

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1839/2015

In the matter between:

**AN**

**PLAINTIFF**

And

**FN**

**DEFENDANT**

**Neutral citation:** *AN v FN* (I 1839/2015) [2017] NAHCMD 154 (6 June 2017)

**Coram:** UNENGU AJ

**Heard:** 15 February 2017, 9 March 2017

**Delivered:** 6 June 2017

**Flynote:** *Husband and Wife* – Divorce – Claims by Plaintiff – Counterclaim by Defendant – Malicious Desertion – Married in community of property.

*Husband and wife* – Spousal Maintenance – Defendant in need of such maintenance – proved on balance of probabilities – Court exercised its discretion in awarding such maintenance as plaintiff does not earn a regular income.

**Summary:** This is a divorce matter instituted by the plaintiff (husband) against the defendant (wife) based on allegations of constructive desertion. The wife has entered a notice of intention to defend the action and in return instituted a counterclaim, also claiming an order for restitution of conjugal rights and failing compliance therewith, a decree of divorce on the basis of malicious desertion.

The main issues determined for adjudication before this court were: (a) which party has succeeded in discharging his or her *onus* of proving malicious desertion which would result in the granting of a restitution order, (b) whether the defendant is entitled to 50% of the proceeds from the sale of the motor vehicle, (c) whether the defendant is jointly liable for 50% of the close corporation's debts and (d) whether the defendant is entitled to spousal maintenance.

*Held* that the plaintiff's version of why the parties' marriage broke down is unlikely and untruthful.

*Held* that the defendant discharged the onus resting on her in respect of her counterclaim in that the plaintiff's conduct amounts to malicious desertion and that he acted with the intention to bring an end to the marital relationship between the parties.

*Held* that the defendant is not jointly liable with the plaintiff for the close corporation's debts.

*Held* that no sufficient evidence was produced to indicate the true value of the motor vehicle at the time of the sale and accordingly it is not conclusive whether the sale thereof was at a loss to the joint estate.

*Held* that a case was made out for spousal maintenance in favour of the defendant but the court exercised its discretion in setting the amount.

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**ORDER**

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1. The plaintiff's action for divorce against the defendant is dismissed with costs.
2. The matter is referred to the case management roll of the Honourable Justice Geier
3. The court grants judgment for the defendant for an order for the restitution of conjugal rights and orders the plaintiff to return to or receive the defendant on or before, the **18<sup>th</sup>** day of **July 2017**, failing which, to show cause, if any, to this court on the **15<sup>th</sup>** day of **August 2017** at **08h30**, why:
  - 3.1 The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
  - 3.2 Custody of the minor child born between the parties should not be awarded to the defendant subject to the plaintiff's right of reasonable access.
  - 3.3 The plaintiff should not pay maintenance in the amount of N\$1 000.00 per month in respect of the minor child, which amount is to escalate at a rate of 8 % per annum on the anniversary date of the final order of divorce.
  - 3.4 The plaintiff should not pay all pre-school, primary and secondary school expenses as well as extra-mural activities of the minor child. The defendant has to consult with the plaintiff about the choice of school of the minor child.
  - 3.5 The plaintiff should not pay the amount of N\$1 000.00 per month towards the accommodation of the defendant, which shall be inclusive of water expenses, for a year from the date of the final order of divorce.

3.6 The joint estate should not be divided.

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## JUDGMENT

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UNENGU AJ:

### Introduction

[1] The plaintiff instituted divorce proceedings against the defendant on the 11 June 2015. The parties were married in community of property and are still so married. One child was born prior to the marriage and was subsequently legitimized by the marriage.

[2] In terms of the action instituted, the plaintiff claims that the defendant constructively deserted him and accordingly he seeks an order for the restitution of conjugal rights, failing compliance therewith, a final order of divorce.

[3] The defendant defended the action and lodged a counterclaim claiming that the plaintiff maliciously deserted her and accordingly she seeks an order for the restitution of conjugal rights, failing compliance therewith, a final order of divorce; as well as maintenance for their minor child and herself.

[4] After the matter was case managed, the only issues still in dispute and subsequently ripe for trial were the following:

1. who was responsible for the breakdown of the marriage,
2. division of the joint estate,
3. whether the plaintiff had to obtain consent from the defendant before he could sell the vehicle,
4. whether the defendant is responsible for 50% of the debt incurred by the plaintiff as a co-owner of the close corporation, and
5. whether the defendant is entitled to maintenance from the plaintiff.

[5] The above points fall within ambit of issues to be adjudicated upon by this court and was set down for trial from 15 – 16 February 2017.

