

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2017/03603

In the matter between:

SILVESTER NANJEMBA

PLAINTIFF

and

SECILIA PENOMWAAMENI NANJEMBA

1ST DEFENDANT

STANDARD BANK NAMIBIA

2ND DEFENDANT

REGISTRAR OF DEEDS

3RD DEFENDANT

Neutral citation: *Nanjemba v Nanjemba* (HC-MD-CIV-ACT-MAT-2017/03603)
[2022] NAHCMD 407 (12 August 2022)

Coram: USIKU, J

Heard: 14 - 17 February and 29 March 2022

Delivered: 12 August 2022

Flynote: Husband and wife – Proprietary rights – Marriage out of community of property by virtue of the provisions of s 17(6) of the Native Administration Proclamation 15 of 1928 – Parties being registered owners of an immovable property, in equal and undivided shares and co-mortgagors in respect of a mortgage bond registered over the property and serving as security for a loan advanced to the parties – The defendant disputes joint ownership – Court holds that the parties are

joint owners and orders termination of the joint ownership; sale of the property and equal division of the proceeds therefrom.

Summary: The plaintiff instituted divorce proceedings, seeking restitution of conjugal rights, failing which, a decree of divorce and an order directing the plaintiff to make payment of half of the valuation amount of the immovable property to the defendant against registration of the immovable property in the sole name of the plaintiff. The defendant filed a counterclaim seeking restitution of conjugal rights, failing which, a decree of divorce and an order declaring her the sole and exclusive owner of the immovable property, as well as an order rectifying the relevant Deed of Transfer in order to reflect her as the sole and exclusive owner of the property. Each party cites malicious and constructive desertion as a ground for their respective divorce actions.

Held that the parties are joint owners of the immovable property and co-mortgagors in respect of the bond registered over the property.

Held further that the joint ownership is terminated and that the property be sold and the proceeds therefrom be divided equally between the parties, after payment of the liabilities in respect of the property.

Held further that an order for the restitution of conjugal rights is granted in favour of the defendant.

ORDER

1. It is ordered that the joint ownership of the parties in the immovable property known as:
CERTAIN: Erf No. 1360 Okuryangava,
(Extension No. 3),
SITUATE: In the Municipality of Windhoek,
Khomas Region,
MEASURING: 200 (Two hundred) square meters,
HELD: by the parties jointly in terms of Deed of Transfer
No. T 3955/2009, is hereby terminated.

2. Unless the parties reach agreement in writing within 30 days from the date of this order on all aspects relating to the termination of the co-ownership, then paragraph 3 hereof shall apply.
3. In giving effect to the termination order referred to in paragraph 1 above (should the parties not reach agreement as provided in paragraph 2 above), the following is hereby ordered:
 - a) the abovementioned property be valued by an independent valuer appointed by the plaintiff's attorneys (unless the parties are able to agree on the appointment of a valuer forthwith);
 - b) upon receipt of the valuation certificate, an open mandate to sell the property be given to a registered estate agent within 30 days of obtaining the valuation certificate;
 - c) the conveyancing of the property shall be attended to by plaintiff's attorneys, as conveyancers for both parties, who shall give effect to the sale as follows:
 - i) the collection of the full purchase price;
 - ii) cancellation and discharge of existing mortgage bonds;
 - iii) the discharge of any further obligations on the property in respect of rates, taxes, estate agent commission, property valuation costs, transfer costs and the like, and;
 - iv) equal distribution of the net proceeds of the sale between the parties.
4. In the event of either party refusing to sign the deed of sale (or any other document necessary for effecting the transfer of the property), the Deputy Sheriff for the District of Windhoek is hereby directed and authorized to sign the deed of sale (for any other documents) in order to effect the transfer of the property.
5. The defendant succeeds on her counterclaim for divorce and the plaintiff's claim for divorce is dismissed.
6. I make no order as to costs.
7. The court grants judgment for the defendant for an order for restitution of conjugal rights and orders the plaintiff to return to or receive the defendant on or before 23 September 2022 failing which to show cause, if any, to this court on 19 October 2022 at 15:15 why:
 - (a) the bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved.

