

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-MAT-

2019/03504

In the matter between:

W M

PLAINTIFF

and

E J V M

DEFENDANT

Neutral citation: *W M v E M* (HC-MD-CIV-ACT-MAT-2019/03504) [2021] NAHCMD 22 (29 January 2021)

Coram: PRINSLOO J

Heard: 27 and 28 October 2020; 2 November 2020

Delivered: 29 January 2021

Reasons: 03 February 2021

Flynote: Husband and wife – Divorce – Proprietary rights – Parties married in community of property – Defendant seeking specific forfeiture order in respect of immovable property and motor vehicle – Applicable legal principles restated – Defendant 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 for division of joint estate, amongst others. Defendant defended the matter and filed a counterclaim wherein he claimed for 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 defendant is not entitled to a specific forfeiture order. The court grants judgment for the plaintiff for an order for restitution of conjugal rights.

ORDER

In respect of the Defendant's claim for specific forfeiture of benefits:

1. The claim for specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf No 6195, Walture Street, Khomasdal Extension no.10, Windhoek, republic of Namibia and the Toyota Hillux with registration number N 63240W is dismissed.
2. The joint estate is to be divided according to the matrimonial regime.
3. No order as to cost.

In respect of the partial settlement agreement:

4. The court order dated 28 October 2020 is incorporated herein.

In addition to the aforementioned order:

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 **12/03/2021**, failing which, to show cause, if any, to this court on the **9/04/2021** at **09:00**, why:

1. The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.

JUDGMENT

PRINSLOO J

Introduction

[1] The parties before court got married to each other in Windhoek on 11 December 2004, in community of property, which marriage still subsists. The parties have two children that were born during the subsistence of the marriage of which one is still a minor.

[2] On 02 August 2019 the plaintiff instituted divorce proceedings against the defendant. In her particulars of claim the plaintiff sought the following relief:

- 1(a) An order for the restitution of conjugal rights and failing compliance therewith;
(b) A final order for divorce
2. Division of the joint estate.
3. Custody and control of the minor child be awarded to the Plaintiff subject to the Defendant's right of reasonable access.
4. An order for spousal maintenance of N\$ 2, 000.00 per month for a period of twelve months after the final order of divorce is granted.

5. An order for maintenance in the amount of N\$ 3 500.00 monthly per child, subject to an annual escalation of 10% on the anniversary date of the final order of divorce which maintenance shall continue until the children reach the age of majority or becomes self-supportive, whichever occurs last.
6. An order directing the Defendant to contribute 50% towards all primary, secondary and tertiary educational costs relating to extra mural activities, books stationary and tuition related costs in respect of both the minor and the major still in school.
7. An order that the Defendant to contribute 50% towards all medical, dental, pharmaceutical, hospital and ophthalmologic expenses (including contact lenses and spectacles) in respect of the children until they reach the age of majority or become self-sustaining, whichever event occurs last.
8. An order directing that Plaintiff becomes the sole and exclusive owner or the moveable property, motor vehicle Toyota Hilux N 633240 W.
5. Cost of suit (only if opposed);
6. Further and alternative relief.

[3] The defendant filed a notice to defend the action on 17 November 2019 and proceeded to file his plea and counterclaim to the plaintiff's particulars of claim on 27 November 2019. In his counterclaim, the defendant also sought a restitution of conjugal rights against the plaintiff, and failing compliance therewith a final order of divorce. In his counterclaim, prayer 2, the defendant sought the following order:

The Defendant to remain the sole and exclusive owner of certain immovable property situated at Erf 6195 Walture Street, Khomasdal Ext. No. 10, Windhoek, Republic of Namibia and the Toyota Hilux with registration number N 63240 W.

