REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2662/2014

In the matter between:

[U……] [D……..] **PLAINTIFF/RESPONDENT**

And

[K……] [G……..] [D……] **DEFENDANT/APPLICANT**

Neutral citation: **[***D……] v [D…..]* (I 2662-2014) [2016) NAHCMD 131 (28 April 2016)

Coram: UNENGU AJ

Heard: **08 March 2016**
Delivered: **28 April 2016**

Flynote: Husband and wife – Marriage out of community of property accrual system applicable – Defendant (husband) applied to Court for an order to exclude certain assets from the accrual – Defendant (applicant) alleging that the assets to be excluded from the accrual are a donation from the employer - Held that the applicant

failed to discharge the onus on a balance of probabilities that the assets sought to be excluded from the accrual are a donation.

Summary: The applicant (defendant) and the respondent (plaintiff) were married to each other out of community of property (Ante-nuptial Contract) but with accrual in place – After the divorce initiated by the respondent (plaintiff) and during the process of giving effect to contents of the Ante-nuptial Contract, the applicant (defendant) by notice of motion sought an order from Court to exclude erven 3….., 3…., 4…. and erf [5…….] from the accrual on the ground that the erven are a donation from the employer – However, the Court found that the applicant failed to discharge the onus to proof on a balance of probabilities that the erven were a donation and dismissed the application with costs on attorney and client's scale.

ORDER

(i) The application, specifically the relief sought in para 2.2 of the notice of motion, is dismissed with costs calculated on the scale of attorney and own client.

(ii) Erven 3……, 3…... 4….. And Erf 5…… are included in the accrual.

JUDGMENT

UNENGU AJ:

[1] In this application, the defendant (applicant) is seeking an order against the plaintiff (respondent) in the following terms:

‘1. That certain of his assets are excluded from the accrual (system) stipulated in the Ante-nuptial Contract No. 4 200/1985 (more specifically clause 9(a), (b) and 10 thereof as per list marked as Annexure “KGD’ annexed hereto.

2. That the plaintiff shall file her opposing affidavit on or before 2 November 2015.

3. That the defendant shall file his Answering affidavit on or before 16 November 2015.

4. That the matter is postponed to 17 November 2015 at 15h15 for status hearing.

5. That the costs in this matter will be costs in the cause.

6. Alternative relief.’

[2] Annexure ‘KGD’ referred to in para 1 above is a list of assets the defendant (applicant) wants to be excluded from the accrual and they are:

1. House situated on Erf 7…… O……
2. Erven 3…... 3…... 4….. and Erf 5……, O…….
3. Tools and Workshop
4. Motor vehicles (VW Kombi, Suzuki 1…….; Yamaha 6……; Golf Citi, (N……) Golf Estate (N……) and Nissan N…… (N…….)
5. All furniture, inventory and movables situated on Erf 7……. O……
6. All fire-arms
7. Capricon Asset Investment (Bank Windhoek) N$3 512-90)

[3] For the sake of convenience and for ease of reference, the defendant will be referred to as the applicant and the plaintiff as the respondent.

[4] The applicant and the respondent were husband and wife who married to each other on the 9th November 1985 at Omaruru out of community of property with the accrual regime. The consequence of such a marriage is that they did not have a joint estate. However, they decided to make their marriage subject to the accrual system.

[5] Clause 7 of the Ante-nuptial Contract provides as follows:

'The marriage between the proposed spouses shall be subject to the accrual system insofar that if the marriage is dissolved by divorce or as a result of the death of one or both of the proposed spouses, the spouse whose estates shows no accrual or a smaller accrual than that of the other spouse in the case of the death of a proposed spouse, his or her executor shall have a legal claim against the other proposed spouse, his or her estate for an amount equal to the half of the difference between the accrual of the respective estates of the proposed spouses.'

[6] In clause 7 above, the proposed spouses, in this case the applicant and the respondent, agreed how their respective estates, in the event of their marriage is dissolved by divorce or death will be divided to give effect to the accrual system.

