

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2021/04927

In the matter between:

CSL

PLAINTIFF

and

FL

DEFENDANT

Neutral citation: *CSL v FL* (HC-MD-CIV-ACT-MAT-2021/04927) [2024]
NAHCMD 167 (11 April 2024)

Coram: USIKU J

Heard: 8 – 9 September 2023, 31 October 2023, 2 November 2023 & 14
November 2023

Delivered: 11 April 2024

Flynote: Husband and wife – Divorce – Marriage in community of property – Proof of the element of fault – Spousal maintenance – Allegations of physical violence against the plaintiff – Court grants final order of divorce.

Summary: The plaintiff (wife) instituted action against the defendant (husband), on the ground of constructive desertion. The defendant defends the action and delivered

a counterclaim for divorce, also based on constructive desertion. Court upheld the plaintiff's claim and dismissed the defendant's counterclaim.

Held that the court accepts the account of the plaintiff and grants final order of divorce in favour of the plaintiff, together with ancillary relief.

ORDER

1. The bond of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
 2. The defendant's counterclaim is dismissed.
 3. The defendant is ordered to pay the plaintiff spousal maintenance in the amount of N\$2000 per month, for a period of twelve months, after the granting of the final order of divorce. The first payment shall be effected on or before 31 May 2024 the last payment shall be effected on or before 30 April 2025.
 4. The defendant shall keep the plaintiff on his medical aid for a period of twelve months after the granting of the final order of divorce.
 5. The joint estate shall be equally divided between the parties.
 6. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This is a divorce action. At the end of the trial, some issues became either settled (or not in dispute) between the parties. These issues are:

- (a) neither party is entitled to a specific forfeiture order and that the parties are entitled to an order directing equal division of the joint estate; and,
- (b) the plaintiff is entitled to an order directing the defendant to retain the plaintiff on his medical aid scheme for a period of twelve months after the final order of divorce is granted.

[2] The following issues remain for determination, namely:

- (a) which of the parties is responsible for the breakdown of the marriage;
- (b) whether spousal maintenance should be granted in favour of the plaintiff, and if so, the quantum thereof; and,
- (c) costs of suit.

Background

[3] The plaintiff (wife) and the defendant (husband) were married to each other, in community of property, on 12 August 2003 at Windhoek. One child was born to the parties on 22 November 2005 but passed away on 17 March 2007.

[4] At the time they got married, the plaintiff had three children from a previous relationship and the defendant had five children from a previous relationship.

[5] Furthermore, at the time they got married, the plaintiff was employed by Sanlam Brokers (Pty) Ltd as a Sales Advisor. She is now unemployed. The defendant was employed by the Ministry of Defence as a soldier. He is now a pensioner.

[6] On 9 December 2021, the plaintiff instituted action for divorce against the defendant.

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

- (a) shows no respect, love and affection to the plaintiff;
- (b) verbally and physically abuses the plaintiff;
- (c) has frequently chased the plaintiff out of the common home, threw her belongings out of the house and changed locks to the house;
- (d) elicits unnecessary quarrels with the plaintiff;
- (e) threatens the plaintiff with divorce and threatens to kill her; and,

(f) has not had sexual relations with the plaintiff for a period of twelve months.

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

[9] The defendant defends the action and has filed a plea and counterclaim. The basis of the defendant's counterclaim is also malicious and constructive desertion. In his counterclaim, the defendant alleges that, during the subsistence of the marriage between the parties, the plaintiff, with a fixed and malicious intention to terminate the marital relations between the parties:

- (a) denies the defendant his conjugal rights;
- (b) shows no love, respect and affection to the defendant;
- (c) shows no interest in the continuation of the marriage;
- (d) elicits unnecessary quarrels with the defendant;
- (e) would leave the common home on occasions to Angola and would return after a month without informing the defendant;
- (f) emotionally, psychologically and verbally abuses the defendant;
- (g) falsely accuses the defendant of verbal and physical abuse;
- (h) does not contribute financially or otherwise to the household; and,
- (i) left the common home during June 2021 and has not returned since.

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

[11] The plaintiff testified in support of her case and called no further witnesses. The defendant testified and called one witness.

Plaintiff's case

Fault

[12] The plaintiff testified that during 2004, the defendant when he got home, after completion of his training at Okahandja, he informed the plaintiff that he no longer wanted her as a wife.

[13] The plaintiff narrated an incident in 2006, when the defendant arrived home one day and found her sleeping with the baby. According to the plaintiff, the defendant pulled her from the bed by her legs and dragged her outside the house and told her that she must leave with her baby. He proceeded to take her belongings and that of the baby and threw them outside the house. The plaintiff recounted that the baby was crying so much, but the defendant did not care.