### Background

[6] The plaintiff is AN, an adult male, self-employed businessman, residing in the Republic of Namibia. The defendant is FN, an unemployed adult female, residing in the Republic of Namibia.

[7] The parties were married on the 04 August 2012 in Swakopmund, in community of property. There was one minor child born prior to the marriage and was subsequently legitimized by the marriage.

[8] The plaintiff in his particulars of claim alleges constructive desertion in that the defendant:

- '6.1 physically abused the plaintiff by assaulting him on a regular basis;
- 6.2 verbally abused the plaintiff on a regular basis;
- 6.3 engaged in unnecessary and unsolicited quarrels with the plaintiff;
- 6.4 emotionally abused the Plaintiff for the duration of the marriage;
- 6.5 did not communicate properly with the plaintiff;
- 6.6 tore his clothes and destroy his personal belongings
- 6.7 he did not show any respect towards the Plaintiff.'<sup>1</sup>

[9] Accordingly, the plaintiff prays for an order in the following terms:<sup>2</sup>

- '1 (a) Restitution of Conjugal Rights and failing compliance therewith,  
(b) A final Order of Divorce;
- 2. Plaintiff shall pay maintenance in the amount of N\$1 000-00 per month in respect of the minor child directly to the plaintiff which amount is to escalate at a rate of 8 % per annum on the anniversary date of the final order of divorce.

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<sup>1</sup> Pleadings bundle, pages 5 – 6.

<sup>2</sup> *Ibid.*

3. Plaintiff shall pay all pre- school, primary and secondary school expenses as well as extra mural activities of the minor child. The defendant has to consult the plaintiff about the choice of school of the minor child.
4. The plaintiff shall pay N\$ 2500.00 per month towards the accommodation of the defendant which shall be inclusive of water expenses.
5. Division of the joint estate.
6. Cost of suit. (only if the action is defended)
7. Further and/or alternative relief.'

[10] The defendant responded to these allegations by not only filing her plea<sup>3</sup>, but also filing a counterclaim alleging malicious desertion on the plaintiff's part, in that:

- '3.1 Plaintiff fails/refuses to communicate with Defendant meaningfully;
- 3.2 Plaintiff left the common home since the year 2014;
- 3.3 Plaintiff is engaged an extra marital affair with one HH with whom he currently resides;
- 3.4 Plaintiff bought a vehicle for the family which he subsequently transferred into the name of the said HH without the consent of the Defendant;
- 3.5 Despite the Defendant's efforts to resolve the problem between the parties, the Plaintiff refuses to change and reconcile.<sup>14</sup>

[11] Accordingly the defendant in her counterclaim seeks an order in the following terms:

- '1 (a) An order for the restitution of conjugal rights and failing compliance therewith,  
(b) A final decree of divorce;
2. An order that the Plaintiff shall pay maintenance in the amount of N\$ 2 000.00 per month in respect of the minor child, which amount is to escalate at a rate of 8 % per annum on the anniversary date of the final order of divorce;

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<sup>3</sup> Pleadings bundle, pages 19 - 21.

<sup>4</sup> Pleadings bundle, page 22.

3. An order that the Plaintiff shall pay all pre-school, primary and secondary school expenses as well as extra mural activities of the minor child. The defendant has to consult the Plaintiff about the choice of school of the minor child;
4. An order that the Plaintiff shall pay the amount of N\$ 2 500.00 per month towards the accommodation of the Defendant which shall be inclusive of water expenses;
5. Division of the joint estate;
6. Cost of suit;
7. Further and/or alternative relief<sup>5</sup>

[12] As the matter became defended, it was placed on the judicial case management roll. Unfortunately, the parties failed to settle during mediation and accordingly a pre-trial conference was held. In their pre-trial report, which was adopted and made an order of the court, the parties agreed on the aspect of custody and control of their minor child as well as maintenance of their minor child.

[13] The parties however could not settle the following issues:

1. Whether the plaintiff is the guilty party and responsible for the break-up of the marriage;
2. Whether the defendant is the guilty party and responsible for the break-up of the marriage;
3. Division of the joint estate;
4. Whether plaintiff required the consent of the defendant to sell the vehicle;
5. Whether defendant is liable/responsible for one half of the debt of the business of plaintiff which amounts to N\$ 1 345 654.00;
6. Whether defendant had to serve her counterclaim on HH since she is referred to by name in the counterclaim;
7. Whether defendant is entitled to receive maintenance from the plaintiff.<sup>6</sup>

## Merits

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<sup>5</sup> Pleadings bundle, page 23.

<sup>6</sup> Joint proposed pre-trial order filed 24 November 2016, page 3 thereof. Joint proposed pre-trial order made an order of court on 06 December 2016.

