

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-ACT-MAT-2017/00210

In the matter between:

GIDEON SHIKONGO ABISAI

PLAINTIFF

and

CANNER ABISAI (BORN: SHADUKA)

DEFENDANT

Neutral citation: *Abisai v Abisai* (HC-NLD-CIV-ACT-MAT-2017/00210) [2020]
NAHCNLD 04 (21 January 2020)

Coram: NAMWEYA AJ

Heard: 17-18 October 2019

Delivered: 21 January 2020

Flynote: Matrimonial - Husband and Wife – Matrimonial regime – Court to determine whether the Plaintiff and the Defendant were married in Community of Property and whether the Settlement Agreement dated 13 March 2018 is valid.

Summary: The plaintiff instituted divorce proceedings against the defendant who then defended the action. The plaintiff and the defendant attended to mediation on two separate occasions arrived at two settlement agreement of which one is the subject of this judgment – court to determine the marital regime between the parties – court to determine the validity of settlement agreement dated 13 March 2018. The court was further requested to deal with clause 7.1 of the Settlement Agreement so as to determine the amount of compensation of which the parties could not agree on;

Held; the marital regime between the parties is not one in community of property. The court further held that the settlement agreement dated 13 March 2018 is valid and the court finally held that it is unable to access or to quantify such claim if any.

ORDER

1. Settlement agreement between the parties dated 13 March 2018 is declared valid and is hereby made an order of court.

2. The Court grants judgment for the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before the **2 March 2020**, failing which to show cause, if any, to this Court on **31 March 2020** at **10H00** why:
 - 2.1 The bonds of the marriage subsisting between the parties should not be dissolved.
 - 2.2 The settlement agreements dated 13 March 2018 and 7 May 2018 should not be made orders of court.

3. Each party to pay their own costs.

JUDGMENT

NAMWEYA, AJ:

[1] The plaintiff is Mr Gideon Abisai, married to the defendant Mrs Canner Abisai. The plaintiff instituted divorce proceedings against the defendant who then defended the action. The plaintiff and the defendant attended to mediation on two separate occasions and arrived at two separate settlement agreements of which one is the subject of this judgment.

[2] The legal issues to be determined by this court are:

2.1. Whether the plaintiff and the defendant were married in community of property?

2.2. Whether the Settlement Agreement dated 13 March 2018 is valid?

The Law

[3] Section 17(6) of the Native Administration Proclamation of 1928 provides as follows:

'A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

[4] In the case of *Nakasholo vs Nakasholo* Case No: I 1543/06 p.3, the court state that:

'... the term 'Red Line' in Section 17 (6) of the Native Proclamation Act 1928, refers to a marriage between natives, which shall not produce legal consequences of marriage in community of property between spouses. . . if the intending spouses want to have enter into a marriage that will produce the consequences of a marriage in community of property, they are to anytime within one month previous to the celebration of such marriage declare jointly before any magistrate or marriage officer that it is their intention and desire that community of property and profit and loss shall result from their marriage, and thereon such community shall result from their marriage.'

[5] In the case of *Mutrifa vs Tjombe* (I 1384/2016) [2017] NAHCMD 162 (14 June 2017), the court had to decide as to whether a customary land right could be awarded to both parties in the dispute as a result of the dissolution of the marriage and further the court was tasked with determining whether by virtue of a marriage in community of property, any contribution and improvements made to the customary land can and how should it be divided. The Court went on the content as follows:

' . . . The customary land rights were awarded to the Plaintiff alone, in his personal capacity, thereby do not accrue to the Defendant by virtue of the marriage.. . . the action instituted, and the relief claimed in the present proceedings do not include a claim compensation and or improvements. However, if an action for compensation was instituted, the action would have no place in dissolution of a marriage. ... Customary land right is not an asset of the joint estate and therefore the remedy sought in such a claim would lie elsewhere and not in dissolution of marriage matter. . . .The court held that a customary land right is a personal right, inseparable from its holder and does not form part of the assets of the joint estate. Accordingly, the Plaintiff, as the holder of such land right, is entitled to the exclusive enjoyment of the benefits conferred upon him under those rights.

[6] In *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199, Wessels JA made the following observation:

' . . .where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of a litigant upon whom the onus

rests, is the true version and that in this case, absolute reliance can be placed upon the story as told by A.'

Plaintiff's evidence

[7] The Plaintiff opened his case by leading evidence in support of his claim, he stated that, him and the defendant were married at a church in Oshakati, which was not their original church, he testified that he does not remember whether he was Married in Community of Property or out of Community of Property, when he was handed the marriage certificate he indicated that he did not recognize the duplicate and indicated that the marriage certificate he knows of, is the yellow marriage which was in the possession of the defendant. The duplicate marriage certificate was handed up to court at Exhibit "C".

[8] Under cross examination, the Plaintiff testified that when he was asked as to whether he knew the Marriage Officer Mr. Mwaetako, who married the parties, he replied and stated that he does not know the pastor furthermore that he does not remember that the parties were married in community of property and that all he knows is that the parties are married out of community of property.

[9] The parties signed a settlement agreement dated 13 march 2018 which he recognized by the signatures of the parties on the agreement which was submitted as Exhibit "B", He states that the female children are with the defendant and the male child is with him, he can only afford to pay maintenance in the amount of N\$ 250.00, this is because he has six children under his direct care. He testified that his grandfather gave him the piece of land that he built his home on, at likango Village, he sent money home, while he was away at work in Grootfontein, to pay for the builders who would construct the structure on the land, he contends that the defendant was unemployed at the time and did not contribute financially to the construction of the structure, but she would cook and clean and take care of the children.

