

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING  
PRACTICE DIRECTIVE 61

<b>Case Title:</b> HELALIA LUKEIKO JOHANNES vs JAFET UUTONI	<b>Case No:</b> HC-MD-CIV-ACT-MAT-2021/04410
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> PARKER AJ	<b>Date of hearing:</b> 22 & 30 MARCH 2023
	<b>Delivered on:</b> 26 APRIL 2023

**Neutral citation:** *Johannes v Uutoni* (HC-MD-CIV-ACT-MAT-2021/04410) [2023] NAHCMD 222 (26 April 2023)

**IT IS ORDERED THAT:**

1. The bonds of marriage subsisting between the plaintiff and the defendant are dissolved; and a final order of divorce is hereby granted.
2. Custody and control of the minor child of the family are awarded to the plaintiff, subject to the defendant's reasonable access to the minor child.
3. The defendant shall pay N\$2 000 per month towards the maintenance of the minor child.
4. The defendant shall forfeit any benefits deriving from the marriage out of community of property.
5. The ownership of Erf No. 94 Tolla Street, Goreangab Dam, Windhoek, is hereby

vested solely in the plaintiff.

6. The defendant must, on or before 17 May 2023, take all steps necessary and required to transfer his share of the said Erf No. 94, Tolla Street, Goreangab Dam, Windhoek, to the plaintiff; and if the defendant fails or refuses to act as such, the Deputy Sheriff responsible for Windhoek is hereby authorized to take all steps necessary and required to effect the aforementioned transfer.
7. The plaintiff be the sole owner of all property listed and identified in Annexure 'HLJ8' to the particulars of claim, a pounding machine and 20 goats listed in paragraph 18 of the particulars of claim.
8. That plaintiff be the sole owner of the two motor vehicles listed in paragraphs 18.1 and 18.2 of the particulars of claim.
9. That the defendant be the sole owner of all the property listed and identified in paragraphs 15 and 16 of the particulars of claim.
10. There is no order as to costs.

**Reasons for the Order:**

**PARKER AJ:**

[1] In this matrimonial matter, the plaintiff, represented by Ms Nambinga, has instituted divorce proceedings. The plaintiff relies on these grounds, namely, that the defendant wrongfully, unlawfully and constructively deserted the plaintiff by, among other things, committing emotional, psychological and physical abuse towards the plaintiff. The parties have been married to each other for some 11 years. There is one minor child of the family. The marriage is out of community of property.

The claim in convention

[2] The said abuse led to the plaintiff seeking and obtaining a final protection order from the Magistrates Domestic Violence Court ('the magistrates' court') on 14 February 2022. The defendant, with legal representation, unsuccessfully resisted the granting of the final protection order. The order was granted on the grounds that the defendant had committed against the plaintiff all manner of abuse, including physical abuse, sexual abuse, economic abuse and emotional, verbal or psychological abuse. For such abuse, I

find that the defendant is the guilty party.

[3] The final protection order has not been set aside by a competent court, and so, I cannot airbrush it. I should implement it. I said in *Beukes v Beukes* –

‘In our law, an order of court does not just evaporate into thin air: It exists until it is set aside by a competent court or vacated or executed by the party in whose favour the order was made.’<sup>1</sup>

[4] On the basis of the said abuse, among other considerations such as the plaintiff having contributed about 90 percent of the repayment of the mortgage bond registered over the property, being Erf No. 94 Tolla Street, Goreangab Dam, Katutura, Windhoek (‘the first immovable property’), the plaintiff seeks an order against the defendant for the forfeiture of any benefits deriving from the marriage out of community of property.

[5] The defendant, on his part, has set up a plea and a counterclaim. In his plea, the defendant denies being responsible for the breakdown of the marriage and challenges the granting of the forfeiture order. In turn, the defendant claims, in reconvention, principally that the first immovable property be sold and the proceeds therefrom divided equally between the parties.

[6] On the evidence and for the purposes of the instant proceedings which are in the course of a divorce matter, I accept Ms Nambinga’s submission that the final protection order disproves the defendant’s defence that he did not abuse the plaintiff. Consequently, the defendant’s denial that he is not responsible for the breakdown of the marriage is roundly rejected as baseless. Therefore, the defendant is the guilty party, as aforesaid.

[7] Although the marriage is out of community of property, the parties jointly acquired the first immovable property. The plaintiff paid towards the acquisition of the property N\$60 000, whilst the defendant paid N\$50 000. There was some contestation about whether the plaintiff paid to the defendant N\$49 000 in June 2020 as a ‘refund’ of the defendant’s deposit payment when he asked the plaintiff return to him the amount of the deposit. The evidence is not clear whether the amount paid was a refund of the deposit amount. No evidence was adduced to explain why, if the defendant wanted a refund of

<sup>1</sup> *Beukes v Beukes* [2023] NAHCMD 169 (5 April 2023) para 23.

the deposit he had paid which was N\$ 50 000, only N\$49 000 was paid back to him. The evidence is not satisfactory nor sufficient to prove that the plaintiff reimbursed defendant for the deposit he had paid. The probabilities are not in favour of the plaintiff's version, and so it is rejected.