### *Malicious desertion/Constructive desertion*

Legal principles

[14] In the case of *Kagwe v Kagwe*, the court stated the following:

‘Three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: first that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant. The onus of proving both the factum of desertion and the animus deserendi rests throughout upon the plaintiff. The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.’<sup>7</sup>

[15] There are two grounds for divorce in our common law namely:

- 1) adultery and
- 2) malicious desertion, which includes constructive desertion.

[16] Since the parties do not rely on adultery as a ground of divorce, I will not deal with that ground.

‘Nathan opines that:

“Malicious desertion takes places when a spouse, without just cause, either physically leaves or remains away from the matrimonial home intending not to return to it, or otherwise so comports himself as to evince an intention to bring the marriage relationship to an end. Constructive desertion is a species of malicious desertion, it takes place when the defendant with intent to put an end to the marriage does not leave the matrimonial home himself but is guilty of conduct which either compels the other spouse to do so or renders it clear that the marriage relationship can no longer continue”.’<sup>8</sup>

[17] *Hahlo* states that malicious desertion consists of two elements, namely:<sup>9</sup>

- a) *factum of desertion* and

<sup>7</sup> (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), paragraph 9.

<sup>8</sup> *Likando v Likando* (I 1384/2011) [2013] NAHCMD 265 (30 September 2013), paragraph 11 – 13.

<sup>9</sup> Halo, H R (3<sup>rd</sup> Ed).1969.*The South African Law of Husband and Wife*.Cape Town: Juta & Co Ltd, page 387.



b) *animo deserandi*.

[18] Furthermore, there are four forms of malicious desertion, namely:<sup>10</sup>

- 1) Actual desertion - where one party actually leaves the matrimonial home with the intention not to return.
- 2) Constructive desertion - when an innocent spouse leaves the matrimonial home, the defendant with the intent to bring the marital relationship to an end drives the plaintiff away by making life in the matrimonial home dangerous or intolerable for him or her. *Hahlo* proceeds and argues that three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:
  - (i) the consortium of spouse must have come to an end as the result of the plaintiff's having left the defendant;
  - (ii) it must have been the defendant's unlawful conduct that caused the plaintiff to leave; and
  - (iii) the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.
- 3) Refusal of marital privileges, and possibly,
- 4) Sentence of death or life imprisonment.

#### Arguments

[19] On this aspect, the plaintiff himself testified that the defendant had abused him, inflicting physical, emotional and verbal abuse; and as a result of such intolerable circumstances, he left the common home in 2014 and moved in with another third party, namely Ms. HH.<sup>11</sup> The defendant in her testimony denied abusing the plaintiff and questioned such abuse as there was no medical proof produced to corroborate his allegations.<sup>12</sup>

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<sup>10</sup> *Likando* case, paragraph 13.

<sup>11</sup> Record of proceedings, pages 7 - 8.

<sup>12</sup> Record of proceedings, pages 49.

[20] In addition, Ms. Ntelamo-Matswetu, counsel for the defendant, argued that the plaintiff never denied his adulterous affair with Ms. HH and that he moved into the house of Ms. HH immediately after leaving the common home in 2014. Also, counsel points out to this court that that the intention of the plaintiff was made very clear, that is to desert the defendant, in that he did not try to resolve the 'issues' between the parties or seek outside help, but rather left the defendant and ran into the arms of another woman, namely Ms. HH. The plaintiff however counters this argument, alleging that his affair had nothing to do with him leaving the common home. He explained in his testimony that his relationship with Ms. HH started only after he left the common home and moved in with Ms. HH, after his wife, the defendant, had abused him.

[21] Further, the defendant placed it on record that the plaintiff left the common home as a result of his adulterous affair with Ms. HH and not due to the fictitious abuse allegations propounded by the plaintiff. The defendant acknowledged that the plaintiff was intimately involved with Ms. HH, however, would condone his behaviour and reconcile with him should he put an end to such adulterous affair. The plaintiff testified that he has no intention to reconcile with his wife, the defendant, as a result of the abuse he endured and that he had moved on.

Who is responsible for the breakdown of the marriage?

[22] It is common cause that the court has jurisdiction in this matter and that the parties were married and are still so married. The remaining and therefore the main question which arises is whether the plaintiff has succeeded in discharging his onus of proving constructive desertion which would result in the granting of a restitution order.

