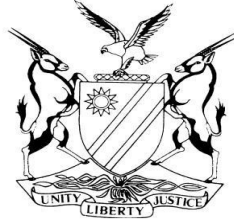


REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2021/00509

In the matter between:

**EMGARD GAEB**

**PLAINTIFF**

and

**GIDEON GAEB**

**DEFENDANT**

**Neutral citation:** *Gaeb v Gaeb* (HC-MD-CIV-ACT-MAT-2021/00509) [2023]  
NAHCMD 825 (14 December 2023)

**Coram:** CLAASEN J

**Heard:** 7-10 August 2023, 18 August 2023

**Order:** 14 December 2023

**Flynote:** Divorce – Parties married in community of property – Plaintiff seeks dissolution of marriage and general forfeiture, alternatively specific or quantified forfeiture – Poorly drafted pleadings and deficient witness statement – requirements for good pleadings – Principles pertaining to good pleadings and proper witness statements – Fatally factually deficient witness statement by plaintiff, replete with legal conclusions – Court dismisses plaintiff's claim – Grants defendant's claim for restitution of conjugal rights – Dissolution of joint estate and division of joint estate in equal shares.

**Summary:** Parties are married in community of property. The plaintiff instituted action against her husband for a decree of divorce and general forfeiture, alternatively specific forfeiture relating to the couple's immovable property, alternatively quantified forfeiture. She appears to have based her claim on adultery and desertion. The defendant denied the allegations and filed a counterclaim. He pleaded that the defendant was the one who engaged in adultery, assaulted him and furthermore engaged in conduct that made it impossible to remain at home, thus he did not maliciously desert the plaintiff.

*Held that* – The plaintiff's case was poorly presented with muddled pleadings that were carelessly drafted with no insight into the purpose and requirements of pleadings. The requisites of good pleadings according to *Herbstein and Van Winsen*, reiterated as that it should contain a statement of (1) fact, not law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a 'summary form' and that 'material facts' are all facts which must be proved in order to establish the ground of claim or defence.

*Held further that* – Plaintiff's witness statement was a fatally factually deficient document, replete with legal conclusions and accusations, without focusing on the material aspects of her claim. It fell short of the criteria set out in the *Josea v Ahrens* case and failed to satisfy the overall burden of proof on a claimant. Thus, the plaintiff did not lead sufficient evidence to establish her cause(s) of action nor the circumstances justifying the granting of any of the various types of the forfeiture of benefits.

*Held further that* – Court finds defendant's evidence credible and coherent. He thoroughly explained the behaviour by the plaintiff that caused him to leave the matrimonial home, which was not credibly refuted in cross-examination. Defendant also presented a credible case as regards to his financial contributions to the patrimonial home. Ultimately he satisfied the burden of proof on a balance of probabilities for the court to grant an order in his favour.

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1. The plaintiff's claim is dismissed with costs.
  2. The counterclaim succeeds. In respect of the defendant's counterclaim, the court grants judgment in favour of the defendant and orders the plaintiff to return to or receive the defendant on or before 25 January 2024, failing which to show cause on 22 February 2024 at 10h00 why an order in following terms should not be granted:
    - a. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
    - b. The joint estate should not be divided in equal shares.
  3. Plaintiff is directed to pay the defendant's costs on a party-party scale.
  4. The matter is regarded as finalized and removed from the roll.
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## JUDGMENT

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CLAASEN J:

### The pleadings

[1] The plaintiff instituted action against her husband for a decree of divorce and for the general forfeiture of benefits, on the purported grounds of desertion and adultery. In the event that general forfeiture was not granted, she also prayed for specific forfeiture and in the further alternative prayed for quantified forfeiture.

[2] The plaintiff *inter alia* pleaded that she is the 'sole original owner of the erf on which their house was built'. The property is situated at erf 1247 Grand Coulee Street, Goreangab in Windoek. The plaintiff also asserted in her particulars of claim that she has been 'shouldering almost all the financial obligations of the joint estate' and that the defendant made no meaningful contribution. The particulars of claim was drafted in a rambling and peculiar manner, to which I will return later in the judgment.

[3] The defendant defended the matter and denied all these allegations. He pleaded that the defendant was the one who engaged in adultery. In relation to the financial setup in the joint household, he pleaded that he was gainfully employed up until 2011 and that the plaintiff was in control of the joint finances. He specifically pleaded that he obtained a home loan in 2009 for the construction of the house and that both spouses contributed towards the property. He pleaded that she was in charge of his retirement funds, an amount of N\$138 345.07 and that he only used N\$ 35 000 to buy a minibus.