[4] This prayer of the defendant in his counterclaim is the crux of the dispute between the parties. As the parties managed to reach a partial settlement agreement during the course of the trial and it is therefore not necessary to deal with all the pleadings. In addition to the partial settlement the issue of spousal maintenance was also dispensed with at the close of the plaintiff's case. No evidence was led regarding the claim for spousal maintenance and absolution from the instance was granted in that

regard. The partial settlement specifically dealt with the needs of the minor child, C E V M and this court made following order on 27 October 2020:

- 1.1 Maintenance in the amount of Two Thousand Namibian Dollars (N\$ 2 000) per month is payable in respect of the minor child. Such payment to be payable on or before the 7th day of every consecutive month.
- 1.2 The defendant will be liable for school expenses relating to stationary and uniforms payable in respect of the minor child.
- 1.3. The defendant will retain the minor child on his medical aid.
- 1.4. The defendant will purchase clothing on ad hoc basis in respect of the minor child.
- 1.5. Custody of the minor child remains with the plaintiff with rights of reasonable access of the defendant. Such reasonable access to be regulated in terms of Annexure A.
- 1.6. In the event that any of the parties require a variation of the aforementioned court order the relevant party must approach the maintenance court and should the need arise a full financial enquiry must be conducted by the Maintenance Court.
2. Spousal maintenance: Absolution of the Instance granted.

[5] As indicated above, the only issue which stands to be adjudicated on is whether the defendant made out a case for specific forfeiture of the assets belonging to the joint estate, i.e. the immovable property as mentioned in his counterclaim and the Toyota Hilux with registration number N 63240 W. In his counterclaim the defendant makes a number of averments in respect of the conduct of the plaintiff.

[6] On the list of issues I will only highlight the relevant averments for purposes of this judgment. The defendant averred in his counterclaim that the plaintiff left the common bedroom during 2011, she stopped cooking for him and their children during 2012 and left the common home of the parties during January 2019 and showed no intention to return¹. Furthermore, the defendant indicates that the plaintiff does not contribute financially to the common household².

¹ Para 3.7 of the particulars of claim.

² Para 3.14 of the particulars of claim.

[7] The basis for the specific relief sought in respect of the immovable property as set out in the defendant's counterclaim is as follows³:

- 'a. During 2000 and prior to the marriage the Defendant acquired certain immovable property situated at Erf 6195, Walture Street, Khomasdal, Extension No 10, Windhoek, Republic of Namibia.
- b. During the subsistence of the marriage Defendant acquired a certain motor vehicle, to wit: Toyota Hilux with Registration number N 63240 W.
- c. Defendant was solely responsible for all the expenses in respect of the aforesaid immovable and movable property.'

[8] The plaintiff in her plea to the counterclaim admitted that she left the marital home on or about 30 December 2018, however claims that she left the marital home due to defendant's frequent assaults on her. The plaintiff further pleaded that the defendant continued to threaten to harm her and their two children and as a result she obtained a protection order against him on 13 January 2019. The plaintiff further denied the averment by the defendant that she did not contribute financially towards the common household. The plaintiff conceded that she was not the breadwinner of the family but insisted that she assisted the defendant with providing necessities for the common household. The plaintiff also pleaded that apart from her financial contribution she also took care of their two children and contributed greatly to the making of their marital household from the time they got married up until the time she left the common home.

The issues

[10] The issues called for determination in this matter can be formulated as follows:

- (a) Whether or not the defendant is to be granted a forfeiture order as prayed for in his counterclaim.

³ Para 5 to 7 of the particulars of claim.

- (b) Corollary to the aforementioned issue, whether or not the plaintiff has made a meaningful financial contribution towards the maintenance, and upkeep of the said immovable property, as well as the payments of the mortgage bond registered against the aforesaid property;
- (c) Whether it is fair and just for the plaintiff to benefit from the joint estate, more specifically from the aforesaid immovable property and Toyota Hilux.

The evidence

[11] Neither the plaintiff nor the defendant called any independent witnesses to testify in support of their claims.

