REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case No: I 402/2014

In the matter between:

W W B **PLAINTIFF**

and

JOHANNES AIPANDA N.O **DEFENDANT**

Neutral Citation*: W W B v Johannes Aipanda N O* (I 402/2014) [2018] NAHCMD 22 (09 February 2018)

CORAM: PRINSLOO J

Heard: **07 July 2017, 25 September 2017, 31 October 2017, 08 November 2017**

Delivered: **07 February 2018**

Reasons: **09 February 2018**

Flynote: Husband and wife – Divorce – Forfeiture of benefits – Spouses married in community of property – When court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce – Court satisfied that plaintiff had made out a case for specific forfeiture of benefit.

Husband and wife – Divorce – Whether value of the improvements made to the traditional homestead is considered part of joint estate – Customary land right may not be allocated to more than one person jointly – The concept of joint-holdership does not find support in the provisions of the Communal Land Reform Act 5 of 2002 – Homestead sole property of defendant

Summary: Plaintiff instituted action against defendant for divorce based on malicious and constructive desertion, and in the alternative that defendant suffered from incurable insanity and was declared of unsound mind and incapable of managing is own affairs. She relief of sought an order for specific forfeiture of benefits arising from the marriage in community of property, in respect of the immovable property situated in Windhoek and alternatively the plaintiff in addition sought an order declaring the value of the improvements made to the traditional homestead situated at to be considered as part of the joint estate where division will be considered.

Held, that a specific forfeiture order is an order where a particular *res* is forfeited to the plaintiff. When such a specific forfeiture order is sought, a court requires a litigant to set out all the relevant information.

Held, further that section 2(b) of the *Divorce Laws Amendment Ordinance* provided that the court shall not, as against the defendant, order any forfeiture of benefits arising out of the marriage if the defendant suffered from an incurable mental illness.

Held, the court held further that a customary land right may not be allocated to more than one person jointly, and thus it shall not form part of the joint estate.

ORDER

Ad Claim 1:

(a) The court grants judgment for the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or to receive the plaintiff on or before 28 March 2018, failing which, the bonds of marriage subsisting between the plaintiff and defendant should be dissolved.

Ad Claim 2:

(b) Specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf 375, Ohima Street, Okuruyangava, Katutura, Windhoek is granted to the plaintiff.

Ad Claim 3:

(c) The rights of the improvements in respect of the property located at Omahalya-Omape, Omusati region, shall be the sole dnd exclusive rights of the defendant.

(d) Costs: Each party to pay his/her own costs.

JUDGMENT

PRINSLOO J:

Introduction

[1] This is an action for a divorce. It was instituted by the plaintiff wherein she sought the following relief:

1. An order for restitution of conjugal rights by her husband, the defendant failing compliance to it,

   a. A final order of divorce.

   b. An order whereby custody and control of the minor child, H. N.B, born on 09 October 1996.[1]

[2] In addition hereto the plaintiff also sought an order for specific forfeiture of benefits arising from the marriage in community of property, in respect of the immovable property situated at Erf 375, Onima Street, Okurangawa, Katatura, Windhoek.

[3] As a further alternative the plaintiff in addition sought an order declaring the value of the improvements made to the traditional homestead situated at Omhalye-Omape, Omsati region, which is in the northern part of Namibia, to be considered as part of the joint estate where division will be considered.

[4] To this end in support of her claim the plaintiff in her particulars of claim alleged that the defendant wrongfully, maliciously, constructively and with the settled intention of

[1] The said minor child had since become a major on 09 October 2017.

termination the marital relationship between them, engaged in the following conduct, verbatim from the particulars of claim:

'6.1 The defendant threatens to kill the plaintiff, strangled and assaults plaintiff;
6.2 The defendant uses foul language towards the plaintiff;
6.3 The defendant's family interferes in the marital relationship;
6.4 The plaintiff obtained a protection order against the defendant as on 25 January 2015 he strangled plaintiff and twisted her arm.
6.5 The defendant failed to meaningfully communicate with plaintiff;
6.6 The defendant failed to contribute to the common household of the parties.

7. As a result of the defendant's behavior as set out above, further cohabitation with him became dangerous and intolerable as a result whereof plaintiff has moved from the common bedroom of the parties in October 2013.

8. In the premises the defendant had wrongfully and maliciously and constructively deserted the plaintiff in which desertion he persists.