JUDGMENT

USIKU, J:

Introduction

[1] In this matter the plaintiff instituted action for divorce against the defendant, praying for relief in the following terms:

- '1. (a) A decree for the restitution of conjugal rights and failing compliance therewith;
- (b) Final order of divorce.
2. An order that the Plaintiff makes payment to the defendant in the amount of N\$330 000, within a reasonable period from granting of the order of divorce, against transfer of ownership in respect of Erf 1360, Okuryangava, Extension 3, Khomas Region, Measuring 200 square meters, held by Deed of Transfer No.T3955/2009 to the Plaintiff.
3. Defendant to take all necessary steps to effect transfer to the Plaintiff of Erf 1360, Okuryangava, Extension 3, Khomas Region, Measuring 200 square meters held by Deed of Transfer No. T3955/2009, and directing the Deputy Sheriff of Windhoek, in the event of the Defendant failing or refusing to transfer the said property to the plaintiff, to execute in the Defendant's stead such documents and to perform all such other acts as may be necessary to effect transfer of the said property into the name of the Plaintiff.
4. Costs of suit (if opposed).
5. Further and/or alternative relief.'

[2] The defendant filed notice of intention to defend the action and subsequently filed a plea and a counterclaim. In her counterclaim the defendant seeks the following relief:

- '1. An order for
 - a) the restitution of conjugal rights and failing compliance therewith;
 - b) final order of divorce
2. An order declaring the First Defendant the sole and exclusive owner of:
Certain: Erf No. 1360 Okuryangava, (Extension No. 3);

Situate: In the Municipality of Windhoek, Registration Division K;
Khomas Region;

Measuring: 200 (Two hundred) square meters.

3. An order rectifying the Deed of Transfer by the deletion of the name Silvester Nanjemba.
4. An order directing the Third Defendant to amend its records accordingly, to reflect the First Defendant, Secilia Penomwaameni Nanjemba, as the sole owner of the erf 1360, Okuryangawa extension 3, Windhoek.
5. An order that Plaintiff be declared the sole and exclusive owner of erf 69, Katutura.
6. Cost of suit.
7. Further and or alternative relief.'

Common cause facts

[3] The following facts are either common cause facts or facts in respect of which there is no real dispute between the parties, namely that:

- (a) the parties were married to each other, on 26 December 1995 at Odibo, in Oshana Region, in Namibia, and their marriage has the consequences of a marriage out of community of property by virtue of the provisions of s 17(6) of the Native Administration Proclamation 15 of 1928,
- (b) there are no children born of the marriage between the parties,
- (c) the marital relationship between the parties has deteriorated to such an extent that the parties have given up any hope for reconciliation between themselves;
- (d) the parties no longer live together as husband and wife;
- (e) during the subsistence of the marriage, the parties became registered co-owners of a property described as: Erf No. 1360, Okuryangawa;
- (f) a mortgage bond is registered over the property in favour of Standard Bank ("the second defendant");
- (g) both parties are liable to the second defendant, in terms of the loan agreement, for the repayment of the loan amount secured by the bond;
- (h) the indebtedness in respect of the bond is being repaid in monthly instalments of N\$3,400.58 and is being deducted from the plaintiff monthly salary as from 30 June 2015;

- (i) the Deed of Transfer in respect of the abovementioned erf incorrectly refers to the parties as 'married in community of property to each other';
- (j) during the subsistence of the marriage the plaintiff alone became a registered owner of a certain Erf 69, Katutura.

Principal issues for determination

[4] It appears to me that the principal issues for determination are:

- (a) which of the parties is responsible for the breakdown of the marriage,
- (b) whether the defendant has made out a case entitling her to the rectification of Deed of Transfer No. T3955/2009, to reflect her as the sole owner of Erf No. 1360, Okuryangava, and,
- (c) whether the plaintiff is entitled to his ½ share in Erf No.1360, Okuryangava, by virtue of his co-ownership in the property.