[23] The *onus* of proving both the *factum* of desertion and the *animus deserendi* rests throughout upon the plaintiff.<sup>13</sup> It is common cause between the parties that the plaintiff left the common home in 2014, so he is the deserter and not the defendant. However, the reason why the plaintiff left is pivotal in establishing whether or not he is the guilty party or whether the defendant is. It is apparent from the evidence

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<sup>13</sup> *Munyelutha* case, paragraph 11.

before me that the parties are playing the 'blame game' as to who is responsible for breakdown of the marriage. In other words, two mutually destructive versions have been placed before me as to why the plaintiff left the common home and I now have to decide whether the plaintiff or the defendant is the guilty party. In the case of *Munyelutha v Munyelutha*,<sup>14</sup> the court was faced with two mutually destructive versions as to why the marriage broke down. The court in deciding which version it should accept stated that it should decide which version to believe on the probabilities and as a starting point it should look at the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true.<sup>15</sup>

[24] Ms. Petherbridge, counsel for the plaintiff, tried to make out a case that the plaintiff left the common home as the defendant made it intolerable for him to stay there as she was abusing him. Further, the plaintiff himself testified that when he left the common home he moved in with Ms. HH, at that stage only a friend, not in a romantic relationship yet. Ms. Ntelamo-Matswetu, counsel for the defendant, argued that there was no abuse whatsoever by the defendant; but rather that the plaintiff moved out of the common home in order to move in with and continue his love affair with Ms. HH. It is very difficult for this court to accept that the plaintiff and Ms. HH were only friends before he left the common home. It is more likely that the plaintiff opted to move out of the common home because he wanted to move in with Ms. HH, with whom he was and is still romantically involved with. The court also rejects the plaintiff's version that he was abused by the defendant, because there is no evidence to corroborate his allegations, whether it be medical evidence or someone to testify that the plaintiff confided in him/her about the alleged abuse, etc.

[25] Consortium only came to an end in April 2016, after the plaintiff and the defendant travelled to the north,<sup>16</sup> accordingly after the alleged abuse which led the plaintiff to leave the common home in 2014. It is for that reason that the court does not accept the plaintiff's allegation that it was the defendant's abuse which caused the plaintiff to leave the common home and accordingly the defendant could not be said to have had a fixed intention to put an end to the marriage. Therefore, his version of why the parties' marriage broke down is unlikely and untruthful. On the contrary, she (defendant) offered during her testimony that she would condone the

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<sup>14</sup> (I 201/2013) [2014] NAHCMD 173 (04 June 2014).

<sup>15</sup> *Munyelutha* case, paragraph 22.

<sup>16</sup> Record of proceedings, p 69.

plaintiff's adultery if he (plaintiff) puts an end to the affair. The court therefore finds that the plaintiff has maliciously deserted the defendant and that the defendant discharged the onus resting on her in respect of her counterclaim in that the plaintiff's conduct amounts to malicious desertion aimed at bringing an end to the marital relationship between the parties.

To conclude this point, it has been established that both parties do not rely on adultery as a ground of divorce, but rather malicious and/or constructive desertion. The plaintiff has during his testimony expressed the view that he has no intention to return to the common home and reconcile with the defendant. The defendant on the other hand has tendered an offer to the plaintiff that she would welcome him back into their home and forgive his adulterous behaviour if he (plaintiff) puts an end to the relationship with Ms. HH. As I have already established that the plaintiff has maliciously deserted the defendant and the defendant has offered to condone the adulterous affair of the plaintiff, the court under the circumstances dismisses the claim of the plaintiff and upholds the counterclaim of the defendant.

### *Sale of the vehicle*

#### Legal principle

[26] It is common cause between the parties that the plaintiff bought a motor vehicle by way of a hire purchase agreement. The plaintiff fell into a financial dilemma and accordingly sold this vehicle to a third party, namely Ms. HH, without the consent of the defendant. Ms. HH bought such vehicle from the plaintiff for N\$150 000.00. The motor vehicle accordingly formed an asset of the joint estate, but also a debt of the joint estate in respect of the hire purchase agreement.

[27] The issue raised in respect of this vehicle is that the vehicle formed an asset in the joint estate and accordingly the plaintiff should have obtained consent from the defendant to sell the said vehicle, but due to his failure in obtaining such consent, the defendant claims that she is entitled to 50% of the proceeds from the sale of the vehicle. Accordingly, the question that arises is whether the defendant is entitled to 50% of the proceeds from the sale of the vehicle.

[28] *Section 7(1)(e) of the Married Persons Equality Act (MPEA)* states the following:

'7. (1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse –...

(e) alienate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;...'

