

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2019/02654

In the matter between:

**JH**

**PLAINTIFF**

and

**LH**

**DEFENDANT**

**Neutral citation:** *JH v LH* (HC-MD-CIV-ACT-MAT-2019/02654) [2021] NAHCMD 133 (12 March 2021)

**Coram:** USIKU, J

**Heard:** 03 & 07 December 2020

**Delivered:** 12 March 2021

**Reasons released:** 01 April 2021

**Flynote:** Husband and Wife – Divorce – Claim by plaintiff – Counterclaim by defendant – Marriage in community of property – Spousal maintenance.

**Summary:** The plaintiff (husband) instituted action for divorce against the defendant (wife) on the ground of constructive desertion. The defendant defends the action and delivered a counterclaim for divorce also based on constructive desertion.

*Held* that the court accepts the account of the plaintiff and grants an order of restitution of conjugal rights in favour of the plaintiff, together with ancillary relief.

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## ORDER

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The court grants judgment to the plaintiff for an order for restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before 28 April 2021, failing which to show cause, if any, to this court on 19 May 2021 at 15h15 why:

1. The bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
2. Custody and control of the minor child should not be awarded to the defendant subject to the plaintiff's right of reasonable access;
3. The plaintiff should not be ordered to pay maintenance in respect of the minor child in the amount of N\$2500 per month, which amount is to escalate at a rate of 10% each year on the anniversary date of the final order of divorce;
4. The plaintiff should not pay rehabilitative maintenance to the defendant in the amount of N\$6700 per month for the period of 15 months from the date of final order of divorce;
5. The plaintiff should not pay all costs in respect of the minor child's tertiary education, which costs include the costs of university fees and/or fees due to an institute of higher learning attended by the minor child including accommodation, living expenses, travel costs and documentation and the costs of all books and equipment required for the child's tertiary education insofar as these are not covered by study loans and/or bursaries;
6. The plaintiff should not retain the minor child on his medical aid fund and pay all excess fees in respect of all his medical expenses;
7. The plaintiff should not retain the defendant on his medical aid fund for a period of 15 months from the date of final order of divorce;
8. The joint estate should not be equally divided between the parties;
9. each party should not bear own legal costs.

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## JUDGMENT

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USIKU, J

### Introduction

[1] The plaintiff (husband) instituted action for divorce against the defendant (wife). The basis of the plaintiff's action is malicious and constructive desertion.

[2] In his particulars of claim, the plaintiff alleges that during the subsistence of the marriage, the defendant, with a settled intention to terminate the marital relations between the parties:

- (a) shows no love, respect and affection towards the plaintiff;
- (b) shows no serious intention to continue with the marriage;
- (c) fails to communicate with the plaintiff;
- (d) elicits unnecessary quarrels and arguments with the plaintiff and;
- (e) denies plaintiff marital privileges.

[3] The plaintiff, therefore, claims that the defendant has maliciously and constructively deserted him and accordingly seeks an order for the restitution of conjugal rights, failing compliance therewith, a final order of divorce, together with some ancillary relief.

[4] The defendant defends the action and has filed a plea and counterclaim.

[5] The basis of the defendant's counterclaim is also malicious and constructive desertion. In her counterclaim, the defendant alleges that, during the subsistence of the marriage between the parties, the plaintiff, with a fixed and malicious intention to end the marital relations:

- (a) failed to communicate meaningfully with the defendant;
- (b) engaged in an adulterous affair with another woman, as a result of which a child was born during September 2001;
- (c) physically and verbally abused the defendant, and;
- (d) denied the defendant conjugal rights.

[6] The defendant claims that the plaintiff has maliciously and constructively deserted the defendant and seeks an order for restitution of conjugal rights, failing which, a final order of divorce, together with some ancillary relief.

### Background

[7] The parties got married to each other on 06 August 2002 at Windhoek in community of property, which marriage still subsists. There are 3 children born from the marriage between the parties. One of these children ALH, a male, born on 09 March 2007, is still a minor.

[8] The parties' first born child was born in February 1994. During 1993 the plaintiff's father bought a house situated at Erf No 4965, (a portion of Erf No 2781) Khomasdal, (Extension No. 4) in the municipality of Windhoek. The parties lived together in this house prior to and during their marriage. The ownership of this immovable property is subject to dispute between the parties during these proceedings.