[7] Meanwhile, clause 9 of the Ante-nuptial Contract deals with which amount of the proposed spouse will be regarded as the accrual estate.

[8] In the meantime, that is, on 01 December 2014 the bond of marriage which subsisted between the applicant and the respondent was dissolved through a divorce. It is this divorce which triggered the division of the accrual estate as contemplated in the Ante-nuptial Contract in clause 7, 9 and 10 thereof.

[9] During the process of implementing and enforcing the terms agreed upon in the Ante-nuptial Contract, the parties filed a joint case management report dated 16 December 2015.

[10] In the Case Management Report, the parties agreed with all the calculations of the assets and liabilities of the respondent set out in annexure 'A' and 'B' to the report. The only items in dispute were items (assets) listed under item 1 ie Dörgeloh Schmidt Foods CC whether the CC formed part of the applicant's estate or not. The Case Management Report was adopted as such.

[11] In spite of the agreement in the Case Management Report under the heading 'THE NATURE AND BASIS OF THE RESPECTIVE CLAIMS AND DEFENCES' wherein it was expressly stated that the parties are in agreement that the issues in dispute pertain to the accrual and the calculations thereof set out in annexure 'A' and annexure 'B' and that the only issue in dispute is whether Dörgeloh Schmidt Foods CC formed part of the applicant's estate or not, the applicant by notice of motion approached the Court seeking an order to exclude assets stipulated in the Ante-nuptial Contract clauses 9(a), (b) and 10 from the accrual system. The assets he sought to be excluded are contained in annexure 'KGD', which I have mentioned in para 2 of the judgment.

[12] The reason he gives for the exclusion of the assets from the accrual, is that they are donations. The respondent agrees in her answering affidavit that some of the items the applicant seeks an order for exclusion from the accrual, are indeed donations from the applicant's parents. However, she denied that erven 334, 335, 450 and 592 are a donation from their employer, therefore, should be excluded from the accrual system. Respondent was in fact not happy that the applicant included in the notice of motion assets which the parties already agreed not to form part of the accrual. Some of such assets are donations the applicant got from his parents and for which copies of Title Deeds were discovered by the applicant and attached to the founding affidavit.

[13] At the hearing of the application Mr Brandt appeared for the applicant and Ms Duvenhage for the respondent. Both counsel prepared and submitted written heads of argument for the Court which counsel expanded on during oral submissions. I must at this stage point out that Ms Duvenhage raised points *in limine* against issues the applicant included in the notice of motion, issues which the parties already agreed to be excluded from the accrual. According to her, it was unnecessary for the applicant to include assets listed as items 1, 3, 4, 5, 6 and 7 on the annexure 'KGD' to ask the Court for an order to exclude them.

[14] Mr Brandt conceded and agreed with Ms Duvenhage that the only issue to be considered and decided on by the Court is the immovable property situated in Omaruru whether that immovable property be included or excluded from the accrual calculations.

[15] In view of the concession made and not persisting with his initial prayers in the notice of motion, I take it that the applicant had abandoned the request for an order on those issues which are not in dispute between the parties except for the immovable property on erven 334, 335, 450 and 592. That being the case, a special costs order prayed for by Ms Duvenhage is not granted at this stage of the proceedings. The only costs order which I intend to make is a costs order at the end of the hearing to the successful party.

[16] Coming back to the dispute or the issue in dispute, namely whether the so-called Industrial property in Omaruru comprising erven 334, 335, 450 and 592 be excluded or included from accrual, there are certain things to be complied with. The first is that the applicant has to prove on a balance of probabilities that the erven in question were donated to them by the employer. The evidence of the applicant and the copy of the Deed of Transfer T 6983/2004 marked DGK tell a different story.