9. Alternatively the plaintiff alleged that the defendant suffered from incurable insanity and was declared of unsound mind and incapable of managing his own affairs on 07 June 2016 by the High Court of Namibia.'

A brief background history of the case leading up to the trial

[5] Summons in this matter was issued on behalf of the plaintiff on 12 February 2014. The notice of intention to defend was filed on behalf of the defendant on 13 March 2014.

[6] The defendant pleaded to the claims of the plaintiff and in turn filed a counterclaim, wherein the defendant prayed for an order of restitution of conjugal rights failing compliance therewith a final order of divorce. The defendant further prayed for an order awarding custody and control of the minor child to the plaintiff subject to the defendant having reasonable access, and for the division of the joint estate.

[7] During July 2014 the plaintiff and the defendant engaged in settlement negotiations. After multiple postponements a settlement was reached and the matter was enrolled for restitution of conjugal rights proceedings (RCR proceedings). In terms of a clause incorporated in the settlement agreement the defendant withdrew his notice of intention to defend and agreed that the plaintiff would proceed with the action undefended.

[8] On 04 March 2015 the plaintiff with the assistance of her duly appointed legal practitioner obtained an RCR order incorporating the settlement agreement reached between the parties.

[9] The *rule nisi* in this matter was extended twice and on 05 August 2015 an application was filed on behalf of the defendant for the rescission of the RCR order dated 04 March 2015, and following shortly thereafter, on 06 October 2015 an application for the appointment of a *curator ad litem* was filed.

[10] On 06 October 2015 the Court appointed Mr, Amupanda Kamanja (herein after called Kamanja), a legal practitioner practicing in the High Court of Namibia, as the *curator ad litem* to the defendant. Kamanja was instructed to interview the patient (the defendant) and to prepare and file his report in this matter with the Registrar in compliance with rule 82 (3) of the Rules of Court.

[11] The *rule nisi* was further extended pending the filing of the *curator ad litem's* report in terms of the said rule. The report was duly filed on 02 February 2016.

[12] In anticipation of the Masters report, in terms of rule 82(5) the matter was postponed repeatedly and on 07 June 2016 the court declared the defendant to be of unsound mind and as such incapable of managing his own affairs. Mr. Johannes Aipanda was appointed as *curator bonis* for the defendant.

[13] The defendant was thereafter substituted with Aipanda in terms of rule 43(7) of the Rules of Court. Thus Aipanda will hereafter be referred to as the nominal defendant.

[14] After several amendments to the particulars of claim the plaintiff withdrew her opposition to the rescission of the RCR order dated 04 March 2015 and leave was granted to the nominal defendant to defend the matter on behalf of the defendant.

Common Cause facts:

[15] The following facts appears to be common cause as gleaned from the proposed pretrial order:

a) The plaintiff and defendant got married to each other on 13 December 1985 at Onawa, Ombalantu in the Omsati Region.
b) The parties were married in community of property, which marriage still subsists.
c) From the marriage three daughters were born, all of whom are majors.
d) The immovable property, Erf 375, Ohima Street, Okuryangava, Katatura is registered in the name of the defendant.
e) The immovable property, situated at Omahalye-Omape is registered in the name of defendant.
f) Mr. A B was declared of unsound mind and incapable to manage his own affair.

Evidence adduce by Plaintiff:

[16] Three witnesses, which included the plaintiff, testified in support of the plaintiff's case.

Domestic violence and alcohol abuse:

[17] The evidence of the Plaintiff stood largely unchallenged. The nominal defendant court neither deny nor confirm the evidence of the plaintiff specifically with reference to

the abusive relationship that existed between the parties. For the sake of brevity I will not repeat the exact details of the abuse suffered by the plaintiff from 1992, save to say that the conduct of the defendant as alleged in the further amended particulars of claim appears to be a fair summary of the instance of abuse. During her evidence the plaintiff articulated in detail to this court a tumultuous and distressing relationship which was tainted with quarrels, verbal abuse, threats of assault and physical assault.

[18] Plaintiff testified initially after the couple got married in 1985 all was well in their marriage. After the marriage the plaintiff fell pregnant with their first born and she remained in the North for approximately a year at the homestead. Thereafter she took up a position as a nurse in Rehoboth in 1987 where she worked and resided up to 1989. She would commute between Rehoboth and Windhoek when the opportunity presented itself. The defendant was living and working in Windhoek at the time.

