

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2020/02160

In the matter between:

F A K

PLAINTIFF

and

I K

DEFENDANT

Neutral citation: *F A K v I K* (HC-MD-CIV-ACT-MAT-2020/02160) [2022] NAHCMD
57 (15 February 2022)

CORAM: UEITELE J

Heard: 4 – 6 October 2021

Delivered: 6 October 2021

Reasons: 15 February 2022

Flynote: Husband and Wife – Divorce proceedings – Marriage in community of property – Plaintiff seeking specific forfeiture order in respect of immovable property – Making of specific forfeiture order requires, amongst other considerations, all contributions made by spouses – Applicable legal principles restated.

Summary: The plaintiff and the defendant were married to each other in community of property. Plaintiff instituted divorce proceedings claiming, *inter alia*, a specific forfeiture order in respect of an immovable property forming part of the joint estate. The court restated the applicable legal principles in that what the parties must lead evidence on is the parties' contribution towards the joint estate and not the acquisition and maintenance of a specific property. The court found that based on the pleadings and the evidence adduced, it was not satisfied that the facts before it indicate the defendant's contribution was insignificant to the extent that it must be ignored. The court is of the considered view that the plaintiff did not lead sufficient evidence to establish exceptional circumstances justifying the granting of the specific forfeiture order sought, as the evidence of the defendant indicated that he indeed contributed to the joint estate, *albeit* not in equal portions with that of the plaintiff. The plaintiff is therefore in law not entitled to an order for specific forfeiture.

ORDER

1. The plaintiff's claim for specific forfeiture in respect of the immovable properties is dismissed.

2. The remainder of the joint estate which falls outside the partial settlement agreement must be equally divided between the parties.
3. The matter is regarded as finalized and is removed from roll.
4. Each party must pay its own costs.

JUDGMENT

UEITELE J:

Introduction and background

[1] In this matter, the plaintiff Ms FAK, is suing her husband Mr IK for divorce. They were married to each other without an ante nuptial contract, on 30 January 2004 at

Okahandja. Two children, one boy and one girl, were born out of the marriage between the parties. At the time of the trial the children were still minors, the girl was 17 years old and the boy was 9 years old.

[2] On the 10th of June 2020 the plaintiff caused a combined summons to be issued against her husband for divorce on the ground of malicious desertion and adultery. In her particulars of claim the plaintiff alleges that during the subsistence of the marriage, the defendant made himself guilty of wrongful and malicious conduct with the settled intention to terminate the marital relationship.

[3] She accused the defendant of physically, verbally, emotionally and psychologically abusing her. She further pleaded that as a result of the abuses she suffered at the hands of the defendant she, during June 2020 obtained a protection order against the defendant and they have since then not lived together.

[4] On the issue of desertion the plaintiff complained of the following conduct:

a) the defendant fails to support the plaintiff financially or contribute adequately and timeously to the upkeep of the household, the bond installment and maintenance of the minor children;

b) the defendant abuses alcohol and drugs and quarrels with plaintiff for no reason;
c) the defendant frequently absents himself from the matrimonial home for long periods without informing the plaintiff;

d) the defendant engaged in extra-marital activities with an unknown third party from which a child was born;

e) the defendant shows the plaintiff no love or affection;

f) the defendant is not interested in the continuation of the marital relationship.

[5] As a result the plaintiff avers that the defendant has maliciously and

constructively deserted her, in which desertion the defendant persists with. The plaintiff thus claims that the following relief be granted to her, (I quote verbatim from the Particulars of Claim):

- '1. A Final Order of Divorce, alternatively:

2. (a) An order for the restitution of conjugal rights, and failing compliance therewith;
(b) A final order of divorce.

3. Custody and control of the minor children be awarded to the Plaintiff subject to the Defendant's right of reasonable access as per Annexure "A" attached hereto.

- 3 An order that the Defendant retains the minor children on his medical aid scheme including the excess amounts which might be required from time to time.

