REPORTABLE

CASE NO: SCR 4/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHRISTIANA CLERESA KHAISEB **Applicant**

and

CYPRIANUS KHAISEB **Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: **25 September 2024**

Delivered: **24 October 2024**

Summary: The parties in this review application were married to each other in community of property. The applicant filed an action for divorce against the respondent alleging malicious desertion to which the respondent also filed a counterclaim for divorce – also alleging malicious desertion and claiming a forfeiture of benefits order in respect of several properties. Prior to the trial, the parties settled certain issues between them (ie the custody, control and maintenance of the children and the issues surrounding the ownership of the motor vehicles fell by the wayside). The only issues that remained were who of the parties was the malicious deserter and the proprietary consequences that should follow from the eventual divorce in

respect of the property not forming the subject matter of the settlement agreement. The court *a quo*, after considering further evidence relating to the forfeiture of benefits relief, varied the original forfeiture order in favour of the respondent on 31 May 2023. The parties set the matter down before Prinsloo J for hearing attempting to finalise orders 1 and 3 of the orders of 31 May 2023. The parties were informed by Prinsloo J that she could not hear the matter as another judge of the High Court already made a final decision on 10 March 2021 and she could not revisit and vary it as the court was *functus officio*. Following this, the parties filed a joint status report stating that they agreed with Prinsloo J's stance and under the heading 'The way forward' agreed that they would abandon the judgment varying the original order, that they would approach the Supreme Court in terms of s 16 of the Supreme Court Act 15 of 1990 to review both the judgments of 10 March 2021 and of 31 May 2023, that security for costs would not be required and that the parties would share the costs in respect of the review.

The applicant petitioned this Court in terms of s 16 of the Supreme Court Act 15 of 1990 to review both the judgments of 10 March 2021 and 31 May 2023. Leave to review the aforesaid judgments was granted and this is the application under consideration.

Held that, in respect of the order of 10 March 2021, it was a final order which the same court could not revisit and all the processes following from the initial restitution order onwards in relation to the forfeiture orders and up to the hearing of the so-called application to vary the forfeiture order and the judgment supporting the varied order amounted to irregularities in the proceedings.

Held that, the judgment of 20 July 2022 in so far as it granted orders to facilitate a further hearing to consider varying the general forfeiture order and the further judgment of 31 May 2023 varying the said general forfeiture order be reviewed and set aside.

Held that, with the general forfeiture order handed down in the present matter, it is highly unlikely that the applicant will be prejudiced. This is because the assets in respect of which no settlement has been reached are clearly sufficient to cover any amount due to her on her own version once the forfeiture calculations are made. In short, no case has been made out for any prejudice never mind substantial prejudice. In these circumstances an appeal, if so advised, must be a suitable remedy.

Held that, the order to restore conjugal rights was simply one for forfeiture of benefits and it is obvious that the parties will have to attempt to come to an agreement in respect to the still disputed properties relating to her contributions or they will have to approach the High Court for an appointment of a referee to assist the court in this regard or for the High Court to endeavour to finalise the issue itself through referring the remaining issues to a hearing of oral evidence.

Held that, the applicant went back on her undertaking and sought the review of the order of 10 March 2021 in this application. This caused the respondent to enter the fray to oppose this relief so as to keep the order of 10 March 2021 as the last effective final order by the High Court in respect of leave granted relating to the divorce between the parties.

Consequently, the applicant is unsuccessful in respect of the relief sought in respect of the order of 10 March 2021 and in these circumstances the court is of the view that a costs order is necessary and should grant an order as to costs. Applicant’s change of tact clearly caused respondent to incur costs, to which he is entitled.

REVIEW JUDGMENT

FRANK AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

Introduction

[1] The parties were married in community of property. The applicant instituted divorce proceedings against the respondent based on malicious desertion. She thus sought a restitution order and failing compliance therewith a decree of divorce. The usual ancillary relief also featured in respect of the custody and maintenance of the minor children. As far as the proprietary consequences were concerned she sought the following relief; namely:

(a) An order compelling respondent to sell his 50 per cent share in a house situate at Erf 1509, Hochland Park, Windhoek to her resulting in her becoming the sole owner of the house (the marital home), and;

(b) That each party retains the movable properties currently in their respective possession.