### Issues for determination

[9] The issues presently for determination by the court are:

- (a) Which party has succeeded in discharging the *onus* of proving malicious desertion and therefore entitled to an order for restitution of conjugal rights;
- (b) whether the defendant is in need of spouse / rehabilitative maintenance, the quantum and the duration thereof;
- (c) the amount of maintenance that the plaintiff should pay to the minor child; and
- (d) whether Erf No. 4965 Khomasdal (Extension No. 4) is an asset of the joint estate.

[10] The parties have agreed that custody and control of the minor child be awarded to the defendant.

### The plaintiff's version

[11] In his evidence, the plaintiff testified that he is employed as a diesel mechanic. His net salary is N\$30 000 per month. He is currently stationed at Okahandja for work and his employer provides him accommodation in Okahandja. He sometimes rents out a truck at the price of N\$300 per hour. This truck is part of the assets of the joint estate.

[12] The plaintiff testified further that the defendant is not interested in the continuation of the marital relations. In 2018 the defendant informed him that she would no longer have sexual relations with him because he might transmit diabetes to her. According to the plaintiff, the parties have not been living as husband and wife since 2018. In June 2020, the plaintiff moved out of the common home.

[13] The plaintiff related that in September 2001 he fathered a child with a different woman. This child was born prior to his marriage to the defendant and according to the plaintiff the defendant was aware of this child.

[14] In relation to spousal maintenance, the plaintiff confirmed that the defendant is presently unemployed. The defendant was previously employed at Nampost but was dismissed. The plaintiff presently pays the defendant N\$3700 per month as spousal maintenance plus N\$8000 per month for household groceries, in terms of an order granted by a magistrate's court. The plaintiff proposes to pay to the defendant N\$3700 per month as rehabilitative maintenance, for a period of one year from the date of final order of divorce. The plaintiff testified that he cannot afford to pay N\$15 000 per month prayed for by the defendant. The plaintiff gave a breakdown of his income and expenses. In addition, the plaintiff proposes to retain the defendant on his medical aid fund for a period of 12 months after the granting of final order of divorce.

[15] With regard to the amount of maintenance in respect of the minor child the plaintiff proposes to pay N\$2000 per month which amount shall escalate with 10% per annum on the anniversary of the final order of divorce. The plaintiff further proposes to retain the minor child on his medical aid fund and pay all excess fees in

respect of his medical expenses. However, the plaintiff proposes that the defendant pays 50% of the costs of the minor child's tertiary educational expenses.

[16] As regards the immovable property, namely Erf No. 4965, Khomasdal, the plaintiff testified that that property is an asset in the estate of his late father who passed away on 5 January 2015. According to the plaintiff, the arrangement between the plaintiff and his late father was that the plaintiff and his brother, Seth, would occupy the property on condition that the one who got married first shall move out of the property. Seth got married first and moved out of the property. The plaintiff and the defendant subsequently got married and stayed on the property. A further arrangement was made between the plaintiff's late father, plaintiff's mother and eight siblings, that the plaintiff and the defendant shall stay on the property without paying rent and shall extend and renovate the property. The property remains registered in the name of the plaintiff's late father. In support of the ownership of the property the plaintiff tendered in evidence Deed of Transfer No. T. 7750/1993 showing that the property in question is registered in the name of Hendrik Dawid Husselmann.

[17] According to the defendant the assets of the joint estate include a Mazda bakkie, a Nissan truck, a Kia motor vehicle (used by the defendant), a trailer and motor bike. The plaintiff proposes that the motor vehicles be valued by an expert in valuation of vehicles and that the plaintiff be ordered to pay the defendant 50% of the value of the motor vehicles before the date of final order of divorce. The plaintiff also prays that the defendant retains the furniture and all household appliances.

#### The defendant's version

[18] The defendant testified that she is presently not employed. She was previously employed but lost her job during June 2017. There is currently an ongoing labour dispute before the Labour Commissioner regarding that matter.