4. An order directing both parties to be equally liable for all costs in respect of the minor children's primary and secondary education, extra-mural activities, books, stationary and school clothes, tertiary education, including the costs of hostel fees or alternative accommodation (should the children show an aptitude and make reasonable progress herein and in so far as such costs are not covered by study loans and for bursaries).
5. An order which the defendant is pays maintenance in respect of the minor children in the amount of N\$ 5 000-00 per month per child.
6. Forfeiture of the property to wit **Erf 386, Xamigaub Street, Cimbebasia, Windhoek, Republic of Namibia;**
7. Costs of suit (only if defended)
8. Further and/or alternative relief.'

[6] After the summons were served on the defendant he, on 19 June 2020 gave notice of his intention to defend the plaintiff's claim. Shortly after the defendant gave notice of his intention to defend the plaintiff's claim the case was docket allocated to a managing judge. During the case planning conference the managing judge, as contemplated by Rule 38 read with Rule 39 of the Rules of Court and Practice Directives 19, referred the matter to court connected mediation. The mediation conference was held on 30 September 2020.

[7] On 1 October 2020 the mediator reported to Court that the parties partly settled the dispute between them. The mediator further reported that the only aspect which the parties did not resolve is the question of which party is responsible for the breakdown of the marriage and the plaintiff's claim for the defendant to forfeit Erf 386, Xamigaub Street Cimbebasia, Windhoek, Republic of Namibia. The partial settlement agreement

in parts reads as follows, I quote verbatim from the agreement.

2. MINOR CHILDREN

2.1 CUSTODY AND CONTROL

The custody and control of the minor children born of the Parties, to wit **EVA NAMUKOLO KAZEMBE** and **IANELLA /KHAE-KHOE KAZEMBE** shall be awarded to the Plaintiff subject to the defendant's reasonable access to be agreed upon as per parental agreement so drafted between the parties.

2.2 MAINTENANCE AND SCHOLASTIC EXPENSES

The defendant shall pay maintenance in the amount of N\$ 2 500 per month per child which amount shall be payable on or before the 7th day of each month.

3. CITY OF WINDHOEK ACCOUNT

3.1.1 Defendant to pay the outstanding amount of N\$ 32 000.00 to the City of Windhoek in respect of the Municipal accounts for **Erf 386 XAMGAUB STREET CIMBEBACIA, REPUBLIC OF NAMIBIA**. The defendant must make his own arrangements with the City of Windhoek.

4. The issue regarding the division of the joint estate with specific reference to the forfeiture claim by the Plaintiff shall stand over for determination at the hearing.

4. LEGAL COSTS

Costs to be determined at the hearing.

5. GENERAL

5.1 The plaintiff shall request this partial agreement to be made an order of Court.

5.2 There shall be no variation of the agreement unless reduced to writing.'

[8] That being the case, the above-mentioned issues have been settled between the parties and were no longer in dispute between them. The only issues still in dispute and which the court must decide upon are the grounds of divorce, and the forfeiture of benefits of the marriage in community of property and the costs of the suit.

[9] After the partial settlement, the defendant filed his plea to the plaintiff's particulars of claim and furthermore filed a counterclaim. In his plea the defendant in essence simply denies the allegations made against him by the plaintiff, he denies that he physically or verbally abused the plaintiff. He further denies the allegation that he does not contribute adequately or timeously to the upkeep of the household. He pleaded that he timeously contributed to the up keep of the family. The defendant further pleaded that it is indeed the plaintiff who showed him no love and affection and banished him from the common home by obtaining a protection order against him based on falsehood.

The evidence

[10] I now turn to consider the evidence presented by the parties. Only a summary will be given to avoid a repetition of what the witnesses have said in their testimonies

[11] The plaintiff testified that she married the defendant on 30 January 2004 at

Okahandja. She testified that during the subsistence of their marriage she and the defendant secured a home loan with Standard Bank Namibia Limited and acquired an immovable property situated at Erf No 386, Xamigaub Street, Cimbebasia. She further testified that from the time, that is during 2004, when they acquired that property the defendant has not contributed to the payment of the mortgage bond installments. The plaintiff tendered into evidence copies of her Bank Statements spanning over the period January 2018 to July 2020 in order to demonstrate that she alone paid for the installments towards the mortgage bond.

