

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: BRINKMAN WILLEM // NATASHA BRINKMAN	Case No: HC-MD-CIV-ACT-MAT-2021/02134
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 12 – 13 June 2023 & 5 July 2023
	Delivered on: 6 September 2023
Neutral citation: <i>Brinkman v Brinkman</i> (HC-MD-CIV-ACT-MAT-2021/02134) [2023] NAHCMD 548 (6 September 2023)	
Order: <ol style="list-style-type: none">1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.2. Custody of the minor child, Madezeme Madubaza Brinkman, is awarded to the defendant with the reasonable access of the plaintiff to the minor child.3. The plaintiff shall pay to the defendant N\$2000 per month for the maintenance of Madezeme.4. The plaintiff shall retain Madezeme on his medical aid scheme.5. The plaintiff and the defendant must in equal shares pay for the educational expenses of Madezeme, including primary school fees, secondary school fees, tertiary education	

fees and expenses reasonably incidental to and connected with educational expenses.

6. The joint estate must be divided in equal shares between the parties.

7. The matter is finalised and removed from the roll.

Reasons:

PARKER AJ:

[1] In the instant action, the plaintiff seeks the following relief:

- (1) a final order of divorce;
- (2) the parties to maintain the two minor children of the family;
- (3) the plaintiff to retain custody of the minor son, Jerome Jose Brinkman, and the defendant the minor daughter, Madezeme Madubaza Brinkman; and
- (4) the defendant to forfeit the benefits arising from the marriage in community of property.

[2] The plaintiff is represented by Mr Nanhapo, and defendant by Mr Mukondomi. The parties agreed that the plaintiff retains custody of Jerome and the defendant Madezeme. On the facts and in the circumstances of this case, I accept the parties' agreement. The agreement should apply to Madezeme only, since Jerome attained the age of majority on 3 April this year (2023). The parties agreed also that the court grants a final order of divorce. The court is inclined to grant such order, considering the facts of the case. These conclusions dispose of para 1 and (2) of the relief sought.

[3] The relief sought in para [1](2) above is a rehash of the common law. At common law, both parties have a duty to maintain the children of the family in proportions equal to their individual capability. For instance, the girl child is a beneficiary of a medical aid scheme subscribed to by the plaintiff and he testified that he would retain her on his medical aid scheme until she reaches the age of majority.

[4] In her plea and counterclaim, the defendant claimed N\$3500 per month to maintain both Jerome (who has now attained the age of majority, as aforesaid) and Madezeme. It means she claimed for Madezeme N\$1750 per month. That was in March 2022. Common sense and human experience¹ tell me that that amount has not stood still. I dare say, the amount might have gone up. I shall put it to N\$2000. That disposes of the relief sought in para [1](3) above. I pass to consider the relief claimed in para [1](4) above.

[5] The plaintiff prays that the court grants an order whereby the defendant forfeits the benefits arising from the marriage in community of property on the ground of malicious desertion on the part of the defendant. On the evidence, I find that the parties have been married to each other since 30 April 2011 in community of property. On 26 March 2021 the defendant left the matrimonial home and has not returned thereto. The defendant feared for her life as a result of persistent violence, perpetrated against her by the plaintiff so much so that she applied for and obtained interim protection orders from the Magistrate's Court of Okahandja on two separate occasions. The first was granted on 2 December 2019 and the second 26 March 2021.

[6] In my view, the interim orders were granted because the magistrate's court accepted to a prima facie degree that the plaintiff had perpetuated violence against the defendant in the form of physical abuse, economic abuse, harassment and emotional, verbal or psychological abuse.

[7] As respects the first protection order, the evidence is that the defendant informed the magistrate that the interim order should not be confirmed. What the defendant wanted was for the magistrate's court to warn the plaintiff 'to reform his behaviour'. As to the second interim order, the uncontradicted evidence is that the defendant could not attend the enquiry proceedings due to work related commitments. Accordingly, the magistrate's court dismissed the application. As Mr Mukondomi submitted, the interim orders were not dismissed on the merits. This submission has force and is valid.

[8] Therefore, I reject the submission by Mr Nanhapo that the interim orders were not confirmed because there were no acts of violence perpetrated against the defendant. Fear is the bad feeling that you have when you are in danger, when something bad might happen to you or when a particular thing frightens you. It is a general feeling.² It is, therefore,

¹ *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* NAHCMD 455 (5 October 2021) para 25.

subjective. In my view, the fact that the defendant applied for the interim orders establishes the fear she had of the plaintiff. On the facts and in the circumstances, the fact that the interim orders were not confirmed is of no moment. I do not find her feeling of fear of the plaintiff unjustified.

[9] Malicious desertion is the departure of a spouse from the matrimonial home without good cause.³ The critical question is, therefore, whether the plaintiff made marriage life insufferable for the defendant.⁴

[10] On the evidence, I find that the plaintiff's violent conduct rendered further cohabitation with him dangerous for the defendant. The plaintiff made marriage life insufferable for the defendant.⁵ Consequently, I conclude that the defendant departed from the matrimonial home with good cause.⁶

[11] The result is that the plaintiff has failed to establish malicious desertion on the part of the defendant. Consequently, I decline to grant a general forfeiture order against the defendant, and *a priori*, I incline to grant the defendant's claim in reconvention that the court orders the division of the joint estate equally between the plaintiff and the defendant. I have decided previously the defendant's other claims in reconvention set out in paras 3, 4, 5 and 6 of her counterclaim.

[12] As to costs, I find that the parties have shared the honours almost equally. I, therefore, think that it is just and reasonable that each party pays his or her own costs of suit.

[13] Based on these reasons, I order as follows:

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. Custody of the minor child, Madezeme Madubaza Brinkman, is awarded to the defendant with the reasonable access of the plaintiff to the minor child.

² Oxford Advanced Learners Dictionary.

³ *Holland v Holland* 1974 PHB 11.

⁴ Clifford Mortimer and CTA Wilkenson *Raydon's Practice and Law in the Divorce Division of the High Court of Justice* 2ed (1926) at 136.

⁵ *Ibid*

⁶ *Holland v Holland* footnote 5.

3. The plaintiff shall pay to the defendant N\$2000 per month for the maintenance of Madezeme.
4. The plaintiff shall retain Madezeme on his medical aid scheme.
5. The plaintiff and the defendant must in equal shares pay for the educational expenses of Madezeme, including primary school fees, secondary school fees, tertiary education fees and expenses reasonably incidental to and connected with educational expenses.
6. The joint estate must be divided in equal shares between the parties.
7. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiffs	Defendant
T Nanhapo Of T Nanhapo Incorporated, Windhoek	L Mukondomi Of Gaenor Michaels & Associates, Windhoek