held — That the secondary documentary evidence is collaborative of the plaintiffs' evidence. A written declaration was clearly made by the parties in front of the pastor and filed with Home Affairs. The content of the declaration is clear and unequivocal. That the parties did enter into a marriage which is in community of property within the meaning of s 17(6) of Proclamation 15 of 1928.

Held — That there was not placed before court sufficient evidence to evaluate the ability of the defendant to pay maintenance in the face of undisputed fact that the defendant is no longer employed and has retired. Held further that the circumstances of the parties

and their respective ages renders the case one which is not appropriate for the grant of maintenance in favour of the plaintiff as requested. Court therefore declined to exercise its discretion in favour of the innocent party (the plaintiff).

Held — That the court has no discretion, under the circumstances where the parties are married to each other in community of property and the defendant commits adultery, but to grant a forfeiture order as prayed for by the plaintiff.

ORDER

1. The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
2. Division of the joint estate.
3. Forfeiture of the benefits arising from the marriage in community of property in favour of the plaintiff.
4. That Mrs Essie Herbst is hereby appointed as Receiver for the purpose of taking all steps necessary to give effect to the order of division of the joint estate and the general forfeiture order with the powers, rights and functions as provided for in the plaintiff's amended particulars of claim.
5. The defendant bears the costs of the appointment of the Receiver.

6. The defendant to pay plaintiff's costs of suit, which costs includes the costs of one instructing and one instructed counsel.

JUDGMENT

E ANGULA, AJ:

Introduction:

[1] During 2011 the plaintiff instituted action against the defendants for divorce and division of the joint estate. During 2015 the plaintiff amended her particulars of claim. First defendant (defendant) defended the action, claiming that the marriage between the parties in out of community of property. During 2015 the second defendant instituted action for divorce against the defendant. Defendant was married to the plaintiff when he also married the second defendant. The main parties in this dispute is the plaintiff and defendant.

[2] It is common cause the plaintiff and the defendant were married to each other on 10 December 1970 at Onesi, Omusati Region, Republic of Namibia. All children born of the marriage between the parties are majors. The relevant provisions of the Native Administration Proclamation 15 of 1928 is applicable to the marriage between the plaintiff and defendant.

[3] It is further common cause that the defendant admitted the adulterous relationship between him and the second defendant and that a divorce may be granted on such basis. The defendant admitted that during 1980, he chased the plaintiff from the common home of the parties. This admission was not withdrawn by the defendant.

[4] The main issue in dispute between the parties is whether they are married in or out of

community of property. The plaintiff testified on her own behalf as well as the defendant. The Executive Director of the Ministry of Home Affairs also testified in respect of the relevant documentation.

[5] The plaintiff seeks the following relief:

- 1.1 *A final order of divorce.*
- 1.2 *A division of the joint estate.*
- 1.3 *An order that the defendant pay maintenance in the amount of N\$1000 per month to the plaintiff in respect of her maintenance.*
- 1.4 *Forfeiture of the benefits arising from the marriage in community of property.*
- 1.5 *The appointment of Mrs Essie Herbst as Receiver for the purpose of taking all steps necessary to give effect to the division of the joint estate with the powers, rights and functions as provided for in the plaintiff's amended particulars of claim.*
- 1.6 *Directing that the defendant bear the costs of the appointment of the Receiver.*
- 1.7 *Costs of suit including the costs of one instructing and one instructed counsel.*

Was the marriage 'in' or 'out' of community of property?

[6] It is common cause that the marriage between the plaintiff and the defendant was solemnised in the north of Namibia, namely north of the Police Zone on 10 December 1970 at Ones, Omusati Region. It is further common cause that the applicable legislation at the time of the marriage and in respect of them was the Native Administrative Proclamation 15 of 1928 (the Proclamation) and that the appropriate provision thereof, namely s 17(6) which provides:

'A marriage between Natives, 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 anytime within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner 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.'

[7] The effect of this legislative provision has been thoroughly discussed in the case of *Mofuka v Mofuka*¹, Maritz J stated the legal position as follows:

'The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the "Police Zone" is significant. No longer does community of property follow unless excluded - rather, the converse applies: The marriage is out of community of property, unless declared or agreed otherwise.'

