

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-MAT-2019/04202

In the matter between:

C D N P N

PLAINTIFF

And

H T N

DEFENDANT

Neutral citation: *N v N (HC-MD-CIV-ACT-MAT-2019/04202) [2021] NAHCMD 31 (9 February 2021)*

Coram: Schimming-Chase, AJ

Heard: 5-7 October 2020 and 9 October 2020

Delivered: 9 February 2021

Flynote: Action for divorce - Plaintiff must prove three aspects in the proceedings for a restitution order – First that the court has jurisdiction – Second that there has been and still is a marriage - Third that there has been malicious desertion on the part of the defendant - The onus of proving both the factum of desertion and the *animus deserendi* rests throughout upon the plaintiff - In order to discharge the onus plaintiff must prove conduct which one must not expect in the ordinary course of marriage- The court has a judicial discretion in weighing misconduct of parties to determine blameworthiness,

and must be satisfied that the guilty spouse had the malicious intention to terminate the marriage.

Semble - Requirement of fault to still be proved in this day and age a travesty and amongst others, a waste of judicial resources.

Contract – Rectification – Mistake - Essential allegations and facts justifying rectification - Mistake in signing of the documents to effect joint ownership of property – Rectification can be granted where written memorial does not reflect true consensus of the parties or common intention of the parties- Onus on party alleging mistake.

Evidence – Evaluation of evidence of witnesses - Weighing up probabilities and credibility of witnesses – Facts - On a balance of probability pointing to malicious desertion on the part of plaintiff – Plaintiff did not discharge onus to prove mistake-evidence on a balance of probability pointing to plaintiff being aware of joint ownership of immovable property when registration and mortgage bond documents signed.

Summary: Plaintiff and defendant were married to each other out of community of property in terms of section 17(6) of the Native Administration Proclamation, 15 of 1928. The plaintiff sued for divorce, and the defendant counterclaimed for divorce, both relying on fault based principles. In respect of an immovable property in Windhoek that was jointly registered between the parties, plaintiff sought rectification of the deed of transfer and mortgage bond loan agreement. Rectification was sought in order to reflect the out of community of property marriage in accordance with the provisions of the Proclamation. Deed of transfer reflected that the parties were married in community of property. The mortgage loan agreement was signed by both the parties at the bank.

Held Plaintiff did not discharge onus to prove fault on the part of the defendant. An evaluation of the evidence found the defendant to be more cogent and authentic as regards her defences, and the plaintiff's own desertion. Defendant succeeded in her counterclaim, and restitution order granted in her favour.

Held Plaintiff did not discharge onus to prove the mistake contended for. The evaluation of the evidence showed that it was more probable than not that the plaintiff was fully aware of and intended that the property be jointly registered. *Caveat subscriptor* principle applied.

ORDER

1. The plaintiff's claims are dismissed and the defendant succeeds on her counterclaim.
2. The plaintiff is ordered to pay the defendant's costs of suit.
3. The plaintiff is ordered to restore conjugal rights to the defendant on or before 16 March 2021, failing which, to show cause, if any, to this court on 13 April 2021, why the bonds of the marriage subsisting between the defendant and the plaintiff should not be dissolved.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This is a divorce action. At the end of the hearing, a number of issues became settled between the parties. Custody and maintenance in respect of one minor child was settled,¹ and certain proprietary claims relating to improved communal land² located in the Odibo , as well as a farm located in Okavango West were similarly settled between the parties.

[2] Two issues remain for determination, namely the question of which of the parties

¹ To the satisfaction of the court as upper guardian of minor children.

² The traditional house

is responsible for the irretrievable breakdown of the marriage, and whether the plaintiff has succeeded in his claim for rectification of registration and mortgage bond documents evidencing joint ownership between the parties of certain immovable property located at 54 Gous Street, Pionierspark (“the property”), which would then make him exclusive owner of the properties.

[3] The plaintiff and defendant were married to each other on 19 August 1995 at Onheleiwa, Okalongo, Omusati Region. The marriage was concluded in terms of section 17(6) of the Native Administration Proclamation, 15 of 1928 which provides that:

“A marriage between, contracted after the commencement of this proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.

[4] Four children were born from this marriage. Only one is currently a minor.

[5] The plaintiff’s allegations made in support of his claim for divorce, are that the defendant deserted him by not showing love and affection, not showing an interest in the marriage, failing to properly communicate with the plaintiff, and refusing him his conjugal rights.