[19] The defendant related that during the subsistence of the marriage the plaintiff engaged in an adulterous affair with another woman as a result of which a child was born during September 2001. The defendant maintains that such affair still subsists. The defendant states further that the plaintiff physically and verbally abused her and denies her conjugal rights. According to the defendant, the plaintiff moved out from

the common home during June 2020 and has not returned since. As a result thereof, the plaintiff has maliciously deserted the defendant.

[20] In her evidence, the defendant also testified that she refused plaintiff conjugal rights because of his adulterous affairs and because he does not want to use protective methods, for safety. The defendant also confirmed having refused the plaintiff access to the common home and having changed locks to the common home because the plaintiff removed things from the house without her knowledge and because the plaintiff is violent.

[21] As regard her need for spousal maintenance, the defendant states that she has no salary and is unable to fully support herself or to contribute to household expenses or to maintain the minor child. She asserts that she is diabetic and has a heart- problem. The defendant seeks maintenance from the plaintiff in the amount of N\$15 000 per month, for a period of at least two years, pending the finalization of her labour dispute or pending her finding alternative employment.

[22] Presently, the defendant receives N\$4000 per month from the rental on a property belonging to the parties' children in Walvis Bay. There is also currently an order by the Maintenance Court, in terms of which the defendant receives N\$3700 per month as maintenance from the plaintiff.

[23] The defendant seeks payment of N\$5000 per month, from the plaintiff as maintenance in respect of the minor child. The defendant testified that the minor child is now 13 years old and still goes to school. The defendant also testified that she collects him from school in the afternoons by car and that the maintenance will also assist in fueling up the car to enable the defendant to drop him at school.

[24] As regards Erf No 4965, Khomasdal, the defendant testified that the property was bought by the parties in 2007 from the plaintiff's late father, for N\$45 000. The parties have been living on that property since 1993 and have renovated and extended the property. The defendant states that the plaintiff and his late father signed certain documents in respect of that transaction. According to the defendant, these documents are in the possession of the parties' daughter, who refuses to give the documents to the defendant for purposes of this case.

[25] The defendant seeks an order that Erf No. 4965, Khomasdal, be sold and the proceeds therefrom be equally divided between the parties. In the alternative, the plaintiff prays that the property be transferred in the name of the parties' children, subject to the registration of a life-long usufruct, in her favour.

[26] In respect of several movable properties forming part of the joint estate, the defendant prays that these be valued and be sold, and the proceeds therefrom divided equally between the parties.

[27] In her evidence, the defendant acknowledged having received money from the plaintiff, being proceeds from the sale of certain motor vehicles referred to by the plaintiff. However, the defendant asserts that she did not know at the time that such money was proceeds from the sale of the motor vehicles in question. She used such proceeds for household needs. The defendant also confirmed having received N\$105 000 as a pension pay-out following the termination of her employment in 2017. She used that money to pay her policies for over a period of two years and for other things and bought a ticket for a pilgrimage to Israel.

### Analysis

[28] The determination of the factual disputes between the parties requires the assessment of the evidence furnished by the parties as well as the parties' credibility. In this regard the defendant did not make a favourable impression in the witness box. For example, in her evidence, she stated that one of her grounds for seeking divorce is that, the plaintiff during the subsistence of the marriage, engaged in an adulterous affair with another woman as a result of which a child was born during September 2001. It is common cause that the parties only got married to each other on 6 August 2002. There could not have been an adultery committed during the subsistence of the marriage, from which a child was born. In her evidence, the defendant also sought to rely for her divorce claim, on the ground that the plaintiff left the common home in June 2020 and has not returned since.<sup>1</sup> This assertion was made notwithstanding the fact that the defendant launched her counterclaim during March 2020 before the alleged desertion occurred.

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<sup>1</sup> Page 52 of the transcribed record.



[29] On the other hand, the plaintiff impressed me as a more-reliable witness. For example he appeared to be frank on the motor vehicles he sold during the subsistence of the marriage and on what he did with the proceeds therefrom. In general, the plaintiff's evidence was not seriously challenged during cross-examination.

[30] In these circumstances, where the evidence of the plaintiff conflicts with that of the defendant, I accept the version of the plaintiff.

[31] There is a dispute between the parties as to who was responsible for the breakdown of the marriage. For reasons stated above, I accept the account of plaintiff on that aspect and would grant an order for conjugal rights in favour of the plaintiff.

