

EPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2022/03696

In the matter between:

E K M

PLAINTIFF

and

B S M

DEFENDANT

Neutral Citation: *E K M v B S M* (HC-MD-CIV-ACT-MAT-2022/03696) [2023]

NAHCMD 748 (16 November 2023)

Coram: SIBEYA J

Heard: 19 September & 24 October 2023

Delivered: 16 November 2023

Flynote: Matrimonial – Husband and Wife – Divorce – Specific forfeiture in respect of the benefits derived from the marriage – Spouses married in community of property – 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 – Evidence led by both parties mutually destructive and court had to, on balance of probabilities, determine which version is more probable – The court was not satisfied that the plaintiff proved her claim for spousal maintenance. Court further not satisfied that the defendant made out a case for a forfeiture of benefit.

Summary: The court is tasked to determine whether breakdown of the marriage caused is at the hands of the plaintiff or the defendant's conduct, whether the plaintiff established a case to be awarded spousal maintenance, and whether the defendant proved that the plaintiff must forfeit the benefit the benefits derived from the marriage in community of property. During the trial, it became evident that there exist mutually destructive versions between the parties and the Court dutifully had to attach weight to the most probable version.

Held – the plaintiff's version substantively appeared more probable and the court attached more weight to it.

Held that – the plaintiff did not disclose sufficient evidence to demonstrate that she requires spousal maintenance from the defendant in the amount of N\$3000 per month for a period of five years after the final order of divorce.

Held further that – there is a duty on a party to put his or her version to an opposing witness in order to afford such witness an opportunity to comment thereon, failing which it can be assumed that the new version constitutes an afterthought.

Held – the defendant failed to prove that he solely contributed to the common household of the parties and is therefore entitled to an order that the plaintiff forfeits the benefits derived from the marriage.

Held that – The effect of noting an appeal against a final protection order in terms of the Combating of Domestic Violence Act 4 of 2003, is that it suspends the final protection order but retains the status ante the protection order, and revives the interim protection order, which remains in force pending the conclusion of the appeal.

ORDER

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. The plaintiff's claim for spousal maintenance is dismissed.
3. The defendant's claim that the plaintiff forfeits all the benefits that she might derive from their marriage in community of property is dismissed.
4. There shall be a division of the joint estate.
5. Each party must pay his or her own costs of suit.
6. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SIBEYA J:

[1] This is an opposed divorce action where the court is seized with a determination whether malicious or constructive desertion of one party resulted from the plaintiff or the defendant's conduct. The further bone of contention is whether the plaintiff should forfeit her benefit in the joint estate or be granted a division of such estate, and whether or not the plaintiff is entitled to spousal maintenance.

Pleadings

[2] The parties got married to each other on 18 February 2016 at Windhoek, in community of property. Two minor children were born of the parties on 1 June 2014 and 7 December 2017, respectively.

[3] The plaintiff listed several grounds for instituting the divorce action and contends that, during the subsistence of the marriage between the parties, the defendant wrongfully, maliciously and constructively deserted her by engaging in the following conduct:

- (a) (He shows her no love and affection;
- (b) He fails to meaningfully communicate with her;
- (c) He shows no serious intention to continue with the marriage;
- (d) He was involved in extra-marital affairs with multiple unknown women;
- (e) He verbally and emotionally abuses her;
- (f) He is extremely aggressive towards her.

[4] The plaintiff averred, in the particulars of claim, that the defendant maintained her during the subsistence of the marriage as she earns a low salary out of which she is unable to sustain herself and the minor children. She, therefore, claims that she requires spousal maintenance to be paid by the defendant. She further stated that the parties jointly own immovable properties, to wit: Erf 1012, Khomasdal, Windhoek ('Erf 1012') and Erf 4359, Butterfly Location, Katima Mulilo ('Erf 4359'). She seeks an order of division of the joint estate.

[5] The defendant, on the other hand, filed a counterclaim dated 30 September 2022. He alleged, in the counterclaim, that it is the plaintiff who maliciously and constructively conducted herself with the settled intention to terminate the marriage by engaging in the following conduct:

- (a) She shows no love and affection, and unnecessarily quarrels with him;
- (b) She does not meaningfully communicate with him;
- (c) She shows no serious intention to continue with the marriage;
- (d) She verbally, physically and financially abuses him, and left him fearful of her and traumatised.

