

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2023/01382

In the matter between:

**MAGDALENA MUTUKU**

**PLAINTIFF**

and

**FILLIPUS MANGUDU MUTUKU**

**DEFENDANT**

**Neutral Citation:** *Mutuku v Mutuku* (HC-MD-CIV-ACT-MAT-2023/01382) [2024]  
NAHCMD 131 (26 March 2024)

**Coram:** SIBEYA J

**Heard:** 29 and 30 January, and 2 February 2024

**Delivered:** 26 March 2024

**Flynote:** Law of persons – 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 also be alleged and proven that the defendant made no contribution whatsoever (or some negligible contribution) to the joint estate – The court was not satisfied that the plaintiff proved her claim for forfeiture of the benefits of marriage – plaintiff's claim for specific forfeiture is dismissed.

**Summary:** This is a divorce matter where it must be determined whether the breakdown of the marriage was caused by the plaintiff or the defendant's conduct, and where the court is called upon to determine whether or not the plaintiff proved that the defendant must forfeit the benefits derived from the marriage in community of property.

*Held* – the defendant's version that he contributed to the renovation and the extension of the property appeared more probable and the court attached more weight to it. The court further found that that it was established that the defendant contributed to the common household of the parties.

*Held that* – the plaintiff did not prove entitlement to the relief sought that the defendant must forfeit the benefits derived from the marriage in community of property in respect of the immovable property despite the plaintiff having purchased the immovable property and paying the bond instalments for the said immovable property.

*Held further that* –the defendant caused the breakdown of the marriage, but the plaintiff failed to prove the claim of forfeiture of benefits.

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## ORDER

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1. The bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.

2. The plaintiff's claim that the defendant forfeit any benefits that he might derive from their marriage in community of property in respect of Erf 669, Budget Homes, Okahandja, and in respect of the motor vehicles: a Toyota Corolla with registration number N 121585 W and a Toyota Vitz with registration number N 182503 W, is dismissed.
3. There shall be a division of the joint estate.
4. Each party must pay his or her own costs of suit.
5. The matter is regarded as finalised and removed from the roll.

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### JUDGMENT

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SIBEYA J:

[1] Dissolution of a once celebrated union in holy matrimony, has the capacity to tear the parties and their families apart. At times the disagreements between the parties are so tense that it is difficult to fathom that such parties were once a happily married couple.

[2] Before court is a contested divorce action where the court is seized with a determination of the propriety of the plaintiff's claim that the defendant maliciously deserted her. The parties are further at loggerheads on whether the defendant should forfeit his benefit in relation to specific properties of the joint estate or that he be granted a division of such estate.

[3] Although the action is defended, there is no counterclaim filed by the defendant.

### The parties and the representation

[4] The plaintiff is Ms Magdalena Mutuku (born Likuwa), a major female resident of the district of Okahandja, employed by the Municipality of Okahandja as an Asset Management Officer.

[5] The defendant is Mr Phillipus Mangundu Mutuku, a major male resident of the district of Omaruru, employed by the Municipality of Omaruru as a driver.

[6] Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as 'the parties'.

[7] The plaintiff is represented by Ms Mufune while the defendant conducted his matter in person and without representation by counsel.

### Pleadings

[8] The parties got married to each other on 10 October 2025, at Okahandja, in community of property. Two minor children were born of the marriage.

[9] The plaintiff alleged that, during the subsistence of the marriage between the parties, the defendant, with malicious intention to terminate the marriage, engaged in the following conduct:

- (a) He shows her no love and affection;
- (b) He took all his personal belongings and left the common home during March 2022;
- (c) He shows no serious intention to continue with the marriage;
- (d) He is engaged in an adulterous relationship with a woman named Vicky Shiyane, with whom he lives;

- (e) He persists with the desertion of the plaintiff and continues with the adultery; and
- (f) He fails to contribute to the joint estate.

