

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-MAT-2019/01720

In the matter between:

L L A B S

PLAINTIFF

and

O S

DEFENDANT

Neutral citation: S v S (HC-MD-CIV-ACT- MAT-2019/01720) [2020] NAHCMD 520 (13 November 2020)

Coram: PRINSLOO J

Heard: 13 - 17 July 2020 and 21 August 2020

Delivered: 13 November 2020

Reasons: 16 November 2020

Flynote: Matrimonial – Husband and Wife – Divorce proceedings – Spouses married in community of property – Claim for specific forfeiture in respect of immovable property — When specific forfeiture orders are requested a party must make the following allegations in his/her pleadings and must lead evidence in court on the following aspects: (i) the value of the joint estate at the time of divorce; (ii) the respective contributions and value of each spouse to the joint estate; (iii) the specific

property sought to be declared forfeited should be identified; (iv) all other relevant circumstances, and (v) the allegations (or evidence) that the defendant made no contribution whatsoever (or only some negligible contribution) to the joint estate, and that if the forfeiture order is not granted, one party (the guilty spouse) will, in relation to the other, be unduly benefitted in the circumstances.

Summary: The parties were married to each other on 30 July 2011 at Windhoek, in community of property, which marriage still subsists. Two children were born from the marriage and both children are still minors. The parties have been separated since October 2018 according to the pleadings and on 16 April 2019 the plaintiff instituted an action for divorce. The defendant defended the matter but he filed no counterclaim.

The plaintiff pleaded in her particulars of claim that during the subsistence of the marriage, the defendant made himself guilty of wrongful and malicious conduct with the settled intention to terminate the marital relationship, in that he committed adultery, and the main issue that was raised in the particulars of claim was that of adultery. The plaintiff pleaded that she was not prepared to condone or accept this adulterous relationship. The plaintiff also pleaded that the defendant failed to show her any love, affection or respect; the defendant adopted a confrontational attitude towards her; the defendant has not been sleeping at the common home for a period of approximately six months (October 2018 to March 2019) and when he came home he would only shower and get a change of clothes; and the defendant moved out of the common bedroom and moved into an outside room. As a result the plaintiff avers that the defendant has maliciously and constructively deserted her, in which desertion the defendant persists with.

The plaintiff also pleaded that two immovable properties fall within the joint estate which are situated in Dorado Park and Khomasdal, Windhoek respectively, of which she claims specific forfeiture. The plaintiff pleaded that she services the mortgage bonds in respect of both the properties and in addition thereto makes payment towards water and electricity and rates and taxes; the insurance policies; and the maintenance and upkeep of the properties. She pleaded that during the marriage

she single-handedly paid and continues to pay towards the school fees of the minor children, including their extra mural activities, medical aid, food, day to day household necessities and policies/investments (of the minor children)

Held that defendant's contribution should be towards the joint estate and not the acquisition and maintenance of a specific property.

Held that the Court accepts that the contributions of the defendant to the joint estate were not equal to that of the plaintiff but there is no evidence that the defendant's contribution was insignificant to the extent that it should be ignored. The Court is of the considered view that the plaintiff did not lead sufficient evidence to establish exceptional circumstances justifying the granting of the specific forfeiture order sought as the evidence of the defendant indicated that he indeed contributed to the joint estate, albeit not in equal portions with that of the plaintiff. What is important to keep in mind is that there must have been some sort of contribution that can be regarded significant, of which the Court is satisfied that there was.

ORDER

1. The plaintiff's claim for specific forfeiture in respect of the immovable properties is dismissed.
2. The bonds of marriage subsisting between the plaintiff and the defendant is hereby dissolved.
3. The partial settlement reached between the parties on 5 June 2020 and 9 June 2020 respectively and which is filed of record is made an order of court.
4. The remainder of the joint estate which falls outside the partial settlement agreement to be divided equally.
5. The defendant is ordered to pay the plaintiff's cost of suit.

JUDGMENT

PRINSLOO J

Introduction

[1] This is a defended divorce action. The parties before me were married to each other on 30 July 2011 at Windhoek, in community of property, which marriage still subsists. Two children were born from the marriage and both children are still minors.

[2] The parties have been separated since October 2018 according to the pleadings and on 16 April 2019 the plaintiff instituted an action for divorce. The defendant defended the matter herein but he filed no counterclaim.