[8] Maritz, J dealt with the proof of the agreement and stated it as follows:

'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. See generally Ex parte Jacobson et Uxor 1949 (4) SA 360 (C); Ex parte Moolman et Uxor 1947 (3) SA 686 (E) and Ex parte Kleinschmidt et Uxor 1952 (3) SA 761 (O).'

[9] Once the Court is satisfied that the parties had entered into an agreement concerning the matrimonial property system, and that they had agreed so prior to their marriage, and even though no other terms were agreed upon, the Court would presume that the parties intended their marriage to be governed by the ordinary minimum terms applicable to the specific property regime. See *Ex parte Swart and Swart*.²

[10] Where a marriage in community of property was dissolved by the court, a dissolution of the community of property takes place as a matter of course. Where the court grants a

¹ 2001 NR 318 (HC) by Maritz J (as he then was), as well as the Namibian Supreme Court in *Mofuka v Mofuka* 2003 NR 1 (SC)

² 1953 (3) SA 22 (T) at 24F - G ; See also *Valindi v Valindi and Another* 2009 (2) NR 504 (HC) *Nakashololo v Nakashololo* 2007 (1) NR 27 (HC) and *EN v SN* 2014 (4) NR 1193 (HC)

divorce on the ground of adultery, and the marriage was in community of property, if the successful plaintiff claimed an order that the defendant forfeit the benefits derived from the marriage in community, the court has no discretion to refuse to grant such an order. The order of forfeiture is an order following upon a determination of the rights of the parties *inter se* at the termination of their marriage.³

The Evidence

[11] Exhibit A, being a duplicate marriage certificate was accepted into evidence. In terms of exhibit A, the marriage between the parties was officiated by a pastor P Nambundunga at Onesi, Omusati Region. In addition to the marriage certificate, the plaintiff cause to be admitted into evidence, without any objection, certified copies of other documents exhibit as follows:

Exhibit “B” – being a declaration under section 22(3) of Native Administration Act, 1927 and “B1” is a sworn translation thereof.

Exhibit “C” – being a duplicate original marriage register and exhibit “C1” is a sworn translation thereof.

Exhibit “D” – being a certificate of Banns of Marriage and exhibit “D1” is a sworn translation thereof.

Exhibit “E” – being another certified copy of the original the original marriage register and Exhibit “E1” is a sworn translation thereof.

[12] The plaintiff testified that their marriage is one in community of property and a joint declaration, Exhibit “B”, was handed into evidence as the declaration made by the parties on 20 November 1970. In her evidence, plaintiff confirmed that the defendant proposed

³ See: S v S 2013 (1) NR 114 (SC).

to her that they be married in community of property and she agreed thereto. They declared to the pastor, when asked, that they want to get married in community of property.

[13] The plaintiff pointed out that the respective signatures on the Exhibit "B" to be that of hers and the defendant. The plaintiff pointed out her own signature and identified the signature of the defendant. The contested exhibit "B" is in the Afrikaans language, but the sworn translation thereof read as follows:

"To the marriage officer Paavo Nambundunga

Onesi P O Ondangwa

Owambo, S.W.A

Dear Reverend,

To us, Malakia Lukas and Linda Ipinge, the marriage in community of property and the law of inheritance resulting therefrom were explained.

We herewith inform you that it is our intention and wish that our marriage must result in community of property and of profit and loss.

Onesi, 20 November 1970

[2 signatures]

[14] The duplicate marriage register, Exhibit C, is written out by hand and indicates the names of the parties, together with two witnesses and is stamped that the marriage between the parties is one in community of property in terms of s 17(6) of Proclamation 15 of 1928.

[15] Initially, only the plaintiff was called to testify on her behalf and after the plaintiff's case was closed and reopened, Mr A J Maritz, the Executive Director of the Ministry of Home Affairs was subpoenaed on behalf of the plaintiff to produce the original of the

documents testified to by the plaintiff. They called Mr Namandje of Sisa Namandje and Co to testify regarding the source of the documents discovered by the defendant.