[12] I will thus proceed to summarise the evidence of the witnesses as follows:

The plaintiff

[13] The plaintiff testified that she and the defendant have been together since 1995. When she met the defendant both of them had daughters from previous relationships. During 1999 their eldest son was born out of wedlock, who was legitimised when the parties got married on 11 December 2004.

[14] The plaintiff testified that their problems started in 2014 and it escalated towards 2018. The plaintiff testified that the defendant does not communicate with her in a meaningful way and/or at all. He frequently assaulted her and drove her from the matrimonial home during December 2018 and she is currently residing with her mother in less than favourable conditions. She further testified that the defendant informed her that he no longer loved her and wants to terminate the marriage. He was frequently absent from the common home without furnishing any reason for his absence. He abused alcohol and entered into adulterous relationships with person(s) unknown to her.

[15] The plaintiff further testified that she obtained an interim Protection Order against the defendant on 13 January 2019, however during cross-examination it was established that the interim protection order was never made final.

[16] The plaintiff testified that the defendant financially abused her and initiated unnecessary quarrels with her. He further showed her no love and affection and refused any assistance from family members for reconciliation.

[17] During 2017 the defendant on two occasions vomited blood and was consequently admitted at the Roman Catholic Hospital for a week during which time she assisted the defendant. The plaintiff also testified that the defendant was involved in a car accident and she paid his bail, which money was never paid back to her.

[18] The plaintiff conceded that she was not the bread winner in the family but testified that she assisted the defendant by taking care of their children and matrimonial home and also contributed financially towards the matrimonial household, from the time they got married up until the time she left the matrimonial home.

[19] The plaintiff testified that she started working as an estate agent at Wendy Estate and with her earnings she paid the water and electricity bills and assisted in the maintenance of their children. The plaintiff testified that during the times that she was unemployed she ensured that everything was done in the home by cooking and cleaning, to grocery shopping, paying the bills, etc. During the times that the defendant went away on business travels she was the one who looked after the children and stated she was always there for their children.

[20] The plaintiff testified that during her tenure as an estate agent with Wendy Estate Agents she sold a house to her uncle and received an agent commission in the amount of N\$20 000 of which she contributed N\$ 10 000 towards the purchase of a VW Passat vehicle, which the defendant sold when she left the matrimonial house without her permission, and the remaining N\$ 10 000 was paid towards the mortgage bond.

[21] During 2008 the plaintiff stopped working at the estate agency and after a period of three years as a homemaker she obtained employment with Namib Pharmacy where she started working on 30 November 2011. The plaintiff is still so employed. The plaintiff testified that with her salary, which was N\$ 3 250 at the time, she bought food and clothes for her children and the defendant. She testified that she contributed towards the furniture bought at Nictus, which furniture was apparently also sold by the defendant without the plaintiff's permission.

[22] The plaintiff testified that throughout their marriage she made a sizeable contribution to the joint estate and the common household and that she will be severely prejudiced if the defendant was to benefit solely from the immovable property. The plaintiff reiterated that her current living conditions is a far cry from where she lived during their marriage and will not be able to afford her own immovable property. Currently she is struggling to make ends meet and had to take a loan, which she is currently repaying and also started a tuckshop at home to supplement her income.

Cross-examination

[23] During cross-examination it was established that the parties' major son is at training college and stays with the defendant. The plaintiff testified that she contributes towards his clothing and food because he often goes to visit her at her mother's place. The plaintiff further testified that she opened a Dunns' and Foschini account and she uses the Dunns account to buy clothes for her sons.

[24] The plaintiff vehemently denied during cross-examination any allegations of extra-marital affairs as well as the allegations that she also frequently left the house to go to bars without any explanation. The plaintiff however conceded that she went to a friend's bar over weekends. According to the plaintiff this friend is a friend whom she grew up with and when she goes to this specific bar they would always visit in a group.

