

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2019/01603

In the matter between:

F S
and

PLAINTIFF

B H

DEFENDANT

Neutral Citation: *F S vs B H* (HC-MD-CIV-ACT-MAT-2019-01603) [2021] NAHCMD 350 (30 July 2021)

CORAM: SIBEYA J

Heard: 28-30 September 2020, 01, 12-13 October 2020, 17, 19 and 24 November 2020; 10,15, and 19 February 2021, 18 March 2021, 02 April 2021 and 30 June 2021.

Order: 02 July 2021

Reasons: 30 July 2021

Flynote: Matrimonial – Husband and Wife – Divorce – Specific forfeiture in respect of immovable property – Spouses married in community of property – 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 – Evidence led by both parties mutually destructive and court had to on balance of probabilities determine which version more probable – Ultimately, court satisfied that plaintiff had made out a case for specific forfeiture of benefit.

Summary: This court was called upon to determine whether malicious and constructive desertion was as a result of the plaintiff or the defendant's conduct and whether the defendant should forfeit his benefit in the immovable property, and that the plaintiff should be the sole and exclusive owner. During the trial, it became evident that there exist mutually destructive versions between the parties and the Court thus has the duty to attach weight to the most probable version.

Held – the plaintiff's version appears more probable and her evidence to be true. The defendant struggled on most aspects to gainsay the plaintiff's case and his witness added no value to his case.

Held – this court further observed that the defendant could not add specificities to the claims made by him and are primarily statements made without established supporting facts. The defendant could not show any evidentiary prove to support his claim regarding the contributions allegedly made to the joint estate and no evidentiary value can be placed on such claims.

ORDER

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.

2. The defendant must pay a minimum amount of N\$50.00 per month towards the maintenance of the minor child;
3. The defendant must pay an amount equal to 50% of the minor child's tuition costs, costs relating to extra mural activities, pocket money, books and stationery whilst the minor child still attends school and the Defendant should further pay an amount equal to 50% towards the costs in respect of tertiary education of the minor child, including the costs of hostel or alternative accommodation not covered by bursaries.
4. The plaintiff must retain the minor child on her medical aid scheme and the defendant must pay the excess payments.
5. The parties must retain the movable properties currently in their respective possession as their sole and exclusive properties.
6. The defendant forfeits his rights in community of property of property in respect of the immovable property situated at Erf 4388 Katutura, Ext 12 in the Municipality of Windhoek and the plaintiff retains the said immovable property as her sole and exclusive property.
7. Each party must pay his or her own costs of suit.
8. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SIBEYA J

[1] Before me is an opposed divorce action wherein this court is called upon to determine whether malicious or constructive desertion resulted from the plaintiff or the

defendant's conduct. The further note of contention is whether the defendant should forfeit his benefit in the immovable property in order for the plaintiff to be the sole and exclusive owner.

Background

[2] The parties got married to each other on the 27th of September 2002 at Windhoek, in community of property. One child was born of the marriage on the 12th of December 2004, who is still a minor at the time of the writing of this judgment.

[3] The plaintiff has set out various grounds why she instituted the divorce action and she states that the defendant has during the subsistence of the marriage between the parties wrongfully and maliciously:

- a) committed adultery;
- b) showed her no love, affection and respect;
- c) failed to properly communicate with her;
- d) failed to contribute towards the maintenance of the common expenses and those of the minor child even though he is in a position to do so;
- e) emotionally and psychologically abused her;
- f) physically abused her to the extent that she had to obtain a Protection Order against him which led to his incarceration for domestic violence;
- g) constructively deserted her during February 2019 by removing all his personal belongings and movable property and has since not returned.

[4] In his plea, the defendant denies wrongfully and unlawfully deserting the plaintiff. He avers that it is the plaintiff that unlawfully and constructively deserted him. The defendant further states that the plaintiff physically assaulted him and caused him to be arrested, chased him from their common home, threw out his clothing and prohibited him from entering the house by locking the entrance to the house. The defendant further alleges that he contributed to the maintenance, upkeep, extension, renovations and

payment of municipal services to the common home and therefore he prays for a division of the common home.

[5] The parties agreed that custody and control of the minor child be awarded to the plaintiff subject to the defendant's right of reasonable access. The custody and control of the minor child therefore remained a non-contentious issue and parties submitted that they require no order in this regard. Nothing further compels mention on this subject.

The evidence

[6] The plaintiff's evidence is, *inter alia*, that she has since 2006 been aware that the defendant was involved in adultery with different women but she had no concrete proof of the said adulterous relationships. During cross examination, Ms. Mcleod who appeared for the defendant vigorously questioned the plaintiff's persistence that the defendant was involved in adulterous relationships. Ms. Mcleod further put to the plaintiff that the defendant will deny the allegations that he has involved in adulterous relationships. It was only halfway through the trial on the 30th of October 2020 that evidence came to the fore that the defendant was indeed involved in an adulterous relationship with one B K where a child was born.