[6] The defendant avers that as a result of the plaintiff's conduct alleged above, he applied for, and was granted an interim protection order by the Domestic Violence Court. Consequent upon the interim protection order, the plaintiff was removed from the common home on 12 September 2022 with her belongings. The defendant further avers that he solely contributed to the common household of the parties, and further that despite the plaintiff being able to contribute to the household, she spent her income on herself.

[7] The defendant seeks the relief that the plaintiff forfeit all the benefits from the marriage. He also invited the court to dismiss the plaintiff's claim for the division of the joint estate and payment of spousal maintenance.

[8] It is apparent by now that the parties both denied wrongdoing on their part.

[9] One is tempted to assume that there is no issue between the parties as they both deny wrongdoing and further deny the responsibility of not showing love and affection towards each other. Quite far from it. When the parties appeared in court it became apparent as to how they despise each other. Their marriage fits hand in glove with the description of a union that has irretrievably broken down in the strict sense.

Live dispute

[10] When the matter was ripe for trial, the parties agreed on several aspects and the only issues that remained in dispute between them for determination are: the plaintiff's claim for spousal maintenance; the defendant's claim that the plaintiff forfeits all her benefits derived from the marriage in community of property; and who of the parties caused the breakdown of the marriage.

[11] The relief for spousal maintenance claimed by the plaintiff is crafted as follows:

'3. The Defendant should pay spousal maintenance to the Plaintiff in the amount of N\$3 000 per month for the period of five (5) years from the date of final order of divorce.'

[12] The defendant, on his part, set out his forfeiture claim as follows:

'5. An order that the plaintiff forfeits all such benefits that she might derive from the marriage in community of property.

7. An order that a liquidator/receiver be appointed by the parties within 14 days of the Court Order, alternatively that a liquidator/receiver be appointed by the President of the Law Society of Namibia, to divide the parties' joint estate, subject to the forfeiture order.'

The pre-trial order

[13] In a pre-trial report which was made an order of court on 14 June 2023, the parties listed the following factual issues to be resolved at trial:

'1.1 Whether or not the defendant or the plaintiff is responsible for the breakdown of the marriage between the parties on the basis pleaded by the parties.

...

1.3 Whether or not the defendant solely contributed to the common household and that the plaintiff (despite) being in a position to contribute, did not do so.

1.4 Whether or not the plaintiff contributed to the common household including financial contributions towards housekeeping, maintenance and upkeep of the common home.

1.5 Whether or not the defendant solely paid for the purchase and construction of the immovable properties and that the plaintiff refused to contribute thereto.

1.6 Whether or not the plaintiff solely purchased the plot situated at Erf 4359, Butterflies location, Katima Mulilo and contributed to the construction thereof.

1.7 Whether or not the plaintiff earns a low salary and is unable to fully support herself and that she is in need of such maintenance and that the defendant can afford to pay such maintenance.

1.8 Whether or not the defendant has been maintaining the plaintiff.'

The evidence

Plaintiff's case

[14] The plaintiff testified as the sole witness in support of her claim. She testified, *inter alia*, that she is employed as a Private Secretary at the Ministry of Industrialisation and Trade, and stationed in Windhoek. Her only source of income is her salary. Her basic salary is N\$17 140. She listed her personal monthly expenses as follows: Medical Aid – N\$180; Rent – N\$5 500; Food – N\$4 000; Electricity – N\$1 500; Water – N\$700; Fuel – N\$2 500; Wifi – N\$350; Letshego – N\$ 3 355; Old Mutual study policy – N\$300; Capri Exclusive Homeware – N\$538,28; and the nanny – N\$1 000.

[15] The plaintiff testified further that the parties jointly own two immovable properties, namely: Erf 1012 and Erf 4359. They further own two motor vehicles.

[16] She testified further that in July 2012, and before their marriage in 2016, she purchased a plot, Erf 4359 from the Katima Mulilo Town Council, without the financial

assistance of the defendant. She stated that she bought most of the building materials used to construct a house on the said plot.

[17] In respect of Erf 1012, she testified that she contributed to the renovations, painting of the house and payment of the municipal bills. She further testified that she contributed to the common household by providing maintenance to their children, purchasing household items and food, contributing to their children's clothing and school fees, paying for electricity and DSTV. She further contributed to the house chores.

