

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,



MAIN DIVISION, WINDHOEK

PRACTICE DIRECTIVE 61

JUDGMENT

Case Title: HELVI HAMUNYELA (PREVIOUSLY KAKUENA) vs PETER IMBODI NAPHTALI	Case No: HC-MD-CIV-ACT-MAT-2021/01518
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE MILLER, AJ	Heard on: 17 August 2022
	Delivered on: 29 September 2022

Neutral citation: *Hamunyela v Naphtali* (HC-MD-CIV-ACT-MAT-2021/01518) [2022] NAHCMD 522 (29 September 2022)

ORDER

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved;
2. No order to pay spousal maintenance is made;
3. The settlement agreement entered into between the parties and dated 28 October 2021 is hereby made an order of court;
4. The joint estate is hereby divided.
5. Each party pay their own costs.

REASONS:

Miller AJ:

[1] This is an action for the dissolution of the marriage as instituted by the plaintiff seeking

the following relief:

'1. An order calling on the defendant to restore conjugal rights to the Plaintiff and failing compliance herewith;

1.1. A decree of divorce.

2. An order directing the Defendant to pay spousal maintenance in the amount of N\$7000 (Seven Thousand Namibia Dollars) per month to the Plaintiff, until such time the Plaintiff is gainfully employed or remarries.

3. An order whereof the village homestead described as Onankali house, approximately 30 kilometers from Onayena, Oshikoto Region, in the Republic of Namibia will become the sole and exclusive property of the Plaintiff and the Defendant forfeits his half-share in respect thereof.

4. An order for equal division of the remainder of the joint estate;

5 Costs of suit (only if the action is defended);

6. Further and/or alternative relief.'

[2] The defendant filed a notice to defend the matter and subsequently filed a plea and counterclaim to the plaintiff's particulars of claim. In his counterclaim, defendant also seeks a restitution of conjugal rights against the plaintiff, and failing therewith a final order of divorce. In his counterclaim, prayer 2, the defendant seeks an order as follows:

'Forfeiture of the benefits derived from the marriage in community of property especially in respect of the immovable properties situated in Nau-Aib, Okahandja and no 1162, Ongaka Street, Okuryangava, Windhoek;'

[3] The parties reached partial settlement on 28 October 2021. What remains for the court to determine is the following:

- a) The specific forfeiture order as claimed by the defendant in his counterclaim and;
- b) Whether or not the plaintiff is entitled to spousal maintenance.

Plaintiff's case

[4] The plaintiff testified that their marriage was solemnized on 31 May 2016, they however have been living together at Erf 1162, Ongaka Street, Okuryangava, Windhoek since 12 August 2015. They got married in community of property, and no children were born of the marriage between them.

[5] It was her testimony that she is currently unemployed but was previously employed at Air Namibia where she earned N\$15 000 per month. She testified that the defendant was aggressive towards her, especially when he was drunk, he would insult and swear at her. He would drink regularly and leave the house for days. It was her further testimony that she always contributed to the marriage, paying expenses like municipality costs, upkeep of properties and food.

[6] It was her further testimony that she started a small business doing catering and events on 18 April 2013, called Ndatoolewe Events Management CC. She indicates that the defendant is still in possession of a 500 person wedding tent and kitchen-ware which was intended for her business and cannot continue to carry on with the business without the above mentioned items.

[7] She testified further that she paid N\$5 500 towards various renovations at the common home including painting, tiling, interlocks and kitchen fittings and that she could not locate the invoices. On 2 November 2018, they purchased Erf 1693, Nau-Aib, Okahandja, Otjozondjupa Region, jointly to the value of N\$ 1 100 000. She states that some of the money came from an Old Mutual savings which they held together.

[8] During April 2019, she suspected the defendant was seeing other women. This was from the phone messages she found and some explicit pictures as exchanged between the defendant and the other woman. As a result of the defendant's unbecoming behaviour she left the common home on two separate occasions first on 15 June 2019 and the second occasion was on 1 January 2020 after she had reported him to the police for assault, which charges she did not pursue.

[9] When she retired from Air Namibia she was only left with N\$50 000, which she allegedly spent during the marriage on sustaining herself and paying for things in the common home, mainly for building costs at the village.

[10] She further testifies that her monthly expenses are:

- a) Legal Shield- N\$250
- b) Car Payment- N\$1 250
- c) Loan Fees - N\$1 000

- d) Food- N\$1 000
- e) Cosmetics/Toiletries- N\$1 000.00
- f) Rent- N\$1000 and that she is struggling to find employment.

Defendant's case

[11] The defendant testified that the plaintiff's pension fund money was paid out to her. She has a substantial investment and is not entitled to rehabilitative maintenance also due to the duration of the marriage. He alleges that the plaintiff was unfaithful and that she moved out twice from the common home to cohabit with boyfriends and that they have not lived together since 2019.