The pleadings

[3] In her relief, the plaintiff seeks the following prayers:

- 1) An order for the restitution of conjugal rights and failing compliance therewith a final order of divorce.
- 2) Forfeiture of benefits in respect of the immovable property falling within the joint estate.
- 3) That each party retains their immovable property in their possession at their sole and exclusive properties.
- 4) An order awarding the custody of the minor children to the plaintiff subject to the defendant's right to reasonable access.
- 5) Cost of suit.

[4] The plaintiff pleaded in her particulars of claim that during the subsistence of the marriage, the defendant made himself guilty of wrongful and malicious conduct with the settled intention to terminate the marital relationship, in that he committed adultery, and the main issue that was raised in the particulars of claim was that of adultery. The plaintiff pleaded that the defendant engaged in an adulterous relationship with a lady residing in Kleine Kuppe, Windhoek (here after referred to as

E.D.D.) and that she (the plaintiff) was not prepared to condone or accept this adulterous relationship.

[5] On the issue of desertion the plaintiff complained of the following conduct:

- a) the defendant failed to show her any love, affection or respect;
- b) the defendant adopted a confrontational attitude towards her;
- c) the defendant has not been sleeping at the common home for a period of approximately six months (October 2018 to March 2019) and when he came home he would only shower and get a change of clothes; and
- d) the defendant moved out of the common bedroom and moved into an outside room.

[6] As a result the plaintiff avers that the defendant has maliciously and constructively deserted her, in which desertion the defendant persists with.

[7] The plaintiff pleaded that two immovable properties fall within the joint estate which are situated in Dorado Park and Khomasdal, Windhoek respectively. The plaintiff pleaded that she services the mortgage bonds in respect of both the properties and in addition thereto makes payment towards:

- a) water and electricity and rates and taxes;
- b) the insurance policies;
- c) the maintenance and upkeep of the properties.

[8] The plaintiff also pleaded that during the marriage she single-handedly paid and continues to pay towards the school fees of the minor children, including their extra mural activities, medical aid, food, day to day household necessities and policies/investments (of the minor children).

Defendant's plea

[9] In his plea the defendant denies that he maliciously and/or constructively deserted the plaintiff and pleaded in amplification that it was indeed the plaintiff who

maliciously deserted him by making the living conditions intolerable for him and this rendered continued cohabitation impossible. The defendant further pleaded that the plaintiff showed him no love and affection and banished him from the common home and that he had to take up occupation in the living quarters at the back of the common home.

[10] The defendant further pleaded that the plaintiff is overly jealous and has obsessive behavioural traits which resulted in the allegations of adultery, which allegations the defendant denies.

[11] On the plaintiff's allegation that the defendant failed to contribute to the common household, the defendant pleaded that he made numerous and periodical contributions to the immovable property and he constructed and built five outside flats on the Dorado Park property, which generates a monthly rental income of N\$ 25 000.

[12] In addition thereto the defendant pleaded that he is self-employed and relies on periodical payments from his business and made lump sum contributions from time to time towards the payment of mortgage bonds, payments towards water and electricity, payments towards insurance policies and payments towards the maintenance and upkeep of the properties in order to defray costs as they become due and payable. The defendant pleaded that the mortgage payments were debited from the plaintiff's bank account because the plaintiff is a salaried employee and not because she was solely contributing to the maintenance of the joint estate.

The pre-trial order

[13] In terms of the pre-trial order dated 29 March 2020 the following issues stood to be adjudicated during the course of the trial:

a) Issues of fact to be resolved during the trial:

i. Whether the defendant committed adultery with E.D.D.

- ii. Whether the defendant admitted that he committed adultery with E.D.D.
- iii. Whether E.D.D. admitted that she committed adultery with the defendant.
- iv. Whether the plaintiff is entitled to an order of forfeiture of benefits arising out of the marriage in community of property as a consequence of the defendant's adultery.
- v. The nature and value of the contribution made by both the parties and specifically whether the plaintiff made the largest contribution towards the joint estate.

b) Issues of law to be resolved during the trial, *inter alia*:

- i. Whether or not the plaintiff is entitled to a specific forfeiture order as stated in para 2 of the particulars of claim.

[14] As is clear from the pre-trial order there is only two issues in dispute, namely:

- a) Whether the defendant committed adultery or not, and
- b) Whether the plaintiff is entitled to specific forfeiture.