[7] The defendant, on the other hand, testified that the plaintiff's change in behavior from 2017 to 2019 together with her conduct from 08 to 10 March 2019 resulted in the breakdown of the marriage. This is whilst the defendant who was driving his taxi communicated to the plaintiff that he will be working late. He further testified that he would at times find the entrance to the boundary wall locked which led him to jump the wall. On several occasions plaintiff refused to communicate with him, so his evidence went. In addition to the latter, the plaintiff threw out the defendant's clothes making her intention clear that she does not want him to stay in the common home with her. She also prohibited him from accessing the common home.

Analysis

[8] From the evidence presented by the parties it was clear that there exist mutually destructive versions. In such circumstances the Court has the duty to attach weight to the most probable version.

[9] In order to determine the issue wherein mutually destructive versions arise during the trial, our courts adopted the approach formulated in *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie & Others*.¹ The relevant passage reads as follows:

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

¹ *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie* 2003 (1) SA 11 (SCA).

in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'. (See *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC); *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC)).

[10] Further in *National Employers' General Insurance Co Ltd v Jagers*² it was held as follows:

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[11] With the above in mind, during the trial and on a preponderance of probabilities, the plaintiff's version struck me as more probable and her evidence to be true. The defendant struggled on most aspects to gainsay the plaintiff's case and his witness did not add value to his case.

[12] This court is not convinced that the defendant was chased out of the common home and that his clothes were thrown out of the house. To the contrary, the evidence shows that following his arrest, the defendant went to the common home in the company of the police officers and obtained his clothing. By leaving the common home with all his personal effects and not returning or showing any intention to return, demonstrates that the defendant has deserted the plaintiff. The defendant, by leaving the common home with all his personal belongings with no intention to return has further

² 1984 (4) SA 437 (E) at H 440E – G; Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 556.

constructively deserted the plaintiff as he terminated cohabitation between the parties. When asked about detailing the facts surrounding his averments that it was the plaintiff's change in behaviour from 2017 to 2019 together with the conduct from 08 to 10 March 2019 that resulted in the breakdown of the marriage, he provided no detailed reasons to this court, citing that those are his marriage secrets.

[13] In respect of the joint estate, the parties agreed that each party will retain the movables in his or her possession. The only issue property left the court's determination is the immovable property. That is whether or not the court should order that the defendant forfeits his rights in community of property specifically in respect of Erf 4388 Katutura, Extension 12 situated in the municipality of Windhoek.

[14] It is apparent from the evidence of the plaintiff that she did not condone the defendant's adulterous relationships. She just did not have proof thereof to vigorously pursue the adulterous claims at an early stage. The belated acknowledgement of adultery by the defendant and only after being poked by the plaintiff with particular adultery allegations in the middle of the trial and after the defendant's legal representative placed instructions on record denying such adultery, cannot be condoned. I therefore find that the defendant's adultery is not condoned and he should therefore bear the consequential effect thereof.

[15] It is settled law that when a party to a marriage in community of property commits adultery, the court must make a general forfeiture when requested.³

[16] The court was invited to consider that the defendant is a taxi driver who earns considerably less than the plaintiff, and as such cannot contribute equally to the common home and his little income cannot be used as a fighting tool against him. He can merely contribute what he can afford. In addition to the aforementioned, the court was further invited to consider that besides any monetary contribution made by the defendant to the joint estate, the Defendant further contributed to the transport of minor

³ *C. v C; L. v L* 2012 (1) NR (HC) 37.

child to school and the cost that would have been occasioned if someone was hired for transport.

[17] As correctly submitted by Ms. Shikale for the plaintiff, the defendant sought sympathy from the court for earning less than the plaintiff and thus allegedly contributing less than the plaintiff but he could not clearly demonstrate his alleged particular contributions to the joint estate. The court observed that the defendant could not add specificities to the claims of contributions made by him but rather made statements without supporting facts. The defendant could not show any evidence to support his claimed contributions to the joint estate and no evidentiary value can be placed on such claims. Contrariwise, the plaintiff was impressive and produced evidence of her clear role in the acquisition, payment of the housing loan and transfer costs, the renovations and extensions as well as maintenance of the immovable property.

Conclusion

[18] In the result, this court makes the following order:

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. The defendant must pay a minimum amount of N\$50.00 per month towards the maintenance of the minor child;
3. The defendant must pay an amount equal to 50% of the minor child's tuition costs, costs relating to extra mural activities, pocket money, books and stationery whilst the minor child still attends school and the Defendant should further pay an amount equal to 50% towards the costs in respect of tertiary education of the minor child, including the costs of hostel or alternative accommodation not covered by bursaries.

4. The plaintiff must retain the minor child on her medical aid scheme and the defendant must pay the excess payments.
5. The parties must retain the movable properties currently in their respective possession as their sole and exclusive properties.
6. The defendant forfeits his rights in community of property of property in respect of the immovable property situated at Erf 4388 Katutura, ext 12 in the Municipality of Windhoek and the plaintiff retains the said immovable property as her sole and exclusive property.
7. Each party must pay his or her own costs of suit.
8. The matter is regarded as finalised and removed from the roll.

O SIBEYA

Judge

APPEARANCES:

FOR THE PLAINTIFF:

L SHIKALE

Shikale & Associates

FOR THE DEFENDANT:

J McLEOD

Shikongo Law

Chambers