



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2016/03005

In the matter between:

**SANDRA CHARLET MBANGO
(BORN TEMBO)**

PLAINTIFF

and

ANANIAS SHIVUTE MBANGO

DEFENDANT

Neutral citation: *Mbango v Mbango* (HC-MD-CIV-ACT-MAT-2016/03005) [2020]
NAHCMD 95 (13 March 2020)

Coram: USIKU, J

Heard: 04-05 November 2019, 07 November 2019 and 14 November 2019

Delivered: 13 March 2020

Flynote: Husband and wife – Divorce – Proprietary rights – Parties married in community of property – Plaintiff seeking specific forfeiture order in respect of immovable property and motor vehicle – Applicable legal principles restated – Plaintiff having not established entitlement to a specific forfeiture order – Court grants an order for restitution of conjugal rights – Court dismisses claim for specific forfeiture.

Summary: The parties are married in community of property. Plaintiff instituted divorce proceedings claiming, among other things, a specific forfeiture order in respect of an immovable property and a motor vehicle forming part of the joint estate. The court restates the applicable legal principles and finds that on the pleadings and the evidence led, the plaintiff is not entitled to a specific forfeiture order. The court grants judgment for the plaintiff for an order for restitution of conjugal rights.

ORDER

1. The plaintiff's claim for specific forfeiture in respect of the immovable property and in respect of the motor vehicle, is dismissed.
2. The court grants judgment for the plaintiff for an order for restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before 23 April 2020 failing which to show cause, if any, to this court on 13 May 2020 at 15:15 why:
 - (a) the bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved,
 - (b) custody and control of the minor child, namely Shivandra Yambeko Mbango, should not be awarded to the plaintiff subject to the defendant's right of reasonable access,
 - (c) the defendant should not be ordered to pay maintenance in respect of the minor child in the amount of N\$ 1000 per month,

- (d) the defendant should not be ordered to pay 50% of all the school fees and other related expenses in respect of the minor child (including tertiary education fees should the child show an aptitude thereof),
 - (e) the plaintiff should not be ordered to pay all the medical expenses in respect of the minor child,
 - (f) the joint estate should not be divided equally,
 - (g) each party should not be ordered to pay own legal costs.
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JUDGMENT

USIKU, J:

Introduction

[1] In this matter the plaintiff (the wife) and the defendant (the husband) got married to each other on 13 March 2009, in community of property, at Walvis Bay and the marriage still subsists.

[2] In September 2016, the plaintiff instituted action of divorce praying for relief in the following terms:

1. An order for the Restitution of Conjugal Rights and failing compliance therewith;
2. A final Order of Divorce.
3. Custody and control of the minor child to be awarded to the plaintiff subject to the defendant's right to reasonable access, as per annexure "A".
4. The defendant to pay maintenance in respect of the minor child in the sum of N\$ 1000.00 per month.
5. The defendant to pay 50% of all the school fees and other related expenses in respect of the minor child (including tertiary education fees should the child show an aptitude therefor).
6. The plaintiff to pay all the medical expenses in respect of the minor child.

7. Forfeiture of the benefits derived from the marriage in community of property especially in respect of Erf 5550 Tutaleni Uugwanga Street, Kuisebmond, Walvis Bay, Republic of Namibia.
8. Forfeiture of the benefits derived from the marriage of community of property especially in respect of the motor vehicle with registration number N7823WB.
9. Division of the remainder of the joint estate.
10. Costs of suit (only if defended).
11. Further and/or alternative relief'.

[3] The defendant filed notice to defend the action and subsequently filed a plea and a counterclaim. However, during trial, the defendant disowned the counterclaim alleging that he never instructed his previous legal practitioner to file a counterclaim on his behalf. As a matters stands, the defendant has no counterclaim.

