



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: I 1139/2013

**SUNCICA HESSEL-ENKE**

**PLAINTIFF**

And

**ANDREAS SINDLGRUBER**

**DEFENDANT**

**Neutral citation:** *Suncica Hessel-Enke v Sindlgruber* (I 1139-2013) [2016]  
*NAHCMD 205* (15 July 2016)

**Coram:** MILLER AJ

**Heard:** 20 August 2015

**Delivered:** 15 July 2016

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**ORDER**

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[1] Judgment in favour of the plaintiff in the sum of N\$ 463,550.00 being half of the rental for the period 1 July 2010 to 30 August 2015.

- [2] The defendant is ordered to render to plaintiff an account for half of the rentals received for the period 1 September 2015 to the date of this judgment.
- [3] Interest on these amounts of the rate of 20% per annum from the date of each payment received to the date of payment.
- [4.1] The property is to be evaluated by a sworn evaluator within two weeks of this court's judgment. The costs for the evaluation are to be borne in equal shares by the parties;
- [4.2] That a receiver be appointed by agreement between the parties, and failing agreement by the president of the law society of Namibia at the time, whom shall have the power, *inter alia*, -
- [4.3] To receive and sell the property by private sale at a price that is not less than the price determined by the aforementioned sworn evaluator;
- [4.5] To pay any liabilities due on the property from the proceeds of the sale, subject thereto that any amount owing in respect of the Bank Windhoek bond shall be fully deducted from the defendant's share of the profits from the proceeds of the sale;
- [4.6] Subject to paragraph 4.5 above, to divide and pay the profits from the proceeds of the sale to the parties equally;
- [4.7] In selling the property as aforesaid, to give the plaintiff and the defendant first option to purchase the respective half share of the property from the other party, subject thereto that the party shall exercise his or her option first in time, as the case may be, and is in an existing financial position to purchase such half share (whether that be in cash, bank financing or otherwise) shall be given preference in respect of the first option to purchase the other parties half share;

- [4.8] Be entitled to apply to the High Court of the Republic of Namibia for any further directions that he shall or may consider necessary to give effect to his obligations in terms hereof and the law;
- [4.9] The fees of any receiver so appointed shall be shared equally between the parties and shall be deducted from the proceeds of the sale;
- [5] Cost of suit in favour of the plaintiff which will include the cost of one instructing and one instructed counsel.
- [6] The counterclaim is dismissed.

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## JUDGMENT

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MILLER AJ:

[1] The parties to this action were married to one another in Austria on 25 September 1985. Four children were born of the marriage. That marriage ended in a divorce according to Austrian law on 11 November 1998. During the year 2001 the parties having become reconciled decided to move to and settle in Namibia.

[3] With funds raised on their property in Austria they purchased a house situate on 47 Pasteur Street, Windhoek described on Erf 3134, Windhoek. The property was registered in the names of both the plaintiff and the defendant. Some movables such as a motor vehicle and items of furniture were also purchased.

[4] Matters did not turn out as the parties had anticipated and they decided to separate. Since co-habitation was for obvious reason not possible a bond over the immovable property in the sum of N\$ 300,000.00 was raised with Nedbank. That money was utilized by the plaintiff to purchase a flat into which she moved.

[5] The defendant remained in possession of Erf 3134, which he rented out to various tenants during the ensuing years. It is not seriously contested by the

defendant that half of their rental income he received during the period 1 July 2010 to 30 August 2015 was N\$ 463,550. It is also common cause that the defendant utilized the entire amount for his own purposes.

[6] There is a sharp difference between the parties in relation to the raising of the bond with Nedbank. The plaintiff's version is that the amount of N\$ 300,000 accrued to her as a repayment of certain funds that the defendant had withdrawn from both her bank account in Austria and in Namibia. Thus so she said it was agreed that the defendant would remain solely responsible for paying the monthly instalments. She says that in fact she only received N\$ 275, 000.00.

[7] There is some support for this version. Firstly the defendant conceded that he had in fact withdrawn monies from the plaintiff's bank accounts without her express consent. He said that he held a power of attorney to do so. That document was however, never produced in evidence. Secondly the defendant himself made all the payments due in respect of bond on and until that bond was cancelled.

[8] The defendant's version is that the plaintiff would receive the entire amount of N\$ 300,000 00 and the plaintiff would then repay an amount of N\$ 200,000 to Nedbank and would also transfer her half share in the property to him. He would then remain responsible to repay the outstanding sum of N\$ 100.000.00. Significantly the plaintiff never transferred the share to the defendant who also took no steps over a long period of time to have her do so. As matter stand the property is jointly owned by the parties. What also detracts from the version of the defendant are the events surrounding the cancellation of the Nedbank loan and the registration of a new bond with Bank Windhoek which I proceed to summarize.

[9] On 23 February 2007, the defendant raised a bond of N\$ 445, 400.00 with Bank Windhoek and settled the bond with Nedbank. The plaintiff refused to sign any documents relating to that loan. The plaintiff then persuaded Mr Swanepoel the conveyances that he was the sole owner of the property and in fact signed an affidavit to that effect. On the strength of that the title deed was amended to reflect the defendant as the sole owner thus facilitating the raising of the bond without the

assistance and consent of the plaintiff. The title deed was subsequently amended again to reflect to that position.