[32] As regards the issue of spousal maintenance, it appears to me to be common cause that the defendant is in need of maintenance and is entitled to rehabilitative maintenance. The only issue in dispute is the amount of such maintenance and duration.

[33] On the evidence, I find that the defendant is entitled to spousal maintenance. Having considered the income of the plaintiff and the parties' financial needs and obligations, I am of the view that the amount of N\$6700 per month for the period of 15 months from the date of the final order of divorce, is appropriate in the circumstances.

[34] With regard to the maintenance of the minor child, the court is required to take into account that the duty of supporting a child of the dissolved marriage, is common to the divorced parents. The incident 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>2</sup> Having considered the evidence as a whole, I have come to the conclusion that the order of maintenance of the minor child I have made below is reasonable and fair in the circumstances.

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<sup>2</sup> *AN v FN* (I 1839/2015) [2017] NAHCMD 154 (6 June 2017) para 46.

[35] In regard to ownership of Erf No. 4965 Khomasdal, the defendant claims that the property is an asset of their joint estate. As such the defendant bears *onus* to prove that the erf in question is owned by the joint estate. The best evidence of ownership of immovable property is a title deed to it.<sup>3</sup>

[36] The defendant did not provide a copy of the title deed to prove title by the joint estate to the immovable property. The only evidence available is that the immovable property is owned by the estate of the late Hendrik Dawid Husselmann, married in community of property to Hendrina Katrina Husselmann. It follows that there is no evidence before court that the property in question is an asset of the parties' joint estate. The defendant is therefore not entitled to the order that she seeks in respect of the immovable property.

[37] During closing submissions, counsel for the defendant submitted that the defendant is entitled to an adjustment, in terms of s 8(1)(b) of the Married Persons Equality Act (No. 1 of 1996) in respect of the motor vehicles sold by the plaintiff. I am of the opinion that the defendant is not entitled to such an adjustment, for two reasons. Firstly, there is no evidence that the joint estate suffered a loss as a result of the transactions in question. The account given by the plaintiff about how the proceeds from such transactions were utilised was not controverted. Secondly, the issue of an adjustment is not set out in the pre-trial order as a matter for determination at trial. In terms of rule 26(10), issues and disputes not set out in the pre-trial order are not available to the parties at the trial.

[38] I have considered the remainder of the issues that are for determination in this matter, against the evidence placed before the court. Having done that, I make the undermentioned order, which in my opinion, meets the justice and fairness of the case. In the result I make the following order:

The court grants judgment to the plaintiff for an order for restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before 28 April 2021, failing which to show cause, if any, to this court on 19 May 2021 at 15h15 why:

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<sup>3</sup> *Goudini Chrome Pty Ltd v MCC Contracts Pty Ltd* 1993 (1) SA 77 at 82.

1. the bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved;
2. custody and control of the minor child should not be awarded to the defendant subject to the plaintiff's right of reasonable access;
3. the plaintiff should not be ordered to pay maintenance in respect of the minor child in the amount of N\$2500 per month, which amount is to escalate at a rate of 10% each year on the anniversary date of the final order of divorce;
4. The plaintiff should not pay rehabilitative maintenance to the defendant in the amount of N\$6700 per month for the period of 15 months from the date of final order of divorce;
5. the plaintiff should not pay all costs in respect of the minor child's tertiary education, which costs include the costs of university fees and/or fees due to an institute of higher learning attended by the minor child including accommodation, living expenses, travel costs and documentation and the costs of all books and equipment required for the child's tertiary education insofar as these are not covered by study loans and/or bursaries;
6. the plaintiff should not retain the minor child on his medical aid fund and pay all excess fees in respect of all his medical expenses;
7. the plaintiff should not retain the defendant on his medical aid fund for a period of 15 months from the date of final order of divorce;
8. the joint estate should not be equally divided between the parties;
9. each party should not bear own legal costs.

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B USIKU  
Judge

## APPEARANCES:

PLAINTIFF: M Engelbrecht  
Of Engelbrecht Attorneys Legal Practitioners  
Windhoek

DEFENDANT: H Ntelamo-Matswetu  
Of Ntelamo-Matswetu & Associates  
Windhoek