[4] In their proposed joint draft pre-trial order, which was subsequently made an order of court, the parties recorded that the following facts are agreed facts and are not in dispute between the parties, namely:

- (a) the parties are married in community of property,
- (b) the plaintiff must proceed with the divorce,
- (c) the custody and control of the minor child, to wit: Shivandra Yambeko Mbango, be granted to the plaintiff subject to the defendant's right of reasonable access,
- (d) the defendant must pay maintenance to the minor child, and that,
- (e) each party must cover his/her own legal costs.

[5] The plaintiff's action for divorce is based on the allegations that the defendant, during the subsistence of the marriage, with the fixed and malicious intention to terminate the marriage, had:

- (a) engaged in an extra-marital affair with another woman,
- (b) assaulted the plaintiff and has,
- (c) left the common home during May 2016 which desertion still persists.

Uncontroverted facts

[6] The following facts are either facts not disputed, or facts proved during the trial:

- (a) during 2014 the defendant had engaged in an extra-marital affair with another woman. This relationship resulted in a birth of a child in February 2015. The plaintiff had condoned the defendant's marital misconduct insofar as such adultery was concerned,
- (b) on 17 May 2016 the plaintiff sought and obtained an interim protection order from the Walvis Bay Magistrate's Court, against the defendant. The order was made pursuant to allegation which included physical assault by the defendant allegedly on the plaintiff. In terms of that order, the defendant was prohibited from entering or coming near the common home and from having contact with the plaintiff. The interim protection order was confirmed and made final on 02 June 2016. The final protection order remained valid till 06 June 2017,
- (c) during 2016 the defendant engaged in extra-marital affair with the same woman, which resulted in the birth of another child in February 2017,
- (d) in September 2016 the plaintiff instituted the present divorce proceedings,
- (e) during 2016 the defendant engaged in extra-marital affair with a different woman, which resulted in a birth of a child in June 2017,

(f) the plaintiff has sold the motor vehicle with registration number N7823WB which formed part of the joint estate. The plaintiff prays for specific forfeiture of the benefits derived from the marriage in community of property in respect of this motor vehicle,

(g) the defendant removed a number of movable properties listed in Para 9.4 of the plaintiff's particulars of claim. These properties remain in the possession of the defendant,

(h) during the subsistence of the marriage, the parties acquired a house at certain Erf No.5550, Kuisebmond, Walvis Bay. The plaintiff prays for specific forfeiture derived from the marriage in community of property in respect of this property.

[7] From the common cause facts and facts found proved it is apparent that the dispute between the parties centres primarily on whether the plaintiff is entitled to a forfeiture order as set out in the prayers referred to above.

Plaintiff's evidence

[8] In her testimony the plaintiff stated that sometime in May 2016, the defendant, during an altercation between the two of them, assaulted the plaintiff. During the argument, the defendant grabbed the plaintiff and threw her on a bed. The plaintiff opened a criminal case against the defendant. The defendant was fined N\$ 500 as a penalty for that.

[9] The defendant left the common home in May 2016. The plaintiff later learnt that the defendant was staying with the woman with whom he has had a child out of wedlock in February 2015. The plaintiff then realised that the relationship between the two did not cease. Thereafter, a second child was born between the two and that the two reside together at the moment.

[10] In regard to the forfeiture claim, the plaintiff testify that in January 2013 the parties acquired the immovable property in question. The plaintiff paid all the bond instalments and other related expenses in respect of the immovable property. The defendant's contributions was minimal or almost non-existent.

[11] In the similar view, the plaintiff related that they bought the motor vehicle in question on hire purchase agreement. The intention for acquiring the motor vehicle, was that it shall be used by the defendant in his business to generate money to pay for itself and for the joint estate. The plaintiff testified that she paid for all the instalments relating to the motor vehicle.

[12] According to the plaintiff, the business that the defendant conducted was not successful and due to a gloomy economic situation, she could no longer afford payment of monthly instalments in respect of the motor vehicle. After discussing the issue with the defendant, she decided to sell the motor vehicle. She sold the motor vehicle, deducted the money due to the bank and used the remaining proceeds of N\$ 8000 for the maintenance of their minor child for the last past three years.