[10] The plaintiff further averred, in the particulars of claim, that during 2013, she acquired immovable property, namely: Erf 669, Budget Homes, Okahandja ('the property') and she paid all bond and municipal fees for the said property without assistance from the defendant. The plaintiff claims that the property is valued at N\$900 000, with a bond owed to First National Bank (FNB) in the amount of N\$284 801. She claims further that she obtained a loan of N\$396 310 against her pension, to renovate the property. She states that the defendant makes no financial contribution to any of the household expenses or the maintenance needs of the minor children.

[11] The plaintiff claims that she purchased two motor vehicles, namely: a Toyota Corolla bearing registration number N 121585 W and a Toyota Vitz bearing registration number N 182503 W, without the defendant's assistance. The said motor vehicles are registered in her names.

[12] It is on the basis of the above allegations, that the plaintiff seeks specific forfeiture of the property and the said two motor vehicles, particularly because the defendant did not contribute or assist in the payments of the property and the motor vehicles.

[13] The defendant, in his plea, denied malicious desertion and intention to terminate the marriage. He contended that the plaintiff and her family members chased him out of their matrimonial home (the property). He alleged that the plaintiff put his belongings in a plastic bag and threatened to report him to the police if he did not oblige. He denied knowledge of Ms Vicky Shiyane and further denied that he had been engaged in an adulterous relationship with any woman. He stated further that he stays alone in Omaruru where he works. He alleged further that the plaintiff disrespects him and insults him.

[14] The defendant contended further that he contributes to the joint estate of the parties. He agreed that the plaintiff acquired the property in 2013, however, he contended that he contributed to the payment of the bond and municipal services. He stated further that he obtained a loan for the extension of the property. He stated that he contributes to the maintenance of the household and maintenance of their children. He also denied making no contribution or rendering no assistance towards the purchase of the two motor vehicles.

[15] The defendant, further averred in the plea that he opposes the divorce order sought by the plaintiff as he loves his wife, and he is not engaged in adultery. He stated that he agrees to a restitution of conjugal rights, order provided that the plaintiff can respect him. He also avers that he is entitled to the benefits emanating from their marriage in community of property.

[16] In replication, the plaintiff insisted that the defendant maliciously and constructively deserted her, and denied chasing him from their common home. She alleged that the defendant packed his clothes in a suitcase and the remaining items is what she put in the plastic bag. After all, she insisted that he should pack his belongings, she further stated. She also alleged that the bond payments and municipal bills are deducted from her salary. She insisted in her claim that the defendant made no contribution to the purchase of the property and the motor vehicles.

[17] The plaintiff further stated in replication that the defendant only commenced to maintain the children after she begged him to do so. He does not however, maintain them consistently.

[18] The plaintiff further averred in replication that the defendant is engaged in adulterous relationships with women unknown to her. She alleged that he flouted his adulterous relationships on social media and even named the parties' last born child after one of his mistresses which the plaintiff only found out afterwards.

[19] It is now completely transparent and unclouded that both parties deny wrongdoing on their part.

#### The live issues

[20] The parties agreed that custody and control of the minor children be awarded to the plaintiff subject to the defendant's right of reasonable access. The parties further agreed that the maintenance of the children be pursued at the maintenance court. Therefore, this court is only seized with the determination of fault in relation to the breakdown of the marriage and forfeiture of benefits derived from a marriage in community of property. The forfeiture order sought is specifically in respect of the property and the two motor vehicles referred to *supra*.

#### The pre-trial order

[21] In a pre-trial report which was made an order of court on 1 November 2023, the parties listed the following agreed facts:

- (a) That the parties were married to each other on 10 October 2015, at Okahandja, in community of property.
- (b) That two minor children were born to the parties.
- (c) That the plaintiff be granted custody and control of minor children subject to the defendant's right of reasonable access.

[22] The parties further listed the following factual issues to be resolved at trial:

1.1 Whether the defendant

1.1.1 Showed no love and affection towards the plaintiff;

- 1.1.2 Took all his personal belongings and left the common home during 2022;
- 1.1.3 Shows no serious intention to continue with the marriage;
- 1.1.4 Entered into an adulterous relationship with another woman named Vicky Shiyane;
- 1.1.5 Failed to contribute to the joint estate;

Whether the plaintiff

- 1.1.6 Chased the defendant from the common home;
- 1.1.7 Bought motor vehicles to wit:
  - 1.1.7.1 Toyota Corolla N 121585 W;
  - 1.1.7.2 Toyota Vitz N 182503 W.