[12] The plaintiff further testified that she received no support from the defendant with respect to the support of the children (she testified that for the period January 2018 to September 2020 she alone paid the school fees in the amounts of N\$ 162 257 in respect of Eva and N\$ 257 365 in respect of Ianella) and the household. She testified that during February 2018 she and the defendant had discussions and agreed that the defendant would sign a lease agreement so as to alleviate the financial pressure on her. She testified that in terms of the lease agreement, a copy of which was tendered into evidence as an exhibit, the defendant agreed to, as from February 2018, pay a rental amount of N\$4 238-84 per month and a deposit of N\$ 3 250. She further testified that despite signing the lease agreement the defendant has only sporadically paid the rent.

[13] With respect to the defendant's conduct, the plaintiff testified that the defendant was irresponsible, abused alcohol and drugs and on one occasion was involved in a motor vehicle accident and he ended up in the intensive care unit of a local hospital and she only learned about the accident a few days later. She also narrated an incident when the defendant assaulted her badly and he took her to hospital and at the hospital he coerced her not to tell the doctor who examined her that her injuries were as a result of an assault by him.

[14] With respect to the adultery, she testified that she only became aware of the adulterous relationship when one of her acquaintances alerted her on Facebook about the existence of the defendant's out of wedlock child. She testified that when she confronted him about the child and the adulterous relationship his reply was that it was an '*one night stand*' which he engaged in while he was intoxicated.

[15] The defendant testified that he married the plaintiff on 30 January 2004. He further testified that during the course of their marriage the plaintiff, on occasions, verbally, emotionally and psychologically abused him. He testified that due to the lack of affection that he received from his wife, he sought solace in the arms of another whom and he had an extra marital relationship with that other woman from which relationship a child was born. He testified that his wife was aware of both the identity of the child and the woman with whom he had the extra-marital relationship with. He further testified that after his wife discovered the existence of the extra marital relationship they continued to have conjugal relationship and his wife thus condoned the adulterous relationship.

[16] With respect to the immovable property the defendant testified that he contributed fairly towards the household and that he and his wife had an agreement in terms of which he would pay rent and utilities and he stated that he generally did his best to honour that agreement. He further testified that during the year 2013 he contributed an amount of N\$ 130 000 towards the renovation of the common home. He concluded by testifying that he contributed a fair share to the household. During his testimony the defendant also submitted copies of his Bank Statements to demonstrate that he made certain contributions towards the common household.

Discussion

[17] The trial in this matter proceeded over three days. During the presentation of the testimonies counsel for the defendant did not contest or dispute the evidence presented by the plaintiff neither did he put the defendant's version of events to the plaintiff for the plaintiff to comment on the defendant's version. In the case of *Small v Smith*¹, Claassen J said:

'The rule that an opposing party must put its case to the other party's witnesses in respect of matters which are not common cause is not to be found in formal rules of court, but is, as I have already pointed out, based on considerations of fundamental fairness and a court should be slow to reject a witness's evidence on such matters where it has not been challenged and the witness has not been given an opportunity to deal with the conflicting version which the opposing party's witnesses give in due course.² (My underlining).

[18] Apart from the fact that the defendant's version was not put to the plaintiff, the defendant's testimony was vague, lacked particularities and details. For those reasons I rejected the defendant's evidence and found that the defendant was the cause of the breakdown of the marriage between him and the plaintiff. I also found that plaintiff did not, as alleged by the defendant, condone the defendant's adultery. Based on my

1 *Small v Smith* 1954 (3) SA 434 (SWA) at 438 ENF

2 Approved by Hanna J in the matter of *Navachab Gold Mine v Izaaks* 1996 NR 79 (LC) at 85B.

finding that the defendant was the cause of the breakdown of the marriage and the admitted agreements between the plaintiff and the defendant, I made the following order:

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

2. The custody of the minor children is awarded to the plaintiff subject to the defendant's right of reasonable access to the children.