[15] During June 2020 the parties reached a partial settlement agreement regarding the interest of the two minor children and the movable property. It was agreed that custody and control be awarded to the plaintiff subject to the rights to reasonable access of the defendant. The parties also reached an agreement in respect of the movable property and agreed that each party will retain all the movable assets and goods in their possession. As a result of the agreement reached between the parties the defendant will retain possession of a number of vehicles, which includes a Nissan truck, a Toyota Hilux bakkie, a Ford Bantam bakkie and an Isuzu 4x4 (rebuild) vehicle. The plaintiff in turn would retain possession of a Mercedes Benz C200.

The plaintiff's evidence

[16] During the course of her evidence the plaintiff testified that prior to their marriage she purchased an immovable property situated in Khomasdal and it was the couple's agreement prior to the marriage that this property will not form part of the joint estate but that it will remain the property of the plaintiff's first born son, to be held as an investment for when he comes of age.

[17] The plaintiff testified that six mortgage bonds are registered over this particular property in favour of Standard Bank Namibia and that she services the mortgage bonds as the payment is deducted from her salary every month. The plaintiff is the only bond owner registered on the property. The property was evaluated and at the time of this proceeding it was valued at N\$ 980 000. The plaintiff testified that she pays the rates and taxes for this property and the defendant does not assist with the maintenance and the upkeep of the said property.

[18] In respect of the Dorado Park property the plaintiff testified that they acquired the said property in August 2013. Currently there are three mortgage bonds over the said property in favour of Standard Bank of Namibia. The plaintiff testified that during their marriage she also paid the monthly instalments on the mortgage bonds and continue to do so without any assistance of the defendant. The plaintiff testified that she also paid the rates and taxes of the property and also pays for the maintenance of the property. At the time of this proceeding the property was valued at N\$ 2 345 000.

[19] The plaintiff testified that the defendant's contribution to the joint estate was insignificant as he was unemployed and in the past when they were still on good terms she assisted the defendant to register a CC, namely Ti Ngutu Construction CC, of which the defendant is the sole member. The plaintiff testified that she contributed to the defendant's business by obtaining clients to whom the business rendered services (mainly construction work). Prior to the registration of the CC the defendant imported second-hand motor vehicles from Botswana which he would then sell in Namibia for a profit. The plaintiff testified that she also assisted the defendant to get this business started.

[20] During subsistence of the marriage the parties decided to construct flats in the backyard of the marital home and renovate the marital home. The defendant's CC, Ti Ngutu Construction was appointed as the contractor company to do the said work. The couple applied and obtained an additional bond and these funds were transferred into the plaintiff's bank account from where she would then settle the expenses of the renovation and the construction of the flats. The plaintiff testified that the defendant however failed to contribute to the maintenance, upkeep and mortgage payment from August 2013 to present.

[21] On the issue of defendant's alleged adultery, the plaintiff testified that during November 2018 the defendant committed adultery with one E.D.D. On 24 March 2019 the plaintiff received a text message from E.D.D inviting the plaintiff to her house to discuss her relationship with the defendant. On the same date E.D.D. called the plaintiff on her cell phone and told her to come to her home in Kleine Kuppe, Windhoek to fetch the defendant. The plaintiff testified that she proceeded to the address in Kleine Kuppe but the defendant left before she arrived there.

[22] The defendant however returned to the said address and found the plaintiff and E.D.D discussing the adulterous relationship that E.D.D and the defendant was having. The plaintiff testified that she there and then confronted the defendant with the information to her disposal and the defendant admitted to having an adulterous relationship with E.D.D.

[23] After the confrontation the plaintiff went back home and packed the clothing of the defendant and when he returned home the plaintiff requested him to move out of the matrimonial home and move into the bachelors flat at the back of the marital home as she no longer wanted the defendant in the matrimonial bedroom. The plaintiff testified that she asked the defendant to move into the bachelors flat whilst the elders and the pastor was called to counsel the defendant regarding his adulterous relationship. The defendant moved into the bachelor's flat but did not really stay there, as he would sleep over at his mistress's place and only come back home to shower and get fresh clothes. Then in June 2019 the defendant moved out of the marital home to a new residence.

[24] The plaintiff testified that the defendant continued with his adulterous relationship with E.D.D until he was arrested in November 2019 and detained on allegations of domestic violence towards E.D.D. The plaintiff testified that she has no intentions of returning to defendant and does not condone the defendant's adultery.

