



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-MAT-2020/04327

In the matter between:

**CHRISTIANA CLERESA KHAISEB**

**PLAINTIFF**

and

**CYPRIANUS KHAISEB**

**DEFENDANT**

**Neutral citation:** *Khaiseb v Khaiseb* (HC-MD-CIV-ACT-MAT-2020/04327) [2022]  
NAHCMD 106 (10 March 2022)

**Coram:** TOMMASI J

**Heard:** 19, 21, October 2021, 18 November 2021

**Submissions:** 18 November 2021

**Delivered:** 10 March 2021

**Flynote:** Marriage — Divorce — Grounds for — Malicious Desertion - actual or constructive desertion – Plaintiff moving out of common bedroom and denial of martial privileges with intention to permanently terminate the marital relationship and without justification - Defendant granted order for restoration of conjugal rights

**Summary:** The plaintiff instituted action against the defendant for a divorce and certain ancillary relief. The defendant opposed the action and filed a counterclaim claiming inter alia specific forfeiture for certain movable and immovable property. The plaintiff claimed that the defendant showed no love and affection, neglects to communicate meaningfully, showed no serious intention of continuing with the marital relationship and due to the behaviour of the defendant, further co-habitation has become intolerable and plaintiff moved out of the common bedroom during August 2020. She testified that the defendant gossips with his mother and sides with her and the family when quarrels erupt. The defendant compares her with other women and this makes her sad. The defendant refuses to support her financially and expects her to support herself. She warned him of her unhappiness with his conduct and the defendant refused to change his attitude and ignored her complaints. She categorically stated that she no longer wants to be married to the defendant. She believes that she is entitled to share in the joint estate given her financial contribution and her care and dedication to the running of the joint household and the upbringing of the children. The defendant claims that the plaintiff shows him no love, affection and respect, quarrels unnecessarily with him, shows impulsive and unwelcome behaviour and moved out of the common bedroom without giving reasons. No significant evidence was adduced to give further detail in respect of the first three grounds. The defendant claims that he wanted to engage the plaintiff after she issued summons in an attempt to salvage the marriage but the plaintiff was not willing to give him reasons for filing for a divorce or discuss the matter with him. The court found that the reasons advanced by the plaintiff do not suffice to establish grounds for a divorce based on constructive desertion and the plaintiff's claim was dismissed. The court further found that the plaintiff's conduct of moving out of the common bedroom and refusing the defendant marital privileges was designed to permanently terminate the marital relationship and that there was no justification for doing so. The court was unable to determine the value of the joint estate and was unable to make a specific or quantified forfeiture. A general order of forfeiture was granted.

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**ORDER**

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Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

Plaintiff's Claim in convention:

1. The plaintiff's claim is dismissed.
2. No order is made as to costs.

Defendant's claim in re-convention

3. The Court grants Judgement for the plaintiff in reconvention/ Defendant for an order for Restitution of Conjugal Rights and orders the defendant in reconvention /Plaintiff to return to or receive the plaintiff in re-convention on or before 21 April 2022, failing which, to show cause, if any, to this Court on the 5th day of May at 10:00, why:

(1) The bonds of the marriage subsisting between the Plaintiff in re-convention/Defendant and the Defendant in reconvention/ Plaintiff must not be dissolved;

(2) The partial Settlement Agreement entered into between the parties should not be made an order of court;

(3) The defendant in reconvention/Plaintiff should not forfeit the benefits arising from the marriage.

(4) No order as to costs should not be made.

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## JUDGMENT

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TOMMASI J:

### Introduction and background

[1] The plaintiff, the wife instituted action against her husband, the defendant, for divorce. The parties were married to each other, in community of property on 19 July 2003 at Windhoek. Two children, both girls, were born from the marriage between the parties. At the time of the trial, the children were still minors aged 17 and 13 years respectively.