[13] In support of her claim for forfeiture of benefits, the plaintiff tendered into evidence various documents, including:

- (a) the valuation of the immovable property (valued at N\$ 770,000 as at October 2017),
- (b) bank statements to indicate:
 - (i) money that the plaintiff borrowed to help the defendant in his business,
 - (ii) deductions made for repayments of bond in respect of the immovable property,
 - (iii) money borrowed from friends (or cash loans) to buy groceries, which plaintiff had to repay to the lenders,

(iv) deductions for instalment payments in respect of the motor vehicle etc etc.

[14] In regard to the plaintiff's prayer in respect of maintenance of the minor child, the plaintiff testified that the defendant is currently employed as a taxi driver and would be able to pay the monthly amount claimed in the particulars of claim.

Defendant's evidence

[15] In his testimony, the defendant related that he left the common home pursuant to the protection order sought by the plaintiff.

[16] During 2013 to 2014 the defendant was employed at Namibia Protection Services, where he later was earning a salary of about N\$ 6 427 per month. Later he established his retail business in fish and clothing apparels. The business was not successful. However, whatever proceeds came from the business he used them to the benefit of the joint estate, for example to buy food and other things.

[17] The defendant further testified that he is currently not employed.

Analysis

[18] It is common cause that the defendant engaged in an adulterous relationship with a certain woman, from which relationship two children were born. It is also common knowledge that the plaintiff condoned the adultery in respect of which the first of those two children was born. It is also known now, that the defendant during the subsistence of the marriage, has fathered another child born in June 2017. According to the plaintiff's evidence, the defendant and the first mentioned woman are still cohabitating. The plaintiff has not condoned defendant's subsequent incidences of adultery and neither has the court done so.

[19] It is also common cause that the defendant left the common home in May 2016. In his evidence the defendant appeared to pay special emphasis that he did not leave voluntarily but due to the conditions specified in the protection order. It is not in dispute that the protection order was confirmed and made final in June 2016. In my opinion the prohibitions set out in the protection order were made pursuant to the unlawful conduct on the part of the defendant, which conduct was confirmed when the protection order was made final. In such event the desertion is as voluntary as in a case where a defendant had left the common home voluntarily.

[20] In any event the parties have already agreed that the plaintiff must proceed to obtain divorce. I am therefore satisfied in the circumstances that the plaintiff is entitled to an order for restitution of conjugal rights.

[21] In regard to the claim for specific forfeiture orders, the applicable principle have been set out in the *C v C and L v L 2012 (1) NR 37*, (“the *C v C matter*”).

[22] In the *C v C* matter referred to above, it was stated that where a party seeks a specific forfeiture order, that party must make the following allegations in his/her pleadings and must lead evidence in court on the following aspects:

- (a) the value of the joint estate at the time of divorce,
- (b) the respective contributions and value of each spouse, to the joint estate,
- (c) the specific property sought to be declared forfeited should be identified,
- (d) all other relevant circumstances, and
- (e) 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.

[23] In the *C v C* matter, the court emphasised that ‘*contribution*’ should be towards the joint estate and not to the acquisition of a specific property. The guilty spouse could

have made other contributions in respect of the acquisition of other property movable or immovable which vested in the joint estate. The court further underlined that a specific forfeiture order is only granted in exceptional circumstances, because it is not always that the guilty spouse is so useless that a plaintiff would be able to say that he/she has made no contribution whatsoever or only made an insignificant contribution to the extent that it can be ignored. The court also observed that it is of no significance or assistance if the plaintiff merely alleges or leads evidence that in respect of a specific property he/she had made all the bond-payments and the like. The other spouse may have made contributions to the joint estate in respect of acquisition of other properties in the joint estate.