[29] What is meant by '**effects**' in the above sub-section remains subject to interpretation as the *MPEA* does not provide a definition therefore. *The Law Dictionary* defines the word '**effects**' as '**property**' or '**worldly substance**'.<sup>17</sup> *The Merriam-Webster Dictionary* define the word '**effects**' as '**moveable property**'.<sup>18</sup> *The English Oxford Living Dictionaries* define the word '**effects**' as '**personal belongings**'.<sup>19</sup>

[30] Should a spouse married in community of property alienate certain 'effects' of the common household without his/her spouse's consent, *section 8 of the MPEA* becomes operational, particularly and in this matter *section 8(1)(b)* and *section 8(2) and section 8(6)* applies:

'8. (1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, or without leave granted by a competent court in terms of section 10 or contrary to an order of a court in terms of section 11, and – ...

(b) that spouse knows or ought reasonably to know that he or she will probably not obtain such consent or leave or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall effected in favour of the other spouse –

(i) upon division of the joint estate; or

<sup>17</sup> Available at: <http://thelawdictionary.org/effects/>; last accessed 10 May 2017 [own emphasis].

<sup>18</sup> Available at: <https://www.merriam-webster.com/dictionary/effect>; last accessed 10 May 2017 [own emphasis].

<sup>19</sup> Available at: <https://en.oxforddictionaries.com/definition/effect>; last accessed 10 May 2017 [own emphasis].

(ii) upon demand of the other spouse at any time during the subsistence of the marriage.

(2) In determining for the purposes of subsection (1)(b) whether or not a joint estate has suffered any loss as a result of the alienation of any property, regard shall be had not only to the economic value of the property in question but also to any sentimental replacement value which, at the time of alienation of that property, such property had to the spouse without whose consent the property was alienated.

...

(6) For the purposes of paragraph (b) of subsection (1), if it is proved in any civil proceedings that a spouse entered into a transaction without the consent required in terms of section 7(1), or leave granted in terms of section 10, it shall be presumed, unless the contrary is proved, that he or she knew that he or she would probably not obtain the consent or leave in question.'

[31] In summary, if any '**effects**' forming part of the common household is sold by one spouse married in community of property without the consent of his/her spouse, the latter spouse will have to prove that the joint estate suffered loss and as a result an adjustment in favour of him/her should be effected upon division of the joint estate.

#### Arguments

[32] The plaintiff does not dispute that he had bought a motor vehicle on hire purchase from a financial institution. He further admits that such vehicle was sold to Ms. HH, at a time when he fell into financial difficulty, without the consent of his wife, the defendant. He also testifies that Ms. HH had given him N\$150 000.00 in cash for the said vehicle.

[33] Ms. Petherbridge, counsel for the plaintiff, argues that although the vehicle formed an asset in the joint estate, such vehicle is no more and the proceeds of the sale of that vehicle was used to settle the debts in the joint estate- therefore there was no prejudice suffered. To further her argument, Ms. Petherbridge states that if the defendant claims that the vehicle, which formed part of the joint estate, was alienated without her consent, the burden of proof lies on her (defendant) to establish that she suffered prejudice as a result of the sale of the vehicle, relying on

the case of *Stipp and Another v Shade Centre and Others*<sup>20</sup> as authority. Further, Ms. Petherbridge quotes the case of *Pretorius v Pretorius*<sup>21</sup> outlining that such onus is not easy to discharge in that a wife will have to prove that viewing the circumstances subjectively rendered it improbable that her husband did not have her rights in mind when he entered into the impugned transaction and that he appreciated that it would not prejudice those rights and viewing the matter objectively, she would have to prove that in all circumstances it was unreasonable for her husband to have entered into such transaction. Ms. Petherbridge in conclusion submits that the defendant during evidence as well as on the papers failed to prove that she suffered any prejudice.

[34] Ms. Ntelamo-Matswetu, counsel for the defendant, produces a counter argument placing reliance on *section 7(1)(e) of the MPEA*.<sup>22</sup> She states that this section prohibits a spouse married in community of property to alienate *inter alia* any property forming part of the joint estate without the consent of his/her spouse. In other words, the defendant argues that the plaintiff did require the consent of the defendant before he alienated the vehicle. Be that as it may, the consequence of his action accordingly is found in *section 8(1)(b) of the MPEA*. Counsel for the defendant stated that the plaintiff himself testified that the value of the vehicle was approximately between N\$500 000.00 and N\$600 000.00 at the time of purchase. Furthermore, of this amount N\$200 000.00 was owed to the financial institution at the time of alienation. Accordingly, the value of the vehicle at the time of alienation was N\$400 000.00. Defendant therefore argues that the car was sold to Ms. HH, the plaintiff's girlfriend, for a mere N\$150 000.00 which is an amount far less than the true value of the vehicle. In addition, counsel points out that the plaintiff still benefits from the alienation as it now belongs to his girlfriend. Ms. Ntelamo-Matswetu submits that the defendant has naturally suffered prejudice from the sale of the vehicle and accordingly an adjustment in favour of the defendant's share in the joint estate should be made in the amount of N\$200 000.00 when the joint estate is so divided.