[2] The plaintiff's claim is that the defendant wrongfully, maliciously and constructively deserted her in that he, during the subsistence of the marriage, acted with the fixed and malicious intent to terminate the marital relationship and wrongfully conducted himself as follows:

- '(a) the defendant shows no love and affection towards the plaintiff;
- (b) the defendant fails and/or neglects to communicate meaningfully with the plaintiff;
- (c) the defendant showed no serious intention of continuing with the marital relationship;
- (d) due to the behaviour of the defendant, further co-habitation has become intolerable and plaintiff moved out of the common bedroom during August 2020.'

[3] The plaintiff's prayer is for: an order for the restitution of conjugal rights, failing which a final order of divorce; ancillary relief relating to the minor children, an order that she buys her husband's half share of the common home and that it be registered as her sole and exclusive property, that the parties retain the movable properties currently in their respective possession and cost of suit.

[4] The defendant in his plea denies that he did not show the plaintiff love and affection. He pleaded that he at all times exhibited love and affection towards the

plaintiff and maintained that he communicated meaningfully. He pleaded that he was shocked to receive the summons and he does not know why the plaintiff is seeking a divorce. His attempts to salvage the marriage was met with a rebuff. He further pleaded that it is the plaintiff who shows no serious intention to continue the marriage and is unwilling to salvage the marriage.

[5] He claims in a counterclaim that the plaintiff, during the subsistence of the marriage, and with the fixed intention to terminate the marriage, showed him no love, affection and respect and quarrels unnecessarily with him. She also shows impulsive and unwelcome behaviour and moved out of the common bedroom without giving reasons. He maintains that it is the plaintiff who unlawfully, intentionally and maliciously deserted him.

[6] The defendant further claims that he, before he married the plaintiff, acquired a property in Dorado Park. This became the property of the joint estate when he married the plaintiff. He claims to have paid 100% of the mortgage bond and municipal bills until the property was sold in 2016. The plaintiff, according to his claim, made no contribution despite the fact that she was employed. He paid the proceeds in the sum of N\$1 700 000 to purchase the current common home in Hochland Park (estimated value N\$3 600 00). The remaining loan amount outstanding at the time was N\$705 000. He further invested around N\$230 000 and withdrew N\$1 200 000 from his pension to reduce the loan on the property. He also claims to have paid 100% of the mortgage instalments on this property and the municipal bills until March 2019. He concedes that his wife paid the municipal bills after March 2019 and contributed towards the swimming pool, blinds and air-conditioners.

[7] The defendant estimates that he paid approximately 80% of the expenses of the joint estate whilst the plaintiff did not make a meaningful contribution. He avers that the plaintiff managed her own finances and property for her own benefit. In light of the above, he claims that this property be awarded as his sole and exclusive property.

[8] The defendant further claims Plot Dagbreek (estimated value N\$409 885.24), a portion of Klein Otavi, with deed registration number T856/1959 be specifically forfeited. He pleads that the plot was purchased by funds provided by his mother and serves as her residence. He pleads that no contribution was made by the plaintiff or the defendant and it was transferred in his name due to difficulties encountered with transferring it into his mother's name.

[9] The defendant claims that the butchery equipment be registered solely and exclusively in his name. According to defendant he withdrew funds from his pension fund and purchased the equipment for purposes of trading under the business of Ara Butchery CC. Plaintiff, according to the defendant, contributed nothing to this asset.

[10] The defendant also claims for specific forfeiture of a Ford Ranger and a Kia Optima Sedan motor vehicles.

[11] He claims that the plaintiff will derive undue benefit if the order for specific forfeiture of the benefits is not granted.

[12] The matter was referred to mediation and a partial settlement was reached. The parties entered into a settlement agreement in respect of the minor children and the vehicles of the joint estate. The parties filed a settlement agreement on 12 November 2021.