[16] The plaintiff maintained that the parties were married in community of property. It is common cause that the relevant documents handed in by the plaintiff, the original of which were presented into court by the Ministry of Home Affairs, constitute secondary evidence. Mr Maritz produced the original Exhibit B- being the declaration, the duplicate original marriage register from which Exhibit "C" was purported copied. He explained that they cannot trace the original marriage register and that the mistake happened in the 70's, a duplicate instead of the original was forwarded to their offices. The original of Exhibit "E", could not be produced.

[17] According to the evidence of Mr Maritz, the page of the declaration under Section 22 (3) which was seemingly attached to Exhibit "B" is not in possession of the Ministry of Home Affairs. This page is of no consequences to the actual declaration.

[18] A simple comparison between Exhibit "C" which purports to be a copy of the duplicate original marriage register and Exhibit "E" which purports to be an original demonstrates that Exhibit "C" is not a carbon copy of Exhibit "E". These discrepancies are apparent from the documents. It is evident from the evidence of Mr. Maritz that there were no proper controls regarding the custody of the original records as some of them have either become misplaced or lost.

[19] The defendant testified that he did know the documents and does not know who wrote these documents. The defendant further testified that the signatures appearing on the purported declaration was not his and that he did not make a declaration. The defendant testified that he did not know who completed the documents (declaration).

[19] It was submitted further that the documents, when considered in conjunction with the provisions of the Marriages Act, their origin is undisputed, as confirmed and verified by the evidence of Mr Maritz.

[20] In the matter of *Smith v Mediva Fisheries (Pty) Ltd and Another*⁴, the following was stated regarding the proper approach by the Court in determining which of the two conflicting versions to believe⁵:

'In the matter of Motor Vehicle Accidents Fund v Lukatezi Kulubone Mtabanengwe, JA outlined the approach he adopts in determining which of two conflicting versions to belief as the approach advocate by Mr. Justice MacKenna when he said:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I 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 like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's.'

[21] In regard to the determination of disputes of fact in an action and determining the probabilities of a matter, the following is valuable:

⁴ (I 429/2012) [2013] NAHCMD 152 (06 JUNE 2013)

⁵ Footnotes omitted

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to(c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail⁶.'

[22] Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness⁷.

"...It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings..."⁸

⁶ *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC); *Vermeulen and Another v Vermeulen and Others* 2014 (2) NR 528 (SC); *Pieterse v Clicks Group Ltd and Another* 2015 (5) SA 317 (GJ) A; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC)

⁷ See: Section 16 of the Civil Proceedings Evidence Act 25 of 1965 (as amended) ("the CPEA")

⁸ See: Section 15 of the CPEA

[23] *In S v BM 2013 (4) NR 967 (BNLD)* this court discussed applicable case law pertaining to discrepancies between a witness statement and the witness' testimony in court and concluded as follows at 1014E – 1015C:

'[187] From the above it is clear that not every discrepancy between a witness's statement and his or her evidence in court would affect the credibility of such witness, but only when the discrepancy is found to be material and the court is further satisfied that the witness statement correctly reflects what the witness had earlier said. When the court is required to evaluate contradicting evidence emanating from the witness statement, the approach to be adopted by the court is set out in S v Mafaladiso en Andere [2003 (1) SACR 583 (SCA)] (headnote):

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and E what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions — and the quality of the explanations — and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide

whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593E – 594H). [My emphasis.]'

[8] *In my view a court of law in its assessment of evidence should be slow in discrediting a witness because of minor inconsistencies observed between a previous statement made by the witness and his/her testimony in court...*⁹

[24] It is common cause the defendant allege that the Plaintiff's evidence is unreliable, and her version is contradictory. It was argued on behalf of the defendant that defendant's version regarding the exhibits was simple and straight forward. It submitted on behalf of the plaintiff that consideration should be given to the age of the plaintiff and defendant and the fact that the marriage occurred some 49 years ago. It was argued that it is reasonable for there to be inconsistencies in the evidence of both parties and any such inconsistencies must however be considered in the context of the remaining evidence, including the documentary evidence. Plaintiff counsel argued that such inconsistencies does not make the evidence of the plaintiff unreliable.

