

REPUBLIC OF NAMIBIA

REPORTABLE



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 182/2014

In the matter between:

**SHAMBWILA MOSES**

**PLAINTIFF**

and

**TULIMEKE ELIZABETH SHAMBWILA (born MUNDJULU)**

**DEFENDANT**

**Neutral citation:** *Shambwila Moses v Shambwila* (I 182/2014) [2016] NAHCNLD 91 (17 November 2016)

**Coram:** CHEDA J

**Heard:** 15.10.2014; 12.03; 07.04; 18.06; 22.06; 29.06; 03.08; 21.09; 05.10;

02.11; 07-09.12.2015; 02.02.; 19-20.07; 24.October 2016

**Delivered:** 21 November 2016

**Flynote:** A party who chooses to marry in community of property and signs a declaration in terms of section 17 of the Native Administrative Proclamation Act, Act 15/1928 of and conducts himself as being married in community of property should be treated as such. He/she cannot be allowed to claim the opposite when the relationship turns sour.

**Summary:** The parties were married in community of property and signed a declaration as required by section 17 (6) of the Native Administrative Proclamation Act, Act 15/1928. They continued to conduct their marriages as such. Plaintiff issued summons for divorce and claimed that the marriage was out community of property. Evidence pointed to the contrary. The court held that the marriage was in community of property.

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## ORDER

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1. Final order of divorce is granted.
2. Custody and control of the minor children, Laudika Tunelao Shambwila and Ndapewa Omano Shambwila be awarded to the defendant subject to the plaintiff's right of reasonable access.
3. Plaintiff pays maintenance in respect of the minor children in the amount of N\$2500-00 per month for both children, which maintenance payments shall be escalated by 10% annually.
4. Both parties to be 50% liable of all costs in respect of the minor child's primary and secondary education, extra mural activities, books, stationary and school clothes, tertiary education, including the costs of hostel fees or alternative accommodation (should the child show an aptitude and make reasonable progress herein and in so far as such costs are not covered by study loan and for bursaries).
5. Defendant keeps both children on her medical aid.
6. Division of the joint estate, and in particular that the property at Erf 5857 Khomasdal, Extension 15 owned jointly by the parties be sold and the proceeds thereof be shared equally between the parties, alternatively that the plaintiff pay out to the defendant's 50% share at the market value prevailing at that time within 90 days of this order.
7. Plaintiff should pay the costs for the action.

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## JUDGMENT

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CHEDA J:

[1] This is an action matter based on the summons issued out of this court on the 12 August 2014 by plaintiff against defendant.

[2] Plaintiff is employed by the Ministry of Agriculture, Water and Forestry as a Technician at Ongwediva Forestry Offices while defendant is employed as a Lecturer and employed by the Ministry Education at Shituwa Secondary School.

[3] According to plaintiff, the parties were married to each other on the 01 May 2003 at Outapi by virtue of the provision of s 17 (6) of the Native Administration Proclamation 15 of 1928. Two minor children were born out of this relationship.

[4] The parties' marriage experienced problems which continue to this date and it is those problems which have led to plaintiff seeking a divorce. Plaintiff prayed for:

- a) that custody of the minor children be awarded to defendant and that he pays maintenance towards the said children in the sum of N\$500 per month per child;
- b) that Erf 5857 Khomasdal be retained by himself; and
- c) that a property at Onebaba, Okalongo district to be retained by himself.

[5] He based this on his assertion that defendant wrongfully, maliciously and constructively deserted him. Defendant entered an appearance to defend and pleaded that the parties were married in community of property, having signed a declaration as set out in section 17 of the Native Administrative Proclamation.

[6] She in turn filed a counter-claim, wherein, she blamed plaintiff for the breakdown of the marriage. Some of the grounds are, that he was excessively jealously and had engaged in extra-marital affairs with various unknown women.

She also claimed custody of the minor children and that plaintiff should pay N\$2500 per month per child.

[7] Defendant further filed an amended counter-claim on the 13 February 2015 wherein she claimed that it was plaintiff who maliciously terminated the marriage relationship by the following conduct:

- a) absenting himself from home without her knowledge;
- b) being excessively jealously and falsely accusing her of engaging in extra-marital affairs;
- c) that he engaged in extra-marital affairs; and
- d) that he does not show love and affection towards her.