[6] The plaintiff also seeks an order declaring that he is the exclusive owner of certain immovable property located at Gous Street, Pionierspark, which he pleads was registered³ as a joint property between the parties “unnecessarily and mistakenly (which mistake was mutual to the parties)”.

[7] The plaintiff further pleaded (and it is not in dispute) that at all material times he

³ On 21 April 2006

exclusively paid all the monthly bond instalments as well as the costs of transfer of the property and its upkeep.

[8] The defendant delivered a plea and counterclaim. She admitted in her plea that the parties were married out of community of property by virtue of the provisions in the Proclamation. This is also reflected as a fact not in dispute in the pre-trial report.

[9] The defendant denied the desertion alleged and pleaded that it was the plaintiff that deserted her by showing no love and affection, showing no interest in the continuation of the marriage, refusing to properly communicate with her and denying conjugal rights. She further pleaded that the plaintiff moved out of the common home and refused to share the common bedroom with her. Also, she pleaded that the plaintiff committed adultery with multiple women whose further particulars were unknown to her, emotionally abused her and permitted the unlawful and wrongful intrusion of his siblings and children into the marriage. These allegations formed part of her counterclaim for divorce.

[10] As regards ownership of the property, the defendant denied that she or the plaintiff operated under any ignorance on the effect and essence of the marriage out of community of property. She further denied that either of the parties were operating under any mistake with respect to the registration of joint property. She pleaded that the parties attended to the intentional and calculated joint registration of the property and that it was expressly agreed between the parties that the defendant would be responsible for payments relating to the upkeep, maintenance and domestic needs of the household whilst the plaintiff would be responsible for the mortgage loan monthly bond instalments.

[11] The court is to determine who is at fault in this marriage irretrievably broken down. The court must also make a determination on whether the plaintiff has made out a case for rectification of the transfer and mortgage bond documents on the ground of mutual mistake.

[12] As regards the question of fault, it remains necessary to again express extreme

disappointment that the current divorce laws, already found to be archaic,⁴ still need to be applied when it is clear that irrespective of fault, this marriage is over. The court must now go through the exercise of evaluating the evidence of both parties, and make a determination as to who deserted whom for purposes of granting a restitution order. Such a waste of judicial resources, not to mention the difficulty experienced by the witnesses having to relive the difficult events in their lives.

Applicable Law

[13] As regards the vexed question of fault, the most common manifestations of malicious desertion are: (i) actual or physical, (ii) constructive, or (iii) refusal of marital privileges. The onus of proving both the *factum* of desertion and the *animus deserendi* rests throughout upon the plaintiff. In considering whether the plaintiff has discharged the onus, there must be conduct which is not expected in the ordinary course of marriage and that:

“..the conduct . . . need not have amounted to a matrimonial offence such as cruelty or adultery but . . . it must exceed in gravity such behaviour vexatious and trying though it maybe, as every spouse bargains to endure when accepting the other 'for better or for worse'. The ordinary wear and tear of conjugal life does not itself suffice.”

[14] It is trite that conduct amounting to malicious desertion means no more than unjustifiable conduct in the circumstances. Three things must be proved by a plaintiff in the proceedings for a restitution order: first, that the court has jurisdiction; second, that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant.⁵

[15] The court has a judicial discretion in weighing up the matrimonial misconduct of the spouses against each other in order to determine whose conduct was more blameworthy or was the real cause for the breakup of the marriage. For this the court looks at the evidence.⁶

⁴ *Inter alia* per Damaseb JP (as he then was) *HV v SV* (2) 2014 (3) NR 842 (HC)

⁵ Per Damaseb JP (as he then was) in *HV v SV* (*supra*) at par [16] and [17] and the authorities collected there.

⁶ *Valindi v Valindi and Another* 2009 (2) NR 518 (HC) at par [29] and the authority referred to.

[16] With reference to the question of the plaintiff's pleaded mistake, a litigant seeking a rectification of a written document must allege and prove:

16.1. an agreement between the parties which had been reduced to writing;

16.2. the written document does not reflect the common intention of the parties correctly;

16.3. an intention by both parties to reduce the agreement to writing;

16.4. there was a mistake in the drafting of the document;

;

16.5. the actual wording of the agreement as rectified.⁷

[17] Also, the party seeking to rely upon a right to claim a rectification must establish the facts justifying a rectification in the clearest and most satisfactory manner.⁸ (emphasis supplied)

Plaintiff's evidence

Fault

[18] The plaintiff's evidence was the following:

18.1. He is a major male and former Minister.

18.2. During or about 2009/10, the defendant became a member of a church. Once she became a member of this church, she no longer showed him any love and affection. Instead of showing interest in the continuation of their marriage, she showed more interest in the church.