[2] The respondent defended the action against him and, denied that he maliciously deserted the applicant, and in a counterclaim instituted divorce proceedings against applicant based on her malicious desertion. He thus similarly sought a restitution order and failing that, a decree of divorce. He sought joint custody of the minor children and an order that the parties would equally be responsible for their maintenance. As far as the proprietary consequences of the marriage were concerned, he sought the following relief:

(a) That he retains full ownership of the marital home;

(b) That he be declared the sole owner of a plot known as Dagbreek situated at Klein-Otavi;

(c) That he retains certain butchery equipment as his sole property, and;

(d) That he retains sole ownership of two motor vehicles namely a Ford Ranger Pick-up and a Kia Optima, and;

(e) That the applicant becomes the sole owner of a Mercedes Benz and absolving him from any liability in respect of the latter car.

[3] Prior to the trial, the parties in writing, settled certain of the issues between them with the result that the custody, control and maintenance of the minor children and the issues surrounding the ownership of the motor vehicles fell by the wayside. The only issues remaining were who of the parties was the malicious deserter and the proprietary consequences that should follow from the eventual divorce in respect of the property not forming the subject matter of the mentioned settlement agreement.

[4] It should be mentioned that the applicant in her claim did not seek an order for the forfeiture of benefits by respondent in respect of the community of property regime established by their marriage. The basis of her claims for the proprietary consequences she sought is thus unclear as it does not follow from her cause of action. For reasons that will become apparent below, it is not necessary to deal with this aspect any further. The respondent's basis for his property claims is termed 'as an order for specific forfeiture of benefits'. In his counterclaim he sets out the factual basis for this relief with allegations as to his contributions to the acquisition thereof and the applicant's contributions (or lack thereof).

[5] The matter proceeded to trial and after hearing the evidence on behalf of the parties the court *a quo* made the following order on 10 March 2021:

> ‘Plaintiff’s claim in convention
>
> 1. The plaintiff’s claim is dismissed.
> 2. No order is made as to costs.
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> Defendant’s claim in re-convention
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> 3. The court grants judgment for the plaintiff in re-convention/defendant for an order for Restitution of Conjugal Rights and orders the defendant in re-convention/plaintiff to return or receive the plaintiff in re-convention on or before 21 April 2022, failing which, to show cause, if any, to this Court on the 5th day of May 2022 at 10h00, why:
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> (1) The bonds of marriage subsisting between the plaintiff in re-convention/defendant and the defendant in re-convention/plaintiff must not be dissolved;
> (2) The partial Settlement Agreement entered into between the parties should not be made an order of court;
> (3) The defendant in re-convention/plaintiff should not forfeit the benefits arising from the marriage;
> (4) No order as to costs should not be made.’

[6] On the return day, the applicant filed an affidavit making it abundantly clear that she had no intention to return to the respondent. She however took issue with the forfeiture of benefits setting out the sacrifices she made while married to the respondent when he was transferred to Katima Mulilo and again when they returned to Windhoek and how they came to sell their first house and bought the marital home

in Pioneerspark. She further alleged that she made contributions thereto in respect of furniture and the building of a swimming pool and certain other improvements. She explains her contribution setting up and working at the butchery that the respondent attempted to establish but which did not materialise due to the COVID-19 pandemic. She further points out that she performed the duties of a housewife over the 18 years of their marriage.

[7] The respondent filed an affidavit in answer to that of the applicant maintaining that she did not make material contributions to the acquisition and maintenance of the matrimonial property as indicated in his counterclaim and also alleged that the applicant 'was not much of a "hands-on" wife as I did most of the cooking, cleaning and the general upkeep of the house'. He maintains her contribution to the common home was between three to five per cent of the total value, and that he paid for the butchery equipment from his 'pension payment' when he resigned from his employment.

[8] On 20 July 2022, the court *a quo* granted a final divorce order and made the partial settlement agreement an order of court. The forfeiture issue stood over for the filing of further affidavits by the parties and after this for a hearing based on the further affidavits. (The timelines for the filing of the further affidavits and the subsequent hearing in respect of the forfeiture order were contained in paras 3 to 6 of this order.)