[25] The plaintiff's evidence maintained that she was present when the declaration was written and signed. The plaintiff became confused and inconsistent in her testimony when questioned whether the defendant was present when the declaration was written out and signed. When she was asked who signed, she pointed to the top of the second page of Exhibit "B" indicating that the defendant signed there and also pointed to the bottom above the words "Omuhokani", at the same time, indicating that the defendant signed at the bottom of the page as well. This was clearly not correct.

[26] It was apparent that the plaintiff relied on what is stated or appearing in the document instead of recalling exact signature or writing on the declaration where the defendant actually wrote his name and where she herself wrote her own name. It was obvious that she could not recall precisely how the document was created. The plaintiff's evidence was however consistent that when the declaration was signed, the defendant, herself and the

⁹ S v Unengu 2015 (3) NR 777 (HC)

pastor were present.

[27] From the evidence presented before me, I find the following: (1) The parties are of old age and were unable to recall how exactly they got married and the circumstances surrounding the signing of the declaration. The plaintiff was forthright and forthcoming with her answers, even when they were inconsistent with the documents. I found her evidence to be reliable, despite the inconsistencies. I take note that the evidence is in her witness statement and evidence in chief where not contradictory. I cannot discredit her evidence in view of the inconsistencies under cross examination when she was required to recall precisely who signed where and how.

[28] The defendant on the other hand denied that the documents presented to him were signed by him and denied knowledge thereof. The defendant furthermore denied that he signed the marriage register whilst admitting to the marriage certificate. I accept that the defendant might have forgotten the documents he signed because the marriage took place a long time ago or he cannot recall what documents he signed at that time. I cannot blame him because of his old age. (2) I found the secondary documentary evidence collaborative of the plaintiffs' version. A written declaration was clearly made by the parties in front of the pastor and filed with Home Affairs. The original was produced in court from which it was apparent that the parties and the pastor signed it. The content thereof is clear and unequivocal.

[29] Thirdly, I find that the defendant did not dispute the testimony of the plaintiff that the defendant proposed to be married in community of property to her. His was merely to deny the existence of the documents produced by the plaintiff.

[30] It is my assessment of the evidence as a whole that the parties concluded an agreement prior to the marriage and jointly declared before a marriage officer, which declaration was reduced in writing expressing their joint intention and desire to be married in community of property. It is my decision that the parties did enter into a marriage which is in community of property within the meaning of s 17(6) of Proclamation 15 of 1928.

Maintenance

[31] The plaintiff claims from the defendant for maintenance in the amount of N\$1000.00 per month. The defendant contend that he could not be ordered to pay the plaintiff any maintenance because both parties have not lived together for more than 20 years and are both retired.

[32] The duty to pay maintenance, and the quantum thereof, is dependent on the ability of the guilty party to pay, the ability of the innocent party to earn an income for her own maintenance, and the period for which the marriage lasted. The innocent party is not entitled to be placed in the same position in regard to maintenance as if she were still married to the husband, although she need not show actual necessity.¹⁰

[33] Section 5(1) of the Matrimonial Affairs Ordinance 25 of 1955 provides as follows:

“...5(1) The court granting a divorce may, notwithstanding the dissolution of the marriage -

(a) Make such order against the guilty spouse for the maintenance of the innocent spouse for any period until death or until re-marriage of the innocent spouse, whichever event may first occur, as the court may deem fit...”

[34] The defendant having admitted adultery and is clearly the guilty party responsible for the breaking down of the marriage. He also maliciously and constructively deserted the plaintiff by chasing her out of the common home. However, there was not placed before me sufficient evidence to evaluate the ability of the defendant to pay maintenance in the face of undisputed evidence that the defendant is no longer employed, and is now retired.

[35] I agree with counsel for the defendant that the circumstances of the parties and their respective ages render this matter inappropriate for the grant of maintenance in

¹⁰ NS v PS 2010 (2) NR 418 (HC); S v S 2011 (1) NR 212 (HC) and AP v PP 2014 (3) NR 671 (HC)

favour of the plaintiff as requested. I therefore decline to exercise my discretion in favour of the innocent party (the plaintiff).