[19] After the plaintiff secured employment at Katutura Hospital in Windhoek she relocated back to the capital and in 1990 the couple moved into their house at Erf 375, Ohima Street, Okuryangawa, Windhoek.

[20] Plaintiff testified that the defendant started consuming alcohol excessively in 1992. Once he consumed alcohol he would become physically abusive and would assault her to such an extent that she would have to flee from the house or lock herself in the cupboard to avoid being assaulted.

[21] When sober the defendant would apparently not abuse her, however, he would go out drinking and come back under the influence of alcohol the cycle of abuse would start all over.

[22] During this period the plaintiff sought assistance from the police, social workers, and the church, as the last resort she approached the court to seek assistance.

[23] This abusive relationship persisted until the plaintiff was forced to move out the communal home in 2014 out of fear for her own safety. Plaintiff also manage to secure a protection order against the defendant in January 2014.

Mental illness:

[24] Plaintiff stated that on a date in 1999, which she could not recall, the defendant went out on a drinking spree and when he returned home he appeared confused, so she called a relative of the defendant who took him to hospital. The defendant was thereafter referred to the psychiatric ward at Windhoek Central Hospital. Defendant was admitted to the psychiatric ward for a week where after he was discharged.

[25] During 2011 the defendant was again admitted to the psychiatric ward at Windhoek Central Hospital for a short period of time during which he got treatment and was discharged.

[26] Plaintiff could not elaborate on a diagnosis in respect of the defendant but stated that the defendant only became aggressive when he consumed alcohol but apart from that he functioned normally.

[27] Plaintiff could not say what gave rise to the spells of confusion by the defendant. She stated that the defendant was never declared mentally ill and only came to know of the fact that he was declared mentally ill when the application for curator *ad litem* served before court.

<u>Immovable properties</u>*:*

Property at Omahalya-Omape, Omusati Region:

[28] At the time that the plaintiff was pregnant with their first child she stayed at the home-stead of her in-laws in Omahalya-Omape, Omusati Region. She was not overly keen to permanently reside in the yard of her mother in law and insisted that the defendant

obtain a plot from the tribal authority where they could construct their own homestead. Defendant was successful and a plot was awarded to him adjacent to his family homestead.

[29] The defendant indicated to the plaintiff that he does not have the fund to build on the plot and plaintiff then requested him to secure builders as she would fund the project. During 1995 a permanent structure consisting of five sleeping rooms and a sitting was erected on the plot at the costs of the plaintiff and she stated that she also installed water and a solar system on the specific plot at her own costs.

[30] The defendant is currently permanently residing at this property.

Property at Erf 375, Ohima Street, Okuryangava, Katutura:

[31] After the birth of their first child the plaintiff moved back to Windhoek and because of a staff shortage she took up a nursing position at Rehoboth Hospital during 1987. She held a position at the said hospital until 1990. During this time the defendant applied for a loan with the Nation Planning Enterprises. He was employed as a cleaner at Model Pick and Pay at the time. He was initially not successful in his application for the housing loan due to his low salary but when the couple agreed that the defendant would submit the salary advice of the plaintiff he succeeded in securing the housing loan in the amount of N$ 104 955.00.

[32] With the loan secured the couple bought the home and they moved into Erf 375, Ohima Street, Okuryangava, Windhoek (hereinafter called the property) during 1990.

[33] The plaintiff's case is that although the defendant initially contributed in the repayment of the housing loan it was temporary as he informed her that he was unable to contribute further as his salary was not sufficient to cover the monthly bond instalments. Plaintiff estimated that the total contribution to the bond repayment was approximately N$ 5000.

[34] Plaintiff was in the position to take over the bond payments and even increased the monthly payments in an attempt to settle the bond sooner.

[35] The plaintiff avers that she did not only maintain the bond payments but also paid rates and taxes and the general upkeep and improvements on the property. Plaintiff denies that the defendant contributed anything to the joint estate in spite of the fact that he was sporadically employed.

[36] Plaintiff testified that this was the position for the onset of their marriage. When she was pregnant with their first child and living in the North the defendant did not maintain her. She was a student nurse at the time and earned an income prior to the birth of their child and it was not much of an issue to her. Afterwards when she started to work in Rehoboth their minor child was living with her as she had a nanny and defendant lived in Windhoek.