[13] The pre-trial order reflects that the parties agreed that the following issues ought to be determined:

(a) Whether the Defendant is entitled to specific forfeiture of the immovable property situated at Erf 1509, Hochland Park, Windhoek, Republic of Namibia;

(b) Whether the Defendant is entitled to claim specific forfeiture of the immovable property situated at a portion of Klein Otavi, plot Dagbreek, with deed registration number T856/1959, Republic of Namibia;

(c) Whether the Defendant is entitled to claim specific forfeiture for the member's interest in Khai-Cyp Investments CC, C/2018/08584;

(d) Whether the Defendant is entitled to claim specific forfeiture of the movable property, being the equipment of the butchery;

(e) Whether the Defendant's claim for forfeiture is a general or specific forfeiture and if a legal basis has been established to do so. '

Naturally the court must determine whether the plaintiff discharged the onus to prove, on a balance of probability, that the defendant maliciously, unlawfully and constructively deserted her and if not successful in doing so whether the defendant discharged the onus to prove his claim for the dissolution of the marriage.

### The evidence

#### Plaintiff's evidence

[14] The Plaintiff testified that the Defendant discussed and gossiped about her to her mother-in-law and the Defendant's siblings. These discussions often took place in front of the minor children, and that this was very embarrassing to her. Plaintiff's testimony was further that the defendant badmouthed and belittled her in front of the minor children and his family. Her mother in law got very involved in their marriage and when quarrels erupted between them (plaintiff and her in-laws). The defendant would always side with his mother and his family.

[15] She further testified that the defendant showed her no affection, love and support. According to Plaintiff, the defendant did not care or support her financially. He told her that she must take care of and support herself financially. He failed to show respect for her efforts to maintain the common household and to provide for their family; he failed to recognise her contribution, financially and otherwise to the common household.

[16] It was further her testimony that, a month after they got married, they moved to Katima Mulilo. The parties jointly made the decision that plaintiff should resign. She then became a housewife and with no source of income. She testified that she worked hard

to make the home comfortable, orderly and clean and requested the defendant to provide her with a monthly allowance to assist her financially which the defendant refused. She testified that defendant advised her to use her own pension money to cover household expenses, which she did. The defendant on the other hand used his pension fund money to benefit himself. Plaintiff testified she was unemployed during 28 February 2019 until 31 May 2020 and the defendant refused to support her financially during this period. He insisted she pays for the meat she bought from his butchery. It was her testimony that she also paid the school fees of one of the children.

[17] The Plaintiff testified that the Defendant always negatively compares her to their female neighbours and his female co-workers. This made her sad.

[18] The plaintiff informed the defendant on numerous occasions that she is unhappy and did not want to be compared with other women and that he should not speak badly about her in front of the children and his family. The defendant ignored her feelings and told her she was insane for being saddened by these things. She informed him that she became so unhappy with the way he treats her emotionally that she would have to institute divorce proceedings against him if he is not willing to work on the relationship. The defendant's response hereto was that she would not be able to afford a lawyer and that she was making idle threats. As a result of his inconsiderate and malicious behaviour, she had no option but to move out of the common bedroom and to institute divorce proceedings. According to her there is no more love and affection between them.

[19] The plaintiff testified that she would be prejudiced if the defendant is to benefit from the immovable property (the common home) solely. She worked tirelessly on a daily basis to maintain proper management and upkeep of the property which they lived in since 2016 i.e. the last 8 years. She paid for landscaping and gardening, the domestic worker, the gardener, insurance, municipal bills and more importantly raising the children every day. Her contribution extended beyond finances as she cooked,



cleaned and bought the necessary food, household items and clothing for the household. She paid N\$80 000 for the pool.

[20] The plaintiff further testified that her husband did not share the proceeds derived from Khai-Cyp Investments CC or that of Ara Butchery with her. She wanted to work at the butchery at the time she was unemployed but the defendant refused. The defendant felt that she had deliberately left her employment and advised her to find other employment. In addition thereto he would insist that she purchase the meat required for the common household from the butchery whilst offering the workers free meat to the value of N\$300. When offering to assist, the defendant would rudely refuse such assistance. The plaintiff holds the view that she is entitled to share in this property.

