

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2019/02282

In the matter between:

FOIBE TUYENIKELAO AMUTENJA

PLAINTIFF

and

ENEAS JOSEF AMUTENJA

DEFENDANT

Neutral citation: *Amutenja v Amutenja* (HC-MD-CIV-ACT-OTH-2019/02282)
[2022] NAHCMD 264 (27 May 2022)

Coram: B USIKU J

Heard: 15 and 17 June 2021; 27-28 September 2021 and 21 January 2022

Delivered: 27 May 2022

Flynote: Husband and wife – Divorce – Proprietary rights – Parties married in terms of Native Administration Proclamation 15 of 1928 – Marriage having consequences of a marriage out of community of property – Plaintiff seeking order for specific forfeiture of the defendant’s interest in immovable property – Property registered in parties’ joint names - Plaintiff’s claim dismissed – Court orders termination of the joint ownership.

Summary: The parties were married out of community of property by virtue of the provisions of the Native Administration Proclamation 15 of 1928. The parties are joint owners of Erf No. 1465, Otjiwarongo. The marriage of the parties was dissolved by order of this court on 21 July 2014. Subsequent thereto, the plaintiff initiated the present action seeking an order for specific forfeiture of the defendant's interest in aforesaid the property.

Held that the fact that the defendant did not contribute financially to the acquisition of the property, alone, is not sufficient to render the benefit 'undue' and therefore subject to a forfeiture order.

Held further that the defendant, will not, in the circumstances, be unduly benefited if forfeiture is not granted.

Held further that the court orders termination of the parties' joint ownership in the property.

ORDER

1. The plaintiff's claim for specific forfeiture of the defendant's interest in the undermentioned property, is dismissed.
2. It is ordered that the joint ownership of the parties in the immovable property known as:
CERTAIN: Erf No. 1465, Otjiwarongo,
(Extension No. 5)
SITUATE: in the Municipality of Otjiwarongo
Registration Division "D"
Otjozondjupa Region.
MEASURING: 1455 (One Four Five Five) square meters
HELD: by the parties jointly in terms of Deed of Transfer No. T
5390/2009, is hereby terminated.
3. Unless the parties reach agreement in writing within 30 days from the date of this order on all aspects relating to the termination of the co-ownership, then paragraph 4 thereof shall apply.

4. In giving effect to the termination order referred to in paragraph 2 above (should the parties not reach agreement as provided in paragraph 3 above), the following is hereby ordered:
- a) the abovementioned property be valued by an independent valuer appointed by the plaintiff's attorneys (unless the parties are able to agree on the appointment of a valuer forthwith);
 - b) upon receipt of the valuation certificate, an open mandate to sell the property be given to a registered estate agent within 30 days of obtaining the valuation certificate;
 - c) the conveyancing of the property shall be attended to by plaintiff's attorneys, as conveyancers for both parties, who shall give effect to the sale as follows; namely:
 - i) the collection of the full purchased price;
 - ii) cancellation and discharge of existing mortgage bonds;
 - iii) the discharge of any further obligations on the property in respect of rates, taxes, estate agent commission, property valuation costs, transfer costs and the like, and;
 - iv) equal distribution of the net proceeds of the sale between the parties.
5. In the event of either party refusing to sign the deed of sale (or any other document necessary for effecting the transfer of the property), the Deputy Sheriff for the district of Otjiwarongo is hereby directed and authorized to sign the deed of sale (or any other document) in order to effect the transfer of the property.
6. I make no order as to costs.
7. The matter is removed from the roll and regarded finalised.

JUDGMENT

B USIKU, J:

Introduction:

[1] In this matter the plaintiff initiated action against the defendant seeking an order for specific forfeiture of the defendant's interest in the immovable property known as:

CERTAIN: Erf No. 1465, Otjiwarongo,
(Extension No. 5),
SITUATE: in the Municipality of Otjiwarongo,
Registration Division "D",
Otjozondjupa Region,
MEASURING: 1455 (One Four Five Five) square meters,

[2] The parties are the registered joint owners of the above property, in equal and undivided shares and hold the property in terms of Deed of Transfer No. T 5390/2009. A mortgage bond is registered over the property in favour First National Bank Namibia.

Background

[3] The parties were married to each other on 16 May 2009 at Ongwediva. Their marriage was governed by s 17(6) of the Native Proclamation 15 of 1928, having consequences of a marriage out of community of property. This marriage was dissolved by an order of this court on 21 July 2014. The court order reads as follows:

'Having heard **Mr. Rukoro** Counsel for the Plaintiff, and the evidence adduced:

IT IS ORDERED THAT:

1. The bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved;
2. The custody and control of the minor child is awarded to the defendant, subject to the plaintiff's right to reasonable access and visit.
3. The joint estate should be divided'.