[5] At the trial the plaintiff gave evidence and called no further witnesses. The defendant gave evidence and called one witness, namely, Petrus Xwanda ("Mr Xwanda").

Plaintiff's case

[6] The plaintiff testified that he seeks divorce because, during the subsistence of the marriage the defendant:

- (a) failed to show love and affection towards him,
- (b) showed no serious intention to continue with the marital relationship, and,
- (c) denied him conjugal rights.

[7] During 1996 the parties moved into a house in single quarters, at Erf No 69, Katutura which belongs to the plaintiff.

[8] In 2004, the defendant bought Erf No. 1360 Okuryangava, (“the property”) from the National Housing Enterprise (“NHE”). The parties moved into the property and regarded it as their common home.

[9] At one point the parties mutually agreed to register the property in both of their names to enable the plaintiff to take out a loan against the property for renovation purposes.

[10] During 2014, the plaintiff applied for a loan from Standard Bank in the amount of N\$325 000. In effect this loan was applied for jointly by the parties, according to information appearing on the “loan application form” (“Exhibit E1”).

[11] According to the plaintiff the loan advanced was used to pay off the outstanding bond amount for the NHE (which was then registered on the property) and to renovate the property.

[12] The previous bond for NHE was then cancelled and a new bond was registered over the property in favour of Standard Bank.

[13] The plaintiff maintained that the registration of the property in the joint names of the parties was occasioned by mutual agreement and denies that registration of the property in the joint names of the parties was effected erroneously.

The defendant’s case

[14] The defendant testified that, the plaintiff has caused her emotional pain and suffering, during the subsistence of the marriage. According to the defendant, the plaintiff conned her out of her money. She further testified that she has since forgiven him. During the subsistence of the marriage the plaintiff has engaged in several adulterous relationships with third parties. One of these relationships resulted in a birth of a boy between the plaintiff and a third party. One other affair resulted in a birth of two children. She added that the parties have not lived together as husband and wife for a period exceeding ten years.

[15] In February 2004, she purchased Erf No. 1360 Okuryangava (“the property”), from NHE. The plaintiff signed the deed of sale as her spouse. Monthly instalments were deducted from her salary in favour of NHE towards payment of the purchase price.

[16] In 2009, she was informed by NHE that the property would be transferred into her name. She was informed of the identity of the conveyancers who were attending to the registration of the transfer. When she approached the conveyancers, she was surprised when they asked her to return accompanied by the plaintiff, together with their marriage certificate. She did as requested. Upon her return, the parties signed many documents.

[17] When she ultimately received the Deed of Transfer, she was surprised to see that it was indicated that the parties were “married in community of property”. According to the defendant, she informed the lawyer, who attended to them, when she collected the Deed of Transfer that the parties were not ‘married in community of property’, but the lawyer informed her that there was nothing that could be done.

[18] The defendant testified that the loan advanced to the parties by Standard Bank was taken by mistake “to both parties and to the Bank itself”. The defendant insists that she is not liable for the plaintiff’s debts as the parties are married out of community of property. She states, she is only willing to pay the plaintiff any money that was used from the loan amount, for her benefit.

[19] With regard to the renovation of the property, she testified that she had applied for a loan of N\$90 000 from her pension fund. However, that amount was not enough for the required renovations. She discussed the issue with the plaintiff who informed her that he could get a loan from his workplace, and that part of the loan could be used for the required renovations. The defendant agreed to that suggestion. The plaintiff then applied for the building loan from Standard Bank.

[20] According to the defendant, the plaintiff did not use the loan amount from Standard Bank for the renovations on the property. She testified that the plaintiff only used N\$3000 to build a wall of 1.5 metres and N\$43 000 which was used as cancellation amount in respect of NHE bond. In her testimony, she indicates that she

received N\$81 000 (inclusive of the N\$43 000) from the plaintiff and that is the only benefit she received from the loan amount.