[37] In addition to paying the mortgage bond, rates and taxes and the general up keep, she also bought the groceries for their home and she paid the tuition for their daughters and did so without the financial assistance of the defendant.

Evidence of Mr. Christian Erb:

[38] Mr. Erb, a valuator and property consultant by profession. He was called as an expert witness on behalf of the plaintiff. He stated that he has been a property valuator since 1984 till date. Moreover he pointed out that he has the work experience, however, he requires only three more subjects to obtain his academic qualification.

[39] He was requested to do an evaluation on the urban property. Erb stated that in order to establish the most probable market value of the property he considered three valuation approaches and took the average thereof. The valuation approaches are:

(a) Comparable market analyses;

(b) Weighted depreciated replacement cost of the improvements, added to the value of the land as if unimproved, valuation approach; and
(c) Income capitalization method of valuation.

[40] He determined the probable market value of the property to be N$ 750 000.00 (seven hundred and fifty thousand Namibian Dollars). A valuation certificate to this effect was handed in as exhibit to certify the value of the property.

Evidence of Efraim Hiamueze Casey Muzambani:

[41] The last witness who testified on behalf of the plaintiff was Mr. Muzambani. He stated that he is a qualified property valuator and consultant and hold a Bachelors of Science and also several other qualifications like a diploma in Property Valuation and Finance and NEAB certificate in Real Estate. He is currently engaged with his Bachelors Science (Hons) in Quantity Surveying.

[42] Muzambani was requested to do a valuation of the property situated at Omahalya-Omape, Omusati Region, which he did on 05 August 2016.

[43] The witness stated that he only valued the permanent structures and the temporary structures which consisted of fencing and two fruit bearing trees separate from the land. Although the home-stead is situated in a communal land area the witness did a valuation on the land that is currently not crop bearing.

[44] Muzambani further indicated that because a property of this nature would not be on the market and, therefore, the comparable method could not be employed to determine the value of the home-stead. In order to reach valuation he used the cost less depreciation method plus site improvement and concluded that the value of the property was N$207 000.00 (Two hundred and seven thousand Namibian Dollars).

[45] The plaintiff case was concluded.

Evidence adduced on behalf of the defendant:

[46] The nominal defendant, Mr. Aipanda, was the only witness who testified on behalf of the defendant. The witness was appointed as the *curator bonis* in respect of the defendant on 07 June 2016.

[47] Aipanda stated that the defendant is his uncle and although they are family he could neither confirm nor deny the abuse suffered by the plaintiff and indicated that he has no objection if the divorce is granted.

[48] The only issue that he had was the prayer for specific forfeiture of the property situated in Windhoek. Aipanda was of the opinion that there should be an equal division of the joint estate. The witness stated that he did not want either party to suffer financially and that the urban property could be liquidated, which would be to the benefit of both the parties.

Mental illness

[49] On the mental state of the Aipandu stated that he got to learn of his uncle's admission to the psychiatric ward in Windhoek during 1999 and 2011. From the medical passport of the defendant, Aipanda determined that his uncle had psychological problems which included confusion, hallucination and hearing of voices. He could, however, not say what the diagnosis was in respect of the mental illness suffered by the defendant or when it was diagnosed. Once the plaintiff instituted the action for divorce and the defendant signed the settlement agreement Aipanda took the defendant to be assessed, where after the application for curatorship was prepared.

[50] Aipanda pointed out that reports were obtained from Dr. Simenda and Dr. Mthoko. Unfortunately these reports were not handed in as exhibits, and the two psychiatrics were not called to testify in support of the defendant's case.

[51] During cross-examination Aipanda indicated that he observed forgetfulness on the part of the defendant but, the defendant did not display aggression towards other people.

Financial aspect

[52] On the issue of finances and contributions made by the defendant towards the join estate Aipanda testified that he knew his uncle was employed at places like Model Super Market and Rhino Super Market and then he drove a taxi during 2011.

[53] This concluded the case for the defendant.

Ground for divorce:

[54] The grounds for divorce as set out in the particulars of claim is based on malicious and constructive desertion, and in the alternative that defendant suffered from incurable insanity and was declared of unsound mind and incapable of managing is own affairs.

Incurable insanity:

[55] I will first deal with the alternative ground for divorce, then I shall later deal with the grounds based on malicious and constructive desertion.