## 2. ALL ISSUES OF LAW TO BE RESOLVED DURING THE TRIAL:

2.1 Whether the plaintiff has made out a case for specific forfeiture alternatively malicious desertion.'

### The evidence

#### *Plaintiff's case*

[23] The plaintiff was the sole witness in support of her claim. She testified, *inter alia*, that she is employed as an Asset Management Officer at the Municipality of Okahandja and she resides at the property. She testified that the parties were married on 10 October 2015, in Okahandja in community of property. Two minor children were born from the marriage.

[24] The plaintiff testified further that during the marriage, she suffered emotional, financial and psychological abuse at the hands of the defendant. She testified further that during their marriage, the parties did not agree on anything and no conversation between them did not result in an argument. Some of the arguments caused the defendant to stop talking to her, stop eating food at home and he would sleep on the



floor for three to four days. She testified that most of the arguments arose from the defendant's accusations that she had extra-marital relationships with her colleagues, cousins, nephews, and even her son from his previous relationship. The accusations turned worse to the extent that whenever she received a telephone call, the defendant accused her of having an intimate relationship with that person, and whenever she arrived home late from work, she was accused of having sexual intercourse at work. She testified that these accusations caused her psychological distress.

[25] The plaintiff testified further that she could not understand what she termed 'defendant's emotional insecurity and emotional manipulation' until when she discovered that he was engaged in numerous extra-marital relationships. She stated further that during 2016, she overheard an explicit conversation between him and a woman where he initiated a sexual encounter. She testified further that in 2018, he invited another woman that he had an extra-marital relationship with to a lodge where he worked and stayed. The two took several pictures together. The pictures taken automatically ended up at the plaintiff's email account as the defendant set up her email as his backup email address. She testified further that when she confronted him, he changed the settings on his email and removed her email address, and denied knowledge of the pictures.

[26] The plaintiff tendered the said two pictures into evidence. The pictures, which are half bodied, depict the defendant dressed in a t-shirt lying on a pillow with a lady whose upper body appears naked.

[27] The plaintiff testified further that on another occasion, when she visited the defendant at the above-mentioned lodge, as she was cleaning his room, she found diapers that belonged to a baby and used panty liners in the dustbin of his room. When she questioned him about the said discovery, he responded that it was his neighbour's rubbish that was thrown into his dustbin. She did not believe him.

[28] The plaintiff testified further that the defendant informed her that she forced him to marry her when he had no desire to. He denied fathering their second child yet he refused DNA testing. She testified further that in March 2022, he removed all his belongings and moved to Omaruru, after getting a new job there. On one occasion she visited him at Omaruru and found the house that he was renting fully furnished to the extent that it appeared to her that there was a feminine touch and that he probably lived with a woman. She asked him about it and he denied the allegations.

[29] The plaintiff testified further that the defendant is involved in an extra-marital relationship with Ms Vicky Shiyane, and he is not interested to continue with their marriage.

[30] The plaintiff testified further that the property is valued at N\$900 000 and there is a mortgage bond over the property with FNB for an amount of N\$284 801. She also stated that she obtained a loan of N\$396 310 in order to purchase and renovate the house. She testified further that she solely paid for the bond instalments and the municipal services.

[31] The plaintiff testified further that when the parties decided to purchase the Toyota Corolla bearing registration number N 121585 W, she obtained a quotation and thereafter secured an overdraft of N\$100 000 from the bank for the deposit of the motor vehicle. She continued to state that the parties agreed to share the instalment of the Toyota Corolla on a 50/50 basis. The parties proceeded to the bank to put up a stop order for his share of the instalment to be deducted from his account. He made the payment but after two months he cancelled the stop order leaving the plaintiff to solely pay the instalments.