[25] The plaintiff submitted to court that the defendant was at fault for the breakup of the marital relationship and testified further that it would be in the interest of justice that the immovable properties be awarded to her, alternatively that the defendant forfeits the benefits arising out of the marital relationship by virtue of the fact that the parties are married in community of property.

[26] In support of the allegations of adultery the plaintiff submitted transcriptions of cell phone conversations with the defendant wherein she confronted him with the adulterous relationship as well as the WhatsApp conversations with E.D.D. The transcriptions and WhatsApp messages were admitted without any opposition on the part of the defendant.

The defendant's evidence

[27] The defendant testified that they already started to experience problems in their marriage in 2013. He testified that he started to notice that the plaintiff was not committed to their marriage and the plaintiff deliberately started making the living conditions at home intolerable for him. The plaintiff became increasingly disrespectful towards him and banished him to take up occupation in the living quarters at the back of the common home. The defendant testified that the plaintiff constantly elicited quarrels about small things in order to annoy the defendant but the defendant stated that he tried to avoid these quarrels for the sake of their marriage and their children.

[28] The defendant testified that the plaintiff became overly jealous and started making unfounded accusations and this resulted in the allegation of adultery. The defendant denied that he had an adulterous affair and further denies that he ever admitted to having an adulterous affair. The defendant testified that he knew E.D.D as they are business associates as E.D.D. also has a construction company.

According to the defendant they were friends and had a number of things in common like sharing the same mother tongue and same religious beliefs. The defendant testified that he confided in E.D.D. that he and the plaintiff were having some marital problems.

[29] He testified that on 23 March 2019 E.D.D. called him and informed him that she wanted to talk to the two of them (plaintiff and defendant) in order for them to work on their marital problems. The defendant testified that he cannot say what was discussed between the plaintiff and E.D.D. but when he got home he tried to open the gate but the remote would not open the gate. When the plaintiff opened the gate he found all his luggage on the truck and the plaintiff had the whole family at the house. He slept in the servant's quarters that night.

[30] The defendant denied that he made any admissions regarding the alleged adulterous affair and stated, when confronted with the transcription of the couple's conversations, that he was threatened by the plaintiff that should he not admit the affair he will not see his children again. The defendant acknowledged that he said he made a mistake but stated that he never admitted to sleeping with another woman.

[31] In respect of the immovable property and the plaintiff's prayer for specific forfeiture of the said immovable property the defendant testified that during the course of their marriage he was self-employed and is the sole member of Ti Ngutu Construction CC and Ivovo Investment CC. He testified that early in their marriage they decided as a couple that they would share all the expenses incurred but because the defendant did not earn a regular salary they decided that the mortgage bonds would be serviced by the plaintiff, who received a consistent monthly salary. The defendant testified that they agreed that he would then make contributions to other expenses. From his income the defendant would pay for household expenses, assist in payment of the children's educational expenses. The defendant testified that he also assisted in the payment of the maintenance on the immovable properties and he also maintained their motor vehicles. When he did not earn an income he would be contributing to the joint household by doing chores and cared for the minor children and do school runs.

[32] The defendant confirmed that the parties bought the immovable property in Dorado Park during 2013. He testified that he made numerous contributions to maintain the said immovable property and he also renovated the property and built 5 outside flats that are rented out and generates an income of N\$ 25 000 per month. The rental income is used to maintain the family and also used for the maintenance and the upkeep of the property. The defendant testified that when his business was quiet he would collect the rent and then deposit it into the plaintiff's account.

[33] The defendant further testified that he also made numerous contributions towards the Khomasdal property by doing occasional renovations and maintenance on the property.

[34] The defendant testified that as he is self-employed and relies on periodical payments from the business, instead of him making a monthly contribution to the common household he would rather make lump sum contributions.

Alleged adultery

[35] The allegation by the plaintiff is that the defendant had a long term adulterous relationship with E.D.D. The defendant denied these allegations which would have left the court in a 'he said/she said' kind of situation has it not been for the sworn translations of transcriptions of conversations between the plaintiff and the defendant as well as between the plaintiff and E.D.D which took place during the time when the plaintiff discovered the alleged adultery.

[36] The sworn translations were admitted into evidence without any opposition from the defendant. There were numerous conversations submitted into evidence but not all of them are relevant for the current proceedings.