3. The defendant must in respect of the ancillary claims of the plaintiff:

3.1 refund and pay to the plaintiff the amount of N\$ 209 811-02 being 50% of the school fees that the plaintiff has paid in respect of the minor children for the period 2018 to 2021;

3.2 pay to the plaintiff the amount of N\$32 500-00 being the amount of maintenance in respect of the minor children (at the rate of N\$ 2500 per child per month over a twelve months period as from 07 November 2020 to October 2021) as agreed at mediation on 30 September 2020, less the amount of N\$ 27 500 paid by the defendant during the period September 2020 to September 2021.

3.3 pay to the plaintiff the amount of N\$ 91 000 being the lease amount of N\$ 3 250 per month as agreed during February 2018.

3.4 pay to the Municipal Council of Windhoek (Account Number 10792473) the amount of N\$ 49 761-55.

4. The defendant must pay maintenance in the amount of N\$ 2 500 per child in respect of the minor children, the amount will escalate annually by the consumer index rate on the anniversary of the divorce.

5. The defendant must pay 50% of the minor children's school fees, including primary, secondary and tertiary education (provided the minor children has an aptitude therefore and show reasonable progress therein), including but not limited to school funds, books, stationary, excursions, extra-mural activities and all related expenses.

6. The defendant must pay 50% of the minor children's medical, dental, pharmaceutical (on doctor's prescription), surgical, hospital orthodontic, ophthalmologic (including spectacles and/or contact lenses) expenses incurred in relation to the minor children.

7. The joint estate of the parties must, with the exception of the immovable property being:

CERTAIN:	ERF 386 CIMBEBASIA
SITUATE:	IN THE MUNICIPALITY OF WINDHOEK REGISTRATION DIVISION "K" KHOMAS REGION
MEASURING:	323 (THRE TWO THREE) SQUARE METERS
HELD	BY DEED OF TRANSFER NO. T 1061/2005,

be equally divided between the parties.

8. The matter is postponed to 07 December 2021 at 08:30 for the purposes of ruling on the plaintiff's claim of specific forfeiture in respect of the immovable property.'

[19] This brings me to the issue of the forfeiture by the defendant of the benefits of

the marriage in community of property, claimed by the plaintiff. In the matter *C v C; L v L*³ 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).

[20] The learned acting judge proceeded and set out the legal principles that must apply where a party seeks a forfeiture order. In summary they are as follows:

- a) When parties are married to each other in community of property, and the defendant commits adultery or maliciously deserts the plaintiff, the court has no discretion but to grant a general forfeiture order, if so requested. The court will grant such general forfeiture order without enquiring as to the value of the estate at the date of divorce, or the value of the respective parties' contributions.
- b) When quantified or specific forfeiture orders are requested, the position is different. A specific forfeiture may be granted in exceptional circumstances. In these cases (that is in a claim for a quantified or specific forfeiture claim) the party claiming a specific forfeiture order must make the following allegations in his/her pleadings and must lead evidence in court on the following aspects⁴: the value of the joint estate at the

3 *C v C; L v L 2012 (1) NR 37 (HC)*. The formulation of the legal principles was accepted by the

time of divorce, the respective contributions and value of each spouse's contribution to the joint estate (not only to the asset sought to be forfeited), the specific property sought to be declared forfeited must be identified, all other relevant circumstances, and the allegations (or evidence) that the defendant made no contribution whatsoever (or only some negligible contribution) to the joint estate, and that if the forfeiture order is not granted, one party (the guilty spouse) will, in relation to the other, be unduly benefitted in the circumstances.