[4] In the pleadings, the plaintiff alleges that the above order was issued erroneously, to the extent that it orders the division of the 'joint estate'. Furthermore, the plaintiff alleges that the above order was issued erroneously in so far as it awards custody and control to the defendant. According to the plaintiff the divorce order was granted on an unopposed basis and that the relief she prayed was for the award of custody and control to herself and that there was no prayer regarding the division of any estate. The plaintiff did not, however, launch an application for variation of the divorce order.

[5] In the present action the plaintiff prays for an order for forfeiture of the defendant's interest in the property, claiming that the defendant did not contribute towards the acquisition of the property and did not make any contribution towards the repayment of the bond.

[6] The defendant defends the action and filed a counterclaim in which he prays for an order for the 'division of the joint estate' as per the provisions of the final order of divorce.

[7] Despite the defendant's prayer for the 'division of the joint estate', the defendant admits in his plea and in his testimony, during trial, that his marriage to the plaintiff was governed by s 17(6) of the Native Administration Proclamation 15 of 1928 and had the consequences of a marriage out of community of property. Furthermore, in the parties' joint pre-trial report (which was made an order of the court) the defendant admits that his marriage had consequences of a marriage out of community of property.

[8] Because of the foregoing admissions by the defendant, I shall assume for the purposes of this judgment that the defendant has abandoned his claim insofar as 'the division of the joint estate' is concerned, and instead wishes the parties' joint ownership, in the property, to be terminated.

[9] At trial the plaintiff testified and called no further witnesses. The defendant testified and called one witness, namely Itula Agapitus Ishidhimbwa (Mr. Ishidhimbwa).

Common cause facts

[10] The following facts are either facts admitted or facts not in dispute, namely:

- (a) the parties were married to each other, on 16 May 2009 at Ongwediva, and their marriage had consequences of a marriage out of community of property;
- (b) the marriage was dissolved by this court on 21 July 2014;
- (c) the parties are co-owners of the property in question which they acquired on 30 October 2009. A mortgage bond is registered over the property in favour

of the First National Bank Namibia. Both parties are liable to First National Bank for the repayment of loan amount secured by the bond;

(d) the indebtedness in respect of the bond is being repaid in monthly instalments of N\$ 3,825.00 and is being deducted from the plaintiff's salary as from September 2009;

(e) the defendant was unemployed at the time when the property was acquired;

(f) the market value of the property amounts to N\$850,000.00 as at June 2016 when valuation was conducted in respect of the property, and;

(g) the defendant has not lived on the property since February 2013.

Principal issue in dispute

[11] It appears to me that the principal issue in dispute in the present matter is whether the plaintiff is entitled to an order for forfeiture of the defendant's interest in the property and therefore entitled to the transfer of the half-share in the property that is currently owned by the defendant.

Plaintiff's case

[12] In support of her claim, the plaintiff testified that prior to her marriage she applied for a home loan at First National Bank, with a view to acquire the property in question. Due to the impending wedding, she wished to have her surname changed to that of her soon-to-be husband. As a result of this, the bank officials insisted that the home loan application documents should also be signed by the defendant and this resulted in the defendant becoming a co-owner of the property.

[13] The plaintiff related that transfer of the property was registered in their joint names on the 30 October 2009. Simultaneously, a mortgage bond was registered over the property in favour of the bank.

[14] The monthly loan repayments were initially set at N\$ 3825.00 and the first instalment became due and payable on 20 November 2009.

[15] During the subsistence of the marriage, the defendant was unemployed and did not make any contribution towards the acquisition of the property nor towards the repayment of the home loan. He also did not make any payments towards the upkeep and maintenance of the property during the subsistence of the marriage or after the divorce.

[16] According to the plaintiff, the defendant deserted the plaintiff and their minor child in February 2013. The plaintiff instituted divorce proceedings and the final order of divorce was granted by this court on 21 July 2014.

[17] The plaintiff submits that it would be unfair if the defendant is allowed to share in the benefit of the property which the plaintiff is solely responsible in respect of home loan repayments as well as for maintenance.

[18] The plaintiff, therefore, requests that the court grants her specific forfeiture order so that the plaintiff becomes the sole owner of the property.

The defendant's case

[19] The defendant testified that, he and the plaintiff agreed to have the home loan repayments deducted from the plaintiff's salary because the defendant was unemployed and did not qualify to have monthly deductions made from him.