[17] According to the Deed of Transfer the erven were sold for two hundred and thirty thousand Namibian dollars (N$230 000.00) but the transfer duty was paid on the amount of N$1,35 million, 105 million being the fair value of the immovable property. This fact was also confirmed by Mr Brandt in his oral submission. He said that, initially, the property was offered to the applicant and his partner, a certain Mr Schmidt for an amount of N$650 000.00 (six hundred and fifty thousand), which offer they declined because they could not afford the amount. He said further that the parties then met with the representative of the company where another offer was made to them to transfer the factory into a CC provided that they paid six hundred and fifty thousand Namibia dollars.

[18] However, to afford the amount, two residential houses, namely Erf 240 and 279 plus two company vehicles a VW Microbus and a Toyota double cab were given to them to sell. After the sale of these erven and the two vehicles, an amount of seven hundred and ten thousand Namibian dollars was paid for the factory. This amount was not accepted by the Deeds Office to be the correct value of the factory. As a result thereof, a sworn valuator was appointed who provided the value of the immovable property for purpose of transfer duty. See s 5(1) of the Transfer Duty Act[1].

[19] Section 5 of the Act provides:

'5(1) The value of on which the duty shall be payable, shall subject to the provisions of section –

(a) Where consideration is payable by the person who has acquired the property, be the amount of that consideration; and

(b) Where no consideration is payable, be the declared value of the property.'

[20] In the present matter, the applicant clearly wanted to avoid payment of the correct transfer duty of the property by not declaring the correct value of the property for registration. The Transfer Duty Act, grants the Permanent Secretary of the Lands and Resettlement powers to determine a fair value of a property when is of the opinion that the consideration payable or the declared value is less than the fair value of the property – which power the Permanent Secretary exercised in this case.

[21] I pointed out above already that in his version the applicant self admitted that the Industrial properties situated in Omaruru were a sale intended to be a donation. This is the evidence of Mr Roy Schmidt dated 2 September 2015 marked as 'DGK3' confirmed under oath by Nicolai Dörgeloh. Mr Dörgeloh when referring to the Deed of Transfer said that the purchase price of the erven was two hundred and thirty thousand. A donation is a donation no money or consideration is paid by the donee to the donor.

[1]Act No. 14 of 1993.

[22] Ms Duvenhage referred the Court to a few cases to support her contention with regard donations. One such case is *Kotze v Kotze* (I 2572/2011) [2013] NAHCMD 96 (9 April 2013) delivered 9 April 2013 wherein Ueitele J granted absolution from the instance and held that the defendant (husband) failed to discharge the *onus* on him to prove the donation. In the present case, I repeat again and agree with Ms Duvenhage that even the Title Deed itself states that the property was sold not donated. The applicant did not present any evidence clarifying why a Title Deed of Sale was issued by the Deeds Office instead of a Deed of Donation.

[23] Having regard to what have been said above – the reasons and conclusions arrived at in the matter, I find that the applicant failed to discharge the onus resting on him on a balance of probabilities that the erven 334, 335, 450 and 592 are a donation therefore should be excluded from the accrual.

[24] There is still the issue of costs. I pointed out before in the judgment that the issue of costs will be considered at the end of the judgment. The general rule is that the successful party should be awarded costs, unless good reasons exist to justify a departure therefrom. There is no such good or any other reasons placed before me in this case to depart from the general rule. Therefore, the successful party, in this instance, the respondent is entitled to costs.

[25] I agree with Ms Duvenhage that a special costs order should be awarded against the applicant for raising issues which have been agreed upon by the parties during the judicial case management proceedings – resulting in unnecessary wasting of time by the respondent through answering allegations which were no longer in dispute between parties. This type of conduct has to be discouraged through sanctions of costs orders at a high rate.

[26] In that regard and following the reasons and conclusions stated above, I make the following order:

(i) The application, specifically the relief sought in para 2.2 of the notice of motion, is dismissed with costs calculated on the scale of attorney and own client.

(ii) Erven 334, 335, 450 and Erf 592 are included in the accrual.

E P UNENGU
Acting Judge

APPEARANCES

PLAINTIF/RESPONDENT: H Duvenhage

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Etzold – Duvenhage, Windhoek

DEFENDANT/APPLICANT: C Brandt

Chris Brandt Attorneys, Windhoek