[8] She averred that plaintiff maliciously deserted her and the said desertion still persists. Defendant further averred that during the subsistence of their marriage they acquired an immovable property being erf 5857 Khomasdal, Extension 15 and was registered in their joint names, for that reason she claims that she is entitled to a 50% share of the said immovable property.

[9] Plaintiff applied to file a plea to defendant's amended particulars of claim. Ms. Kishi for plaintiff submitted that her failure to file the said plea timeously was due to some administrative oversight in her office and to buttress her argument pointed out that since this document is computer generated it can be traced to show the authenticity of its existence at the time of its generation.

[10] The centre of the argument is that plaintiff in his particulars of claim stated that the parties were married to each other out of community of property by virtue of the provision of s 17 (6) of the Native Administrative Proclamation Act, Act 15/1928, whereas, in defendant's counter-claim stated that they were married in community of property and they signed a declaration in terms of s 17 of the Native Administrative Proclamation Act.

[11] It is plaintiff's argument that since both parties are black and no declaration was signed the marriage was therefore out of community of property. This is the

bone of contention. It is plaintiff's view that defendant's plea does not state that the parties are black and are married in terms of the Native Proclamation 15/1928 and further that she does not make an allegation that the parties signed a declaration stating that their marriage to be in community of property. "It is further her argument that the non-compliance was not wilful and the delay was not very long.

[12] Defendant has opposed this application and maintained that there was no reasonable explanation for plaintiff's failure to file his plea timeously.

[13] I find credence in this explanation. A legal practitioner is an officer of the court and I am of the opinion that it is not necessary for the court to ask a legal practitioner to produce proof where he/she alleges that he/she did or did not do something. To do so will be implying that he/she is dishonest, an attribute I am uncomfortable with regarding a legal practitioner. After all ours is not only a honourable profession, but, the only profession that we have and cherish.

[14] It is plaintiff's argument that since the issue of the marriage regime, it is important that they be indulged in order to ventilate the facts which will enable the court to understand what took place. Central to this whole issue is what the marital regime was in this case.

[15] Ms. Nguasena for the defendant called in the evidence of the defendant. Her evidence was that she was married to plaintiff in community of property. It is her evidence that two weeks prior to their marriage, they met Pastor Josef Avia in his office and he asked them which marriage they wanted to enter into and they advised him that they wanted to be married in community of property, to which he proceeded to explain the consequences of such a union.

[16] The pastor asked them to bring their identification documents and in his case he was asked to bring his divorce order as he had been married before. She stated that the explanation was made two weeks before the marriage and they signed the declaration on the day of the marriage. She, however, was not in a position to furnish the court with the said declaration as it could not be located at the Ministry of

Home Affairs. For some reason this document seems to have developed feet or just fizzled into thin air.

[17] What comes out of her evidence is that:

- a) they were married In Community of Property;
- b) they conducted their affairs as if they were so married in community of property;
- c) There was no reference of their marriage having been out community of property either by reference or operation of law;
- d) In order to prove the common understanding of their marital regime, plaintiff paid off her loan of N\$40 000 at SWABOU and the reason for such actions by plaintiff was that they wanted to clear the said debt before they applied for a new one in order to buy a house in Windhoek. They bought the house which is registered in both their names.

[18] She went further to state that they shared financial responsibilities on a *pro rata* basis, e.g electricity and water. In addition, she purchased all household furniture and did not keep receipts as she did not anticipate this being an issue later.

[19] It is also her evidence that she was not an alcoholic, was not irresponsible and did not commit adultery as alleged by plaintiff. She further stated that plaintiff would absent himself from the matrimonial home during weekends without explanation. While this was going, according to her, he continued to service the mortgage while she purchased food, electricity, water and furniture, both in Windhoek and in their village. They have four motor vehicles which are fully paid for and she is presently using one of them, a Toyota VVTI Registration No. N3026SH which vehicle she would like to continue using and retain as hers.