[18] The plaintiff testified that before their marriage, she resided in Katima Mulilo where the cost of living was affordable. After the marriage, and on the insistence of the defendant, the plaintiff applied for a transfer at work and relocated to Windhoek, where she is presently paying rent. It was her testimony further that during the subsistence of the marriage, and on account of her low salary, the defendant maintained her. She is therefore unable to support herself, hence the claim for spousal maintenance.

[19] She further testified that she issued summons in this matter in August 2022. The summons were served on the defendant on 29 August 2022. She states that the defendant applied for a protection order after being served with summons, and averred that his application for a protection order was an afterthought.

[20] The defendant was granted an interim protection order which was served on her on 12 September 2022, and on the same day, she moved out of the common home. The interim protection order was made final on 4 August 2023, for a period of three years. The protection order calls on the plaintiff not to commit any acts of domestic violence against the defendant, and not to go near the defendant wherever he may be. Disgruntled by the final protection order, the plaintiff filed a notice of appeal to this court on 15 September 2023.

[21] In cross-examination it was put to her by Mr Lombaard who appeared for the defendant that she is the cause of the breakdown of the marriage as she does not meaningfully communicate to the defendant. She responded that it is the defendant who does not communicate with her and further that he even went to an extent of blocking her mobile number from calling him while they lived in the same house. When confronted with averments of not contributing to the household, the plaintiff testified that she was employed as an administrative officer in the Ministry of Education from 2005 to 2015, and from 2015 to date as a private secretary at the Ministry of Industrialisation and Trade. She earned a net monthly salary of N\$11 000 and she used part of that money to contribute to the common household.

[22] In further cross-examination, the plaintiff conceded that she received a pension pay-out of about N\$200 000. This amount was not mentioned in her witness statement. When pressed to explain the absence of the pension pay-out when she is claiming spousal maintenance, she first stated that she received the pension pay-out after her witness statement dated 31 May 2023, was drafted. She, however, later changed and said that she received the pension pay-out before her witness statement was drafted. She further said that she utilised the pension pay-out to pay for the household expenses and also towards the construction of the house at Erf 4359.

[23] It was put to her in cross-examination by Mr Lombaard that regarding Erf 4359, she only paid the deposit of N\$4000 and paid nothing further. She disputed and stated further that she also purchased building materials, and she obtained a loan of N\$50 000 and used it to construct the house at Erf 4359. She transferred the said amount into the bank account of the defendant to purchase the building materials and pay for the construction of the house as she was heavily pregnant by then.

[24] Mr Lombaard put it to the plaintiff that she transferred N\$45 000 and N\$6 000 into the bank account of the defendant but she used the said funds from the defendant's account. She denied having access to his bank accounts and denied using the said funds.

[25] In respect of the motor vehicles, the plaintiff testified that although the parties purchased a Mercedes Benz vehicle, she was responsible for payment of the service for the vehicle and purchase of the tyres. With regard to the Range Rover vehicle, she stated that the defendant pays for the service and purchase of the tyres. Regarding the furniture, she testified that she contributed to their purchase and when she moved out, she left the furniture in their common home.

[26] The plaintiff did not produce proof of her claims that she paid for the medical aid, and the alleged monthly rental payment of N\$5500. She alleged that she pays for electricity and water bills, fuel, DSTV and Wifi. She testified further that from September 2022, the defendant did not support their children, who resided with her. She denied involvement in forex trading or pyramid schemes.

Defendant's case

[27] The defendant took to the stand and testified as the sole witness for his case. He testified and laid blame for the cause of the breakdown of the marriage on the plaintiff. He stated that he applied for and was granted an interim protection order, as a result of which the plaintiff was, on 12 September 2022, removed from their common home. The interim protection order was made final on 4 August 2023.

[28] The defendant testified further that although the plaintiff was employed and thus capable to contribute to the common household, she failed or neglected to financially contribute to their joint estate. He stated that she used her income on herself, her other family members, pyramid schemes and forex trading, leaving the defendant to solely cater for their monthly expenses.