[32] The plaintiff further testified that she also purchased a Toyota Vitz bearing registration number N 182503 W where she made all the payments without any contribution from the defendant.

[33] The plaintiff testified that the defendant would seldom purchase groceries. It was her further evidence that he, however, does not make any financial contribution to the household expenses and the maintenance needs of the children, except when the children ask him directly.

[34] In cross-examination, the defendant put to the plaintiff that when they met and got married she was sickly and she confirmed. In respect of the baby diapers found in his room, he put to her that they belonged to his co-worker who used to come there with a baby. To this assertion, the plaintiff responded that yes the explanation was given. He denied accusing her of being involved in extra-marital relationships but stated that the plaintiff did not respect him. She agreed that she did not respect him because of the manner in which he treated her and accused her of having sexual intercourse at work.

[35] The defendant further put to the plaintiff that in respect of the maintenance and the insurance of the Toyota Corolla, he paid the required amounts directly to her bank account. The plaintiff denied the alleged payment for maintenance but confirmed that he paid for the insurance of the Toyota Corolla as he was driving it. To this the defendant stated that he only used the Toyota Corolla to take her to work and take the children to school and back. The plaintiff agreed.

[36] The defendant put to the plaintiff that when he left Okahandja to work at the aforesaid lodge, he insisted that the plaintiff must visit him but the plaintiff refused. The plaintiff confirmed the allegation and stated that she could not visit him as their second born child was still a baby and their children were about five and three years' old respectively. This, in view, contributed to the breakdown of the marriage between the parties as the age of the children could not have reasonably been an obstacle preventing the plaintiff from visiting the defendant.

[37] The defendant put to the plaintiff that he used to purchase food for the family. The plaintiff disputed.

[38] In respect of the pictures, the defendant put to the plaintiff that the pictures were taken at Kashana Guest House and he confirmed removing her email address as all the time when something popped up he had to answer to her.

[39] The defendant put to the plaintiff that when they got married the property did not have a boundary wall and only had three sleeping rooms, thus he took a personal loan and a revolving loan from the bank to extend the house. The plaintiff disagreed and said that she utilised her own funds to construct the garage and extend the property. She also stated that they both took loans and bought a Subaru motor vehicle which they used as a taxi and built a house at the defendant's village situated at mile 30 in the district of Rundu.

[40] The defendant stated in cross-examination that he did not make any financial contribution to the purchase of the Toyota Vitz.

[41] The defendant put to the plaintiff that as an example and to demonstrate that he supported the plaintiff and their children, on 3 January 2016, he paid an amount of N\$5000 to her bank account. The plaintiff confirmed but she could not recall the purpose of the said amount. He said further that on 10 March 2017, he sent her an amount of N\$4000, which she confirmed. On 23 March 2017, he sent her N\$5000 and stated that he could not remember very well what it was for as they were building and he used send money for food and maintenance of the children. On 27 March 2017, he sent an amount of N\$2000 to her. The plaintiff responded that she has no comment.

[42] When the defendant asked the plaintiff as to how she utilised the money that he sent her, she answered that they were married and used to share expenses, including purchasing electricity and food.

[43] The defendant put to her that she had a lot of debts some of which he paid off. She responded that it was only when there was a shortage with deductions where he would assist with about N\$3000.

[44] In re-examination, the plaintiff testified that she does not dispute that the defendant sent money to her, as he would sent money for groceries and toiletries. He would also pay for their furniture.

*Defendant's case*

[45] The defendant was also the sole witness for his defence. He testified that during their marriage in community of property, the parties acquired properties including motor vehicles which are registered in the plaintiff's names. He testified that while he supported the plaintiff financially, she in turn did not render him financial support. He also stated that he maintained the plaintiff and their children.

[46] The defendant testified further that the plaintiff did not respect him and at times restrained him from sleeping on their bed. He said further that during March 2022, the plaintiff chased him out of their common home (the property). He stated that the involvement of her family members in their marriage led to him being chased out as they accused him of unfairly benefiting from the plaintiff's properties. Despite that, and with a view to resuscitate their marriage, he invited her to Omaruru where he secured employment.