[10] What did not happen during all this time was that no attempt was made to have the plaintiff transfer her share in the property. As she had allegedly agreed. Instead a rather dubious route was followed. That in my view detracts significantly from the veracity of the defendant's evidence not only on this issue but on his testimony as a whole.

[11] On his own version he utilized the amount obtained from Bank Windhoek not only to settle the Nedbank loan but also his personal debts. In spite of that he seeks to hold the plaintiff liable for a half share of the loan.

[12] I find the defendant's version on this score to be contrived, improbable and plainly not plausible. I will accordingly reject his version and accept the version presented by the plaintiff.

[13] As I had indicated the plaintiff's claim is for half of rental income received. It is virtually common cause that she is entitled for that.

[14] The defendant in his pleadings seeks to meet that case on the basis that his counterclaims exceed the plaintiff's claim. During argument before me, Mr Brand who appeared for the defendant argued that the plaintiff and the defendant had formed a universal partnership which is still in existence. Hence no debtor/creditor relationship can exist between the partners inter se. For that Mr Brand relies on *Muhlmann vs Muhlmann* 1983 (3) SA 102 (A)

[15] The difficulty I have with this argument is firstly that it was never raised in the pleadings or in the pre-trial order. Secondly the facts do not support such a finding. I will proceed to deal with the counterclaims. I have already dealt with and discussed defendant's claim in respect of the Nedbank loan. That claim is accordingly dismissed.

[16] The defendant also seeks payment of half of the payments made to Bank Windhoek. Defendant alleges that the payments he made totals N\$ 354, 29.046. There is simply no basis to sustain this claim. The plaintiff was not a party to this. The amount was raised and used safely for the benefit of the defendant. That claim accordingly faults to be dismissed.

[17] The third claim is for payment of half of the rates and taxes on the property being the sum of N\$ 65,328.20. I accept that the defendant paid the rate and taxes, the evidence tendered facts for short of the proof require to establish what he in fact paid. That evidence clearly was available and should have her tendered, but it was not. In these circumstances I am compelled to grant absolution. (*Abner v K.L Construction and Another* (I 1676/2011) [2013] NAHCMD 139.

[18] The same fate befalls the claim based on the alleged renovations and maintenance. There is no evidence as to the quantum of that claim. That leads me to deal finally with the purchase of a business, a car and furniture.

[19] The plaintiff and the defendant lent and advanced N\$ 200,000.00 to a Mr Mayerhofer. The plaintiff says she received N\$ 80,000.00 as part of the repayment. She assumes that the balance was paid to the defendant. The defendant denies that he received anything. I have discussed already the quality of the defendant's testimony or rather the lack thereof. I am not prepared to accept his version. The defendant upon whom his onus rests did not call Ms Mayerhofer as a witness to support his version.

[20] The claims for the car and the furniture can be dealt with briefly. The car was used by the plaintiff to transport the children and not as her sole property. Moreover there is no evidence as to the value of the car.

[21] The plaintiff's evidence is that when they separated they divided the furniture between them. Certain photographs tendered in evidence supports her testimony. I accept her evidence. During the course of the trial it became apparent that the relief claimed by the plaintiff needed to be amended to make provision for the sale of the

property. The particulars of claim were amended accordingly without opposition from the defendant.

[22] As for costs, they should follow the result. I am not persuaded that any punitive costs are warranted.

[23] In the result, the following order is made

- [1] Judgment in favour of the plaintiff in the sum of N\$ 463,550.00 being half of the rental for the period 1 July 2010 to 30 August 2015.
- [2] The defendant is ordered to render to plaintiff an account for half of the rentals received for the period 1 September 2015 to the date of this judgment.
- [3] Interest on these amounts of the rate of 20% per annum from the date of each payment received to the date of payment.
- [4.1] The property is to be evaluated by a sworn evaluator within two weeks of this court's judgment. The costs for the evaluation are to be borne in equal shares by the parties;
- [4.2] That a receiver be appointed by agreement between the parties, and failing agreement by the president of the law society of Namibia at the time, whom shall have the power, *inter alia*, -
- [4.3] To receive and sell the property by private sale at a price that is not less than the price determined by the aforementioned sworn evaluator;
- [4.5] To pay any liabilities due on the property from the proceeds of the sale, subject thereto that any amount owing in respect of the Bank Windhoek bond shall be fully deducted from the defendant's share of the profits from the proceeds of the sale;

- [4.6] Subject to paragraph 4.5 above, to divide and pay the profits from the proceeds of the sale to the parties equally;
- [4.7] In selling the property as aforesaid, to give the plaintiff and the defendant first option to purchase the respective half share of the property from the other party, subject thereto that the party shall exercise his or her option first in time, as the case may be, and is in an existing financial position to purchase such half share (whether that be in cash, bank financing or otherwise) shall be given preference in respect of the first option to purchase the other parties half share;
- [4.8] Be entitled to apply to the High Court of the Republic of Namibia for any further directions that he shall or may consider necessary to give effect to his obligations in terms hereof and the law;
- [4.9] The fees of any receiver so appointed shall be shared equally between the parties and shall be deducted from the proceeds of the sale;
- [5] Cost of suit in favour of the plaintiff which will include the cost of one instructing and one instructed counsel.
- [6] The counterclaim is dismissed.

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Miller, AJ  
Acting



Appearance:

Plaintiff

Instructed by

J P JONES

Keop &amp; Partners, Windhoek

Defendant

Of

Windhoek

C BRANDT

Chris Brandt Attorneys,