[29] The defendant further testified that at the time that he met the plaintiff he already owned Erf 1012. He is the only one who paid for bond payments, the maintenance of Erf 1012 and the related monthly municipal account. In respect of Erf 4359, he testified that, when he met the plaintiff, she was the owner of Erf 4359. By then Erf 4359 was a

vacant plot. He testified that he paid for the municipal fees for Erf 4359, after which the parties had the building plans approved by the Town Council and were permitted to construct a house on the said Erf. He testified that he singularly paid for the construction of the house on Erf 4359 without any contribution from the plaintiff. This property is occupied by the family members of the plaintiff who were supposed to pay rent that they had not paid and thus deprived the defendant of the benefit of the said property.

[30] The defendant testified that the parties own three motor vehicles, a Range Rover, a Mercedes Benz and a Volkswagen Golf which he purchased and paid for. He has been responsible for the service and all maintenance payments for the vehicles, without any contribution from the plaintiff.

[31] In respect of the plaintiff's notice of appeal, the defendant, unsurprisingly, counter-argued that the appeal was filed as an afterthought on the part of the plaintiff. He testified in court on 19 September 2023, but produced a payslip of February 2023, and a statement of his bank account for the period of 30 October to 31 December 2022, and 31 January to 28 February 2023 only.

[32] The defendant testified further that the amount of N\$45 000 was transferred to his bank account by the plaintiff as she was inundated with bank deductions, but she used the money from his bank account. With regard to the amount of N\$6 000, he stated that the plaintiff sent the said amount to him so that he could drive from Katima Mulilo where he attended to the construction of a house at Erf 4359 back to Windhoek.

[33] During cross-examination by Mr Hamunyela who appeared for the plaintiff, it was put to him that the plaintiff contributed to the maintenance of the household at Erf 1012. He disputed the assertion but stated that she only contributed an amount of N\$2100 to fix a bathtub, and subsequently, he refunded her the said amount. He further said that she also purchased paint used for the Erf 1012 house and he later refunded her the amount spent. In further cross-examination, the defendant said that the plaintiff paid for

the service of the Mercedes Benz vehicle when it had an alternator problem, which he later refunded her.

[34] When asked by Mr Hamunyela that he asked the plaintiff to relocate to Windhoek, his response was that she relocated consequent upon their marriage. When asked whether he used to maintain her, he said he used to maintain their life.

Analysis

[35] The parties presented mutually destructive versions. In such circumstances the Court has the duty to assess the versions and attach weight to the most probable version.

[36] When faced with mutually destructive versions during a trial, our courts have adopted the approach set out by the Supreme Court of Appeal of South Africa in the celebrated decision of *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie & Others*,¹ where the court remarked as follows at paragraph 5:

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre

¹ *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie* 2003 (1) SA 11 (SCA).

and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'. (See *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC); *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC)).

[37] Further in *National Employers' General Insurance Co Ltd v Jagers*² it was held as follows:

'(The plaintiff) can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[38] Guided by the above legal principles I proceed to discuss the evidence presented by the parties in order to determine as to who of the parties managed to prove his or her claim.

² *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G; Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 556.

Spousal maintenance

[39] This court in *DK v DK*³ remarked as follows regarding spousal maintenance:

[63] It is trite that when the legislature confers discretion on the court that discretion must be exercised judicially. One of the guiding principles is that the court will only grant maintenance if it is proven on a balance of probabilities that the party who asks for maintenance is in need of it — *Van Wyk supra*; *Hossack v Hossack* 1956 (3) SA 159 (W); *Portinho v Portinho* 1981 (2) SA 595 (T) at 597G – H where Van Dijkhorst J said:

“In my view the test to be applied is whether on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in s 7(2) come into play. If on the probabilities it is not shown that maintenance is or will not be needed no award thereof (whatever its size) can be made.”

[64] In *Hossack v Hossack supra* at 165B – F Ludorf J stated that maintenance is not to be granted as a matter of course. Factors taken into account in relation to the question as to whether maintenance should be granted at all and in regard to the amount thereof —

“. . . includes such considerations as the period that the marriage has endured, the age of the innocent spouse and her qualifications for earning a living as well as the conduct of the guilty spouse”.