[9] The court *a quo* considered the further evidence relating to the forfeiture of benefits relief on 24 August 2022 and in a judgment dated 31 May 2023, varied the original forfeiture order to read as follows:

> '1. The immovable property situated at Erf 1509, Hochland Park, Windhoek, Republic of Namibia is to be specifically forfeited to the defendant (plaintiff in re-convention) subject to the qualification that the plaintiff's (defendant in re-convention) percentage of forfeiture be quantified at the subsequent hearing.
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> 2. The immovable property plot Dagbreek, a portion at, Klein-Otavi with Deed Registration No. T856/1959, Republic of Namibia is declared specifically forfeited and to be the sole property of the defendant (plaintiff in re-convention) to the exclusion of the plaintiff (defendant in re-convention).
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> 3. The butchery equipment is to be specifically forfeited to defendant (plaintiff in re-convention), percentage of forfeiture to be quantified at subsequent hearing.
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> 4. The office of the Registrar is directed to allocate the matter for hearing evidence to quantify the plaintiff's (defendant in re-convention) percentage of forfeiture of the above two properties (orders 1 and 3 above) before another judge.
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> 5. Matter is finalised and removed from the roll.'

[10] The matter was then set down before Prinsloo J for hearing so as to finalise orders 1 and 3 of the orders of 31 May 2023 quoted above. She informed the parties that she could not hear the matter as another judge of the High Court (Tommasi J), when she made the order of 10 March 2021 made a final decision which could not be revisited and varied as the court was *functus officio*. Following this, the parties filed a joint status report stating that they agreed with the stance of Prinsloo J and under the heading 'The way forward' agreed that they would abandon the judgment varying the

original order, that they would approach this Court in terms of s 16 of the Supreme Court Act 15 of 1990 to review both the judgments of 10 March 2021 and that of 31 May 2023, that security for costs would not be required and that the parties would share the costs in respect of the review.

[11] The applicant launched an application in terms of s 16 of the Supreme Court Act to this Court seeking leave to review the original judgment (10 March 2021) and the varied judgment (31 May 2023). Applicant in the petition states as follows:

> 'I am advised that the court *a quo* should have made the order of 10 March 2021 a final order, in order to allow the parties, or me, to approach the Supreme Court to appeal the judgment of 10 March 2021.'

[12] The applicant was granted permission to institute the review application and this is the application under consideration.

[13] At the hearing of this application counsel for the applicant informed this Court that the parties reached an agreement in respect of Plot Dagbreek at Klein-Otavi and the order of the court *a quo* in respect of this property was no longer in dispute between the parties. (I point out here, in passing, that the legal practitioners representing the applicant in this application are not the legal practitioners who represented her in the court *a quo*.)

Decision of 10 March 2021

[14] It is clear that what the court *a quo* did on 10 March 2021 was to issue a restitution order. What was to be determined at the return day of the order, as there were no allegations of fraud or collusion in obtaining the restitution order, was whether the applicant returned to the respondent or tendered to return to him. The court *a quo*'s only function was to determine whether the applicant restored conjugal rights or made a *bona fide* offer to restore such rights.

> '. . . [T]he function of the Judge on the return day . . . is confined to seeing whether the restitution order has been duly served and whether the defendant has made return to the plaintiff.'[1]

[15] The other questions such as whether there was malicious desertion and whether the forfeiture order was correctly granted were *res judicatae* and could not be reconsidered.[2] As applicant made it crystal clear that she would not restore conjugal rights it thus followed as a matter of law that a divorce order had to be granted in terms of the order of 10 March 2021.

[16] From the case law I refer to in para 14 above it is clear that this position has been in place for a very long time and I would have thought that it was trite law. I must say I was surprised to note that neither of the parties' legal practitioners seemed to know this and even more surprised that the judge *a quo* also seemed unaware of this trite principle. This caused a needless waste of money, resources and time.

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[1] *Juszkiewicz v Juszkiewicz* 1945 TPD 48 at 52.

[2] *Adams v Adams* 1953 WLD 150, *Coetzee v Coetzee* 1945 WLD 122, *Slabbert v Slabbert* 1947 (2) SA 547 (C) and *Juszkiewicz supra*, *Grobler v Grobler* 1944 EDL 153 and *Joseph v Joseph* 1951 (3) SA 776 (N).

[17] It follows that all the processes following from the initial restitution order onwards in relation to the forfeiture orders and up to the hearing of the so-called application to vary the forfeiture order and the judgment supporting the varied order amounted to irregularities in the proceedings. The aspects the parties wished to traverse had already been finally decided and the court *a quo* was *functus officio* after issuing the restitution order on 10 March 2021 in respect thereof. At least Prinsloo J realised this and avoided a further waste of time and resources by refusing to hear the matter.