[4] He too filed a counterclaim for an order for restitution of conjugal rights, alternatively, a final order of divorce and division of the joint estate. He made averments of constructive desertion and physical abuse by the plaintiff, asserting that it became impossible to remain in the common home and that was why he left.

#### Pre-trial order

[5] The parties set out the issues for determination in the pre-trial order as follows:

- a) Whether the Defendant had an adulterous affair?
- b) Whether Defendant greatly neglected his responsibilities as head of the household?
- c) Whether the Plaintiff has been shouldering most of the financial responsibility of the joint estate for the past 14 years?
- d) Whether the Plaintiff is entitled to a forfeiture of the benefits arising out of a marriage in community of property?
- e) Whether the immovable property Erf 1247, Goreagab Dam was purchased before the date that the parties were married and whether the Plaintiff should subsequently be declared the sole owner of the property?
- f) Date of marriage of the parties.

Summary of the evidence:

[6] It is common cause that the parties are married in community of property. Two children were born out of the union, of which both are adults at this juncture.

[7] The plaintiff in her witness statement attacked the averments of the defendant, saying, *inter alia*, that the purported protection order was just an empty ruse to mislead the court, that she is a violent person without any iota of evidence to bolster that and that the defendant never approached a police station to lay charges against her for that.

[8] The plaintiff denies that she has engaged in an extramarital affair and stated that it is merely another unfruitful attempt to besmirch her name. Furthermore, that there is no substance in the allegations and that 'it is trite that he who alleges must prove.' In addition to that, the defendant is the one who maliciously deserted her and the matrimonial home because the defendant has been engaged in an extra-marital affair for which he seeks to pin the blame on the plaintiff unjustifiably.

[9] According to the plaintiff, the defendant has not been making any significant contribution towards the upkeep of the home, leaving the plaintiff with the financial burden of that. The plaintiff also complained about not having had access to the defendant's accounts and that she never saw a single penny from his retirement payout. Furthermore, that when he left he never made any financial contribution towards the utilities bills of the matrimonial home. The plaintiff's exhibits were confined to the deed of sale, a purported valuation report, with no expert witness to testify on the report and municipal bills for the house.

[10] During cross-examination counsel for the defendant, *inter alia*, tackled the pertinent issue of adultery and the circumstances that led the defendant to leave the matrimonial home. The plaintiff denied the allegations and testified that she may not have proof thereof but that she knows that the defendant is cohabiting with another woman. The plaintiff, however, conceded that she did not make mention of this allegation in her witness statement and/or testimony and that there is no evidence placed before the court in relation to the allegation of adultery.

[11] A proposition was then put to her that she was not able to prove that property

should be forfeited to her based on adultery. She responded by saying that she is unable to make that decision, and that the debt she is currently paying out of her own pocket is the reason why she came to court for the court to decide. She reiterated that it is not that she wants the property to be solely hers, but that if it was not for her financial contributions, the property would have been sold, as there is a huge amount of debt on the property.

[12] In relation to the allegations that the defendant has not made significant financial contributions to the home, the plaintiff conceded during cross examination that the defendant in fact did contribute financially towards the matrimonial home and the upkeep thereof. She conceded that the defendant made payments towards the construction of the home and also provided for the normal day to day needs of the home.

[13] The defendant's evidence showed that he and the plaintiff got married on 22 May 1993 at Windhoek. He tendered the marriage certificate as proof. The defendant testified that it is the plaintiff who displayed conduct, indicative thereof that she does not want to continue with the marriage. He testified that the plaintiff was both emotionally and physically abusive towards him. He testified that prompted him to apply for a protection order in December 2020.

[14] The defendant testified that during 2015, the plaintiff ordered him to stop sleeping in their matrimonial bed. He explained that she invited several of her relatives to sleep in their matrimonial bedroom. That left him with little choice but to sleep on the floor in the same room, later in the sitting room and eventually he moved to their last born daughter's room, outside the house. That conduct by the plaintiff made living together as husband and wife impossible, according to the defendant.

[15] The defendant testified that the plaintiff started having an affair with a person unknown to him. In support of that he tendered in evidence an affidavit, purported to be that of the deceased wife of the person the plaintiff is alleged to have had an affair with. Collectively, the plaintiff's conduct caused him to leave the common home for the sake of not subjecting himself to further emotional and physical abuse from the plaintiff.