[37] On 24 March 2019 the plaintiff received a WhatsApp message¹ from E.D.D which contained a location on Google Maps with a message 'come here now' and 'come get Ivan' and attached thereto was a photograph of the defendant. Shortly hereafter a conversation followed between the plaintiff and E.D.D. which went as

¹ Exhibit L at 300 of the indexed bundle.

follows²: (Only the relevant portions of the transcription will be replicated in order not to overburden the record)

'Unknown: L?

L: Yes?

Unknown: How are you dear?

L: Lovely how are you?

Unknown: Very well thank you. I need you to drive to the location that I have sent you and come and pick up your husband.

L: Which location?

Unknown: Check your WhatsApp, I have sent you my current location which is my house.

L: Who am I speaking to?

Unknown: You will find out soon enough.

L: What is wrong with him?

Unknown: Nothing is wrong with him, I want him out of my place and I want you to pick him up.'

[38] The next conversation with E.D.D. which followed shortly after was as follows³:

'L: L hallo.

Unknown: Yes so you had the chance to see your life lying husband in action, so he is not here you do not need to come, because he just left.

L: I was on my way, I stay in Dorado and do you expect me to just come like that.

Unknown: I do not expect anything from you, so do not be rude and do not even try to pick a fight with me because that is not what I am doing.

L: No, but still, I want to talk to you, so can I still come?

Unknown: But he is going to leave in the next few minutes, how far are you?

L: You can keep him there keep him busy.

Unknown: I cannot because you know you husband.

L: No keep him busy I am driving and there is traffic, I am on my way.'

² Conversation 1 Marked as exhibit M.

³ Conversation 2 marked as exhibit N.

[39] There were a number of conversations that followed which I will not replicate for purposes of this judgment as it contains intimate details, however portions of the conversations between the parties during the next couple of days are of importance and these conversations⁴ went as follows:

'L: Hallo?

I: L I am no more (indistinct) as I am seated here.

L: I cannot hear.

I: I tell you, you will not know how it feels like as I am seated here as a human being.

L: How do you feel I?

I: Z I do not want to sit in an empty house.

L: What do you mean I?

I: Any couple.

L: What did you do to me yesterday how did I feel?

I: Let me tell you Z, let me tell you that today I am not the only man who stood out there and who went to have sex with another women.

L: Hhm, but I am not those women who accepts it, also do remember that.

I: Yes.

L: Yes what? How do I feel I, tell me? In the first place your whore calls me I have to go to her house to go and catch you there and I arrive there, what you say, when I talk to you, you ignore me and you are talking to her decently, what do you say? Because you feel that she is meant for you. How should I fell I? You do not see your mistakes that you commit I. You feel that it is nothing that is why you say you are not the only man that goes out and have sex with a woman.

I: No man Z but see.

L: When do you admit your mistake?

I: Z I do admit, however you cannot treat me like that L.'

[40] During the next conversation⁵ the defendant stated as follows:

⁴ Marked as exhibit N at 270-271 of the indexed bundle.

⁵ Marked as exhibit R at 293 -294 of the indexed bundle.

- 'I: To come and change the gate locks and to change the doors at the house, yes? Now I am asking mommy?
- L: Now what is the matter now?
- I: No, there is no problem, no I am asking you mommy, honestly speaking, I acknowledged the mistake I committed and I disclose it happen and I now humble myself before you and I tell you that I acknowledge and know what I did was absolutely wrong. I am prepared that is, if you give me another change to perfect my life, please.
- L: That is why I said you can perfect it there.'

[41] During the further conversation⁶ the following was said:

- 'I: You filed for the divorce and now blames me for that or what?
- L: No, no how could you say I am blaming you, why did I file for it in the first place, because of infidelity, isn't it? Who went on cheating? You see you never admit guilt.
- I: I told you it is me, but until when should I say it?'

[42] From the conversations between the parties it is quite clear the defendant did not only admit the adulterous relationship with E.D.D. but also asked the plaintiff to forgive him for his indiscretion, which the plaintiff was clearly not willing to give. It is clear from the record that the plaintiff did not condone the defendant's adulterous relationship.

[43] During the course of the cross-examination of the plaintiff by the defendant's legal practitioner and during the defendant's case very little time was spent on the allegations of adultery in spite of the damning transcriptions that were presented to court.

[44] The reason appears to be quite clear and that is that the defendant does not have a defence to the claim made by the plaintiff in respect of the adulterous relationship. The version that was put to the plaintiff that E.D.D. was a concerned third party and wanted to counsel the parties at her house hold absolutely no water.