[21] The plaintiff contended during her evidence that the defendant made an insignificant contribution to the joint estate. It was accepted during the parties' testimonies that the defendant's employment during the subsistence of the marriage was not always stable but he was employed on occasions and had income. In her rough calculations in court the plaintiff estimated that the defendant contributed approximately 15% to 20% to the joint estate as opposed to her 80%.

[22] During cross-examination the plaintiff was asked how she came to that conclusion and her response thereto was that she did not do the calculation per month but she took the overall expenses of the joint estate and then took into consideration the defendant's contribution such as transporting the children to school (which the

Supreme Court in the matter of *S v S* 2013 (1) NR 114.

4 Also see *Mbango v Mbango* (HC-MD-CIV-ACT-MAT-2016/03005) [2020] NAHCMD95 (13 March 2020) para 22.

defendant apparently did not do since 2018) and occasionally buying food. The plaintiff presented a list of expenses for the minor children and submitted that she is liable for those expenses as the defendant does not contribute to them.

[23] The plaintiff during her testimony repeatedly told this court that the defendant's contribution was insignificant. The question is therefore, to use the words of Heathcote AJ⁵, whether the guilty defendant was so 'useless' that the plaintiff would be able to say that he has made no contribution whatsoever, or a really insignificant contribution, (to the extent that it can for all practical intents and purposes be ignored).

[24] From the documentary evidence presented to me in court I found it impossible to determine the precise contributions of each party to the joint estate. This was mainly so because the bulk of the parties' evidence with respect to their contributions to the joint estate were concentrated on the period 2018 to 2020, when the joint estate came into existence in the year 2004.

[25] When the plaintiff's counsel embarked on this exercise in court I got the distinct impression that the plaintiff was attempting to demonstrate the contributions that the plaintiff made with respect to the acquisition of Erf 386 Xamigaub, Street. What counsel for the plaintiff loses sight of is the fact that the plaintiff is not seeking a general or quantified forfeiture but a specific forfeiture. It must be understood that in the *C v C* matter the court stressed the fact that what the parties must lead evidence on is the parties' contribution towards the joint estate and not the acquisition and maintenance of

5 *C v C supra* footnote 11 para 22.8.

a specific property.⁶

[26] In this matter the evidence was clear that the plaintiff made the bulk of the contribution towards the payment of the mortgage bond and that the defendant also made some contributions to the joint estate of the parties. That, in itself, does not equate to a finding that the defendant made no contribution towards the joint estate or only made negligible contributions towards the joint estate.

[27] I am therefore not satisfied that the facts before me indicate the defendant's contribution was insignificant to the extent that it must be ignored. I am of the considered view that the plaintiff did not lead sufficient evidence to establish exceptional circumstances justifying the granting of the specific forfeiture order sought as the evidence of the defendant indicated that he indeed contributed to the joint estate, *albeit* not in equal portions with that of the plaintiff. What is important to keep in mind is that there must have been some sort of contribution that can be regarded significant, of which I am satisfied that there was.

[28] Therefore, because the plaintiff did not seek a general forfeiture or quantified forfeiture and as I found that the plaintiff has not succeeded to prove that exceptional circumstances justifying the granting of specific forfeiture exist, the court must return to the default position which is the division of the joint estate.

[29] This leaves the question of cost. As a general rule costs are in the discretion of

⁶ *C v C supra* footnote 11 para 22.7.

the court. Normally in divorce cases where the parties are married in community of property, the courts tend to take up a 'no order as to costs' principle. Nothing has been placed before me to justify a departure from that general approach. I will therefore not make any order as to costs and each party must pay its own costs.

[30] For the reasons set out in this judgment I make the following order.

1. The plaintiff's claim for specific forfeiture in respect of the immovable properties is dismissed.
2. The remainder of the joint estate which falls outside the partial settlement agreement must be equally divided between the parties.
3. The matter is regarded as finalized and is removed from roll.
4. Each party must pay its own costs.

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF:

S Paulus
Of Dr Weder, Kauta & Hoveka Inc,
Windhoek.

DEFENDANT:

B Cupido
Of Isaacks & Associates, Windhoek.