



'Unreportable'

CASE NO.: I 3766/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

IMMANUEL LEOPOLDT FRANS

Plaintiff

and

LUCIA FRANS (born SHIDUTE)

Defendant

CORAM: PARKER J

Heard on: 2012 June 4

Delivered on: 2012 June 25

JUDGMENT

PARKER J: [1] In this matrimonial matter the plaintiff husband instituted action for the order appearing in the plaintiff's particulars of claim. The defendant defends the action and institutes a counterclaim in terms appearing in her amended counterclaim. It is important to note the following at the outset. Up to 14 October 2011 Tjitemisa & Associates represented the plaintiff. The plaintiff has since then represented himself. The defendant's first legal representatives,

Ueitele & Hans Legal Practitioners, withdrew in July 2010. Conradie and Damaseb replaced them only to withdraw on 8 May 2012. But before withdrawing, the legal representatives had submitted to the managing Judge a joint case management report. A pre-trial conference was set down for 27 October 2011.

[2] As it was difficult for the parties to meet in order to compile the parties joint proposed pre-trial order the defendant per se submitted a separate proposed pre-trial order, and an order was made by the managing judge in respect thereof. It is worthy of note to mention that both parties have submitted their individual affidavits in terms of rule 37(6)(b) of the Rules.

[3] From the papers, the following relevant facts are not in dispute. The parties are married in community of property. The defendant acquired the immovable property at Erf. No. 4401, Kuisebmond, Walvis Bay prior to their marriage. The following are listed as being facts in dispute, namely, (1) which party is guilty of desertion, (2) whether the plaintiff should forfeit all benefits in respect of Erf. No. 4401, Kuisebmond, Walvis Bay, (3) whether the defendant was the sole contributor to the joint estate, and (4) whether the plaintiff left the common home in May 2008?

[4] At the trial, the plaintiff testified in his own case; so did the defendant in her own case. They did not call witnesses to testify in support of their individual cases. I shall consider only the relevant versions that conduce to the determination of the factual issues in dispute that they have called on the Court to resolve at the trial, as set out previously.

[5] I shall deal first with issue (1) and issue (4) together because they are intertwined. The uncontradicted testimony of the defendant is simply this. The plaintiff was ordered by the Walvis Bay magistrates court in terms of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003) to leave the matrimonial home in terms of a protection order granted by the magistrates court. The court granted the order because the court was satisfied that the plaintiff (a) physically abused the defendant by assaulting her, (b) economically abused the defendant because he withdrew money from the defendant's bank account without the defendant's consent, and (c) emotionally, verbally or psychologically abused the defendant by swearing at her and insulting her.

[6] Upon the evidence, I am satisfied that the plaintiff has constructively and/or maliciously deserted the defendant because the plaintiff's conduct which the magistrates court, Walvis Bay, condemned, as indicated previously, has rendered cohabitation dangerous or intolerable for the defendant. And on the facts I find that the desertion is wilful and malicious (see *Malcom v Malcom* 1926 CPD 235). This disposes of issue (1) and issue (4). And so, on the evidence I grant judgement for the defendant, that is, plaintiff in reconvention, in her counterclaim. It will serve no useful purpose, on the facts and in the circumstances of the case, including the aforementioned protection order, to make a restitution order. I therefore, exercise my discretion and grant a final order of divorce based on the defendant's counterclaim.

It has been said that a successful plaintiff in action for divorce is entitled at his or her option, and as of right, to an order for division of the joint estate, or to an order declaring the defendant to have forfeited the benefits of the marriage. The court has no discretion to withhold such an order (CTM Nathan, *South Africa Divorce*

Handbook (1970): p 28, and the cases there cited). In the instant case, the defendant, as plaintiff reconvention, has been successful and she seeks an order declaring the plaintiff (defendant in reconvention) to have forfeited all benefits of the marriage in community of property as respects Erf. 4401, Kuisebmond, Walvis Bay. I have no discretion to hold such an order, and so I grant it. This disposes of issue (2) and issue (3) as they relate to the immovable property of the joint estate. As to the movable property of the joint estate, the proposed pre-trial order records that it is the defendant's prayer that an order be made that each party retains the movable property presently in his or her possession. On the evidence, I have no good reason not to make such an order. This disposes of issue (2) and issue (3) in relation to the moveable property of the joint estate.

[8] I now proceed to consider the other ancillary issues, namely, custody and control of the minor child. The oral evidence and the parties' individual affidavits in terms of rule 37(6)(b) of the Rules converge on this, namely, that the Court makes an order that the custody and control of the minor child be awarded to the defendant, subject to the plaintiff's right of reasonable access. I have no good reason not to grant such an order.

[9] I now pass to consider the issue of maintenance of the minor child. In her counterclaim the defendant seeks orders that the plaintiff pays N\$800.00 to the defendant in respect of the maintenance of the minor child. In his papers and in his testimony during the trial and in his rule 37(6)(b) affidavit the plaintiff states that he could afford only N\$650.00. During her testimony, the Court asked the defendant upon what basis did she think the plaintiff could afford N\$800.00. She did not have any good reason, only to say that in her view, the plaintiff could afford to give the amount of N\$800.00 for maintenance of the minor child. I am not

persuaded that the plaintiff can afford the N\$800.00. In any case, taking into account the fact that the plaintiff has forfeited all benefits of the marriage as respects the immovable property, I think it is just and reasonable to order the plaintiff to pay maintenance in the amount of N\$600.00 per month in respect of the minor child. In the same vein, the defendant must continue to retain the minor child on her medical aid scheme as she has been doing since the plaintiff removed the minor child from his medical aid scheme, particularly in view of the plaintiff's statement in his rule 37(6)(b) affidavit that 'now I am busy cancelling my whole medical aid scheme due to my financial constraints'.

[10] In the result I make the following order:

1. There is judgment for the defendant in her counterclaim.
2. A final order of divorce is hereby granted.
3. The plaintiff forfeits all benefits in respect of Erf. 4401, Kuisebmond, Walvis Bay, and that this property must be registered in the name of the defendant as her sole and exclusive property, and further that the Deputy Sheriff for the District of Walvis Bay is hereby authorized to sign all documents necessary and required to effect the transfer of the aforementioned Erf. 4401, Kuisebmond, into the name of the defendant.
4. The custody and control of the minor child, Precious Charity Frans, is awarded to the defendant, subject to the plaintiff's right of reasonable access.

5. The plaintiff must pay N\$600.00 per month to the defendant for the maintenance of the minor child, Precious Charity Frans.
6. The defendant must retain the minor child, Precious Charity Frans, on her medical aid scheme.
7. Each party shall retain the moveable property presently in his or her possession.
8. There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF: In person

COUNSEL ON BEHALF OF THE DEFENDANT: In person