Forfeiture or Division of the joint estate?

[36] In the case of *C v C and L v L*¹¹, Heathcote AJ summarized the nature of a forfeiture order as follows:

*'[5] Before dealing with the two cases and their specific facts, it is necessary to say something about forfeiture orders. To appreciate the context, and to give clarity to reasoning and, I hope, comprehension, I shall refer to three kinds of forfeiture orders. 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' (ie 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 (eg 6:4); and lastly, what I shall I term a 'specific forfeiture order' (eg when a specific immovable property is declared forfeited). In his work *The South African Law of Husband and Wife* by HR Harloh (3 ed) the learned author states at 430:*

'Whereas an order of division (or no order at all) means equal division, irrespective of the amounts contributed to the joint estate by husband and wife, an order for forfeiture of benefits may mean equal or unequal division, depending on whether the defendant or the plaintiff has contributed more to the common fund, for an order of forfeiture, even if this is not expressly stated, amounts to an order for benefits which the guilty spouse has derived from the marriage. Since the order does not affect benefits which the innocent spouse has derived from the marriage, the estate will be divided in equal shares if the guilty spouse has contributed more to the joint estate than the innocent one, there being nothing on which the order for forfeiture could operate. If the contributions of the innocent spouse exceeded those of the guilty one, the guilty spouse will be deprived of the benefits which he has derived from the marriage. . . .'

[6] *Bluntly put, the drunken adulterous and maliciously deserting husband, who happens to be a millionaire, and who contributed far more to the joint estate than his innocent spouse, forfeits nothing, even in circumstances where the court makes a general forfeiture order against him.*

¹¹ *C v C and L v L* 2012 (1) NR 37 (HC)

[37] The evidence of the plaintiff is that the defendant is a businessman who she helped build up a considerable wealth. During 1980, the defendant chased the plaintiff away from the common home, and never paid any maintenance and left her with nothing.

[38] The following principles are applicable:

1. *When parties are married to each other in community of property, and the defendant commits adultery or maliciously deserts the plaintiff, the court has no discretion but to grant a general forfeiture order, if so requested. The court will grant such general forfeiture order without enquiring as to the value of the estate at the date of divorce, or the value of the respective parties' contributions.*

2. *Even if a general forfeiture order is granted, it may have the effect, in certain circumstances, that the property is simply equally divided. That would be in circumstances where the so-called 'guilty spouse' has contributed much more to the joint estate than the contributions of the so-called 'innocent spouse'.*

3. *A general forfeiture order will only have a practical effect if the guilty spouse contributed less to the joint estate than the innocent spouse did. In short, the guilty spouse cannot insist on half of the value of the joint estate. The benefit of a marriage in community of property is that, in the normal course, each party is entitled to half of the estate. But, a guilty party in divorce proceedings forfeits that benefit.*

4. *Once a general forfeiture order is granted, the court may either appoint a liquidator, who would then liquidate the estate in accordance with the law, or any one of the parties.¹²*

[39] I have no discretion under the circumstance but to grant a forfeiture order as prayed for by the plaintiff in view of the admitted adultery by the defendant.

[40] Based on all these reasoning and conclusions, I make the following order:-

¹² C v C and Lv L supra.

1. The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
2. Division of the joint estate.
3. Forfeiture of the benefits arising from the marriage in community of property in favour of the plaintiff.
4. That Mrs Essie Herbst is hereby appointed as Receiver for the purpose of taking all steps necessary to give effect to the order of division of the joint estate and the general forfeiture order with the powers, rights and functions as provided for in the plaintiff's amended particulars of claim.
5. The defendant bears the costs of the appointment of the Receiver.
6. The defendant to pay plaintiff's costs of suit, which costs includes the costs of one instructing and one instructed counsel.

EM ANGULA

ACTING JUDGE

APPEARANCES:

Plaintiff:

Adv. A Van Vuuren

On instructions of

KISTERN & CO INC, Windhoek

First Defendant:

Adv G NARIB

On instructions of

SISA NAMANDJE & CO INC, Windhoek