[10] He testified that the goats that are on the land, all belong to the defendant and to the children. He has no issue with the defendant collecting all the items as listed in the settlement agreement dated 13 March 2018.

Defendant's evidence

[11] The Defendant opened her case by leading evidence in support of her counterclaim she testified that she and the defendant were married in Oshakati at the Anglican Church that was not their original church; the Pastor asked the parties whether they wanted to be married in or out of community of property. She testified that the plaintiff was the one who told the Pastor that the parties want to be married in community of property and the defendant agreed thereto.

[12] She testified that they attended to the Anglican Church with the paper from their pastor on the date of marriage. She further testified that they attended to the Mediation and signed the settlement agreement and that she raised issue with the settlement agreement because of the maintenance amount, the movable good and further because she was seeking compensation for the contribution, she made towards the traditional homestead at likango Village.

[13] She testified that she contributed to the construction of the structure at the homestead by collecting sand and fetching water to assist with the construction, she indicated that she does not have documentary proof of the financial contribution towards the construction of the structure at the homestead. She indicated that the amount of N\$ 80 000.00 is enough to assist her in buying her own land and building a structure that is similar to the one at likango Village, because currently she is suffering. The defendant was further asked under cross examination as to how she arrived at the amount of N\$ 80 000.00 as her claim for compensation, the defendant was unable to advise the court on how she obtained the amount of N\$ 80 000.00 and only stated that it was an amount that she was entitled to and that she has no documentary proof thereto.

[14] Mr. Eradius Mwaetako testified as a witness for the defendant, he testified that he is a retired Pastor, who has done marriages for over 20 years and who was

authorised to conduct marriages. He conducted the marriage between the plaintiff and the defendant, the parties came to his church on the date of their marriage and that is the day that he first met them. He explained the marital regime to the parties and then asked the parties which marital regime they wanted to enter and the parties both agreed that they want to be married in community of property. He indicated that the parties signed a document to indicate that they want to be married in community of property but he cannot recall what that document was.

Application of the Law to the facts

[15] The first issue to be determined is the marital regime between the parties? The marriage between the plaintiff has taken place at Likango Village, a place in Oshana Region in Namibia and thus the marriage is governed by section 17(6) of the Native Administration Proclamation of 1928. If the parties intended for their marriage to be in community of property, in terms of the proclamation the parties are supposed to at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage.

[16] From the evidence of the spouses in this matter, it appears that a declaration was jointly made before the marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire for their marriage be one in community of property. It seems also that such declaration was not documented or not properly written to last as living evidence of what the spouses declared before the marriage officer. Mr. Eradius Mwaetako who sermonized the marriage was unable to clearly name the document where he marked the regime of the marriage, attesting the intention of the parties. What he was clear about is that a document called 'proclamation' was not used as he only came to learn about it later.

[17] The parties presented themselves before a marriage officer. They apparently declared their marriage before the said marriage officer. Plaintiff remained adamant that he is illiterate, he does not recall declaring before the marriage officer that he wants to

marry in community of property, whereas the defendant states otherwise. The two stories are rather mutually destructive as it was decided in *National Employers Mutual General Insurance Association v Gany*.

[18] The marriage officer was unable to tell the court what document the spouses actually signed but he remembers very well that both the spouses wished for their marriage to be in community of property. The parties failed to provide the written declaration or produce the marriage register of the church. The court has no reasons to doubt the testimony of the Retired pastor, however is the absence of the necessary documentation needed in terms of section 17 (6), with that the formalities and requirements of Section 17(6) of the Native Administration Proclamation of 1928 and the case of *Nakasholo vs Nakasholo* are thus unfortunately not meet and the marriage remains one of out of community of property.

[19] The second issue is whether the Settlement Agreement dated 13 March 2018 is valid? From the testimony it is settled that the parties were represented by their legal representatives during the settlement negotiations. The parties also wilfully signed the settlement agreement. The defendant her submissions concedes that the settlement agreement dated 13 March 2018 be adopted. As such the settlement agreement dated 13 March 2018 is hereby adopted and will be made an order of court.

[20] The court was further requested to deal with close 7.1 of the Settlement Agreement so as to determine the amount of compensation of which the parties could not agree on; The defendant is unable to determine the value of the house from which she demand contribution; neither is she able to determine as to how much she contributed for the construction of the house. Further, defendant is unable to tell how she arrived at the amount of N\$ 80 000. The court cannot therefore be expected to access or to quantify such claim.

[21] In my view, the absence of evidence showing how the defendant arrived at the amount of N\$80 000 and existence of evidence that defendant was unemployed at the time, it is conclusive that defendant failed to prove her claim. In absence of any such

evidence this court is not in a position to determine such contribution and cannot pick an amount at random.

[22] In the result;

1. Settlement agreement between the parties dated 13 March 2018 is declared valid and is hereby made an order of court.
2. The Court grants judgment for the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before the 2 March **2020**, failing which to show cause, if any, to this Court on 31 March **2020** at **10H00** why:
 - 2.1 The bonds of the marriage subsisting between the parties should not be dissolved.
 - 2.2 The settlement agreements dated 13 March 2018 and 7 May 2018 should not be made an orders of court.
3. Each party to pay their own costs.

M Namweya
Acting Judge

APPEARANCE:

PLAINTIFF:

C Tjihero

Of Dr Weder, kauta & Hoveka, Ongwediva

DEFENDANT:

M Amupolo

Of Amupolo & Co. Inc, Ongwediva