⁶ Marked as exhibit S at 296 of the indexed bundle.

Especially not if one have regard to the conversation between the plaintiff and the lady in question and the WhatsApp message that she sent to the plaintiff.

[45] The defendant described E.D.D. as a business associate and as a friend in whom he confided in, and denied that he had any feelings for her, however if one considers the transcribed WhatsApp messages and calls made to the plaintiff it would not appear to be what one would expect from a platonic friend. It should be born in mind that the WhatsApp messages and the conversations between the plaintiff and E.D.D. is not disputed nor is it disputed that E.D.D. was the author of the WhatsApp messages or that she called the plaintiff.

[46] The defendant further alleged that he was basically coerced into making certain admissions as the plaintiff threatened him that he will not see the children. However if the transcriptions are read in context it is clear that there is no question of coercion at play. The defendant was finding himself between the proverbial rock and a hard place. On the one hand he was attempting to make amends with the plaintiff and on the other hand tried to justify what he did, but the bottom line is that the defendant admitted his adultery. This was not a case of the plaintiff having an overly active imagination or her being overly jealous. The defendant, on his own admission, made himself guilty of adultery. I am therefore of the considered view that the defendant has not shown any defence to the plaintiff's claim and a final order of divorce should be granted in favour of the plaintiff based on the admitted adulterous relationship with E.D.D.

Specific forfeiture opposed to the legal principles relating to the division of a joint estate

[47] Marriage in community of property carries major implications for ownership of the parties' assets, liability for their debts as well as their capacity to enter into legal transactions. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage automatically and by operation of law. The same regime applies to assets and liabilities which either spouse acquires or incurs

after entering into the marriage. The joint estate created by marriage in community is held by the spouses in co-ownership, in equal, undivided shares.⁷

[48] The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture order is made. In such event the value of the assets in the joint estate that must be divided will be determined at the date of the divorce.⁸

[49] The learned author RH Hahlo in *South African Law of Husband and Wife*⁹ further states that the joint estate consists of all property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by either of them during the marriage.¹⁰ Assets forming part of the joint estate are owned by the spouses in equal, undivided shares.

[50] The authorities in relation to forfeiture orders are to be found in the judgment of Heathcote AJ in *C. v. C; L. v L*¹¹ from which the following principles emerge.¹²

- a) When a party to a marriage in community of property commits adultery or maliciously deserts his/her spouse the Court has no discretion and must make a general forfeiture order if so requested.
- b) When quantified or specific forfeiture orders are requested, the position is different. Specific forfeiture may be granted in exceptional circumstances. In these cases the party must make the following allegations in his/her pleadings and must lead evidence in court on the following aspects¹³:
 - i. the value of the joint estate at the time of divorce,
 - ii. the respective contributions and value of each spouse, to the joint estate,
 - iii. the specific property sought to be declared forfeited should be identified,

⁷ See *Boberg's Law of Persons and the Family* (2nd ed) at 185; and also *HR Hahlo, The South African Law of Husband and Wife* (5th ed) at 157 - 158.

⁸ See *Mathee v Koen* 1984 (2) SA 543 (C).

⁹ 5th ed at 157-158.

¹⁰ *The South African Law of Husband and Wife* 5th at 161.

¹¹ 2012 (1) NR 37.

¹² *Kafidi v Neputa* I 1866/2012) [2013] NAHCMD 278 (08 October 2013).

¹³ Also see *Mbango v Mbango* (HC-MD-CIV-ACT-MAT-2016/03005) [2020] NAHCMD95 (13 March 2020) para 22.

- iv. all other relevant circumstances, and
- v. the allegations (or evidence) that the defendant made no contribution whatsoever (or only some negligible contribution) to the joint estate, and that if the forfeiture order is not granted, one party (the guilty spouse) will, in relation to the other, be unduly benefitted in the circumstances.

[51] The majority of the time spent during the trial was centred on whether the plaintiff is entitled to a specific forfeiture order as set in the relief prayed for.

[52] In support of the claim for forfeiture the plaintiff presented the following documents into evidence:

- a) bank statements of the plaintiff's current account for the period dated from 6 February 2019 to 12 July 2020;
- b) the plaintiff's credit card statements for the period from 13 June 2020 to 11 July 2020;
- c) the plaintiff's call deposits account statement for the period 3 October 2018 to 6 July 2020;
- d) the valuations done by Michelle Craill in respect of both the immovable properties;
- e) the deed of transfer of the Dorado Park property;
- f) the certificate of registered sectional title in respect of the Khomasdal property.