[8] It is common cause between the parties that the plaintiff paid 90 percent of the settlement of the bond repayments, and the defendant 10 percent. Furthermore, the plaintiff on her own effected renovations to the first immovable property in the amount of N\$679 330.74. As at October 2021, the mortgage bank's statement indicated that the outstanding balance on the bond was N\$671 927.57.

[9] *Carlos v Carlos*<sup>2</sup> should guide us in the consideration of the relief the plaintiff claims, ie the forfeiture of benefits. In that case, the court dealt with the legal principles applicable in Namibia to orders for the forfeiture of benefits in matrimonial matters in the following terms:

[22] From the aforementioned authorities, I would venture to suggest, the legal principles applicable in Namibia are these:

[22.1] When parties are married 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.

[22.2] Even if a general forfeiture order is granted, it may have the effect, in certain circumstances, that the property is simply equally divided. That would be in circumstances where the so called "*guilty spouse*" has contributed much more to the joint estate than the contributions of the so called "*innocent spouse*". (Italics in the original passage)

[22.3] A general forfeiture order will only have a practical effect if the guilty spouse contributed less to the joint estate than the innocent spouse did. In short, the guilty spouse cannot insist on half of the value of the joint estate. The benefit of a marriage in community of property is that, in the normal course, each party is entitled to half of the estate. But, a guilty party in divorce proceedings forfeits that

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<sup>2</sup> *Carlos v Carlos* [2011] NAHCMD 156 (10 June 2011).

benefit.

- [22.4] Once a general forfeiture order is granted, the court may either appoint a liquidator, who would then liquidate the estate in accordance with the law, or any one of the parties can approach the court to give practical effect to the general forfeiture order by issuing a quantified forfeiture order.
- [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.
- [22.6] When a court considers a request to grant a quantified forfeiture order, evidence produced should include the value of the joint estate at the time of the divorce, the specific contributions made to the joint estate by each party, and all the relevant circumstances. The court will then determine the ratio of the portion each former spouse should receive with reference to their respective contributions. If the guilty spouse has only contributed 10% to the joint estate that is the percentage he or she receives. If, however, the 10% contributor is the innocent spouse, he or she still receives 50% of the joint estate. The same method as applied in the Gates' case should find application.
- [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 led 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 identified. 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). I am of the view that it is only fair that Defendants also, in unopposed divorce actions, (by and large getting divorced in circumstances where the Defendant is illiterate and would not even understand the concept of forfeiture of benefits) should be provided with such details. (Underlining in original passage)

[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?

[22.10] It is also not a valid argument, to submit, (as counsel for the one of the Plaintiff's in this case did), that the matter is unopposed. The question which arises is, does the Defendant know what is claimed? And in any event, the court has no discretion to act contrary to the law simply because the matter is not opposed. No opposition does not constitute an agreement. Any Defendant is entitled to assume, even if he/she does not oppose, that a court will only grant a default judgment within the confines of the law.'

[10] In the instant matter, I have mentioned previously that the defendant, the guilty party, has contributed only 10 percent towards the mortgage bond repayment and no contribution at all towards the renovation of the first immovable property. That being the case, he receives 10 percent of the value of the joint estate. The defendant being the guilty party cannot receive one half of the value of the joint estate, as the defendant claims in reconvention.<sup>3</sup>

The defendant's claim in reconvention

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<sup>3</sup> Ibid para 22.6.

[11] The defendant's allegation that the plaintiff is the guilty spouse has been rejected. And based on the foregoing reasons, I refuse to grant the order he seeks in paras 2 and 3 of the counterclaim.

### Conclusion

[12] The parties agree as to who should be granted custody and control of the minor child. The defendant has offered to pay maintenance in the amount of N\$2 615 per month for the minor child. Since his counterclaim for half of the value of the joint estate has been rejected, I think, it is fair and reasonable that he pays only N\$2 000 per month for child maintenance. In the nature of the proceedings, it is similarly fair and reasonable that no costs order is granted in favour of, or against, any party.

[13] In the result, I make an order in the following terms, that-

1. The bonds of marriage subsisting between the plaintiff and the defendant are dissolved; and a final order of divorce is hereby granted.
2. Custody and control of the minor child of the family are awarded to the plaintiff, subject to the defendant's reasonable access to the minor child.
3. The defendant shall pay N\$2 000 per month towards the maintenance of the minor child.
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9. That the defendant be the sole owner of all the property listed and identified in paragraphs 15 and 16 of the particulars of claim.
10. There is no order as to costs.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
S Nambinga of Palyeenime Incorporated, Windhoek	J Andreas of Andreas-Hamunyela Legal Practitioners, Windhoek