[47] The defendant testified further that he contributed to the purchase of the Toyota Corolla and the extension and renovations made to the property.

[48] He denied being engaged in extra-marital relationships. He testified that he has shown love and affection to the plaintiff and still believe in their marriage vows.

[49] In cross-examination, it was put to the defendant by Ms Mufune that the bank statements showed payments from him to the plaintiff and some of the payments from the plaintiff to him. He agreed and said further that they both shared household expenses including food and toiletries. Ms Mufune inquired as to the reason why the defendant stopped paying the instalments for the Toyota Corolla just two months after

the agreement for such deductions was made. The defendant disputed the period and stated that he cancelled the stop order payment for a period of two years in order to buy food for the common home and to pay the insurance for the Toyota Corolla. He stated that when he stopped paying the instalments of the Toyota Corolla, the plaintiff continued to pay the instalments while he shouldered some of their responsibilities.

[50] Ms Mufune further put to the defendant that the plaintiff took up a loan against her pension in order to extend and renovate the property. The defendant agreed that he is aware that the plaintiff took up a loan, however, some of the money sent to the plaintiff, as depicted on his bank statement, was his contribution to the loan repayment. When questioned further by Ms Mufune, the defendant conceded that the plaintiff is the one who has been paying the instalments for the property which she purchased about two to three years before their marriage, but he contributed to the household expenses.

[51] In respect of the pictures, the defendant testified in cross-examination that the pictures were taken at a lodge in 2022 where he sat with the lady depicted, and they were not lying down as suggested by the plaintiff. He could not recall as to who took the pictures. Ms Mufune put to him that the lady in the pictures appears to be unclothed, and he responded that she had a top on. He explained that what appears to be a pillow was a cushion that was on the chair where they sat at a party. He explained further that the lady in the picture was a co-worker and a student. When asked that in his questions posed to the plaintiff in her cross-examination he put to her that he did not know the lady in the pictures, he stated he knows her but he does not know her whereabouts.

[52] Ms Mufune further put to the defendant that there was a video footage involving the same lady appearing in the pictures where he expressed his love for her. The defendant answered that he only heard of the video footage but never saw it.

## *Arguments*

[53] Ms Mufune argued that the plaintiff managed to prove that she is entitled to the order of specific forfeiture in respect of the property. Mr Mutuku argued that he contributed to their common household, as a result he is entitled to the benefits derived from their marriage in community of property including the benefit in the property. He insisted that he took a loan from the bank to assist with the renovations and extension of the property.

[54] Ms Mufune did however concede that the plaintiff did not prove entitlement to specific forfeiture in respect of the Toyota Corolla. She submitted that the concession is premised on the evidence that the defendant paid for the insurance of the said Toyota Corolla. The concession was correctly made although such claim may not have failed on the basis of the insurance payments alone. In respect of the Toyota Vitz, Ms Mufune conceded that the plaintiff did not plead the valuation of the said motor vehicle, and therefore, submitted that the Toyota Vitz should form part of the joint estate of the parties to be divided according to law. Again this concession was correctly made regard been had to the decision of this court in *Carlos v Carlos, Lucian v Lucian*,<sup>1</sup> where this court remarked as follows at para [22.5]:

[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;

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<sup>1</sup> *Carlos v Carlos, Lucian v Lucian* Case number: I 141/2010 & I 501/2011, delivered on 10 June 2011.

[55] The above concessions leaves the only issues for determination, the aspect of fault and specific forfeiture of the property.

### Analysis

[56] It is common cause that the evidence of the parties is poles apart despite them being the only persons with full knowledge of the events that unfolded in their marriage. The irreconcilability of the parties' evidence in material respects makes it plain that either one or both of them is economical with the truth.

[57] The parties' versions of events are mutually destructive. In such matters the court is obliged to assess the versions and attach weight to the most probable one.