[40] The evidence established that the plaintiff is a 39 years old female and a holder of a Diploma in Business Administration obtained in 2016. She is a Private Secretary. She testified that her gross monthly salary is N\$17 000 while her net salary is N\$11 000, and that this is her sole source of income. She, however, failed to produce her payslip to confirm her gross and net salary. She listed several expenses inclusive of her monthly rental, fuel costs, municipal bills, DSTV and Wifi with no supporting documents to confirm her expenses.

[41] A person who claims spousal maintenance must lay bare his or her financials and expenses so that the court can make a determination whether he or she is unable

³ *DK v DK* 2010 (2) NR 761 (HC).

to maintain himself or herself without the aid of spousal maintenance. Supporting documents must be produced to support the alleged expenses. In *casu* no supporting documents were produced.

[42] The plaintiff, in evidence in chief, was silent about the amount N\$200 000 received. It was only during cross-examination, and after being questioned by Mr Lombaard, that she acknowledged that she indeed received the said pension payout. When she was questioned whether she became aware of the pension payout before or after drafting her witness statement, she responded without hesitation that it was after the witness statement was drafted. She was then alerted that her witness statement reveals a date of 31 May 2023 as the date that it was made, she changed and said that she received the pension payout before the witness statement was drafted. What is apparent from her evidence is that if she was not questioned about the pension payout, the court would not have known about it. I find that the reluctance to disclose the pension payout with a considerable amount of money counts against the plaintiff in her claim.

[43] The defendant, on the other hand, produced his payslip for February 2023, which revealed that he earned a monthly gross salary of N\$38 000 and a net salary of N\$13 200. The net salary of the plaintiff testified to only by word of mouth is not far apart from the net salary of the defendant. In any event I am not satisfied that the plaintiff managed to establish a case for spousal maintenance to be paid by the defendant.

Forfeiture

[44] Heathcote AJ in *Carlos v Carlos, Lucian v Lucian*,⁴ discussed different kinds of forfeiture and said the following:

‘Firstly, what I shall term a “*general forfeiture order*”, being an order which simply reads “*the Defendant shall forfeit the benefits arising out of the marriage in community of property*”,

⁴ *Carlos v Carlos, Lucian v Lucian* NAHC I 141/10 and I 501/11 Para 5.

secondly, a forfeiture order which I shall term an “*quantified forfeiture order*” (i.e. an order in terms of which the court determines the ratio with regard to which the estate should be divided to give effect to a general forfeiture order (e.g. 6:4); and lastly, what I shall term a “*specific forfeiture order*” (e.g. when a specific immovable property is declared forfeited).’

[45] The court in *Carlos* further remarked as follows regarding common law rules:

[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);

[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? . . .'

[46] The court in *Carlos* at para [8.6] cited with approval a passage from *Gates v Gates*,⁵ where it was stated that:

'It seems to be indisputable that although a wife may not, in a positive sense actually bring in or earn any tangible asset or money during the marriage, her services in managing the joint household, performing household duties, and caring for children have a very real and substantial value, which may well, and usually does exceed the bare costs of her maintenance.'

⁵ *Gates v Gates* 1940 NPD 361 at 364.

[47] In the present matter, the defendant claimed general forfeiture in that he sought an order that the plaintiff forfeits all the benefits that she may derive from the marriage in community of property on the basis that he solely contributed to the common household while the plaintiff spent her income on herself. This claim is firmly pleaded in the particulars of claim.

[48] The defendant's evidence was, however, a different kettle of fish. The defendant, on his own version, testified that the plaintiff contributed an amount of N\$2100 to fix the bathtub, and that she purchased the paint for Erf 1012. The defendant further testified that the plaintiff paid for the service of the Mercedes Benz vehicle when it had an alternator problem, but he later refunded her. This version of refund was not put to the plaintiff in cross-examination.

[49] In an old matter of *Small v Smith*,⁶ the court considered the failure of a party to put one's version to an opposing witness and remarked as follows:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct.

. . . unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.⁷

⁶ *Small v Smith*² 1954 (3) SA 434 (S.W.A) at 438E-G.

⁷ See also *President of the Republic of South Africa & others v South Africa Rugby Football Union and others* 2000 (1) SA 1 CC at 36J-38B – 'cross-examination not only constituted a right; it also imposed certain obligations'.