[21] The plaintiff testified that she resigned from her employment during 2019 and in an effort to gain an income, she registered Khaima Recruitment & HR Solutions CC. She wanted to bring in money for the common household but the business however did not generate as much income as she anticipated.

[22] The plaintiff concluded by stating that the defendant, on paper, made a larger monetary contribution to the common house but she strongly believes that she made more contributions of her time, effort and physical labour than he ever did, She also contributed financially as far as she was able to do.

[23] It is the Plaintiff's case that she has proved to this court, that she, as the wife of the Defendant, standing equally with him in their marriage in community of property, has the right to claim for an equal and fair division of the joint estate.

#### Defendant's evidence

[24] The Defendant testified that he cared for, and has never neglected the plaintiff. The plaintiff on the other hand has shown him no respect for the past few years. He also testified that it was in fact the Plaintiff who illicitly unprovoked quarrels which to him

shows that she has no intention to continue with the marital relationship. The plaintiff exhibits impulsive and unwelcome behaviour. He testified that she went to the extent of moving out of the common bedroom without prior communication and this conduct signals her expression of a desire to end the marriage.

[25] He testified that he attempted to salvage the marriage after the plaintiff instituted divorce proceedings but the plaintiff informed him that it is her decision to get divorced and that she does not have to give reasons why she wants a divorce and if she has any reasons there was no need to discuss it with him. She exhibited an attitude which was indicative of her unwillingness to continue with the marriage.

[26] He confirmed what he pleaded in respect of the immovable in Hochland Park, that he carried 80% of the expenses of the common household, and that he purchased the butchery equipment out of funds he withdrew from his pension. He, upon withdrawing funds from his pension fund, bought butchery equipment (“the equipment”) cash for purposes of trading under the business of Ara Butchery CC. The equipment was bought at an estimated value of N\$470 000.00 and Plaintiff made no contribution whatsoever to the purchase of the butchery equipment, nor has she made any meaningful contribution to the butchery business in any way. The property was valued by his expert witness to be N\$2 850 000. This value was not disputed.

[27] He testified that the plot Dagbreek was initially purchased by his biological mother, Mrs. Aletha Khaises, who inherited livestock and other property after the passing of her late husband. The plot has subsequently been valued at N\$900 000 and this was also not disputed.

[28] According to the defendant, ever since the parties got married, the Plaintiff did not in any meaningful way, make financial contributions to establish and or maintain the joint estate of the parties, alternatively, that the Plaintiff did not in any meaningful way make any financial contribution that is required to maintain a common household that benefits both parties to a marriage. According to defendant’s testimony, the Plaintiff

instead, managed her finances and property solely on her own accord and for her sole benefit. The defendant admitted that she received two (2) pension payments from her previous employers.

#### Plaintiff's claim

[29] Every marriage has its fair share of challenges and this one is no different. The court, however, needs to determine whether plaintiff succeeded to prove the *factum* of desertion and the *animus deserendi*. The plaintiff's claim is one of constructive desertion i.e. that the defendant made cohabitation intolerable by not showing her love and affection, not supporting her financially, gossiping about her with her mother-in-law, not taking her part in quarrels and comparing her to other women.

[30] In *HV v SV* (2) 2014 (3) NR 842 (HC) at page 848 para 16, Damaseb JP, stated the following:

In considering whether the plaintiff has discharged the onus 'that "there must be conduct which one must not expect in the ordinary course of marriage' and that:

"the conduct need not to 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."

[31] The court must determine that the conduct of the defendant is of such gravity that it justified the plaintiff from withdrawing from cohabitation and it was designed to cause such separation. The onus rests on the plaintiff to prove that the defendant unlawfully, maliciously and constructively deserted her.

[32] The evidence of gossip is unreliable for obvious reasons and no weight can be attached thereto. The plaintiff's testimony that the defendant always sides with his mother and family when arguments between them arise could be a real issue if it amounts to acquiescence to ill treatment and abuse by his mother and his family. No such evidence was however adduced.