[25] It was further put to the plaintiff during cross-examination that that the defendant alleges that she denied him his marital privileges and shirked her wifely duties and that the defendant would testify that she did not act as his wife since 2011 when she left the common bedroom. The plaintiff vehemently denied these allegations and stated that she was doing her duties by cooking, washing and she always did her wifely duties without the assistance of a nanny. The plaintiff further testified that she never refused the defendant his marital privileges and she even went the extra mile to buy supplements from the pharmacy to make their sexual life more enjoyable. However, the couples' physical relationship stopped in 2017. The plaintiff denied that she did not show the defendant love and affection. She stated that she supported the defendant while he was in the hospital and when he went through a difficult time when he was arrested and bail had to be posted on his behalf, albeit with the defendant's own funds.

[26] The plaintiff denied exploiting the defendant financially because she is allegedly greedy. She amplified by stating that the defendant gave her his debit cards to do payments and the defendant never complained about the funds expended on the household needs. The plaintiff testified that the common home was bought in 2001, which was prior to their marriage. She conceded that the defendant paid the instalments on the mortgage bond, including the rates and taxes. The plaintiff further conceded that the defendant was responsible for the bulk of the expenses regarding groceries that she contributed where her salary allowed it.

[27] When confronted with the payment of the N\$ 20 000 that she earned as 'commission' that she handed to the defendant, the plaintiff testified that she handed the full amount to the defendant approximately one year before the purchase of the Passat motor vehicle and stated that she might be mistaken when she said that she gave N\$ 10 000 towards purchase of the Passat and N\$ 10 000 toward payment of the mortgage bond.

The defendant

[28] The defendant confirmed that he and the plaintiff got married on 11 December 2004 in community of property and that they have two biological sons of which one is still a minor. The defendant testified that the irretrievable breakdown between the parties occurred on the eve of the plaintiff's biological daughter's (Anna) 21st birthday. The defendant testified that as a father figure to the plaintiff's daughter he felt that he should make a tangible contribution to the child's 21st birthday, however the plaintiff indicated that the child's father would take care of all the financial obligations. The defendant testified that in light of that fact he then elected not to attend the birthday celebrations. However, the plaintiff pleaded with him to attend for the sake of her daughter, Anna, and the plaintiff told him that she wanted to give him the opportunity to speak at the event as Anna's father. To his surprise Anna's biological father was present and he gave the intended speech. The defendant testified that he felt betrayed and humiliated because some of the guests present at the festivities did not know that he was not actually Anna's father.

[29] The defendant gave his speech and then left the celebrations feeling very hurt. A disagreement occurred between him and the plaintiff later that night and because of the humiliation and the betrayal of his trust he requested the plaintiff that same evening to end their marriage as he did not see his way clear to continue with a marriage whilst not trusting the plaintiff.

[30] The defendant testified that the plaintiff moved out of the common bedroom that same night (2011) and out of the common home during December 2018. The defendant confirmed that the plaintiff sought the assistance of family members and prominent pastors in Windhoek with the aim of seeking reconciliation but he could not see himself in a relationship of mistrust with her. The defendant testified that the plaintiff acted with the malicious intent to terminate the marriage and denied him his marital privilege and showed no love and affection towards him since 2011.

[31] The defendant further testified that the plaintiff stopped cooking in the common home since 2012 and failed to communicate with him meaningfully and showed no

respect towards him. He testified that the plaintiff was frequently absent from the common home without furnishing any reasonable explanations and she engaged in an extra-marital affair which she admitted to him.

[32] The defendant further testified that the plaintiff told him in as many words that she will only leave the marriage once he is bankrupt and that she was untruthful to him on multiple occasions.

[33] The defendant denied being frequently absent from the common home without furnishing any reasons and it was in fact the plaintiff spending the majority of her weekends out spending money with male friends.