[53] The defendant in turn submitted the following:

- a) the CC1 documents of Ti Ngutu Construction CC and Ivovo Investment CC;
- b) the defendant's bank statements on his current account for the period 2 December 2015 to 31 January 2016;
- c) the bank statement of Ti Ngutu Construction CC for the period 14 January 2016 to 30 April 2016.
- d) the quotation by Ti Ngutu Construction CC regarding the renovation and upgrading of the couples immovable property in Dorado Park;

- e) proof of transfer of funds in the amount of N\$ 1 400 000 from Ti Ngutu Construction CC into the account of the plaintiff under the reference 'construction fund Mr So-oabeb'.
- f) proof of funds transfer from the defendants account to that of the plaintiff for the period 2017 to 2018.

[54] At the commencement of the plaintiff's evidence she indicated that she purchased the Khomasdal property prior to the parties getting married and they agreed at the time that the house will not fall within the joint estate. The plaintiff further testified that she is the sole party registered on the title deed of the property. Clearly, having regard to the RH Hahlo in *South African Law of Husband and Wife* referred to above in para 49, this is untenable in law and it must be accepted for purposes of this judgment that the parties are joint owners of the property in question.

[55] In order to decide the issue of specific forfeiture it is necessary to consider the evidence of both parties in more detail and for that purpose I intend to concentrate mostly on the evidence that is relevant to the current enquiry.

[56] The plaintiff contended during her evidence that the defendant made an insignificant contribution to the joint estate. It is common cause that the defendant does not have a fixed income and he testified that he would make lump sum payments. In her rough calculations in court the plaintiff estimated that the defendant contributed approximately 5% to 10% to the joint estate opposed to her 90%. During cross-examination the plaintiff was asked how she came to that conclusion and her response thereto was that she did not do the calculation per month but she took the overall expenses of the joint estate and then took into consideration the defendant's half share of the rental flats that amounts to approximately N\$ 10 000 per month and other small things like transporting the children to school (which the defendant apparently did not do since 2018) and occasionally buying food. The plaintiff presented a list of expenses for the minor children and submitted that she is liable for those expenses as the defendant does not contribute to them.

[57] The plaintiff denied that the defendant made lump sum payments towards the joint estate and further denied that the defendant assisted in caring for the house or the children during the time that he was unemployed.

[58] What the plaintiff repeatedly told this court is that the defendant's contribution was insignificant. The question is therefore, to use the words of Heathcote AJ¹⁴, whether the guilty defendant was so 'useless' that the plaintiff would be able to say that he has made no contribution whatsoever, or a really insignificant contribution, (to the extent that it can for all practical intents and purposes be ignored).

[59] Admittedly the defendant failed to discover the better part of his bank statements and that of his CC, however it is possible to consider the plaintiff's bank statements to have some idea of the contributions made by the defendant. In the same breath I must interpose and add that the parties made it very difficult for this court to determine all the contributions and to distinguish between personal contributions/payments made by the defendant and those made by the CC, Ti Ngutu Constructions, as the funds paid into the plaintiff's account for purposes of paying the business debts of the CC was mixed up with the funds in the plaintiff's bank accounts. The plaintiff's bank accounts were the ones through which all the electronic fund transfers in respect of the CC were channelled. Large amounts of money flowed into and out of the plaintiff's accounts. Some of the funds were inbound from the defendant's business, some from investments accounts which is in the name of the plaintiff and number of other different sources. It is quite impossible to determine which funds are which and which funds were used for the benefit of the joint estate. It also struck me that plaintiff's main focus was on the deposits on her bank account by the defendant and his company but hardly any reference was made of cash spent by the defendant for the benefit of the joint estate. On the evidence adduced I find it hard to believe that the defendant spent no money on groceries and other household necessities during the subsistence of the couple's marriage.

[60] What is clear is that the monthly rental of the flats was paid into the plaintiff's account. This amount would fluctuate depending on the occupancy of the flats but half of those earnings was the contributions of the defendant to the joint estate

¹⁴ C v C supra footnote 11 para 22.8.