[16] Based on the defendant's evidence, both of the spouses contributed to the financial affairs of the home. He testified that, at the time of their marriage he was

gainfully employed at Autohaus Windhoek and that the parties together applied for the Erf when it was advertised by the Windhoek municipality. He deposed that he was so employed from the date of marriage until 2011 and after that he had a casual job. During that time the plaintiff was in control of the finances in the home. He further took a home loan with his employer in 2009 which was used to commence the building. He furthermore, contributed towards the household while also paying off the home loan and supporting the plaintiff and their children. The defendant testified that even at retirement he received an amount of N\$138 345.07 of which he only used N\$35 000 to buy a minibus, he let the plaintiff control the rest of the finances as she had access to his accounts. He tendered supporting documents in evidence, such as his pay-slip, certificate of service from his employer, the deed of transfer, Standard Bank loan account statement, a document relating to his pension payout and an application for a protection order.

[17] In cross-examination he was confronted about his allegations that his wife assaulted him with a broom-stick. He insisted that it occurred on 2 December 2020, and explained that the reason why he did not list injuries in the application for a protection order was because he did not sustain serious injuries. As for the allegation of adultery, he answered that he currently resides at his sister's house, where many people are staying. That includes his girlfriend. He, however, categorically denied that they are engaged in sexual activity.

#### The law

[18] In the matter at hand it is clear from both sides that dissolution of the marriage is inevitable and that the main issue in contention revolves around the couple's immovable property. The plaintiff asserts that the defendant should forfeit his share in the immovable property whereas the defendant prays for an equal division of the joint estate. As such it is necessary to briefly revisit the applicable principles.

[19] A marriage in community of property has major implications for ownership of the parties' assets, liability for their debts as well as their capacity to enter into legal transactions. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law. The same regime applies to assets and liabilities which either spouse acquires or incurs after entering into the marriage. The joint estate created by marriage in community is

held by the spouses in co-ownership, in equal, undivided shares<sup>1</sup>.

[20] The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture order is made. In such event, the value of the assets in the joint estate that must be divided will be determined at the date of the divorce<sup>2</sup>.

[21] The plaintiff in the current matter prays for the general or specific or quantified forfeiture. In the matter *C v C; L v L*<sup>3</sup> AJ Heathcote explained the various forfeiture orders as a 'general forfeiture order' (the order simply reads defendant shall forfeit the benefits arising from a marriage in community of property), 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).

[22] 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 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 aspects: the value of the joint estate at 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

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<sup>1</sup>See *Boberg's Law of Persons and the Family* (2<sup>nd</sup> ed) at page 185; and also *HR Hahlo, The South African Law of Husband and Wife* (5<sup>th</sup> ed) at 157 to 158.

<sup>2</sup> See *Matthee v Koen* 1984 (2) SA 543 (C).

<sup>3</sup> *C v C; L v L* 2012 (1) NR 37 (HC).



party (the guilty spouse) will, in relation to the other, be unduly benefitted in the circumstances.

#### Application of the law

[23] Each of the respective parties carries the burden of proving their respective claims on a balance of probabilities. In starting to consider whether the plaintiff has done so, this court turns to the plaintiff's case and how it was presented.

[24] The general requirement of pleadings is that it '... must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party reply thereto...' <sup>4</sup> This fundamental purpose of pleadings is to '... ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'<sup>5</sup>

[25] That criteria is amplified in *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa*<sup>6</sup> as follows:

' The requisites of good pleadings are said to be 'that it contain a statement of (1) fact, not law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a summary form' and that 'material facts' are all facts which must be proved in order to establish the ground of claim or defence.'

[26] With reference to claims pertaining to matrimonial causes, HR Hahlo in *The South African Law of Husband and Wife*<sup>7</sup> explains that:

' The plaintiff in a matrimonial action must set out, with reasonable certainty, the facts and alleged grounds for relief, and should state: (1) the name, address and occupation(if any) of the plaintiff; (2) the name, address (if known) and occupation (if any) of the defendant; (3) the date and place of the marriage; (4) whether it was in or out of community, and if the latter, whether it is subject to the accrual system; (5) whether there are any living children of the marriage and , if so, whether any of them are minors; (6) the fact that the marriage still subsist; and (7) particulars of the relief claimed.'

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<sup>4</sup> Rule 45(5) of the Rules of the High Court.

<sup>5</sup> Southwood BR *Essential Judicial Reasoning* Lexis Nexis 2015 at 43.

<sup>6</sup> Cilliers et al *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5<sup>th</sup> ed JUTA p 565.*

<sup>7</sup> HR Hahlo in the *South African Law of Husband and Wife 5<sup>th</sup> ed, (Juta & Co Ltd 1985) at 417.*

[27] In returning to the particulars of claim herein, it definitely was not drafted with the above criteria in mind and was below the standard required by the courts. It presents a longwinded and incoherent document with some biographical data of the parties but also several sweeping evidential opinions, presumably that of the plaintiff. For example, in the particulars of claim she says that the defendant is openly boasting that he cannot wait for the divorce to be finalised so that he can lay claim to 50 percent of the value of the house.