[34] The defendant denied that he entered into adulterous relationships and further denied that he in any way emotionally, psychologically and financially abused the plaintiff and their children. Instead, so testified the defendant, the plaintiff exploited him financially and emotionally for her greedy needs. The defendant confirmed that the plaintiff paid on occasion bail on his behalf but stated that the money so paid was his own money.

[35] The defendant testified that before they got married he purchased the immovable property in question in 2001. This property then became their common home. The defendant further testified that he solely settled the mortgage bond of the common home as well as the insurance thereof on 10 April 2012. In addition thereto the defendant testified that he solely maintained the common household and that the plaintiff, despite being employed since mid-2012, refused to make any financial contributions to the joint expenses or the purchase of household groceries and necessities.

[36] The defendant further testified that during the subsistence of the marriage he purchased three vehicles, namely a VW Passat in 2008, a 2007 Toyota Hilux 207 in 2012, and a Volkswagen Beetle in 2014. According to the defendant he settled the due amounts on all these vehicles without the plaintiff making any contributions thereto.

[37] Lastly, the defendant denied assaulting and/or threatening the plaintiff and indicated that they only had frequent verbal arguments. The defendant however confirmed that an interim protection order issued against him.

[38] The defendant prayed that the court grants him a specific forfeiture order in respect of the immovable property as well as the 2007 model Toyota Bakkie.

Cross Examination

[39] During cross-examination the defendant confirmed that he understood marriage in community of property to mean that both husband and wife need to contribute equally to maintaining themselves and the children. Further to that the defendant testified that according to the law, marriage in community of property means that whatever he possesses or whatever the plaintiff possesses belongs to both of them and that he understood that the house that he bought prior to the marriage will belong to both of them by virtue of the marital regime.

[40] According to the defendant during the subsistence of the marriage he shared the cooking duties with the plaintiff both him and the plaintiff took care of the boys but it was the plaintiff's duty to wash the boy's clothes and clean the house. This position however changed to the plaintiff cooking and cleaning only now and then and these duties progressively started to fall on him. The defendant testified that when he had to travel due to his employment the plaintiff stayed at home and looked after the children, cooked and cleaned. He further testified that when he travelled with work, he gave the plaintiff money to buy food at home. The defendant however conceded that he gave the plaintiff his cards voluntarily to buy household necessities and he never had complaints from his children that the plaintiff was neglecting them and she used the money for the purpose he directed her to.

[41] When confronted regarding the value to immovable property the defendant testified that he obtained no sworn valuation as he had no intention of selling the property.

[42] In respect of the financial contributions made by the plaintiff the defendant testified that the plaintiff did not make a payment towards the purchase of the Passat vehicle. In fact the defendant testified that he had purchased the vehicle by trading in his previous vehicle and then later in order to be able to sell the Passat he had to spend a lot of money to get it in a sellable condition and he retained the profit of the vehicle once sold.

[43] He testified that he believes that the plaintiff was having extra-marital affairs because she was out drinking with other men and she admitted this to him. Although the defendant had not direct evidence of the plaintiff's infidelity he testified that where there is smoke there is fire. The defendant also testified that he relied on what his friends told him about the plaintiff and that painted a picture to him that she was in adulterous relationships with men. The defendant however conceded that the plaintiff never admitted to having an affair.

[44] From the court's questions it came to light that from 2011 when the plaintiff moved out of the common bedroom, the defendant testified that he still had certain expectations from the plaintiff, which she did not do. In amplification the defendant testified that there was an expectation that the plaintiff would not neglect the children and that she would still cook and clean and provide him with his conjugal rights. This however did not happen.

[45] According to the defendant when the plaintiff moved out of the common bedroom in his mind it already constituted her moving out of the common home. He testified that the relationship during that time deteriorated and they were not communicating well and only communicated on issues regarding the children. They maintained this unhealthy

relationship for 7 more years, until the time the plaintiff moved out of the common home during December 2018 when he asked her to leave the house. He stated that the plaintiff indicated that before she leaves she wants him to be bankrupt, but during this time the defendant still entrusted her with his bank card when he travelled.