[21] Mr Xwanda testified on issues pertaining to the renovations on the property. He stated that the parties approached him to prepare a construction quotation to be used by the plaintiff to apply for a loan. According to him the parties approached him with that request because he is a contractor registered with different banks. Thereafter the plaintiff's loan application was approved by Standard Bank. An official at Standard Bank informed him that payments of the loan amounts would be made to him in instalments as the construction of the building progressed.

[22] Mr Xwanda indicated that he was not involved in the renovation works himself. The renovations were done by other parties. He only served as a conduit for the receipt of the loan amounts from Standard Bank to the plaintiff. He paid the loan amounts received from the bank to the plaintiff.

Analysis

[23] The *onus* is on the plaintiff to prove desertion and the intention on the part of the defendant to desert the plaintiff.

[24] In his particulars of claim the plaintiff seeks divorce on the ground of desertion. At trial, the plaintiff stated that the defendant deserted him in that she failed to show love and affection towards him; showed no serious intention to continue with the marital relations; and denied him conjugal rights.

[25] The plaintiff did not particularise how precisely the defendant failed to show love and affection or how she failed to show serious intention to continue with the marital relationship.

[26] On the evidence before the court, I am of the opinion that the plaintiff has not discharged the *onus* on him to prove desertion on the part of the defendant.

[27] On the other hand, in her counterclaim and in her evidence, the defendant stated that, the plaintiff, with the intention to terminate the marital relationship between the parties, deserted her by:

- (a) not showing love and affection towards the her,
- (b) engaging in extra-marital affairs with other women, from which affairs three children were born, and
- (c) by informing the defendant that he was no longer interested in the continuation of the marriage and instead intends to marry someone else.

[28] In his plea to the counterclaim the plaintiff made bare denials. In his evidence he did not seriously contest that he has fathered three children outside the marriage relationship.

[29] On the basis of the evidence adduced by the defendant, I am satisfied that the defendant has established, on the balance of probabilities, that the plaintiff deserted her by showing her no love and affection and showed no serious intention in continuing with the marital relationship with her, through engaging in adulterous affairs. On that basis I shall, therefore, grant an order for the restitution of conjugal rights in favour of the defendant.

[30] In regard to the disputed property, the defendant testified that the property was erroneously registered in the joint names of the parties. She further asserted that the loan agreement and subsequent mortgage bond registration over the property were done by mistake.

[31] A party seeking to rely upon a right to claim a rectification must establish the facts justifying the rectification, in the clearest and most satisfactory manner¹. Such party is required to set out averments and adduce evidence to enable the court to determine how the error came about.

[32] In the present matter, the parties agree that they are married out of community of property to each by virtue of the provisions of s 17(6) of the Native Administration

¹ *N v N* (HC-MD-ACT-MAT-2019/04202) [2021] NAHCMD 31 (9 February 2021) para 17.

Proclamation 15 of 1928. They are registered as co-owners, in undivided shares, of the property. The fact that they are incorrectly reflected in the relevant deed of transfer as 'married in community of property to each other' does not detract from the fact that they are co-owners of the property by virtue of them being the registered owners. The incorrect description may be rectified, on application to the Registrar of Deeds, in terms of the provisions of the relevant legislation, as such rectification would not have the effect of transferring any right².

[33] On the evidence before court, the parties applied together for a loan from Standard Bank and both parties undertook responsibility for the repayment of the mortgage bond in accordance with the provisions of the loan agreement and the bond. The joint application of the loan, and the subsequent registration the bond, would not have been possible if the parties were not co-owners of the property now put up as security for the loan. The repayment of the loan is presently being made by way of a 'stop order' and the instalment amounts are being deducted from the plaintiff's salary. There is no evidence indicating that all such arrangements were made by mistake.

[34] I am therefore of the opinion that the defendant has not established a factual basis for the rectification that she seeks. There is no evidence before court that the registration of the property in the joint names of the parties was occasioned by mistake. I am persuaded to accept the evidence of the plaintiff that the parties agreed to have the property registered in their joint names and the parties are properly reflected as co-owners of the property.