[56] Incurable insanity is an exception to the fault principle and in order for the plaintiff to succeed on this ground she has to establish three things, i.e.[2]:

a) that the defendant was of unsound mind;

[2] Hahlo HR: *The South African Law of Husband and Wife* 5th ed, at page 347-348.

b) that the defendant had been subject to the provision of Mental Health Act, 18 of 1973 for a period of not less than seven years[3]; and

c) that the defendant was incurable.

[57] "Incurable" means that the defendant cannot hope to be restored to a state which he (or she) will be capable of leading a normal social life and of managing himself and his affairs.[4] Under section 1(1)(a) of the *Divorce Laws Amendment Ordinance* 18 of 1935 incurability had to be proved by the evidence of three medical practitioners, two of whom had to be appointed by court.

[58] The defendant was voluntarily admitted to the psychiatric ward twice according to the evidence of the plaintiff where after he was discharged after a short period of time. It would, therefore, appear that the plaintiff will not be successful on this ground because of what I have alluded above.

[59] One should also not lose sight of the fact that the plaintiff seeks specific forfeiture in her relief. If the plaintiff was serious in proceeding with her claim of divorce based on incurable insanity she would not be able to obtain the relief sought. Section 2(b) of the *Divorce Laws Amendment Ordinance*[5] provides that the court shall not, as against the defendant, order any forfeiture of benefits arising out of the marriage. The principle underlying this provision is that the divorce is granted by reason of misfortune, and not for any fault on the part of the defendant and there is therefore no occasion to visit the defendant with penal consequences[6].

Malicious or Constructive Desertion:

[60] HR Hahlo *The South African Law of Husband and Wife* 3 ed (Juta & Co Ltd 1969) at 387 states that: 'Malicious desertion is made up of two elements, (a) there must

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[3] Section 1(1)(a) *Divorce Laws Amendment Ordinance* 18 of 1935
[4] *Ridley v Ridley* 1961 (1) SA 59 (S.R) decided on the analogous provision of the Rodesian Act, following Whysall v Whysall (1959) All E.R. 89
[5] Ordinance 18 of 1935
[6] *De Villiers v De Villiers* 1959 (2) SA 28 (T) at 34.

be the factum of desertion . . . ; (b) the defendant must have acted *animo deserendi*.' Hahlo supra continues at 387 and argues that there are four forms of malicious desertion in our law, namely actual desertion, constructive desertion, refusal of marital privileges, and possibly, sentence of death or life imprisonment.

[61] In the matter *in casu* the plaintiff's evidence is that she had to leave the common home out of fear for her own safety due to the continuous abuse from the defendant. This is a clear example of constructive desertion. Hahlo describes constructive desertion as having taken place when an innocent spouse leave the matrimonial home when the defendant, with the intent to bring the marital relationship to an end, drives the plaintiff away by making life in common dangerous or intolerable for him or her.

[62] Hahlo proceeds and argues that four requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:

(a) the consortium of spouse must have come to an end as the result of the
(b) plaintiff's having left the defendant;
(c) it must have been the defendant's unlawful conduct that caused the plaintiff to leave;
(d) the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.

[63] Coleman J held in *Froneman v Froneman*[7] that the *animus* for constructive desertion is either satisfied upon proof of *dolus directus* or *dolus eventualis*. At page 198 of the judgment the learned judge stated as follows:

'The law, as I understand it, is this: No conduct, however reprehensible, will constitute constructive desertion unless the necessary animus is present. The animus may take the form of *dolus directus* in the sense of a positive intention to put an end to cohabitition; or it may take the form of dolus

[7] 1972 (4) SA 197 (T) at 198

eventualis in the sense of a knowledge by the defendant that the probable or possible effect of his conduct would be a termination of cohabitation, coupled with a wilful disregard of that possibility or probability. The animus may be proved by direct or indirect evidence of the defendant's state of mind; it may, in a proper case, be inferred from the circumstances, including the nature of the defendant's unlawful conduct. But, unless the animus is established by inference or otherwise, there can, in my judgment, be no finding of constructive desertion.'

[64] According to the plaintiff there was a build- up of incidences that eventually lead up to the point where she proceeded to institute divorce action. According to her the defendant was aware of the possible consequences of his continued abuse. Defendant promised to reform on many occasions when there were interventions from a social worker, the church and the police. In fact, whilst in hospital in 2011 he promised that if he is released he would stop drinking and abusing the plaintiff.