[28] Not only is it misplaced in the particulars of claim, but it detracts from the pleading and purpose thereof. Apart from the biographical information the document should have set out the material facts that underlies her cause(s) of action and relief clearly with sufficient particularity. The document was rife with bold and underlined phrases with inverted commas and italics, which does not comply with the prescripts of rule 131.<sup>8</sup> Not to mention, the date of marriage, is incorrect, if one has regard to the marriage certificate tendered in evidence by the defendant. As a whole, the claim was drafted carelessly, with no insight into the requirements of pleadings and ostensible ignorance to the consequences that such a poorly drafted pleading may bring.

[29] That was not the only problem, as the witness statement of the plaintiff also presented hurdles that was hard to overcome. As regards to what a witness statement should contain, valuable guidance was given by Schimming-Chase AJ in *Josea v Ahrens*<sup>9</sup> as follows:

‘ A witness statement must, if practicable, be in the deponents own words and should be expressed in the first person. The witness’ style of speaking should as much as possible be adhered to. For example, words like “seriatim” or “inter alia” do not belong in the statement of a person who does not know what those words mean or the context in which they are used. A witness statement is not to be used as a vehicle for conveying legal argument, nor should it contain lengthy quotations from documents unless it is necessary in the circumstances of the case.’

[30] Further along in the matter of *Josea v Ahrens*,<sup>10</sup> it was stated that it is advisable to follow the chronological sequence of events and to deal with each factual allegation in such a manner as to enable the reader to understand the evidence that will

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<sup>8</sup> Rules of the High Court of Namibia.

<sup>9</sup> *Josea v Ahrens* (I 3821-2013) [2015] NAHCMD 157 (2 July 2015) para 15.

<sup>10</sup> *Ibid.*

be given. Each paragraph should be numbered, and, so far as possible, be confined to a distinct portion of the subject. All facts must be set out clearly and with adequate particularity.

[31] This court searched in vain in the plaintiff's witness statement for the underlying facts that would be material for the plaintiff's claim. At the bare minimum, a plaintiff in a divorce matter would have to allege and prove the existence of a valid marriage, that the court has jurisdiction, the marital regime, the grounds of divorce and further evidence as may be required to sustain ancillary orders as applicable.

[32] The plaintiff's statement was deficient in many respects. The witness statement, did not contain the bare minimum for a divorce claim, such as tendering a marriage certificate in evidence. That came from the defendant's evidence. It thus came as no surprise that the date of marriage, as pleaded by the plaintiff, turned out to be wrong. Other than a bare denial of the assertions pertaining to the defendant's grounds of divorce, the witness statement is silent on any particularity on the alleged malicious desertion. There was no date or sufficient details as to how the defendant either constructively or physically maliciously deserted her.

[33] In a similar fashion there was no evidential details about the alleged adultery on which she premised her claim for the divorce, save for a single phrase that the defendant engaged in an extramarital affair. No shred of evidence was offered in the witness statement as to what led her to that conclusion, nor was there any averment whether she condoned the purported adultery. The witness statement was silent about details regarding her own income or employment. Although there was a purported valuation report for the house, no expert witness was called as a witness for that. Thus, the court could do nothing with the valuation report. The recurrent theme in the witness statement was that the defendant did not contribute towards the common home and that she was saddled with that responsibility.

[34] It would have served the plaintiff's case for her counsel to focus on his client's claim first and foremost and thereafter deal with averments in the defendant's claim that the plaintiff intended to refute. Needless to say, the repetitive legal expressions in plaintiff's witness statement such as 'he who alleges must prove' was out of place and did nothing to strengthen the claim. It is ironic that counsel for the plaintiff sang that song and omitted to do that with his own client's case. All in all, it illustrated an alarming state of affairs as it appears that counsel confused what should have been in the

pleadings versus what should have been in the witness statement and the fundamental purpose of these documents.

Was there proof of adultery by either of the parties?

[35] Counsel for the plaintiff is mistaken in his belief that plaintiff has proven adultery. Apart from the poor evidence presented by the plaintiff in general, the plaintiff had the burden to specifically prove that sexual intercourse has taken place between the defendant and a third party. To have seen the defendant with a third party is not sufficient. If she intended to capitalise on the evidence that the defendant has a girlfriend, the defendant made it categorically clear that they do not engage in sexual activity, thus that element is left floundering. In regard to adultery there must be full particularity as to the time and place of the alleged adultery.<sup>11</sup>The plaintiff's evidence on this allegation is thus far from sufficient.