Is the defendant entitled to 50% of the proceeds from the sale of the motor vehicle?

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<sup>20</sup> Case No. SA 29/2006 at paragraph 13.

<sup>21</sup> 1948 (1) SA 250 (A).

<sup>22</sup> Act 1 of 1996.

[35] This court will deem it safe to include the said vehicle as an example of 'effects' in terms of *section 7(1)(e) of the MPEA*. Subsequently, it follows that consent by the defendant was required in respect of the alienation of the vehicle by the plaintiff.

[36] The defendant pointed out to this court that during the testimony of the plaintiff, the plaintiff admitted that the value of the vehicle was somewhere between N\$500 000.00 and N\$600 000.00 at the time when it was purchased. Also, when the vehicle was alienated, it was sold for N\$150 000.00. In respect of the amount owed in terms of the hire purchase agreement, the plaintiff testified that he owed approximately N\$200 000.00 to the financial institution. Accordingly, the vehicle was sold at a loss, meaning that the plaintiff still owed N\$50 000.00 to the financial institution and the vehicle's value was approximately N\$400 000.00.

[37] There was no documentation produced in this court as to the value of the vehicle or with how much the vehicle depreciated in respect of the time it was used before alienation, besides the testimony of the plaintiff, who is not an expert in valuating vehicles. This court also acknowledges that the proceeds from the sale of the vehicle were used to pay the debts of the joint estate and not used by the plaintiff to entertain his mistress for example. In light of the above and due to the fact that no sufficient evidence was provided regarding the value of the vehicle at the time it was alienated, this court cannot make a finding in favour of the defendant, that is that she is entitled to 50% of the proceeds from the sale of the vehicle.

### *Debts of the close corporation*

Legal principle

[38] The plaintiff in this matter is a businessman and it is common cause that he has 50% member's interest in a business called 'Road to success building Construction CC'. During trial and in terms of the evidence produced before the court, it is common cause that the close corporation (cc) was experiencing financial difficulty and had/has serious debts. In *Mwinga v Mwinga*, the court held that marriage at common law creates community of property and profit and loss.<sup>23</sup> Due to this principle, the question that arises here is whether, because the plaintiff has 50%

<sup>23</sup> (I 1439/2013) [2014] NAHCMD 382 (12 December 2014), paragraph 10.



member's interest in the cc and is married to the defendant in community of property, the defendant is jointly liable with the plaintiff for 50% of the debts of the cc?

[39] In terms of the *Close Corporations Act, 26 of 1988*, section 2 thereof refers to the juristic personality of close corporations:

'(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership until it is in terms of this Act deregistered or dissolved.

(3) Subject to the provisions of this Act, the members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation.'<sup>24</sup>

[40] In other words, a CC is a juristic person which means that it is 'a body recognized by the law as being entitled to rights and duties in the same way as a natural or human person, the common example being a company'<sup>25</sup> or can be defined as including 'a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.'<sup>26</sup>

[41] In terms of *section 70 of the CC Act*, 'no member of a corporation shall in the winding-up of the corporation be liable for the repayment of any payment made by the corporation to him by reason only of his membership, if such payment complies with the requirements of section 51(1).'<sup>27</sup> The concept of separate legal personality' of a CC is not absolute. The *CC Act* provides that a member will only be held personally liable for the debts of the CC if it is proven that such member has breached his/her fiduciary duty; if a member has not acted with the necessary care and skill that may be required by such member due to his knowledge and skill; where the member acted recklessly, with gross negligence, or with the intent to defraud any person dealing with the CC; or where a competent court finds that the incorporation of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity; as per the following sections:<sup>28</sup>

<sup>24</sup> Section 2(2) of Act 26 of 1988.

<sup>25</sup> The Free Dictionary by Farlex. Available at: <http://legal-dictionary.thefreedictionary.com/juristic+person>; last accessed on 11 May 2017.

<sup>26</sup> Available at: [http://sociologyindex.com/juristic\\_person.htm](http://sociologyindex.com/juristic_person.htm); last accessed on 11 May 2017.

<sup>27</sup> Section 70 of Act 26 of 1988.

<sup>28</sup> Sections 42(3)(a), 43(1) &(2), 64(1) & (2) and 65 of Act 26 of 1988.

'42. Fiduciary position of members

...

(3)(a) A member of a corporation whose act or omission has breached any duty arising from his fiduciary relationship shall be liable to the corporation for-

- (i) any loss suffered as a result thereof by the corporation; or
- (ii) any economic benefit derived by the member by reason thereof.'