[20] Further she would like custody of both minor children and that plaintiff should pay maintenance in the sum of N\$2500 per month for both children. This witness was intensely cross-examined by Ms. Kishi, but, she stood by her averments and denied being a wasteful person, an alcoholic or a spend thrift.

[21] The next witness was Pastor Josef Avia of Evangelical Lutheran Church in Namibia. He is a licenced Marriage Officer. It is his evidence that he explained the procedure to the parties when he solemnized their marriage. It was further his evidence that he first enquired whether the parties required a marriage in community of property, or out community of property.

[22] He stated that after his explanation of the two different marriage regimes, they opted for the marriage in community of property and he then asked them to sign a declaration form which they did. It was further his evidence that he had known the plaintiff since 1983 and it is plaintiff who approached him and requested him to solemnize their wedding.

[23] It is also his evidence that he personally took the said declaration form to the Ministry of Home Affairs. He handed over the marriage certificate to the parties on the day of the marriage.

### **Non-compliance**

[24] Plaintiff applied for indulgence as stated above. Such an indulgence is at the discretion of the court based upon good cause shown. The thrust of plaintiff application is that in the absence of filing an amended plea to amended particulars of claim filed by defended, the court will be deprived of hearing the full facts of the use.

[25] It should be *borne* in mind that the court's decision is based on the determination of facts as presented by the parties. While the court is generally not kin to open up pleadings in that regard, sight should not be lost that these courts, being courts of justice, have an unwavering objective of delivering justice in a fair manner and as such the principle of fair play is paramount in its mind. In addition, thereto, these courts should be slow in closing out a party in a matrimonial matter as the court's decision drastically changes a person status for life.

[26] In light of this fundamental principle I granted the amendment. In matrimonial matters, the courts are always persuaded to relax the rules as public policy dictates that it should be so. In addition to this, the conclusion of the case results in the

parties' change of status and children are affected. It is for that reason that I allowed her to do so.

[27] The issue at hand is whether or not the parties' marriage was in community or out community of property. This can only be determined upon looking at the evidence as a whole. Plaintiff maintained that;

- a) the marriage was out community of property;
- b) they did not sign any declaration before they married;
- c) the loan application from the Bank erroneously recorded their marriage as being of community of property;
- d) they conducted themselves as having been married out community of property;
- e) he paid for the Mortgage Bond;
- f) although furniture was purchased under defendant's name, he gave her the money;
- g) she was a spendthrift, alcoholic and irresponsible person; and
- h) the pastor did not explain to them the two different marital regimes.

[28] This, of course, is denied by defendant. Both the pastor and defendant corroborated each other in that it was plaintiff who sought out the pastor in order to solemnise their marriage and this was two weeks before the solemnisation. They also stated that the marital regime was explained to them two weeks prior and plaintiff elected to be married in community of property. A declaration was signed and forwarded to the Ministry of Home Affairs and is now missing.

[29] Defendant and the pastor confirmed that the declaration was in existence. I see no reason why the pastor, a man of the cloth whose role was to fulfil both the Government and Godly requirements for the establishment of a Holy matrimony would lie under oath on a matter which had nothing to do with him. In any event marriages are a creation of God the pastor is only there to fulfil that role. This was not the first marriage for him solemnize after all.



[30] Defendant calmly stated that they conducted themselves as having been married in community of property hence plaintiff's election to extinguish her personal loan with the bank in order for them to qualify for a Home Loan which enabled them to purchase a house, which house is registered under both names.

[31] Plaintiff blames the bank's officials for failing to state that the mortgage was granted on the basis of a marriage out community of property. He did not call the bank officials to acknowledge their fatal error. He gave conflicting instructions with regards to when the pastor explained the marriage regime to him, this contradiction placed his legal practitioner in an embarrassing situation.

[32] I find that plaintiff was not a truthful witness. He is the kind of person whose tongue the truth sits with a lot of discomfort. His evidence was designed to mislead the court and was in stark contrast to reality and all probabilities, vis-à-vis the evidence of defendant together with that of the pastor.

[33] Defendant was a far more convincing witness and her evidence was entirely logical, very precise and was in keeping with the expected normal procedure in the solemnisation of marriages in terms of the law. This marriage was in terms of the law as stated in s 17 (6) of the Native Administrative Proclamation 15 of 1928 which reads thus:

"A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage."