[14] She testified further that in 2007, four months after the baby passed away, the defendant informed her that she should feel ashamed because her baby died.

[15] She narrated a further incident, in 2008, while at home, the defendant started a random argument with her and started threatening her. According to the plaintiff, the defendant went to retrieve a panga, prompting the plaintiff to run away and locked herself in another bedroom. The defendant tried to break the door down and demanded that the plaintiff opens the door. She refused to open the door and stayed in that room until the defendant eventually went to sleep.

[16] The plaintiff testified further that in 2009, she became aware that the defendant was engaged in adulterous relationships with other women. That same year, the plaintiff testified, the defendant stopped to have any sexual relations with her.

[17] The plaintiff also narrated an incident, in the morning of New Year's Day in 2013, when the defendant scolded her for not having served and attended to his family properly the previous night. According to the plaintiff, the defendant slapped her. Thereafter the defendant went to take a knife and a knobkerrie. The plaintiff ran away and went to seek refuge at the defendant's brother's house. The wife of the defendant's brother, Josephine, told her to hide in one of their rooms and she locked the plaintiff in there. When the defendant arrived, with the knife still in his hand, demanded that Josephine hands over the plaintiff to him, Josephine refused.

[18] The plaintiff further testified that when the defendant went into retirement in 2019, he moved to the parties' homestead in Omuthiya. Two of the defendant's older children moved into the parties' common home in Soweto, Katutura. One day in 2020, the plaintiff discovered that the locks to the house have been changed and she could not get into the house. According to the plaintiff, one of the defendant's children, Gottlieb, informed her that the defendant had ordered them to change the locks and that they should not give her the new keys.

[19] The plaintiff travelled to Omuthiya to ask the defendant, why he locked her out of the house. According to the plaintiff, upon her arrival the defendant asked her what she wanted and started beating her. At one point he ran into their bedroom and came out, walking towards her, with a shotgun and cocking the gun. The plaintiff ran away into the mahangu field to seek refuge. Thereafter, she could hear the defendant shouting that he was supposed to have shot her.

[20] It is further the plaintiff's testimony that at one point the defendant threatened to kill her and then kill himself. Due to the seriousness of the threats, the plaintiff decided to leave the common home and went to her corrugated iron house in Okuryangava, where she stays until now.

[21] Thereafter, the plaintiff obtained an interim protection order against the defendant. The order was not made final, because she decided not to persist with the final order, in order to salvage her marriage. However, things never changed for the better between the parties.

[22] The plaintiff testified further that the witnesses to the hardships she had endured at the hands of the defendant are members of the defendant's family and they have refused to give evidence against the defendant. She also testified that her son witnessed some of the violence perpetrated on her by the defendant, but he is scared to testify against the defendant in this matter.

[23] The plaintiff also gave evidence relating to incidences of adultery committed by the defendant. However, since the plaintiff is not seeking a final order of divorce

based on the ground of adultery, I am not going to dwell on the evidence relating to adultery.

Spousal maintenance

[24] The plaintiff gave evidence that when she was employed at Sanlam Brokers (Pty) Ltd she used to earn about N\$7000 per month. She testified that she is now unemployed and is in need of financial assistance from the defendant.

[25] The plaintiff asks for spousal maintenance in the amount of N\$2500 per month for a period of twelve months after the final order of divorce is granted. She asserts that this amount will assist her to get monthly food (in the amount of N\$1000); 5% of the access payment on the medical aid (in the amount N\$500), and water and electricity (in the amount of N\$1000).

[26] The plaintiff testified that the defendant is in a position to assist her, as he earns a total amount of N\$17 300. She asserts that the defendant receives an amount of N\$10 000 per month from GIPF as pension, an amount of N\$6000 per month from the Ministry of Defence and Veterans Affairs and an amount of N\$1300 per month as a Basic Social Grant from the Government.

[27] The plaintiff also testified that she is of ill-health and requires frequent medical care. The plaintiff narrated some of the medical conditions afflicting her.

[28] The plaintiff prays for the relief she seeks with costs.

Defendant's case

Fault

[29] The defendant testified that the plaintiff moved out of the common home during 2021, without his knowledge.

[30] He further testified that sometimes the plaintiff would leave for Angola (to purchase goods and resell them in Namibia) and would be away for about a month without informing him.

[31] The defendant denies having committed any of the allegations pleaded by the plaintiff in her particulars of claim. He stated that he has always respected and loved the plaintiff unconditionally.

[32] The defendant asserts that he has never verbally or physically abused the plaintiff. He has never threatened to kill the plaintiff. He also denies having blamed the death of their child on the plaintiff nor did he tell the plaintiff to be ashamed of herself because of the passing of the child.