[46] In conclusion, it was further established that even though the defendant is praying to be the sole and exclusive owner of the immovable property as well as the Toyota Hilux, no averments were made with regard to the value of these assets as they were not valued.

Arguments on behalf of the plaintiff

[47] Ms Pack, on behalf of the plaintiff argued that the natural consequence of the law and benefit of marriage in community of property is that the estate is divided equally between the parties. Counsel argued that a party cannot escape the consequences of the marital regime when the relationship turns sour and as a result of the marital regime all the assets before the marriage now form part of the joint estate. In addition thereto counsel argued that all income earned by the parties during the marriage or assets attained during the marriage form part of the joint estate. It was further argued that where there is no order that specifically makes provision for the division of a joint estate, the law provides the parties' estate be divided equally. Ms Pack also made reference to the Namibian Constitution wherein the parties shall be entitled to equal rights during the marriage

[48] Ms Pack pointed out that the defendant conceded that he understood the consequences of marriage in community of property yet the defendant sold the VW Passat without sharing the proceeds with the plaintiff. Ms. Pack further referred the court to the *locus classicus* case of *C v C*⁴ with regard to the special forfeiture order. Counsel argued that in the aforementioned matter it was provided that it is necessary to provide evidence to the Court as to the value of the estate at the date of divorce of which is not evident in the current matter. Counsel argued that the latter is a

⁴ 2012 (1) NR 37.

requirement that should be met for a successful forfeiture claim. Counsel further argued that a specific forfeiture order is made only in exceptional circumstances and requires that the party must have made the necessary allegations. Furthermore that evidence about the contribution of both spouses should be led and the fact that the husband or wife is unemployed does not mean that he/she did not contribute to the joint estate. Ms Pack submitted that due regard should be made to the cooking, cleaning and taking care of the other party and the children and household regardless of whether one is able to quantify such contribution or not. Ms Pack emphasised that the defendant conceded that the plaintiff contributed to the household with regard to the list of the latter's contributions made.

[49] In conclusion Ms Pack argued that the defendant's prayer for specific forfeiture is without merit and should not be granted.

Arguments on behalf of the defendant

[50] Ms. Delport, on behalf of the defendant, argued that the credibility of the witnesses and the mutually destructive versions have to be considered by the Court and referred the court to *Mbango vs Mbango*⁵ in this regard.

[51] Counsel proceeded to make a number of observations regarding the specific forfeiture order which was discussed in *C v C*⁶ and pointed out that the *C v C* matter came about before the introduction of the current judicial case management process, more particularly rule 89. Ms Delport argued that Heathcote AJ laid down the requirements in order to succeed with a claim for specific forfeiture, in that the value of the joint estate must be alleged and proven at the stage of pleadings already. However, with the introduction of rule 89 such averments as to the value of the joint estate was made in the rule 89 affidavit, which was not disputed by the plaintiff during judicial case management process. Counsel argued that as the parties are now at an advanced

⁵ *Mbango vs Mbango* HC-MD-CIV-ACT-MAT-2016/03005 [2020] NAHCMD 95 (13 March 2020)

⁶ *C v C* 2012 (1) NR 37.

stage of litigation where full disclosure was made in terms of rule 89 and the values as set out therein were not disputed by the plaintiff, it can thus be said that the plaintiff agreed to these valuations.

Analyses of the evidence and evaluation thereof

[52] I intend to concentrate mostly on the evidence relevant to the aspect of the estate and the defendant's claim for specific forfeiture of the immovable property. In order to determine the issues as set out above it is necessary to consider the evidence advanced by the parties in that regard and also to consider the credibility of the witnesses.

Mutually destructive testimonies

[53] It is clear from the conflicting accounts testified to by the plaintiff and the defendant that their evidence is at complete variance.