[33] The plaintiff further accuses the defendant of comparing her with other women. She was able to recall an incident of the defendant comparing her to another woman. He remarked that she would never be as good a Human Resources Practitioner as the woman in question. This happened during 2016.

[34] The plaintiff has been less than candid with the court when it came to the failure of the defendant to care for her and to support her financially at the time they lived in Katima Mulilo. She omitted to mention that the defendant bought her a vehicle at that time. Similarly it appears that the Kia was also bought for the household and the plaintiff had access to it. She was also reluctant to disclose the details of moneys she received from her pension fund. The first payment she received she could not remember the amount and she flatly refused to disclose the amount of the second more recent payment she received.

[35] The evidence shows that plaintiff paid for some of the household expenses and the defendant paid for the others. Each party dealt with their pension fund moneys separately without necessarily involving or disclosing the details thereof to the other party. This arrangement is not uncommon. The plaintiff's unhappiness with this arrangement is only with the defendant's working with his own income to his exclusive benefit but the plaintiff does not appear to have any issue with conducting her own affairs without the interference of the defendant.

[36] The question is whether these reasons, advanced by the plaintiff to support her claim that the defendant constructively deserted her i.e. that he engaged in this conduct with the settled intention of terminating the marriage and which forced her to withdraw from cohabiting with the defendant.<sup>1</sup> and moved out of the common bedroom.

[37] The marriage endured for 18 years despite the interference by the defendant's mother in their marriage and his reaction to it. The defendant's comment comparing the

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<sup>1</sup> See *HV v SV* (2) 2014 (3) NR 842 (HC) p 849, para 20

plaintiff to other women seems to have occurred a considerable time ago. The plaintiff was furthermore unable to demonstrate that such comparisons were an everyday occurrence as she seems to portray in her evidence in chief. I by no means disregard the disrespectful nature of these and other comments the plaintiff testified to. The plaintiff however agreed that the defendant has other caring attributes such as his willingness to help with household chores i.e. cooking and washing clothes. The financial arrangement between the parties existed from the inception of their marriage and the plaintiff accepted it.

[38] This court cannot conclude that the defendant's conduct was of such a grave nature that it can be said that he intended thereby to terminate the marital relationship between him and the plaintiff. The evidence of the plaintiff does not go far enough for me to conclude that she discharged the onus to prove, on a balance of probability, that the defendant unlawfully, maliciously and constructively deserted her as claimed in her particulars of claim. The plaintiff's claim for restitution of conjugal right and the ancillary relief must consequently fail.

#### Defendant's claim in re-convention

[39] The defendant relies on the following conduct of the plaintiff to prove constructive desertion: (a) the plaintiff shows him no love, affection and respect and quarrels unnecessarily with him. She also shows impulsive and unwelcome behaviour and moved out of the common bedroom without giving reasons.

[40] It was not clear in which way the plaintiff did not show the defendant love and affection and respect. The details of the quarrels were also not given but a good guess would be that it involved the conduct of his mother and his failure to side with the defendant. The defendant testified to one incident of impulsive behaviour. This conduct would likewise not be of such a nature that it would qualify as constructive desertion.

[41] In *ZS v ES* 2014 (3) NR 713 (HC),<sup>2</sup> Van Niekerk J, at page 749, para 107, states the following:

'Desertion may take place even though the parties are still living under one roof, for example, ...; or where the one spouse permanently moves from the common bedroom thereby ending the sexual relationship between the spouses. Using the last example I take Mr Heathcote's point that this may constitute actual desertion as opposed to constructive desertion, however, it would, in my opinion, very much depend on the actual facts.'

[42] It is however common cause that the plaintiff left the common bedroom. This is generally considered to be an act of withdrawing from cohabitation and a denial of marital privileges. If this was without justification and intended to terminate the marital relationship, it would amount to malicious desertion, whether it is defined as actual or constructive desertion. As archaic as this may sound, it is the law present until such time as it is changed.