[65] Plaintiff stated that she informed the defendant that she wish to institute divorce proceedings in 2011 already. The abuse, however, continued in spite of being forewarned of the possibility and in 2014 plaintiff put word to action and instituted the current action.

[66] It was submitted by the *curator ad litem* that due to the mental illness of the defendant he might not have had the required *animus*. It was further submitted that he had this condition since 1999. However, the plaintiff who lived with the defendant year in and year out and who is a registered nurse stated that he was not diagnosed as mentally ill in 1999 and when the defendant did not drink he became quite normal.

[67] This Court did not have the advantage of hearing the psychiatrist that diagnosed and treated the defendant to explain the correlation between defendant's alcohol abuse and his mental incapacity, if any.

[68] Having regard to the plaintiff's evidence, I am satisfied that the defendant is shown to have had the knowledge that the probable or possible effect of his conduct would result in the termination of cohabitation between them and he willfully disregarded that possibility or probability. Defendant's unlawful conduct rendered further cohabitation with him dangerous and intolerable for the plaintiff.

Specific forfeiture order:

[69] The plaintiff seeks a specific forfeiture order in respect of the property situated in Windhoek. A specific forfeiture order is an order where a particular *res* is forfeited to the plaintiff.[8] When such a specific forfeiture order is sought, a court requires a litigant to set out all the relevant information[9]. The relevant principles applicable were discussed in the authoritative judgment of *C v C, L v L*.[10] Heatchcote AJ articulated the relevant principles as follows;

[22] . . . the legal principles applicable in Namibia are these:

'…….

> [22.5] When the court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led. The fact that a husband or wife does not work, does not mean that he/she did not contribute. Value should be given to the maintenance provided to the children, household chores and the like. It would be readily quantifiable with reference to the reasonable costs which would have been incurred to hire a third party to do such work, had the spouse who provided the services, not been available during the marriage. Of course, he/she would then possibly have contributed more to the estate, but these difficulties must be determined on a case by case basis. Only in such circumstances can the forfeiture order be equitable.

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[8] Hahlo HR n14 supra at 435. See also Steenberg v Steenberg 1963 (4) SA 870 (C); Ex parte De Beer supra.

[9] Ex parte Deputy Sheriff, Salisbury: In re Doyle v Salgo 1957 (3) SA 740 (SR) at 742D; NS v RH 2011 (2) NR 486 (HC).

[10] 2012 (1) NR p37 at 46-47.

[22.6] When a court considers a request to grant a quantified forfeiture order, evidence produced should include the value of the joint estate at the time of the divorce, the specific contributions made to the joint estate by each party, and all the relevant circumstances. The court will then determine the ratio of the portion each former spouse should receive with reference to their respective contributions. If the guilty spouse has only contributed 10% to the joint estate that is the percentage he or she receives. If, however, the 10% contributor is the innocent spouse, he or she still receives 50% of the joint estate. The same method as applied in the Gates' case should find application.

[22.7] The court, of course, has a discretion to grant a specific or quantified forfeiture order on the same day the restitution order is granted, if the necessary evidence is led at the trial. In order to obtain such an order, the necessary allegations should be made in the particulars of claim ie the value of the property at the time of divorce, the value of the respective contributions made by the parties, and the ratio which the plaintiff suggests should find application (where a quantified forfeiture order is sought). Where a specific forfeiture order is sought, the value of the estate should be alleged, and the specific asset sought to be declared forfeited should be identified. It should then be alleged that the defendant made no contribution whatsoever (or some negligible contribution) to the joint estate. (Note: this is not the same as alleging that no contribution was made to the acquisition or maintenance of the specific asset.) I am of the view that it is only fair that defendants also, in unopposed divorce actions (by and large getting divorced in circumstances where the defendant is illiterate and would not even understand the concept of forfeiture of benefits) should be provided with such details. (*my underlining*)

[22.8] In exceptional circumstances, and if the necessary allegations were made and the required evidence led, it is possible for a court to make a forfeiture order in respect of a specific immovable or movable property (ie. a specific forfeiture order). I say that this would only find application in exceptional circumstances, because it is not always that the guilty defendant is so useless that the plaintiff would be able to say that he/she has made no contribution whatsoever, or a really insignificant contribution (to the extent that it can for all practical intents and purposes be ignored).