[58] Our courts have adopted the approach set out by the Supreme Court of Appeal of South Africa in the matter of *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie & Others*,<sup>2</sup> where the following was stated 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 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

<sup>2</sup> *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie* 2003 (1) SA 11 (SCA).



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)).

[59] In *National Employers' General Insurance Co Ltd v Jagers*,<sup>3</sup> the courts remarked that:

'(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.'

[60] With the above principles in mind, I find it opportune to consider the evidence led with a view to determine whether or not the plaintiff, as the *dominis litis*, managed to prove her claim.

### Forfeiture

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<sup>3</sup> *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.

[61] As alluded to above, the court in *Carlos v Carlos, Lucian v Lucian*,<sup>4</sup> in discussing different kinds of forfeiture remarked as follows regarding a claim for specific forfeiture:

[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);

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<sup>4</sup> *Carlos v Carlos, Lucian v Lucian* NAHC I 141/10 and I 501/11 para 5.

[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? . . .' my underlining

[62] The court in *Carlos* at para [8.6] cited with approval a passage from *Gates v Gates*,<sup>5</sup> where it was remarked 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.'

[63] In *casu*, the plaintiff claimed specific forfeiture in that the defendant must forfeit all the benefits that he may derive from the marriage in community of property in respect of the immovable property on the basis that she solely contributed to the purchase and the payment of the bond instalments. The said claim is properly pleaded in the particulars of claim.

[64] As it is apparent by now, the defendant denies not contributing to the acquisition of the property in that he contributed to the common household and further that he obtained a loan utilised for the renovations and extension of the property.

[65] It is the undisputed evidence of the defendant that he contributed to the maintenance of their children and the plaintiff. It is further undisputed that he purchased groceries for the common household; drove the plaintiff to work and back and as well as the children to school and back. It is further undisputed evidence of the defendant that he paid for electricity units, the insurance of the Toyota Corolla, and sent money on several occasions to the plaintiff.

[66] It must be laid bare that when the plaintiff was cross-examined by the defendant on the several amounts that the defendant sent to her, she responded that they are

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<sup>5</sup> *Gates v Gates* 1940 NPD 361 at 364.

obviously a married couple and thus they share household expenses. This in my view, resonates with a functioning marriage relationship, particularly where the parties are married in community of property. More so that at times it becomes difficult to disentangle each party's contribution to the joint estate.

[67] The defendant testified undisputedly that he obtained a loan from the bank. The dispute that the plaintiff launched on the defendant's loan was only in respect of its utilisation, in that whereas the defendant averred that the loan was utilised for the extension and renovations to the property, the plaintiff contended that the defendant's loan was utilised for the construction of his property at Mile 30. It was however the undisputed evidence of the defendant that he, on diverse occasions, sent money in different amounts to the plaintiff. He testified such monies were used as part of the extension and renovations to the property as they were building. The plaintiff confirmed receiving several payments from the defendant and also stated that she also sent monies on different intervals to the defendant as they are married to each other.

[68] Whilst the defendant was forceful in his evidence that the monies sent to the plaintiff were for the renovation and the extension of the property, the plaintiff on the other hand stated that she could not remember what the purpose of the money was, save for stating that it should have been for their common household. This, in my view, puts credence to the version of the defendant that it is highly probable that the defendant's payments made to the plaintiff's bank account were for the renovation and extension of the property.

[69] The above finding must be understood against the backdrop of the fact that it was the plaintiff's evidence-in-chief that the defendant never contributed to their common household. It was only in cross-examination that she conceded to the contribution made by the defendant to their common household. On this finding alone, the plaintiff's claim of specific forfeiture ought to fail as I find that it is highly probable that the defendant, although not having purchased the property, he nevertheless contributed to the renovations and extension of the property.

[70] I find further that even if I had concluded that the defendant did not contribute to the renovation and extension of the property, the evidence that the defendant contributed to the common household by paying maintenance for the children, paying the insurance for the Toyota Corolla, purchased the groceries for the children and the plaintiff, paid for electricity, and transported the plaintiff to work and back and transported the children to school and back home is overwhelming. This much is also admitted by the plaintiff.