[35] By virtue of the parties' joint ownership of the property, each party is entitled to a half-share in the property. Every co-owner is entitled to have the joint ownership terminated, as no co-owner should be obliged to remain a co-owner against his will.³

[36] In his particulars of claim, the plaintiff prays for an order directing him to make payment to the defendant in the amount of N\$330 000 being half of the N\$660 000 valuation of the property, as per the valuation report made in September 2017.

² See s 5 (1)(b) of the Deeds Registries Act No. 14 of 2015.

³ *Robson v Theron* 1978 (1) SA 841 at 856H.

[37] In view of the fact that the valuation report being relied upon by the plaintiff is now about five years old, I would afford the parties an opportunity, in the order that I will make, to obtain a new valuation, if so advised. In my order, I will also allow the parties opportunity to decide by agreement, if so advised, who shall buy the other out, failing which the property would be sold to the third parties.

[38] In her counterclaim, the defendant also seeks an order declaring the plaintiff as the sole and exclusive owner of Erf No. 69, Katutura. In order to get a declaratory relief, the defendant is required to satisfy the court that she is a person interested in an existing, future or contingent right or obligation.⁴ The defendant is not the person interested in an existing, future or contingent right or obligation in respect to Erf No 69, Katutura, therefore, such relief cannot be granted. Furthermore, there is no existing dispute between the parties in respect to Erf No 69, Katutura. The circumstances of this matter do not, therefore, warrant such relief.

[39] In so far as the issue of costs is concerned, the plaintiff was successful in regard to the disputed property. The defendant was successful in proving desertion on the part of the plaintiff. Both parties can, therefore, be regarded as being partially successful. In the circumstances, I am of the view that each party should pay its own costs and I shall make the order reflecting that position.

[40] In the result, I make the following order:

1. It is ordered that the joint ownership of the parties in the immovable property known as:
CERTAIN: Erf No. 1360, Okuryangava,
(Extension No. 3),
SITUATE: In the Municipality of Windhoek
Khomas Region,
MEASURING: 200 (Two hundred) square meters,
HELD: by the parties jointly in terms of Deed of Transfer No. T
3955/2009, is hereby terminated.

⁴ *Southern Engineering and Another v Council of the Municipality of Windhoek* SA 14/2009 delivered on 7 April 2011 at para 48.

2. Unless the parties reach agreement in writing within 30 days from the date of this order on all aspects relating to the termination of the co-ownership, then paragraph 3 thereof shall apply.
3. In giving effect to the termination order referred to in paragraph 1 above (should the parties not reach agreement as provided in paragraph 2 above), the following is hereby ordered:
 - a) the abovementioned property be valued by an independent valuer appointed by the plaintiff's attorneys (unless the parties are able to agree on the appointment of a valuer forthwith);
 - b) upon receipt of the valuation certificate, an open mandate to sell the property be given to a registered estate agent within 30 days of obtaining the valuation certificate;
 - c) the conveyancing of the property shall be attended to by plaintiff's attorneys, as conveyancers for both parties, who shall give effect to the sale as follows:
 - i) the collection of the full purchase price;
 - ii) cancellation and discharge of existing mortgage bonds;
 - iii) the discharge of any further obligations on the property in respect of rates, taxes, estate agent commission, property valuation costs, transfer costs and the like, and;
 - iv) equal distribution of the net proceeds of the sale between the parties.
4. In the event of either party refusing to sign the deed of sale (or any other document necessary for effecting the transfer of the property), the Deputy Sheriff for the District of Windhoek is hereby directed and authorized to sign the deed of sale (or any other documents) in order to effect the transfer of the property.
5. The defendant succeeds on her counterclaim for divorce and the plaintiff's claim for divorce is dismissed.
6. I make no order as to costs.
7. The court grants judgment for the defendant for an order for restitution of conjugal rights and orders the plaintiff to return to or receive the defendant on or before 23 September 2022 failing which to show cause, if any, to this court on 19 October 2022 at 15:15 why:
 - (a) the bonds of marriage subsisting between the plaintiff and the defendant should not be dissolved.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

P SIYOMUNJI
Siyomunji Law Chambers
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DEFENDANT:

S ZENDA
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