[34] The declaration was signed by the parties, but, has since disappeared in the Registrar's Office of the Ministry of Home Affairs, a very disturbing scenario and hopefully a genuine misfiling and completely free from underhand methods. Its

disappearance surprisingly is very convenient to the plaintiff. I smell a rat here and a dead one for that matter.

[35] However, its disappearance does not nullify the fulfilment of the marriage, as it is not necessary for the declaration to be in writing, see *Nakashololo v Nakashololo* 2007 (1) NR 27 (HC). The same principle was applied with equal force in *Mulenamaswe v Mulenamaswe* (I 2808/2011) [2013] NALCMD 275 (9 October 2013) and in *Kasita v Ipinge* (I 1321/2011) [2013] NAHCMD 72 (14 March 2013). What comes out clearly in this matter is that, firstly, there is no need for the declaration to be in writing and secondly that it has to be within one month.

[36] I find that the marriage was solemnised in accordance with the laws of Namibia and was therefore in community of property as demonstrated by the inclusion of defendant's name.

[37] The court is not a soothsayer and therefore cannot read plaintiff's intention from the construction of his face, but, court can only rely on his external manifestation and enforce the law see *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-6:

"The law does not concern itself with working of the minds of parties to a contract, but with the external manifestation of their minds. Even, therefore, if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."

[38] The parties entered into this marriage in community of property, in daylight and cemented their desire by conducting themselves in the spirit of their chosen marital regime.

[39] When he applied for a loan, it was granted on the strength of him being married in community of property. When the immovable property was purchased, plaintiff included defendant in the title. While the relationship was sweet he proudly

associated himself with the marital regime he had chosen. He cannot now choose to abandon the marital regime which he consciously entered into for his selfish reason. It will be improper in my view to read anything outside that.

[40] With regards to malicious desertion, there is no evidence that defendant deserted the matrimonial home. What is clear is that plaintiff created a condition at his convenience which placed defendant in such a position that she found herself banished from the home. The departure of a spouse under siege should not be regarded as a sufficient ground to fulfil the requirements of malicious desertion. It would have been folly for defendant to remain thereat, at the risk of being physically pushed out which could have been by violence, which violence could even have led to the loss of her life. Cases of this nature are not uncommon. A spouse who reasonably believes that she is likely to be violently removed from a matrimonial home should not wait for such eventuality only to be another statistic of domestic violence.

[41] I find that defendant together with the pastor who is an independent witness were truthful. Plaintiff has proved her case on a balance of probabilities.

[42] In light of the above I find that the said marriage was in community of property and, therefore, attracts all the legal consequences of such a marriage in terms of the law. Defendant is therefore, entitled to the rights which flow from such a marriage.

[43] The following is the order:

1. Final order of divorce is granted.
2. Custody and control of the minor children, Laudika Tunelao Shambwila and Ndapewa Omano Shambwila be awarded to the defendant subject to the plaintiff's right of reasonable access.
3. Plaintiff pays maintenance in respect of the minor children in the amount of N\$2500-00 per month for both children, which maintenance payments shall be escalated by 10% annually.
4. Both parties to be 50% liable of all costs in respect of the minor child's primary and secondary education, extra mural activities, books, stationary and school

clothes, tertiary education, including the costs of hostel fees or alternative accommodation (should the child show an aptitude and make reasonable progress herein and in so far as such costs are not covered by study loan and for bursaries).

5. Defendant keeps both children on her medical aid.
6. Division of the joint estate, and in particular that the property at Erf 5857 Khomasdal, Extension 15 owned jointly by the parties be sold and the proceeds thereof be shared equally between the parties, alternatively that the plaintiff pay out to the defendant's 50% share at the market value prevailing at that time within 90 days of this order.
7. Plaintiff should pay the costs of this action.

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M Cheda  
Judge

## APPEARANCES

APPELLANT: F. Kishi  
Of Dr. Weder, Kauta & Hoveka Inc.  
ONGWEDIVA

RESPONDENTS: Nguasena  
Of AngulaCo. Inc.  
ONGWEDIVA