⁷ *Shikale NO v Universal Distributors of Nevada South Africa (Pty) Ltd and Others* 2015 (4) NR 1065 (SC) at par [27] and the authorities there collected

⁸ *Shilake (supra* at par [28]

18.3. As regards communication, the defendant refused to properly communicate with the plaintiff. For example, on two occasions she flew to South Africa during December 2017 and 2018, without informing him prior to travelling. He only became aware of her whereabouts when she returned and he confronted her. She then informed him that they had travelled. When he asked her about how she got to South Africa and where she stayed, she refused to disclose anything to him. However he found a letter addressed to her from the “well-known prophet Bushiri”.

18.4. On one occasion the defendant also attempted to persuade the plaintiff and their children to go to Nigeria and see “TB Joshua”. The plaintiff as well as the children refused the request.

18.5. Sometimes the plaintiff would leave the house and go away without properly informing him. Sometimes she would even sleep on the floor or go to sleep in another room.

18.6. As a result of the conduct of the defendant, the plaintiff moved out of the common bedroom during 2018.

[19] During cross examination, the plaintiff denied that he committed adultery as alleged by the defendant in her plea and counterclaim⁹. He also denied that he was bringing different women into the traditional home, and that as a result of the disruption of the marital sanctity, the defendant no longer wanted to sleep in the same bedroom with the plaintiff.

[20] In response to it being put, that it was the plaintiff who disrupted the matrimonial sanctity by bringing women into the common bedroom, the plaintiff testified that the defendant left the common room first by sleeping on the floor or in another bedroom, and that her excuse was that she had backache. This is why he eventually left the common bedroom.

⁹ In support of her claim for desertion

[21] According to the plaintiff, his main gripe was that the defendant became a fundamentalist, and tried to force him into and their children into her religion. This, according to the plaintiff, is what broke the back of the marriage.

[22] The plaintiff also testified that he went to the lawyers because life was unbearable, as a result of which he sought to evict the defendant from the property in Pionierspark. In any event, the defendant had asked him to get a divorce. He further confirmed that he changed the locks, and prohibited the defendant from going to the traditional homes at Kwangali and Odibo unless he was present.

Mistake

[23] With regard what effectively was his claim for rectification¹⁰ of the of the registration and mortgage bond documents, the plaintiff testified that during 2006 he was:

“...ignorant about the effect and essence of the marriage out of community of property between the parties, I unnecessarily and mistakenly purchased the house at Pionierspark, Windhoek, and caused it to be registered as a joint property between myself and the defendant” (emphasis supplied).

[24] It is expressly indicated the deed of transfer dated 21 April 2006 that the plaintiff and defendant were “married in community of property to each other”.

[25] So too, the mortgage bond, dated 15 March 2006 was addressed to plaintiff and defendant, who both signed and therefore took responsibility for repayment of the mortgage bond in accordance with its terms.

[26] In cross examination, the plaintiff confirmed that both he and the defendant attended at Nedbank and that they signed the bond documents. He conceded that in spite of the fact that he exclusively paid the mortgage bond, both he and the defendant

¹⁰ The formulation of the claims on the pleadings left much to be desired. However the matter had been case managed and set down for trial, and a further delay would not be in the interests of the principles of judicial case management and in particular the provisions of Rule 19(1)(b).

were jointly and severally liable for repayment of the bond.

[27] It was put to him that the defendant's version was that the property was indeed correctly recorded as being joint owned, and that they had agreed between themselves to obtain the loan and to buy a matrimonial home together. Further it was put to the defendant that in terms of their *inter partes* agreement, the plaintiff was to make the instalments that are not in dispute, and that defendant would contribute to upkeep and maintenance.

[28] In response the plaintiff mentioned that initially the defendant was unemployed, and could not contribute to the upkeep and maintenance of the property, and in any event, there was someone who washed and cooked and took care of the children and ironed, and that he had never seen the defendant do such work, and therefore she had not contributed to the upkeep.

[29] As to the error in the bond documents, the defendant testified that he only became aware of the error when he was in the process of instituting proceedings. He did confirm that he saw both names reflected on the mortgage bond as well as their signature. He did not dispute that the parties signed the deed of sale together, and made the loan application together. He testified in this regard that he did not scrutinise the agreement at the time.