[50] The expenses to fix the bathtub, to purchase the paint, to service the Mercedes Benz vehicle were testified to by the plaintiff as being amongst the expenses that she incurred. During cross-examination Mr Lombaard put to her that she did not contribute anything at all to the common household. Astoundingly, as stated, it is only during cross-examination by Mr Hamunyela that the defendant conceded that the plaintiff paid for the bathtub to be fixed, bought the paint and paid for the said service of the Mercedes Benz vehicle. In order to explain the change in the version, the defendant testified belatedly that although the plaintiff made the above payments, he later refunded her the money spent on the bathtub, the paint and the service of the Mercedes Benz vehicle.

[51] The allegation of refunding the plaintiff which only surfaced during the cross-examination of the defendant, was not put to the plaintiff to comment thereon. If indeed the defendant refunded the plaintiff for the expenses paid, I find that this is such a critical version that should have been canvassed during the cross-examination of the plaintiff because it would demonstrate to the plaintiff that although she made specific financial contributions to the common household but such financial contributions were refunded to her. I find that the failure by the defendant to put the version of the refund to the plaintiff and failure to produce documents to support such averments leads to the conclusion that such version is an afterthought. I therefore do not accept the said version.

[52] It is an established fact that the plaintiff acquired Erf 4359 before the marriage and therefore, brought an addition to the common household of the parties. She was employed from 2005, earning a monthly salary. She purchased food, paid the municipal bills, paid for fuel, maintenance of the children, etc. It was her undisputed evidence that the defendant did not maintain the children since September 2022. She attended to the house chores. She testified further that she also obtained a loan from Letshego Bank, of

N\$121 000 which she utilised to make improvements on Erf 1012, to fix the Mercedes Benz vehicle which was broken, and renovate Erf 4359. The above established facts lead me to the conclusion that the plaintiff contributed to the common household of the parties.

[53] There is more. Mr Lombaard put to the plaintiff that the amount of N\$45 000 and N\$6 000 that the plaintiff paid to the defendant's bank account was to be kept there as the plaintiff had a lot of bank deductions and she ended up using the whole amount from the defendant's bank account. This version was disputed by the plaintiff, who insisted that she had no access to the defendant's bank account. It was only during cross-examination of the defendant that he stated that the N\$6000 paid to him by the plaintiff was to enable him to travel from Katima Mulilo where he attended to the construction of a house at Erf 4359 back to Windhoek. This is a new version that only surfaced during the defendant's case, after the plaintiff had completed her testimony. I find her version that the N\$6000 was used for the construction of the house to be more probable than that of the defendant.

[54] The defendant is conversant in English and was in court throughout the evidence of the plaintiff and could have provided instructions to dispute incorrect versions of the plaintiff and ensure that correct instructions were put to her to comment thereon. This was not done, in my view, signaling the defendant's concurrence with the instructions put to the plaintiff by Mr Lombaard. I find that the different versions that sprang up only during the defendant's case, as discussed above, can be said to constitute an afterthought. It should be clear to all and sundry that a witness should not be allowed to leave the stand without the version of the opposing party being put to him or her in order to afford him or her an opportunity to comment thereon. Should the witness be excused after completing his or her evidence, without the critical issues being put, the court will be at large to regard those critical issues which only surfaces afterwards as an afterthought.

[55] What is important is that there is undisputed evidence that the plaintiff contributed to the joint estate, which was admitted by the defendant *albeit* belatedly. For reasons stated above, and where the evidence of the plaintiff and the defendant is mutually destructive, that the plaintiff did not contribute to the common household, I reject the version of the defendant. I further reject the defendant's evidence that he refunded her the money expended to fix the bathtub; to purchase the paint and to service the Mercedes Benz vehicle. I further find that the plaintiff contributed to the acquisition and construction of Erf 4359. She contributed to the maintenance of Erf 1012. She contributed to the common household of the parties, the maintenance of their children and performed household chores. I find that the defendant's claim that he solely contributed to the common household stands in total contrast to the totality of the evidence on record.

[56] As I draw the judgment towards the finishing line, there was an issue that remained live between the parties. It is this - what is the effect of the plaintiff's notice of appeal filed against the final protection order? I am of the opinion that the dispute between the parties can be determined without necessarily having regard to the effect of the notice of appeal filed.