[20] He related that on 22 October 2005, prior to their marriage, the defendant was involved in a motor vehicle collision which resulted in him sustaining severe cervical spine injury which rendered him incapable of acquiring and maintaining fixed employment.

[21] Around 2016, the defendant received a settlement amount of N\$99,995.00 from the Motor Vehicle Accident Fund, which he used to contribute towards the property, furniture, the welfare of the minor child and other household expenses. Apart from that, said the defendant, he had a business enterprise which helped him to generate some income.

[22] In regard to the allegation that the defendant deserted the plaintiff in 2013, the defendant asserted that the conduct of the plaintiff made cohabitation intolerable and he was forced to leave the common home.

[23] The defendant further stated that he is entitled to his share of the joint property and that the relief sought by the plaintiff is unjust and should be refused.

[24] Mr Ishidhimbwa, testified that he is a cousin to the defendant. He knows the defendant as a self-employed business-man. The defendant owns an enterprise known as Shipatu Investment CC and has been operating a jackpot-machine business in Ongwediva and Oshikango and owns Dorado Bar in Ongwediva. According to Mr. Ishidhimbwa, the defendant has been running his business prior to the motor vehicle accident and after the accident.

[25] Mr. Ishidhimbwa further related that he has personal knowledge that the defendant was supporting his family financially during the subsistence of the marriage.

Analysis

[26] According to authors PJ Visser and JM Potgieter¹, the principle of forfeiture of patrimonial benefits of a marriage, also applies in the case of marriages out of community of property. The basic criterion is whether one party will, in relation to the other, be unduly benefited if a forfeiture order is not granted. The underlying principle governing the forfeiture of patrimonial benefits is that no person ought to benefit financially from a marriage which he caused to fail. The patrimonial benefits which may be forfeited in a marriage out of community of property are the following:

- (a) the right to share in the accrual of the other spouse's estate, where the marriage was subject to the accrual system;
- (b) benefits in terms of a succession clause (*pactum successorium*);
- (c) a donation already made in terms of an ante-nuptial contract or which is still to be carried out;
- (d) the pension benefits of the other spouse, and;

¹ *Introduction to family law*, P.J. Visser, J.M. Potgieter. 2nd Edition, Juta, 1998 at page 184.

(e) rights under a lease².

[27] None of the examples of the benefits outlined above are applicable to the present case. In the present case matter, the gist of the plaintiff's forfeiture claim is based on the allegation that she made all the payments in regard to the acquisition of the property and made all loan repayments to the bank. The plaintiff therefore seeks an order declaring the defendant's interest in the property forfeited, thereby making the plaintiff the sole owner of the property.

[28] It is common cause that the plaintiff and the defendant are the registered joint owners of the property in equal and undivided shares. By virtue of such joint ownership, each party is entitled to a half-share in the property.

[29] It is evident from the deed of transfer that the property was sold to the plaintiff and the defendant on 9 June 2009 for a purchase price of N\$ 320,000.00. This implies an agreement of sale between the seller on the one hand, and the plaintiff and the defendant, on the other hand. Registration of the transfer took place on 30 October 2009.

[30] It is also common cause that the parties got married to each other on 16 May 2009. The property was acquired relatively soon after the marriage.

[31] From the evidence, it appears apparent that the plaintiff made most, (if not all) the payments for the acquisition of the property. The plaintiff also provided documentary proof in support thereof. This much is not seriously contended by the defendant. The gist of the defendant's evidence on that aspect appears to me to be that, due to his health condition, he could not secure fixed employment. He conducted some business enterprise and he contributed to the matrimonial joint expenses to the extent his income allowed him to, as part of the agreement between the parties. And that, whatever financial means the defendant had, he did not withhold the same and had contributed to the matrimonial joint expenses to the extent that he could. He contended that he should not be disqualified from enjoying the benefits of his half-share in the joint property.

² Ibid.

[32] For the purposes of this judgment, I shall therefore assume without deciding the issue, that the half-share that the defendant has in the property accrued to him as a benefit of the parties' marriage.

[33] The crucial issue now is whether the fact that the defendant did not contribute to the acquisition of the property, as much as the plaintiff did, and did not make any payments to the bond account, is sufficient to render the half-share benefit that the defendant owns in the property as 'undue' and therefore subject to a forfeiture order.

[34] I am of the view that on the evidence before court it appears that the conduct of both parties most likely contributed to the breakdown of the marriage relationship. The property was acquired soon after the marriage. The marriage was relatively not of a long duration. From the foregoing, it cannot be concluded that the defendant has, through his conduct, shown himself to be not entitled or deserving, to receive the benefit in question.