[30] The defendant also did not scrutinise the transfer documentation where it expressly indicated that the parties were married in community of property. He was however aware at the time, that it should have been registered in his name alone, in terms of the Native Administrative Proclamation. He even realised when he was in parliament that he was married north of the red line and out of community of property.

Defendant's evidence

Fault

[31] The defendant denied the misconduct complained of by the plaintiff. She stated that it was the plaintiff who showed no love and affection towards her during the subsistence of the marriage as he is the one committed adultery and in fact had multiple extra marital affairs.

[32] She testified that the plaintiff showed no interest in the continuation of the marriage. He continued to engage in extra marital affairs unabated, and he continued to disrespect the marriage by conducting his extra marital affairs within the sanctity of their marital bedroom in their traditional home. She stated further that the plaintiff abandoned the marital bedroom in the house in Windhoek since 2018 and moved to the outside flat.

[33] She stated further that in the interest of the continuation of their marriage, she suggested on numerous occasions that the family seek spiritual guidance from religious leaders, which suggestions the plaintiff was not amenable to. Her attempts to find guidance to repair her marriage were completely rejected by her husband and labelled as fundamentalism.

[34] Her evidence was that the plaintiff refused to communicate with her. He even travelled in and out of town without informing her. When she insisted on communicating, he directed her to communicate through third parties or within crowd settings only. She insisted that she had always attempted to maintain communication with her husband, which attempts he continually frustrated.

[35] She further asserted that to the detriment of the marriage, her husband permitted the wrongful and unlawful intrusion of his siblings and extended family in their marital relationship and levelled a multitude of unsubstantiated and outrageous accusations against her pertaining to practicing witchcraft and being desirous of his demise, which accusations she vehemently denied.

[36] Finally, she asserted that the plaintiff had unlawfully deserted her, which desertion he persisted in. She specifically mentioned the plaintiff's attempt to interdict her from the matrimonial home, and his barring her from access to the traditional homes in his absence. She prayed that the court grant a restitution order as set out in her

counterclaim and dismiss the prayers sought in the particulars of claim.

[37] The defendant was cross-examined about the fact that her legal practitioner did not put the specifics surrounding the allegations of adultery to the plaintiff during cross-examination. She indicated that she had declined to give particulars, to preserve some modicum of dignity. She insisted, however, that her husband had been intimate with other women in their marital bed. This was why she slept on the floor or outside the bedroom, but she also did sleep on the floor from time to time because she enjoyed it. She also mentioned that when she was angry with the plaintiff she did sleep on the floor but generally returned when they made up.

Mistake

[38] As regards joint ownership of the property, the defendant was adamant that it was at all material times the intention of the parties that the property would be registered jointly. This was, as she testified, as a result of an agreement between the parties that they would jointly own the immovable property. She testified in this regard that the property was acquired as a result of a joint decision by the parties. In terms of this agreement, she went to identify the property and the plaintiff approved it. They both signed the deed of sale, and they jointly obtained a loan from the bank. She pointed out that the mortgage bond documents were signed by and addressed to both her and the plaintiff.

[39] It is also noted, that the defendant changed some of the terms of her witness statement. Initially the indication was that the parties were joint owners of the property by virtue of their marriage in community of property. This was changed at the hearing, the defendant relying on joint ownership of the agreement. However in the rest of her testimony in chief she relied on a marriage in community of property.

[40] In this regard, she testified that although she admitted in the pleadings that the marriage was out of community of property for want of compliance with section 17(6) of the proclamation, she remained adamant that the underlying intention they both had for their marital regime at that time was one of community of property.

[41] The defendant confirmed that she did not sign a declaration as envisaged by the Proclamation. She stated that it may be to ignorance of the law at the material time, that all of the formalities were not complied with in that a formal declaration was not made in writing to the marriage officer prior to the conclusion of the marriage. However, she affirmed that at the date of marriage and all material times prior thereto she and her husband expressly voiced their intention to marry in community of property and further that during the subsistence of their marriage, they affirmed that intention by conducting their affairs in a form and manner reflecting the intention and belief that they married in community of property.