(which amounted to approximately N\$ 10 000 per month). It is also common cause that the defendant's business was responsible for the construction of the flats and the renovation of the marital home. By using the services of the defendant's company the loan amount was paid to the CC and effectively to the defendant who could expend it for the benefit of the joint estate. It is further common cause that an amount of N\$ 1 400 000 was paid into the account of the plaintiff which money was in favour of Ti Ngutu Construction CC and the plaintiff indeed settled accounts of the CC from this amount but a portion of that money was also used for the benefit of the joint estate. The defendant also presented to court what appears to be a summary of internet banking transactions for the period 2017 to 2018 during which period he transferred N\$ 221 000 into the plaintiff's account.

[61] It is impossible for this court to try and do all the calculations to determine what exact contributions were made by the parties during the subsistence of the marriage. In any event it became clear when plaintiff's counsel tried to do this exercise in court that the majority of the calculations would be based on estimations and suppositions.

[62] When the plaintiff's counsel embarked on this exercise in court I got the distinct impression that the plaintiff is confusing the types of forfeiture orders available to her as counsel for the plaintiff was at great pains to calculate in court what contribution was made by the plaintiff and what contribution was made by the defendant (90:10 ratio calculated), however the plaintiff did not plead quantified forfeiture¹⁵. The plaintiff also did not plead general forfeiture but specific forfeiture. It must be understood that in the *C v C* matter the court stressed the fact that the defendant's contribution should be towards the joint estate and not the acquisition and maintenance of a specific property.¹⁶

[63] It is common cause that the plaintiff serviced the mortgage bonds in respect of both properties but that does not equate to a finding that the defendant made no contribution towards the joint estate.

¹⁵ 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), see *Carlos v Carlos Lucian v Lucian* supra para 5.

¹⁶ *C v C* supra footnote 11 at 22.7.

[64] If one applies *C v C*¹⁷ to the facts before me it is clear that there are certain short comings in the case of the plaintiff. Although the plaintiff clearly identified the respective immovable properties in respect of which she prays for a specific forfeiture order she fails to plead the value of the joint estate at the time of divorce. The plaintiff made some averments in her particulars of claim regarding the respective contributions to the joint estate but failed to plead the value thereof.

[65] Although there is evidence regarding some contributions made by the defendant and or his company at some stages during the course of the marriage the picture before me remains far from complete as it is limited to the period 2016 to 2020 only.

[66] I accept that the contributions of the defendant to the joint estate were not equal to that of the plaintiff but there is no evidence that the defendant's contribution was insignificant to the extent that it should be ignored. I am of the considered view that the plaintiff did not lead sufficient evidence to establish exceptional circumstances justifying the granting of the specific forfeiture order sought as the evidence of the defendant indicated that he indeed contributed to the joint estate, albeit not in equal portions with that of the plaintiff. What is important to keep in mind is that there must have been some sort of contribution that can be regarded significant, of which I am satisfied that there was.

[67] Therefore, as neither general forfeiture nor quantified forfeiture is applicable on the facts in casu and the plaintiff was unable to prove to a large extent exceptional circumstances justifying the granting of specific forfeiture, the court must return to the default position which is the division of the joint estate.

[68] The courts have wide discretion in relation to costs. Normally in divorce cases where the parties are married in community of property, the courts tend to take up a 'no order as to costs' principle. In the current matter, I am of the considered view that the plaintiff is entitled to her costs even though she was only partially successful in the sense that although a final order of divorce was granted this court could not

¹⁷ Supra at footnote 11.

make a specific forfeiture order in her favour. The defendant defended the divorce matter against his better judgment in spite of overwhelming evidence of adultery. The only issue that should have been adjudicated by this court is the issue of forfeiture of the immovable property. The defendant caused this matter to become unnecessarily protracted and as a principle of fairness, the plaintiff should not be liable for the costs occasioned by it. I am of the opinion that the defendant should be liable to pay the plaintiff's costs on the ordinary scale.

Order

[69] My order is therefore as follows:

1. The plaintiff's claim for specific forfeiture in respect of the immovable properties is dismissed.
2. The bonds of marriage subsisting between the plaintiff and the defendant is hereby dissolved.
3. The partial settlement reached between the parties on 5 June 2020 and 9 June 2020 respectively and which is filed of record is made an order of court.
4. The remainder of the joint estate which falls outside the partial settlement agreement to be divided equally.
5. The defendant is ordered to pay the plaintiff's cost of suit.

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF: K Angula
 AngulaCo Incorporated
 Windhoek

DEFENDANT: R Silungwe
 Silungwe Legal Practitioners
 Windhoek