[36] The same goes for the defendant's contention that he has proven adultery as the defendant had seen his wife eating with another man. In an effort to strengthen his case, the defendant presented a purported statement by made the (now) deceased wife of the man with whom the plaintiff ostensibly had a relationship with. The problem with that evidence is that, it affords no opportunity for cross-examination, which reduces its probative value. Thus, in my view none of the parties has proven the elusive adultery.

Forfeiture of benefits or equal division of the joint estate

[37] It was common cause that both parties had the intention of dissolving the marriage and the sole issue in contention pertained to their immovable property. Thus, whether the joint estate should be divided in equal shares or whether the plaintiff has made out a case for forfeiture of benefits against the defendant.

[38] Although the plaintiff in her particulars of claim alleges that she solely carried the responsibility of the upkeep of the home, in cross examination she contradicted her allegations in the particulars of claim. She conceded that the defendant did make contributions towards the home and that the parties jointly made contributions towards the building of the house. The plaintiff further did not tender any receipts or proof of payment for the municipal bills even though she claimed to have made such payments herself. She did not even submit a salary slip in evidence.

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<sup>11</sup> *Woodiwiss v Woodiwiss* 1958 (3) SA 609 D.

[39] This court has already pointed out the muddled pleading and the poorly drafted witness statement by the plaintiff. These fell short of established requirements for pleadings and the criteria set out in the *Josea v Ahrens* case for witness statements. Cumulatively that negatively impacted on the overall burden of proof on a claimant. The witness statement constitutes the foundation of her claim, and the required averments and or supporting documents simply were not there. Thus the inevitable conclusion is that the plaintiff did not lead sufficient evidence to establish her causes of action nor the circumstances justifying the granting of any the various types of forfeiture of benefits against the defendant. As a consequence, the court thus finds that the plaintiff has failed to establish, on a balance of probabilities, that she is entitled to the relief in the main order, nor the relief of her ancillary claims.

[40] That is as opposed to the defendant's evidence, which the court finds to be credible and coherent. He meticulously explained various forms of delinquency by the plaintiff pertaining to their marital life, which was not credibly refuted during cross-examination. That satisfied the court that the defendant has not maliciously deserted the plaintiff. Defendant also presented a credible case regarding his financial contributions towards the matrimonial home. Ultimately, he satisfied the burden of proof on a balance of probabilities.

[41] That is with the exception of his accusation that the plaintiff committed adultery, which I dealt with earlier. Though the defendant also prayed for a final order of divorce, in the absence of him persuading the court that his wife committed adultery, the court has to resort to the standard position of granting an order for restitution of conjugal rights. In *Shitaleni v Shitaleni*<sup>12</sup> Cheda J explained it as follows:

[5] In terms of our law, a marriage can indeed be dissolved on good grounds shown. However, the procedure, is that the plaintiff should call on the defendant to restore conjugal rights within a certain period, failing which a final order of divorce can be granted. The rationale of this requirement is the widely held view of the sanctity of marriage.

[6] On that basis, our courts, do not encourage the dissolution of marriages, hence the stringent requirements for a Restitution of Conjugal rights order before a final order is granted. This is the correct legal position and is indeed understandable.'

[42] This leaves the question of costs. As a general rule costs are in the discretion of the court. Normally in divorce cases where the parties are married in community

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<sup>12</sup> *Shitaleni v Shitaleni* (I 61-2015)[2015] NAHCNLD 30 (08 July 2015).

of property, the courts tend to take up a 'no order as to costs' principle. At the same time, however, the general rule of our law is that costs follow the event, that is the successful party is awarded his costs. Nothing has been placed before me to justify a departure from that general rule. I will therefore make an order as to costs accordingly.

[43] In the result:

1. The plaintiff's claim is dismissed with costs.
2. The counterclaim succeeds. In respect of the defendant's counterclaim, the court grants judgment in favour of the defendant and orders the plaintiff to return to or receive the defendant on or before 25 January 2024, failing which to show cause on 22 February 2024 at 10h00 why an order in following terms should not be granted:
  - a. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
  - b. The joint estate should not be divided in equal shares.
3. Plaintiff is directed to pay the defendant's costs on a party-party scale.
4. The matter is regarded as finalized and removed from the roll.

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C CLAASEN  
Judge

## APPEARANCES

PLAINTIFF:

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SECOND DEFENDANT:

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