[22.9] It is of no significance or assistance, if the plaintiff merely leads evidence that, in respect of a specific property he or she had made all the bond payments and the like.

> What about the defendant's contributions towards the joint estate or other movable or immovable property in the joint estate?
>
> [22.10] It is also not a valid argument, to submit (as counsel for one of the plaintiffs in this case did), that the matter is unopposed. The question which arises is, does the defendant know what is claimed? And in any event, the court has no discretion to act contrary to the law simply because the matter is not opposed. No opposition does not constitute an agreement. Any defendant is entitled to assume, even if he/she does not oppose, that a court will only grant a default judgment within the confines of the law.

[70] I fully endorsed the principles laid down in the judgment and moreover I respectfully associate myself with the above-stated principles.

[71] In applying these principles to the facts I am satisfied that the plaintiff has proven the following on a balance of probabilities:

a. The value of the immovable property at the time of the divorce;
b. That specific asset sought to be declared forfeited was sufficiently identified; and
c. Evidence regarding the contributions of each party.

[72] The argument is amongst other that as the defendant has now been declared a mentally ill the court should not grant the relief sought in claim 2 by the plaintiff.

[73] It should be very clear that the court does not stand unsympathetic to the unfortunate position that the defendant finds himself in. The court has a lot of empathy for the defendant but that does not change the reality of the facts before me.

[74] Admission to a psychiatric ward twice for short periods of time does not call for an automatic conclusion that the defendant is mentally ill. Nor does the fact that the

defendant at times was confused call for an assumption that the defendant is mentally unfit to work and unable to earn an income. There is no such evidence before me.

[75] From 1985 when the couple got married to 2011 the defendant was apparently quite fit to work but even when he worked he did not contribute to the joint estate, with the exclusion of the small sum of money that he paid towards the bond shortly after the home loan was obtained.

[76] The fact that the defendant behaved in an excessively violent manner towards the plaintiff can also not be regarded as a sign of mental illness as the violence was only directed to the plaintiff and only when the defendant was under the influence.

[78] I can therefore not accept that it was proven that the defendant was mentally ill for the bigger part of his marriage and that is why he should be guiltless in respect of his violent behavior.

[79] Given the violent history between the parties and for reasons already discussed I am of the opinion that this is an exceptional case where specific forfeiture should be granted.

[80] With that in mind I should make the remark that the plaintiff was the sole contributor in respect of the construction of the dwelling in which the defendant currently resides and that she does not claim the value of the improvements from the defendant. The value of the improvements of which the defendant has enjoyment makes up for the insignificant contribution that the defendant made to the joint estate.

[81] In terms of the Communal Land Reform Act[11] , a customary land right may not be allocated to more than one person jointly. The court in *Mutrifa v Tjombe*[12] had this to say with regards to communal land held under the Act;

[34] However, from the nature of the customary land right as set out in the *Act*, it appears to me that a customary land right is akin to a usufruct, in that:

> (a) it is granted in favour of a particular individual, and entitles the holder to have use and enjoyment of the property of another;
> (b) the holder does not acquire ownership of the property and must use the property in the manner it was intended to be used . . .;

Therefore, the concept of joint-holdership does not find support in the provisions of the *Act.* In consequence of this the defendant retains the personal right to occupy said communal land as his sole and exclusive property.

Conclusion

[82] As a result of the aforesaid my order is therefore as follows:

Ad Claim 1:

(a) The court grants judgment for the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or to receive the plaintiff on or before 28 March 2018, failing which, the bonds of marriage subsisting between the plaintiff and defendant should be dissolved.

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[11] 5 of 2002.
[12] *Mutrifa v Tjombe* (I 1384-2016) [2017] NAHCMD 162 (14 June 2017) at para 34.

Ad Claim 2:

(b) Specific forfeiture of benefits arising from the marriage in community of property in respect of property situated at Erf 375, Ohima Street, Okuruyangava, Katutura, Windhoek is granted to the plaintiff.

Ad Claim 3:

(c) The rights of the improvements in respect of the property located at Omahalya-Omape, Omusati region, shall be the sole dnd exclusive rights of the defendant.

(d) Costs: Each party to pay his/her own costs.

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JS Prinsloo

Judge

APPEARANCES:

PLAINTIFF:	N Shilongo of Sisa Namandje & Co. Inc., Windhoek
DEFENDANT:	A Kamanya Instructed by Shikale & Associates, Windhoek