[42] The defendant further referred to a conversation she had with her husband in September 1995, a month after their marriage. At the time, the plaintiff had just been assigned to head of the Namibian Embassy in Angola and asked her to quit her fulltime job as a teacher at a local school and move to Angola with him. She agreed and they proceeded to make arrangements including bidding her parents farewell. She distinctly recalled her parents questioning the defendant regarding the wisdom of the decision to resign from her job as she had dependents in her extended family. The plaintiff informed the parents that the marriage is one of community of property, what was his was hers and therefore his income would support both families equally and her dependents would not suffer a loss of support. The parties lived in Angola for 8 years and were further commissioned to India for 2 years. During this time, the defendant continued to fully support her as well as the family and extended family.

[43] In addition, as a result of the foreign missions the defendant also lost all pension fund benefits accrued to her in respect of her former job but she stated that she was not concerned about this because she believed her husband and she were married in community of property. The plaintiff was very responsible and supportive at the time, so she believed she had no reason to worry. She became formally employed from 2011 and contributed proportionally to the household from that date.

[44] Further, during or about 2013, she wanted to buy property in Khomasdal. Upon approaching the bank in order to obtain financing for the purchase, the bank requested that the plaintiff also come in to sign the documents as their marriage was one in community of property. The plaintiff refused to sign as her spouse and joint co-owner

which resulted in the entire transaction falling through.

[45] The defendant was cross-examined at length on the terms of the antenuptial contract but she maintained that she held the view that the parties were married in community of property. Counsel for the plaintiff pointed out that none of this information or version was put to the plaintiff in cross-examination. And, as counsel correctly pointed out, it was admitted in the plea and accepted as a fact not in dispute that the parties were married out of community of property in terms of the Proclamation. Unfortunately no application to amend the plea and counterclaim or pre-trial report, was made, and counsel for the plaintiff was correct in objecting to the eliciting of this evidence (as regards whether the parties were married in or out of community of property).

Application

[46] On the evidence before the court, the court finds that the plaintiff has not discharged his onus to prove desertion on the part of the defendant. The defendant has however proved conduct by the plaintiff amounting to desertion. It is not lost on the court that the plaintiff (on his own version) sought to interdict the defendant from the property, and changed the locks at their traditional home, requiring her to attend only when he was present. This conduct is clearly conduct unjustifiable in the marriage, and is a manifest intention of an absence of interest in the continuation of the marriage.

[47] In addition, although the adultery of the defendant was not particularised in the plea and counterclaim, it was pleaded, in spite of the specifics not being sought in cross examination. The plaintiff's denial was a bare denial. The defendant did not seek a final order of divorce on these grounds, but made it plain that his conduct with other women in the marital bed had caused major emotional trauma and affected her dignity. This could also be gleaned from her demeanour during cross examination, and even then, wanting to maintain some form of dignity by not giving names.

[48] As regards the claim for rectification, the court finds that the plaintiff has not discharged his onus to prove that it was at all material times the intention that the property be registered in his name only. Firstly the evidence is clear that both the

parties went to sign the mortgage bond at the same time. There would have been no need for the defendant to come along and sign the mortgage bond if the property was his alone, and the veracity of his evidence in this respects is questionable, given his experience and knowledge of the applicable law as a parliamentarian.

[49] The mortgage bond, dated 15 March 2006 was addressed to plaintiff and defendant, who both signed and therefore took responsibility for repayment of the mortgage bond in accordance with its terms. Again, this is not conduct of someone who on his own version only became aware of the error in 2018. He was married to the defendant in 1995, and the property bought in 2006.

[50] The plaintiff also avoided pertinent questioning relating to his knowledge of the terms of the Proclamation and why, in spite of this knowledge, he still proceeded to sign a deed of sale, and apply for a loan and complete all necessary documentation together with his wife.

[51] This is to be considered together with the defendant's testimony relating to the intention of the parties at all material times, which the court considered in relation to whether it was the intention of the plaintiff to register the property in his name exclusively.

[52] In light of the foregoing the plaintiff's claims fail, and the defendant succeeds. Costs would follow the event.

[53] In the result the following order is made:

53.1. The plaintiff's claims are dismissed and the defendant succeeds on her counterclaim.

53.2. The plaintiff is ordered to pay the defendant's costs of suit.

53.3. The plaintiff is ordered to restore conjugal rights to the defendant on or before **16 March 2021**, failing which, to show cause, if any, to this court on **13 April 2021**, why the bonds of the marriage subsisting between the defendant

and the plaintiff should not be dissolved.

EM SCHIMMING-CHASE
Acting Judge

APPEARANCES

PLAINTIFF

J Diedericks

Instructed by Sisa Namandje & Partners

DEFENDANT

NS Enkali

Instructed by Kadhila Amoomo Legal
Practitioners