[35] There seems to be no doubt that there was some agreement (implied or tacit) between the parties to have the property registered in their joint names. At that time, it was known by the parties that the defendant was unemployed and, due to the motor vehicle accident, was not capable of acquiring and maintaining fixed employment. Equal contribution to the acquisition of the property or to the bond repayments, appear not to have been a pre-condition to the joint ownership. The requirements of passing ownership of immovable property, namely: 'delivery', through registration in the Deeds Office, and the 'real agreement', namely: the intention on the part of the transferor to transfer ownership and the intention of the transferee to become owner of the property, have been satisfied. The validity of the agreement between the parties to have the property registered in their joint names cannot now be assailed on the basis of unequal contribution to the acquisition of the property.

[36] I am of the opinion that, where parties are registered as joint owners in equal and undivided shares, unless such parties make precisely equal contributions, the one who contributed less shall on the termination of the joint ownership, be benefited above the other. However, mere unequal (or lack of) contribution, does not necessarily render the 'benefit' undue.

[37] In the present matter, I am not persuaded that the defendant will, in relation to the plaintiff, be unduly benefited if the forfeiture is not granted. I am of the view that the plaintiff has failed to discharge the onus resting on her to prove her claim for the forfeiture of the benefits alleged. The plaintiff's claim for specific forfeiture, therefore, stands to be dismissed.

[38] As mentioned earlier, the defendant has filed a counterclaim, praying for a division of the 'joint estate'. Both parties agree that their marriage had consequences of a marriage out of community of property and there was not, therefore, a joint estate. What is apparent is that the defendant wishes to have the parties' joint ownership of the property terminated. I shall therefore approach the counterclaim from that perspective, under the prayer of 'further and alternative relief'.

[39] It is common cause that the parties are already divorced. The property is the only nexus between them which stands unresolved. Every co-owner is entitled to have the joint ownership terminated, as no co-owner is normally obliged to remain a co-owner against his will.³

[40] Having considered the background of the parties' present dispute, I believe that an order terminating the joint ownership in the property is fair and just in the circumstances. I shall therefore make an order to that effect.

[41] Insofar as costs are concerned, it is apparent from the record that legal aid is being rendered to the defendant. For that reason, I shall not make an order as to costs.

[42] In the result, I make the following order:

1. The plaintiff's claim for specific forfeiture of the defendant's interest in the undermentioned property, is dismissed.
2. It is ordered that the joint ownership of the parties in the immovable property known as:
- 3.

CERTAIN: Erf No. 1465 Otjiwarongo,

³ Robson v Theron 1978 (1) SA 841 (A) at 856 H.

(Extension No. 5)

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MEASURING: 1455 (one four five five) square meters

HELD: by the parties jointly in terms of Deed of Transfer No.T
5390/2009, is hereby terminated.

4. Unless the parties reach agreement in writing within 30 days from the date of this order on all aspects relating to the termination of the co-ownership, then paragraph 4 thereof shall apply.
5. In giving effect to the termination order referred to in paragraph 2 above (should the parties not reach agreement as provided in paragraph 3 above) the following is hereby ordered:
 - a) the abovementioned property be valued by an independent valuer appointed by the plaintiff's attorneys (unless the parties are able to agree on the appointment of a valuer forthwith);
 - b) upon receipt of the valuation certificate, an open mandate to sell the property be given to a registered estate agent within 30 days of obtaining the valuation certificate;
 - c) the conveyancing of the property shall be attended to by plaintiff's attorneys, as conveyancers for both parties, who shall give effect to the sale as follows, namely:
 - i) the collection of the full purchased price;
 - ii) cancellation and discharge of existing mortgage bonds;
 - iii) the discharge of any further obligations on the property in respect of rates, taxes, estate agent commission, property valuation costs, transfer costs, and the like, and;
 - iv) equal distribution of the net proceeds of the sale between the parties.
6. In the event of either party refusing to sign the deed of sale (or any other document necessary for effecting the transfer of the property), the Deputy Sheriff for the district of Otjiwarongo is hereby directed and authorized to sign the deed of sale (or any other document) in order to effect the transfer of the property.
7. I make no order as to costs.
8. The matter is removed from the roll and regarded finalised.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

Mr. R. Rukoro
Of LorentzAngula Inc,
Windhoek

DEFENDANT:

Ms. S. Nyatondo
Of Sibeya & Partners Legal Practitioners,
Windhoek