REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1321/2011

In the matter between:

JOHANNES JONAS KASITA **PLAINTIFF**

and

HELVI TWEUTHIGILWA IIPINGE **DEFENDANT**

Neutral citation: *Kasita v Iipinge* (I 1321/2011) [2013] NAHCMD 72 (14 March 2013)

Coram: PARKER AJ
Heard: **6 – 8 February 2013; 21 February 2013**
Delivered: **14 March 2013**

Flynote: Husband and wife – Matrimonial property regime – Marriages governed by Proc 15 of 1928 – Such marriages presumed to be out of community of property – However, parties can within one month prior to celebration of the marriage jointly declare before the marriage officer that they wish to be married in community of property – In that event the marriage will be in community of property.

Flynote: Husband and wife – Maintenance of one spouse by the other – Spouse asking for spousal maintenance must establish he or she is in need of such maintenance.

Summary: Husband and wife – Matrimonial property regime – Marriages government by Proc 15 of 1928 – Such marriages presumed by operation of law to be out of community of property – However, such marriage will be one in community of property if within a time lag of one month prior to (ie 'previous to') the celebration of the marriage the parties jointly declare before the marriage officer that they wish their marriage to be in community of property – *In casu* the parties jointly made such declaration – Court holding that 'anytime previous to the celebration of the marriage' in s 17(6) of the Act means a time lag of one month prior to the celebration of the marriage – Consequently, the court concluding that the parties' marriage is one of community of property – Principle in *Nakasholo v Nakasholo* 2007 (1) NR 27 applied – Court therefore making an order that the joint estate be divided equally between the parties.

Summary: Husband and wife – Maintenance of one spouse by the other – Spouse asking for spousal maintenance must establish he or she is in need of such maintenance – Court applied principle in *Neil Roland Samuels v Petronella Samuels* Case No. I 902/2008 (Unreported) – Court finding that the defendant needed the spousal maintenance – However since the court has ordered the plaintiff to immediately pay 50 per cent of the money the plaintiff was paid by the Omuthiya Town Council for expropriating the matrimonial home (ie N$255 169,50), the court found it would be unreasonable and unfair to order the plaintiff to pay maintenance to the defendant.

ORDER

(a) The plaintiff must not later than 31 March 2013 pay to the defendant N$255 169,50.

(b) The rest of the joint estate must be dissolved and divided equally between the plaintiff and the defendant.

(c) Costs shall stand over for determination in due course.

JUDGMENT

PARKER AJ:

[1] In this matrimonial matter the issues requiring adjudication as set out in the pre-trial order made on 24 January 2013 are:

(a) whether the parties are married in community of property or out of community of property;

(b) which party shall have custody and control of the minor children;

(c) the amount of maintenance that shall be paid in respect of the minor children;

(d) whether or not the defendant is entitled to spousal maintenance and the amount that shall be paid.

[2] It was the understanding of Ms Shipopyeni, counsel for the plaintiff, and Ms Shikale, counsel for the defendant, that since issues (b) and (c) are interrelated and a decision on (c) should reasonably be influenced by who will have custody and control of the minor children, issues (b) and (c) should be adjudicated in a separate proceeding. It was further the understanding of both counsel that decisions on issues (b) and (c) should await the social welfare report requested by the registrar from the Ministry of Gender Equality and Child Welfare. For these reasons, evidence and submissions were heard on only issues (a) and (d). This judgment, therefore, concerns these two issues only.

Issue (a):

[3] The law is now settled that a marriage governed by s 17(6) of the Native Administration Proclamation 15 of 1928 ('the Proclamation') has by operation of law the consequences of a marriage out of community of property unless within a time lag of one month prior to the celebration (ie solemnization) of the marriage the parties jointly declared before the marriage officer that it was their intention and wish

that their marriage be in community of property. (*Nakasholo v Nakasholo* 2007 (1) NR 27) In the instant case the evidence points irrefragably to this, and both counsel do not dispute it: A declaration was jointly made by the parties within the time lag of one month prior to the celebration of their marriage on 26 December 2003 at Oshigambo within the meaning of s 17(6) of the Proclamation. But that is not the end of the matter. Ms Shipopyeni submits that according to s 17(6) of the Proclamation 'a declaration must be made one month prior to the solemnization (celebration) of the marriage', and 'the parties made such declaration two weeks before the conclusion (celebration) of the marriage'. And so, counsel concludes, the Plaintiff and the Defendant are married out of community of property. Counsel's construction of s 17(6) of the Act is incorrect.