[54] From the onset I must point out that the court did not have the benefit of independent witnesses. The immovable property in respect of the counterclaim by the defendant was never evaluated. For the bulk of the evidence it is a question of he said she said. Therefore the court must consider which of the versions are favoured by the probabilities

[55] In *Mulenamaswe v Mulenamaswe*⁷ Ueitele J made the following observations in respect of mutually destructive evidence:

' . . . The following legal principles are now well settled in our law namely that:

- (a) where the evidence of the parties' presented to the court is mutually destructive the court must decide as to which version to believe on probabilities⁸;

⁷ *Mulenamaswe v Mulenamaswe* (I 2808/2011) [2013] NALCMD 275 (9 October 2013) para 34.

⁸ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

- (b) the approach that a court must adopt to determine which version is more probable is to start from the undisputed facts which both sides accept, and 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.⁹

[56] Both the plaintiff and defendant's testimonies leaves much to be desired. However, I can confidently say that the defendant did not leave the Court with a good impression and his testimony was less favourable. During the bulk of his testimony, he attempted to paint the picture that the plaintiff neglected to take care of him or neglected to execute her wifely duties. He would not give the plaintiff credit where credit is due. He conceded that she did cook, she did clean and she did take care of him and his children but in the same breath would say that she 'pretended to be a good wife'. Evidence on record is that the plaintiff did contribute to the common household in the best way she could. The defendant trusted her with his debit cards while he was away and no evidence was put forth on how she exploited him financially as he claims.

[57] The defendant alleged that as a result of an incident in 2011 at the birthday celebrations of the plaintiff's daughter he decided (that night after the said celebrations) that that was the end of their marriage yet he remained in this 'sham' of a marriage for another 8 years without taking any steps to apply for a divorce. Further to that it appears that despite the defendant requesting the plaintiff to end the marriage as he could not remain in a marriage where he mistrusts her, the defendant still harboured certain expectations of the plaintiff, eg cooking, cleaning, raising the children and marital privileges. This is an interesting position taken by the defendant because the defendant's expectations were then clearly not in line with his general attitude that the marriage was over. According to the defendant they effectively lived separate lives but the defendant took great exception to the fact that the plaintiff went out and made a number of allegations regarding the plaintiff's alleged infidelity, which allegations appears to be without substance.

⁹ *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 16-17 para 24).

[58] As indicated above, the plaintiff's evidence is also not beyond reproach and can be, and was indeed criticised by the defendant as there were contradictions in the plaintiff's version. Yet if one has regard to probabilities and improbabilities the probabilities absolutely favour the version of the plaintiff. According to the plaintiff the cracks started in their marriage in 2014 which got progressively worse towards 2017. The plaintiff fulfilled her wifely duties, she supported the defendant when he was in hospital and she looked after the house by doing grocery shopping, etc. That is why the plaintiff was entrusted by the defendant with his bank cards and she made the necessary purchases and paid the necessary bills. I have no issue in accepting that the defendant also did his part in the house but I am not convinced that the defendant was the one who took over the general running of the communal home and the cooking and the caring for the children.

[59] The defendant complains that the plaintiff did not contribute to the communal home. It is the version of the plaintiff that she contributed where she could financially but other than that she fulfilled her role in the house as a wife and a mother. For a substantial period of their marriage the plaintiff was unemployed and was a homemaker. The contribution that the plaintiff made to the home and the general well-being of her family during the time that she was unemployed cannot be disregarded. The defendant wants the court to believe that when the plaintiff started working she contributed absolutely nothing to the common household. I find that hard to believe. There is no evidence that the plaintiff is a spendthrift or a drunk that would waste her money. The defendant alleged that the plaintiff is/was greedy but when he was questioned as to whether she squandered his money when she had the bank card his answer was in the negative.

Legal principles relating to division of joint estate

[60] 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 shares¹⁰.

[61] 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 divorce¹¹.