Spousal maintenance

[33] The defendant testified that he is not in a position to pay spousal maintenance as he is a pensioner and depends on his pension for his livelihood. The defendant alleges that to his knowledge, the plaintiff is still employed as a Financial Advisor by Sanlam. The defendant did not offer supporting evidence for this allegation.

[34] The defendant confirms that he gets N\$1300 per month, as pension from the Government. He asserts that he gets a pension pay from GIPF in the amount of N\$8 800 per month and a further amount of N\$6 000 per month as a war veterans pay-out from Ministry of Defence and Veterans Affairs.

[35] The defendant further testified that he has monthly expenses that he has to cater for and depends on the above pension pay-out for his livelihood. From the little money that the defendant receives, he asserts, he also has to cater for legal fees as a result of the interim protection order which the plaintiff instituted as well as the present divorce proceedings.

[36] The defendant submits that since the plaintiff moved out of the common home during 2021 to date, she has been maintaining herself without his assistance and the defendant submits that the plaintiff is in a position to maintain herself without any spousal maintenance from the defendant.

[37] The defendant therefore contends that the plaintiff's claim be dismissed with costs.

[38] The second witness for the defendant was GL who is a son of the defendant. His evidence was to the effect that during June 2020, the parties' common home was broken into. The aforesaid break-in necessitated the locks of the house to be changed. GL testified that he was informed by his brother ML that the plaintiff was given spare keys to the house.

Analysis

[39] The plaintiff seeks divorce on the ground of desertion. The plaintiff asserts that the defendant deserted her in that he, among other things, failed to show her love and affection, verbally and physically abused her and threatened to kill her.

[40] In the evidence, the plaintiff narrated several incidences of verbal and physical abuse, allegedly perpetrated by the defendant on her. The defendant denies the accounts narrated by the plaintiff.

[41] The determination of 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 plaintiff impressed me as a more-reliable witness. She appeared to be frank and, generally, her evidence was not seriously challenged during cross-examination.

[42] On the other hand, the defendant did not make a favourable impression in the witness box. The defendant makes mere denials to specific allegations by the plaintiff of verbal or physical abuse. For example, the plaintiff narrated specific incidences such as what transpired when the defendant got home during 2004, after his completion of training at Okahandja, the incident in the morning of New Year's Day in 2013 and the incident when the plaintiff travelled to Omuthiya to enquire from the defendant why he allegedly instructed that locks to the Windhoek's house be changed and that she not be given keys. In my opinion allegations of that kind require a response more than a bare denial.

[43] In these circumstances, where the evidence of the plaintiff conflicts with that of the defendant, I accept the version of the plaintiff. For that reason, I accept the account of the plaintiff that the defendant was responsible for the breakdown of the marriage. The defendant's counterclaim therefore stands to be dismissed.

[44] As regards the issue of spousal maintenance, the plaintiff asserts that she requires maintenance to cater for her food, water and electricity and the 5% excess payment on her medical aid. In my view, these are legitimate needs. It is the plaintiff's case that N\$2500 per month for a period of twelve after the granting of the final order of divorce, would cover those needs. On the evidence presented, I find that the plaintiff has no income. I further find that the plaintiff has established a need to be supported.

[45] The defendant contends that he lacks means to support the plaintiff. On the evidence given by the defendant, the defendant has a net monthly income of N\$16 100. I therefore find that the defendant is able to pay maintenance to the plaintiff.

[46] However, have taken into account the total income of the defendant, I am of the view that the amount of N\$2000 per month, for a period of twelve months after the granting of the final order of divorce would be fair maintenance, in the circumstances, to cater for the plaintiff's needs.

[47] In view of the evidence of violence presented before this court, I am of the view that it is not advisable for the court to order restitution of conjugal rights. I would therefore grant a final order of divorce in favour of the plaintiff.

[48] On the issue of costs, I am of the view that each party should bear his or her own costs. The defendant shall be ordered to pay maintenance and it would be inappropriate to burden him with a costs order.

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

1. The bond of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. The defendant's counterclaim is dismissed.
3. The defendant is ordered to pay the plaintiff spousal maintenance in the amount of N\$2000 per month, for a period of twelve months, after the granting of the final order of divorce. The first payment shall be effected on or before 31 May 2024 the last payment shall be effected on or before 30 April 2025.
4. The defendant shall keep the plaintiff on his medical aid for a period of twelve months after the granting of the final order of divorce.
5. The joint estate shall be equally divided between the parties.
6. The matter is removed from the roll and is regarded as finalised.

B USIKU
Judge

APPEARANCES

PLAINTIFF: M Mombeyarara
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DEFENDANT: J Andreas
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