[12] It was his testimony that their marriage was short lived and that the plaintiff should forfeit any and all benefits from the marriage in community of property. He testifies that he bought the house in Okuryangava during 2004 and the value of the house has been determined as N\$835 000. He submits that he made all the payments in respect of the mortgage bond the house and it is paid up. He effected payment of all of the municipal accounts in respect of this house.

[13] He agrees with the plaintiff that they bought the house in Nau-Aib, Okahandja jointly however he indicates that he was the only person making payments in respect of the mortgage bonds on the property. He also denies that she made any payments towards the municipal accounts for this Okahandja property.

The law

[14] Heathcote AJ in *Carlos v Carlos, Lucian v Lucian* (141 of 2010) [2011] NAHC 156 (10 June 2011) at sub-paras 22.5-22.9; stated the with regards to the legal principles applicable in Namibia to forfeiture orders, Heathcote AJ, as he then was, elucidated the common law and its principles as follows:

'... [22.5] When the court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led. The fact that a husband or wife does not work, does not mean that he/she did not contribute. Value should be given to the maintenance provided to the children, household chores and the like. It would be readily

quantifiable with reference to the reasonable costs which would have been incurred to hire a third party to do such work, had the spouse who provided the services, not been available during the marriage. Of course, he/she would then possibly have contributed more to the estate, but these difficulties must be determined on a case by case basis. Only in such circumstances can the forfeiture order be equitable;

[22.7] The court, of course, has a discretion to grant a specific or quantified forfeiture order on the same day the restitution order is granted, if the necessary evidence is lead at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim i.e. the value of the property at the time of divorce, the value of the respective contributions made by the parties; and the ratio which the Plaintiff suggests should find application (where a quantified forfeiture order is sought). Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be indentified. It should then be alleged that the Defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. (Note: this is not the same as alleging that no contribution was made to the acquisition or maintenance of the specific asset);

[22.8] 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). I say that this would only find application in exceptional circumstances, because it is not always that the guilty Defendant is so useless that the Plaintiff would be able to say that he/she has made no contribution whatsoever, or a really insignificant contribution, (to the extent that it can for all practical intents and purposes be ignored);

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

[15] Damaseb JP, in *Neil Ronald Samuels v Petronella Samuels* (I 902/2008) NAHC 28 (26 March 2010) para 33 considered the aspect of spousal maintenance in an instance where the payment of spousal maintenance was claimed by the wife, as follows:

'The duty to pay maintenance, and the quantum thereof, will hinge on the ability of the guilty party to pay, the ability of the innocent party to earn an income from her own maintenance, and the period for which their marriage lasted. The innocent party is not entitled to be placed in the same position in regard to maintenance as if she were still married to the husband, although she needs to show actual necessity.'

Conclusion

[16] In order for the defendant to succeed on his claim for a specific forfeiture order, he ought to have satisfied the court in terms of the judgment by Heathcote AJ. The court when dealing with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led.

[17] The court is satisfied with the valuations that have been placed before it, with respect to both the properties, however what come out lacking is the probative evidence of the contributions made by the respective spouses.

[18] I thus cannot deny the evidence that is before me with regard to the property situated at Nau-Aib, Okahandja. The defendant and the plaintiff bought the property jointly, and for that I am convinced that no specific forfeiture order can be granted with regards to this property and seeing that the property is still registered under both the parties' names.

[19] Similarly, applying the principles stated in *C v C, L v L* supra, I am of the view that having regard to the evidence in totality, the defendant does not establish that the plaintiff had not made any contributions or negligible contribution to the joint estate, consequently, the prayer for a specific forfeiture should fail.

[20] The purpose of divorce is to cut all ties and it is incumbent on this court to equip the defendant to live independently of the plaintiff and to focus on developing and empowering herself to secure and sustain her future.¹ There is no evidence lead by the plaintiff that the defendant has ever maintained or sustained her. What is however clear from the evidence is that their marriage lasted for five years before plaintiff instituted divorce proceedings and of these five years she has moved out of the common home twice in the year 2018 and 2019.

[21] The court is not satisfied that she cannot sustain herself and thus will not grant an order for spousal maintenance.

[22] As a result I make the following order:

¹ *RWM v FFM* (HC-MD-CIV-ACT-MAT-2019/02448) [2020] NAHCMD 8 (17 January 2020) at para 13.

<ol style="list-style-type: none"> 1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved; 2. No order to pay spousal maintenance is made; 3. The settlement agreement entered into between the parties and dated 28 October 2021 is hereby made an order of court; 4. The joint estate is hereby divided. 5. Each party pay their own costs. 	
Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
N Kloppers of Kloppers Legal Practitioners, Windhoek	M Petherbridge of Petherbridge Law Chambers, Windhoek