[62] The learned author RH Hahlo in *South African Law of Husband and Wife*¹² 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 marriage¹³. Assets forming part of the joint estate are owned by the spouses in equal, undivided shares.

[63] The defendant seeks a specific forfeiture order in respect of the property situated in Windhoek. A specific forfeiture order is an order where a particular *res* is forfeited to the party who seeks such an order.¹⁴ When such a specific forfeiture order is sought, a court requires a litigant to set out all the relevant information¹⁵.

[64] In *C v C; L v L*¹⁶, Heathcote AJ set out the relevant principles relating to both general and specific forfeiture orders relating to divorce proceedings in marriages in community of property as follows:

¹⁰ See *Boberg's Law of Persons and the Family* (2nd ed) at page 185; and also *HR Hahlo, The South African Law of Husband and Wife* (5th ed) at 157 to 158.

¹¹ See *Matthee v Koen* 1984 (2) SA 543 (C).

¹² 5th ed at 157-158.

¹³ *The South African Law of Husband and Wife* 5th at 161.

¹⁴ Hahlo HR: *The South African Law of Husband and Wife* 5th ed. See also *Steenberg v Steenberg* 1963 (4) SA 870 (C).

¹⁵ *Ex parte Deputy Sheriff, Salisbury: In re Doyle v Salgo* 1957 (3) SA 740 (SR) at 742D; *NS v RH* 2011 (2) NR 486 (HC).

¹⁶ 2012 (1) NR 37.

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

[22.7] The court, of course, has a discretion to grant a specific or quantified forfeiture order on the same day the restitution order is granted, if the necessary evidence is led at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim i.e the value of the property at the time of divorce, the value of the respective contributions made by the parties, and the ration which the plaintiff suggests should find application (where a quantified forfeiture order is sought). Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be identified. It should then be alleged that the defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. (Note: this not the same as alleging that no contribution was made to the acquisition or maintenance of the specific asset.) I am of the view it is only fair that defendants also, in unopposed divorce actions (by and large getting divorced in circumstances where the defendant is illiterate and would not even understand the concept of forfeiture of benefits) should be provided with such details.

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

[65] I fully endorse the principles laid down in the judgment and moreover I respectfully associate myself with the stated principles.

[66] In summary, as far as a specific forfeiture order is concerned, this may be granted in exceptional circumstances provided the necessary allegations are made in the pleadings and the required evidence is led.¹⁷ Having considered the circumstance of the current matter I cannot find that any exceptional circumstances exists.

[67] I have considered the arguments by Ms. Delport on the development of the law with the inception of the judicial case management system and rule 89. However, I will not pronounce myself in the current matter in this regard because this is not a matter where specific forfeiture should be granted and I would have been hard pressed to give such an order even if the requirement as set out above had been met.

[68] In my considered view the prayer for specific forfeiture must be dismissed.

[69] The only issue remaining to consider is the issue of costs. The issue of cost is and remains in the discretion of the court. Matrimonial matters are generally guided by the same principles as any other matter. The plaintiff is however represented on the instruction of the Legal Aid Directorate and I will therefore make no order as to costs.

[70] In the result I make the following orders:

In respect of the Defendant's claim for specific forfeiture of benefits:

1. The claim for specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf No 6195, Walture Street, Khomasdal Extension no.10, Windhoek, republic of Namibia and the Toyota Hillux with registration number N 63240W is dismissed.
2. The joint estate is to be divided according to the matrimonial regime.
3. No order as to cost.

In respect of the partial settlement agreement:

¹⁷C v C; L v L *ibid* at 47A-B:

4. The court order dated 28 October 2020 is incorporated herein.

In addition to the aforementioned order:

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 **12/03/2021**, failing which, to show cause, if any, to this court on the **9/04/2021** at **09:00**, why:

2. The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

L Pack
Of Pack Law Chambers

DEFENDANT:

A Delport
Of Delport Legal Practitioners