[43] The plaintiff's defence thereto was that the defendant's misconduct drove her to leave the common bedroom. The plaintiff's reasons have been discussed above but the crux thereof is that the defendant refused to pay attention to her general unhappiness or to change his attitude despite numerous warnings. The plaintiff however in no uncertain terms informed the court that she does not want to be married to the defendant when his legal practitioner informed her that the plaintiff still desires to be married to her and would restore conjugal rights to her. This shows that the plaintiff moved out of the common bedroom with the settled intention to put an end to the marriage and furthermore that she is no longer interested in the continuation of the marriage. The reasons advanced by the plaintiff for leaving the common bedroom do not justify her conduct. Leaving the common bedroom without justification and consequentially also denying the defendant his marital privileges amounts to malicious desertion.

#### Forfeiture of benefits

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<sup>2</sup> See also *KING v KING* 1971 (2) SA 630 (O) p 636.

[44] The defendant herein claims specific forfeiture. In *F A K v I K* (HC-MD-CIV-ACT-MAT-2020/02160) [2022] NAHCMD 57 (15 February 2022) para 19, Ueitele J, states:

'the matter *C v C*; *L v L* this Court, per Heathcote AJ, opined that there are three kinds of forfeiture orders that a court may make in divorce proceedings, namely, a 'general forfeiture order', (that is, an order which simply reads 'the defendant shall forfeit the benefits arising out of the marriage in community of property'); secondly, a 'quantified forfeiture order' (that is, an order in terms of which the court determines the ratio with regard to which the estate must be divided to give effect to a general forfeiture order; and lastly, a 'specific forfeiture order' (that is, when a specific immovable property is declared forfeited).'

[45] It is now accepted that the following legal principles must apply where a party seeks a forfeiture for quantified or specific order:

(a) Evidence must be adduced regarding the value of the estate at the date of divorce. Evidence about all contributions of both spouses should be led. The fact that a spouse 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.

(c) 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.

(d) In exceptional circumstances, and if the necessary allegations were made and the required evidence led, it is possible for a court to make a forfeiture order in respect of a specific immovable or movable property (i.e. a specific forfeiture order).

[46] The evidence adduced in this matter specifically covers certain assets, but the value of the estate is not known. There is however no evidence adduce as to the value of the membership which the plaintiff and the defendant holds in the respective close corporations. The value of the plaintiff's Mercedes Benz has not been determined nor

has the furniture and household equipment been evaluated. Under these circumstances I would decline to exercise my discretion to determine the value of the joint estate. The plaintiff herein refuses to disclose the pension benefits she received. The plaintiff submits that she invested time, effort and raised the children. The defendant underplays the importance and value of this contribution and only focuses on the financial contribution. The plaintiff's contribution is certainly not insignificant and it requires proper assessment. The defendant alleges that the plaintiff contributed to air conditioners and blinds, this has not been evaluated. I am thus unable to establish the value of the estate and the contribution of the respective parties to the joint estate or to quantify it.

[47] In the absence of sufficient evidence for this court to order specific or quantified forfeiture, a general order of forfeiture would suffice.

[48] In the result, the following order is made:

Plaintiff's Claim in convention:

1. The plaintiff's claim is dismissed.
2. No order is made as to costs.

Defendant's claim in re-convention

3. The Court grants Judgement for the plaintiff in reconvention/ Defendant for an order for Restitution of Conjugal Rights and orders the defendant in reconvention /Plaintiff to return to or receive the plaintiff in re-convention on or before 21 April 2022, failing which, to show cause, if any, to this Court on the 5<sup>th</sup> day of May at 10:00, why:



- a) The bonds of the marriage subsisting between the Plaintiff in re-convention/Defendant and the Defendant in reconvention/ Plaintiff must not be dissolved;
- b) The partial Settlement Agreement entered into between the parties should not be made an order of court;
- c) The defendant in reconvention/Plaintiff should not forfeit the benefits arising from the marriage.
- d) No order as to costs should not be made.

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M A TOMMASI  
Judge