[4] Seeing that counsel had misread the clear and unambiguous provisions of s 17(6) of the Proclamation, with carefulness and judicial patience, I draw the attention of counsel to the fact that her misreading of those provisions has resulted in her misinterpretation of those provisions. Counsel appeared to remove the critical phrase 'at anytime within' which qualifies the clause 'one month previous to the celebration of such marriage'. In the end – it would seem to me – counsel appeared to have accepted that the correct interpretation and application of the limitation of time in s 17(6) of the Proclamation is that the declaration should be made jointly by the parties at any time within the time lag of one month prior to (ie 'previous to') the celebration of the marriage. As I have said previously, it is not in dispute that the parties jointly made the s 17(6) declaration within the time lag of one month prior to ('previous to') the celebration of their marriage in terms of that section of the Proclamation. In my judgment, therefore, I hold that the parties' marriage is in community of property.

[5] In his rule 37(6)*(b)* affidavit, the plaintiff claims, 'In the event of this Honourable Court finding that the marriage is in community of property, which I deny, then I propose that the Defendant forfeits the benefits derived from the marriage in community of property'. I should mention that this is not a statement of fact, as an affidavit should contain, but a conclusion of fact and a prayer for a particular relief. The plaintiff has not stated on oath the facts he relies on to support his prayer that the defendant should 'forfeit the benefits derived from the marriage in community of property'. In her counterclaim the defendant prays for the division of the joint estate, based on – as I understand it – the defendant's contention that the parties' marriage is in community of property (as I have found it to be). The plaintiff has not in his plea

pleaded to the defendant's counterclaim that the joint estate be divided. Besides, he has not, as I say, placed any facts before the court to persuade the court to order the defendant's forfeiture of the joint estate in the marriage which I have found to be in community of property. On the facts and in the circumstances of the case I conclude that it is just and fair that the joint estate of the parties is divided equally, ie each party taking 50 per cent of the joint estate. The facts placed before me do not justify a finding as to who has contributed less to the joint estate.

[6] There is the question of the matrimonial home. In her rule 37(6)*(b)* affidavit, the defendant states that whilst the divorce is ongoing the plaintiff sold the common home to the Town Council of Omuthiya. The plaintiff does not mention anything about this in his rule 37(6)*(b)* affidavit. The issue of the common home was only dealt with in the plaintiff's testimony during the trial. The plaintiff's testimony is that the Council paid an amount of N$524 339,59 but his father took N$400 000,00 and told the plaintiff that the plaintiff could keep the remaining N$124 339,59. I shall not place any credence on the plaintiff's testimony for the following reasons. The plaintiff did not adduce any evidence from the father to corroborate his say-so. Besides, this issue about the common home was not dealt with at all in the plaintiff's rule 37(6)*(b)* affidavit; and so I think I should invoke rule 37(16) of the rules in that regard. Thus, for these two considerations, I think I should not accept the plaintiff's testimony that he was only left with N$124 339,59 out of the compensatory payment of N$524 339,59 made by the Omuthiya Town Council to the plaintiff in respect of the matrimonial home. I hold, therefore, that the total amount of N$524 339,59 should form part of the joint estate; and the defendant is entitled to 50 per cent of this amount. She has already been given the aforementioned N$7 000,00 by the plaintiff from the payment made by the Council.

Issue (d):

[7] As I understand it, the dispute is not concerned with whether the defendant is entitled to spousal maintenance but with the amount to be paid. And in this regard, what the defendant prays for is N$1 200,00 per month for a period of 24 months only. From the evidence I gather that the plaintiff says he is only able to pay N$200,00. To support his position, he testified about his monthly remuneration (indicated on his payslip) as an assistant clerk in the employ of the Ministry of Agriculture, Water and Forestry. This court can only award her maintenance and the amount involved 'if it is proven on a balance of probabilities that she is in need of it'.

(*Neil Ronald Samuels v Petronella Samuels* Case No. I 902/2008 (judgment on 26 March 2010) (Unreported) para 32)

[8] The defendant says she needs the N$1 000,00. Since the matrimonial home has been sold by the plaintiff, I find that the defendant needs the maintenance to pay for, among other things, at least rent in respect of residential accommodation and her sewing shop. On the evidence I find that she derives N$750,00 per month from her sewing business, and out of that she pays rent of N$300,00 per month for the sewing shop, leaving her with N$450,00. I have decided previously that the defendant is entitled to one half of the joint estate, including 50 per cent of the money paid to the plaintiff by the Omuthiya Town Council, that is, N$255 169,50. For this reason, I think it would be unfair and unreasonable to order the plaintiff to pay the defendant spousal maintenance of N$1 000,00 or any amount per month for two years.

[9] Since the present proceeding concerns only one part of the cause or matter (ie issues (a) and (d)) I shall not determine costs of suit at this stage: costs will stand over for determination in due course.

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

(a) The plaintiff must not later than 31 March 2013 pay to the defendant N$255 169,50.

(b) The rest of the joint estate must be dissolved and divided equally between the plaintiff and the defendant.

(c) Costs shall stand over for determination in due course.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	F N K Shipopyeni Of Shipopyeni & Associates, Windhoek
DEFENDANT:	L Shikale Of Kaumbi-Shikale Inc., Windhoek