'43. Liabilities of members for negligence

(1) A member of a corporation shall be liable to the corporation for loss caused by his failure in the carrying on of the business of the corporation to act with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience.

(2) Liability referred to in subsection (1) shall not be incurred if the relevant conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.'

'64. Liability for reckless or fraudulent carrying on of business of corporation

(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) Without prejudice to any other criminal liability incurred where any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.'

'65. Powers of Court in case of abuse of separate juristic personality of corporation

Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.'

#### Arguments

[42] Counsel for the plaintiff argued that it is no secret that the CC has large amounts of debts as per the bank statements presented to court. Ms. Petherbridge continues to argue that the defendant only wants to share in the assets and not the liabilities of the business, which in law is not correct as she is jointly liable with the plaintiff for the 50% of the CC's debts by virtue of her marital regime.

[43] Counsel for the defendant disagrees with the arguments presented by the plaintiff because a CC enjoys a separate and distinct legal personality from its members in terms of *section 2 of the CC Act*. Accordingly, the defendant cannot be held liable for the debts of the CC.

Is the defendant liable for 50% of the debts of the close corporation in which her husband is a co-owner?

[44] It is clear that the pleadings before me are that of a divorce, not a winding up application nor pleadings concerning anything regarding the determination of solvency of the CC. Furthermore, the CC Act does provide for a separate legal personality from its members, unless in exceptional circumstances as discussed above, which have not been proven in this instance. I hereby agree with counsel for the defendant that the defendant cannot be held liable, together with the plaintiff, for 50% of the debts of the CC.

*Maintenance for the minor child*

[45] It is not in dispute that custody and control of the parties' minor child should be awarded to the defendant and that the plaintiff shall maintain the parties' minor child. What is in dispute is the amount of maintenance the plaintiff should pay each month to the defendant to be used for the minor child. Plaintiff offered to pay N\$1 000.00 per month, but the defendant rejected this, requesting this court to order the plaintiff to pay N\$2 000.00 per month as maintenance for their minor child.

[46] The court in the matter of *Erastus Hailonga Andreas v Johanna Kathindi*, laid down the principle in respect of maintaining a minor child as follows:

'It has been said authoritatively that in making an order for the maintenance of a child of the family the Court ought to take into account that the duty of supporting a child of the dissolved marriage is common to the divorced parents, and the incidence of the duty in respect of each parent depends upon their **relative means and circumstances** and the needs of the child from time to time.'<sup>29</sup>

[47] The plaintiff is unemployed and the defendant is self-employed at the moment. The plaintiff is a businessman and has always been the breadwinner in the family. The parties agreed that the plaintiff will maintain their minor child, although custody and control is awarded to the defendant subject to the plaintiff's right of reasonable access. In addition, the plaintiff offered to pay all pre-school, primary and secondary school expenses as well as extra-mural activities of the minor child. They also agreed that the defendant has to consult the plaintiff regarding the type of school their minor child will attend.

[48] This court must be fair to both parties, taking into account their circumstances and the needs of the minor child. As the minor child is relatively young and her needs are relatively few at this stage and the plaintiff currently does not earn a regular income, this court will award an maintenance order in the amount of N\$1 000.00 per month, which amount is to escalate at a rate of 8 % per annum on the anniversary date of the final order of divorce.

### *Spousal maintenance*

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<sup>29</sup> Case No.: I 1382/2010 at paragraph 10 [my own emphasis].

[49] Although the *Married Persons Equality Act 1 of 1996*, repealed certain sections of the *Matrimonial Affairs Ordinance 25 of 1955*, section 5(1) of the Ordinance remains in force and effect in Namibia. Section 5 of the Ordinance provides as follows:

'5 (1) The Court granting a divorce may, notwithstanding the dissolution of the marriage –

- (a) Make such an order against the guilty spouse for the maintenance of the innocence spouse for any period until death or until remarriage of the innocence spouse, whichever, event may first occur, as the Court may deem fit.'

In *Negongo v Negongo*, Van Wyk, AJ quoted the matter of *BA De Klerk v CR De Klerk*, where Ueitele J stated that 'I accordingly find that section 5 of Ordinance 25 of 1955 does not prevent the court from granting an order of maintenance in favour of a guilty spouse who is in need of it.'<sup>30</sup>

[50] However, Van Wyk, AJ also acknowledges the principle as laid down by the court in *Neil Ronald Samuels v Petronella Samuels*, in that 'the innocent party is not entitled to be placed in the same position in regard to maintenance as if she were still married to the husband.'<sup>31</sup> The party seeking such maintenance must accordingly prove on a balance of probabilities that he/she is in need of it.<sup>32</sup>

#### Arguments

[51] Ms. Petherbridge, counsel for the plaintiff, submits that the defendant claims N\$2 500.00 in spousal maintenance from the plaintiff. The plaintiff admits that he has always provided for his family and that the defendant's only source of income is derived from selling items along the road. Counsel, however, points out to this court that he is in no position to make a contribution towards the defendant's accommodation at all, due to him experiencing financial difficulty in his business undertaking.