[71] It should be stated that the plaintiff appeared to have a better paying job than the defendant, but that should not mean that the defendant's contribution to the joint estate should be mathematically calculated and equated to that of the plaintiff, who appeared to be financially better placed than him. I find that the defendant contributed to the joint estate in his own way and within his means. A person should not be condemned for contributing less than his or her spouse to whom he or she is married in community of property and be deprived of his benefit from the said marriage when he or she contributed based on his or her means and in his or her own right.

[72] On the basis of my finding that the defendant contributed to the common household, I hold the view that the plaintiff cannot succeed with her claim even if it could not have been established that the defendant made specific contribution to the property.

### *Fault*

[73] In respect of determining as to who caused the breakdown of the marriage, it is undisputed evidence that the plaintiff does not respect the defendant and that contributed to the breakdown of the marriage. The defendant testified that he is prepared to receive the plaintiff so that they can work on their marriage provided that the plaintiff can respect him. The plaintiff on the other hand attempted to justify her lack of respect for the defendant on the basis of his lack of trust in her occasioned by his false allegations of infidelity that he levelled against her. On this score blame could have

been laid at the foot of the plaintiff for the breakdown of the marriage, but the defendant did not deny the said accusations claimed by the plaintiff. I can imagine how tormenting it could be to be accused of infidelity day in day out. The said accusations when continued unabated, especially where they are unjustified, can lead to disharmony in a marriage and contribute to its breakdown.

[74] I further find that the pictures of the defendant with a half-naked woman, were taken on a bed. Thus I reject the version of the defendant where he stated that the pictures were taken on a chair or table and that the woman in the pictures had a top on her body. His version in this regard stands in total contrast to the real evidence depicted in the pictures. As the saying goes a picture tells a thousand words. The pictures suggest that the defendant had a love relationship with the woman depicted therein. What the pictures do not prove is that the defendant committed adultery with the said woman. I further find as far-fetched the version of the defendant that the diapers and the panty liners found by the plaintiff in the defendant's dustbin as belonging to the neighbour who allegedly dumped his rubbish in the defendant's dustbin. I am tempted to conclude that even the defendant could not have believed the truthfulness of his version of the dustbin.

[75] The rejection of the above evidence of the defendant, however, does not catapult the plaintiff's case to an entitlement to the claim of forfeiture of his benefit in the property.

[76] What became obvious at least from the plaintiff's evidence is that the continuous existence of the union of marriage between the parties is untenable. I ascribe to the view that no party must be forced to remain in a marriage, neither should one force oneself on a marriage.

Conclusion

[77] In view of the findings and conclusion reached hereinabove, I am of the considered opinion that the defendant's fault caused the marriage to be irretrievably broken down. Notwithstanding the said finding, I hold that the plaintiff failed to establish on a balance of probabilities that she is entitled to an order that the defendant must forfeit all the benefits that he might derive from the marriage in community of property.

[78] As a matter of fact, it was the plaintiff's evidence, all said and done, that the defendant contributed to the common household.

#### Costs

[79] It is well established that costs follow the event. The defendant managed to ward off the plaintiff's claim and ordinarily would have been entitled to disbursements, but in *casu*, it is the defendant's behaviour that caused the marriage to breakdown irretrievably. In the premises I consider it just to deny the defendant costs in any manner or form.

#### Order

[80] 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 that the defendant forfeit any benefits that he might derive from their marriage in community of property in respect of Erf 669, Budget Homes, Okahandja, and in respect of the motor vehicles: a Toyota Corolla with registration number N 121585 W and a Toyota Vitz with registration number N 182503 W, is dismissed.

3. There shall be a division of the joint estate.
4. Each party must pay his or her own costs of suit.
5. The matter is regarded as finalised and removed from the roll.

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O SIBEYA  
Judge

APPEARANCES:



FOR THE PLAINTIFF:

L Mufune

Of Ueitele & Hans Inc, Windhoek

FOR THE DEFENDANT:

In person