[24] In the present case, the plaintiff has not made allegations in the particulars of claim and has not given evidence on:

- (a) total value of the joint estate, and,
- (b) the respective contributions and value of each spouse to the joint estate.

[25] In the absence of the allegations and evidence on the above issues, it is not possible to come to the conclusion that the defendant made no contribution whatsoever to the joint estate or that if the forfeiture order is not made, one party (the guilty spouse) will, in relation to the other, be unduly benefitted in the circumstances.

[26] It is of no assistance to the court to allege that the plaintiff paid all the bond instalments in respect of the immovable property and the motor vehicle payments. Assertion to that effect does not address the extent of the contribution made by the defendant to the joint estate. The fact that the defendant did not contribute to payments regarding the acquisition of the immovable property or the motor vehicle, does not per se mean that he did not contribute to the joint estate. He might have performed household chores or provided maintenance to the minor child and the like. Such activities are readily quantifiable with reference to the reasonable costs which would have been incurred to hire a third-party to do such work, had the defendant not been

available to do the same. Moreover, evidence was led that the business that the defendant conducted was meant by both spouses to generate a profit for the benefit of the joint estate. In my opinion, the defendant's effort in the conduct of the business for the benefit of the joint estate, ought to have been quantified.

[27] In summary, I am of the opinion that the plaintiff has not led evidence to establish exceptional circumstances justifying the granting of the specific forfeiture order sought. The plaintiff's claim for a specific forfeiture order in respect of the immovable property and in respect of the motor vehicle, therefore, falls to be dismissed.

[28] As stated earlier, the parties have agreed that the defendant must pay maintenance in respect of the minor child. In her particulars of claim, the plaintiff claims maintenance for the minor child, from the defendant, in the amount of N\$ 1000 per month. According to the plaintiff, the amount claimed is reasonable in the circumstances. The plaintiff testified that the defendant is employed as taxi driver. In his evidence the defendant testified that he is unemployed. When invited by the court to specify the amount he suggests to pay as a monthly payment for maintenance, the defendant was non-committal and could not specify any amount. He, however, confirms that he must pay maintenance in respect of the minor child.

[29] On the evidence given, the probabilities are that the defendant is employed as a taxi driver. It is common cause that the parties have agreed that the defendant must pay maintenance for the minor child. The only matter in issue is the quantum of the maintenance. According to evidence, the defendant has about four minor children. Taking into account all circumstances of this matter and the order that I will finally make, I am of the opinion that the amount of N\$1000 per month is fair and just, and I shall make an order to that effect.

[30] In regard to the costs, the parties have agreed that each party bears own legal costs and I shall make an order to that effect.

[31] In the circumstances, I make the following order:

1. The plaintiff's claim for specific forfeiture in respect of the immovable property and in respect of the motor vehicle, is dismissed.
2. The court grants judgment for the plaintiff for an order for restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before 23 April 2020 failing which to show cause, if any, to this court on 13 May 2020 at 15:15 why:
 - (a) the bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved,
 - (b) custody and control of the minor child, namely Shivandra Yambeko Mbango, should not be awarded to the plaintiff subject to the defendant's right of reasonable access,
 - (c) the defendant should not be ordered to pay maintenance in respect of the minor child in the amount of N\$ 1000 per month,
 - (d) the defendant should not be ordered to pay 50% of all the school fees and other related expenses in respect of the minor child (including tertiary education fees should the child show an aptitude thereof),
 - (e) the plaintiff should not be ordered to pay all the medical expenses in respect of the minor child,
 - (f) the joint estate should not be divided equally,
 - (g) each party should not be ordered to pay own legal costs

B Usiku
Judge

APPEARANCES:

PLAINTIFF:

A. Delport
Instructed by Delport Legal Practitioners
Windhoek

DEFENDANT:

T. Ipumbu
Instructed by Ipumbu Legal Practitioners
Windhoek