<sup>30</sup> (I 3179-2015) [2016] NAHCMD 230 (9 August 2016), paragraph 7.

<sup>31</sup> *Ibid*: paragraph 12.

<sup>32</sup> *Samuels v Petronella Samuels* Case No. I 902/2008 (judgment on 26 March 2010) (Unreported), para 32.

[52] Ms. Ntelamo-Matswetu, counsel for the defendant, states that a court can only award spousal maintenance to a spouse if he/she has proven on a balance of probabilities that he/she is in need of it. She continues to prove that her client's need is real in that the defendant earns an income by selling sweets and snacks along the road which yields approximately N\$1 000.00 per month. Of this amount, she pays N\$80.00 for their minor child's day-care with an additional N\$50.00 as a registration fee at the beginning of the year. The remaining amount is used to pay for the daily up keep of her family and for water usage. She also expressed that she currently resides in an informal settlement with their daughter and would like to move to a place with better municipal services. In addition, counsel states that the defendant requests this maintenance for only one year which counsel submits is a reasonable period of time and also considering that she is trying to obtain employment which earns her a better income. Subsequently, the counsel submits that she has made out a case for spousal maintenance.

Is the defendant entitled to rehabilitative maintenance from the plaintiff?

[53] I have already established that the plaintiff is responsible for the breakdown of the parties' marriage. As per the *De Klerk* matter cited above, the defendant would be entitled to claim maintenance from the plaintiff. However, that is not the end of the enquiry. The defendant must prove to this court that she is in need of this maintenance and that the plaintiff can afford to pay for such maintenance.

[54] From the facts, it is clear that the plaintiff has always been the breadwinner of the family. Further, the facts indicate that the defendant is unemployed, whereas the plaintiff is self-employed, however, the CC he is a co-owner of is currently in financial difficulty and he derives no income therefrom at this moment. Although this court finds that the defendant earns very little from selling sweets and snacks and accordingly is in need of such maintenance, this court however, also weighs this against the fact that the plaintiff currently does not have a regular income, if at all, as well as the fact that the defendant has not substantiated how she arrived at an amount of N\$2 500.00 in claiming maintenance from the plaintiff. Accordingly, this court deems it fair and just to award the defendant N\$1 000.00 in spousal maintenance, as a contribution towards the defendant's accommodation, per month, inclusive of water expenses, for one year from the date of the final order of divorce.

## Costs

[55] In the case of *Intamba v Tjapaka* the court stated the following in respect of costs:

‘The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court. It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court’s discretion is a wide, unfettered and an equitable one. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. Costs are ordinarily ordered on the party and party scale.’<sup>33</sup>

[56] In this instance the court sees no need to derogate from the general rule that costs should follow the event. Accordingly, the court grants a cost order in favour of the defendant.

## Conclusion

[57] In light of the above reasoning, I make the following order:

1. The plaintiff’s action for divorce against the defendant is dismissed with costs.
2. The matter is referred to the case management roll of the Honourable Justice Geier
3. The court grants judgment for the defendant for an order for the restitution of conjugal rights and orders the plaintiff to return to or receive the defendant on or before, the **18<sup>th</sup>** day of **July 2017**, failing which, to show cause, if any, to this court on the **15<sup>th</sup>** day of **August 2017** at **08h30**, why:

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<sup>33</sup>

(A57-2015) [2015] NAHCMD 218 (16 September 2015), paragraph 27.

- 3.1 The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
- 3.2 Custody of the minor child born between the parties should not be awarded to the defendant subject to the plaintiff's right of reasonable access.
- 3.3 The plaintiff should not pay maintenance in the amount of N\$1 000.00 per month in respect of the minor child, which amount is to escalate at a rate of 8 % per annum on the anniversary date of the final order of divorce.
- 3.4 The plaintiff should not pay all pre-school, primary and secondary school expenses as well as extra-mural activities of the minor child. The defendant has to consult with the plaintiff about the choice of school of the minor child.
- 3.5 The plaintiff should not pay the amount of N\$1 000.00 per month towards the accommodation of the defendant, which shall be inclusive of water expenses, for a year from the date of the final order of divorce.
- 3.6 The joint estate should not be divided.

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E P UNENGU  
Acting Judge



## APPEARANCES

PLAINTIFF:

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Windhoek

DEFENDANT:

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