[57] For what it is worth, the plaintiff filed a notice of appeal against the final protection order on 15 September 2023. Section 18(1) of the Combating of Domestic Violence Act, ('the Act')⁸ provides that an appeal against a protection order may be made within one month after the order was issued. The plaintiff purported to note an appeal. I say purported as the notice of appeal was filed after the statutory period of 30 days, within which to appeal, had lapsed. Unless the delay is condoned, this may mean that there is no appeal pending against the final protection order. Even if it is accepted that there is an appeal pending, the common law rule that the noting of an appeal

⁸ Combating of Domestic Violence Act 4 of 2003.

suspends the order appealed from applies with modifications as circumscribed by the Act.

[58] Section 18 of the Act reads:

'18. (1) Where a court has made or refused to make a protection order, or included or refused to include a particular provision in a protection order, the applicant or the respondent may appeal to the High Court, but, the appeal must be lodged within one month of the decision in question

...

(3) Where an appeal is lodged in terms of this section against a final protection order, the interim order remains in force until the conclusion of the appeal.'

[59] It is apparent from s 18(3) cited above that an appeal against the final protection order as in *casu*, if accepted to be a notice of appeal proper, does not suspend the whole protection order. To the contrary, it suspends the final protection order but retains the status ante the final protection order. It revives the interim protection order, which then remains in force pending the conclusion of the appeal. What this means is that where the appeal filed out of time is not condoned, there is strictly speaking no appeal pending. Once an appeal is properly filed, or is condoned and is pending against a final protection order, then that breathes life into the interim protection order granted prior to the said final protection order. Either way, I find that in *casu*, there is a protection order which prohibits the plaintiff from, *inter alia*, going near the defendant.

[60] The existence of a protection order, in my view, defeats the whole purpose of marriage, where parties are prohibited to be in each other's presence for a lengthy period of time. What is more, in the present matter, is that the parties cannot stand each other. The continuous existence of the union of marriage between the parties is untenable. It may lead to violence if the parties remain joined at the hip by the bonds of marriage and this would not serve the parties, society or the interests of justice.

Conclusion

[61] In view of the findings and conclusion reached hereinabove, I am of the considered opinion that both parties were economical with the evidence that they presented to court. The plaintiff was economical with her source of income. She did not produce her payslip, notwithstanding her evidence that her salary is her only source of income. She proffered no explanation why her payslip was not produced. She was silent as a church mouse on the pension pay-out of over N\$200 000, which she only testified to after being probed in cross-examination. I hold that she has failed to establish on a balance of probabilities that she has no sufficient income to sustain herself and further failed to prove that she is entitled to an order of spousal maintenance from the defendant.

[62] The defendant on the other hand, was walking on eggshells in his testimony. He tried as best as he could, to find an explanation for every situation placed before him while being careful with his choice of words throughout his testimony. For example, following the undisputed evidence of the plaintiff that he used to maintain her, when he was questioned about it in cross-examination, he said that he used to maintain their lives. Being very careful not to slip towards any suggestion of maintaining the plaintiff. The defendant's testimony, especially in cross-examination, was clouded with new evidence, as alluded to above, which was not put to the plaintiff to comment thereto. His evidence was furthermore, as pointed out above, in some instances, at variance with the questions put to the plaintiff by Mr Lombaard.

[63] In any event, the defendant claimed that the plaintiff should forfeit all the benefits that she might derive from the marriage in community of property as he solely contributed to the common household and that despite being in a position to so contribute, the plaintiff failed to do so. The defendant failed to prove his averment that he solely contributed to the common household. As a matter of fact, by the defendant's aforesaid evidence, it is apparent that the plaintiff contributed to the common household. I find that the defendant never got out of the starting blocks to prove that he solely contributed to the common household.

Costs

[64] Ordinarily, costs follow the event. Both parties failed to prove the remaining claims, namely: spousal maintenance and forfeiture, respectively. As a result, no costs will be awarded to either of the parties.

Order

[65] In the result, this court makes the following order:

1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. The plaintiff's claim for spousal maintenance is dismissed.
3. The defendant's claim that the plaintiff forfeits all the benefits that she might derive from their marriage in community of property is dismissed.
4. There shall be a division of the joint estate.
5. Each party must pay his or her own costs of suit.
6. The matter is regarded as finalised and removed from the roll.

O SIBEYA

APPEARANCES:

FOR THE PLAINTIFF:

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