[18] When the matter was referred to the trial judge, she was seized with the matter and had to deal with it and all the issues relating thereto. As the forfeiture issue was in her mind not yet decided she could also not simply direct that the issue be heard by a different judge. She had to finalise it or appoint a referee to deal with it and report back to the court to be finalised. As this has been done since 1904 this should also have been trite.[3] The referral to another judge of the court *a quo* for the determination of the forfeiture dispute was thus also an irregularity as there is no reason why the trial court could not deal with this issue.[4]

Forfeiture of benefits

[19] Because of the way the claims were framed and as a result of certain statements made in the (abortive) application to vary the forfeiture order as well as in

[3] *Nghimtina v Nghimtina* (SA 21-2022) [2024] NASC (5 July 2024) para 19.
[4] *Harvey Tiling Co. (Pty) Ltd v Rodomac (Pty) Ltd & another* 1977 (1) SA 316 (T).

the petition, I deem it necessary to make some short general comments with regard to forfeiture.

[20] The court does not have a general discretion to divide the parties' assets in accordance with what it considers would be fair and equitable in the circumstances. In this regard our law is antiquated and in essence follows the law applicable in South Africa prior to the reforms in that country in the late 1970s. Thus the position is that where the court finds that party A in divorce proceedings maliciously deserted party B and hence party B is entitled to a divorce, it is only party B that can seek a forfeiture of benefits. In fact if party B in such circumstances seeks a forfeiture order the court is bound to give it and cannot refuse such order.[5] (For convenience sake I refer to the spouse found to be the malicious deserter as the spouse at fault and the other spouse as the innocent spouse.)

[21] Where both spouses claim forfeiture of benefits in divorce proceedings against each other in a claim and counterclaim it follows that the court must first decide who is the innocent spouse in the claim and counterclaim. This finding will, by necessity, disqualify the spouse at fault's claim for forfeiture.

[22] What a defendant (the spouse at fault) forfeits in such case is all financial benefits, which the defendant derives or is to derive from the marriage.[6] What is part

[5] *Murison v Murison* 1930 AD 157 at 161, *Gates v Gates* 1940 NPD 361, *Anthony v Anthony* 1946 CPD 871 at 877, *Harris v Harris* 1949 (1) SA 254 (A) and *Opperman v Opperman* 1962 (1) SA 456 (SWA).
[6] See *Murison supra* at 161, *Harris supra* at 264 and *Allen v Allen* 1951 (3) SA 320 (A).

of a defendant's estate proper and not a benefit derived from the marriage cannot be forfeited.[7]

[23] In *Smith v Smith*[8] Schreiner J puts the position as follows:

> 'What a defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage . . . [I]t is really an order for division of the estate plus an order that the defendant is not to share in any excess that the plaintiff may have established over the contributions of the defendant.'

[24] A court may where it is clear, eg where the innocent spouse has paid for a house registered in the name of the spouses jointly as part of a forfeiture order direct that the house be transfered to the innocent spouse. In other words declare the house forfeited to the innocent spouse.[9]

[25] When looking at the contributions of the respective spouses, one is entitled to take the services of the wife in managing the joint household and caring for the children into consideration.[10]

[26] Where an estate has grown beyond the joint contributions of the spouses it would be fair to divide it in proportion to the contributions. I cannot accept the

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[7] See *Opperman supra* at 457.
[8] *Smith v Smith* 1937 WDL 126 at 127-128.
[9] *Ex parte De Beer* 1952 (3) SA 288 (T).
[10] *Gates v* Gates 1940 NPD 361 at 365-366 and *C v C; L v L* 2012 (1) NR 37 at 46 sub-para 22.5.

proposition that such growth must be equally shared as this would be unfair to the spouse who contributed the most.[11]

[27] When no forfeiture order is claimed by the innocent spouse in a community of property marriage then a division must be made. Where special property is the subject matter of a forfeiture order and not the whole estate, it follows that the property not subject to the forfeiture order must simply be divided between the spouses. It also follows, in my view, where some of the properties are disposed of in terms of a settlement agreement between the parties it is only the property not forming the subject matter of the settlement agreement that can form the subject matter of a forfeiture order. As pointed out below it does not follow necessarily that the property excluded from the forfeiture order does not play a role when the extent of the forfeiture needs to be ascertained.

[28] As pointed out in *C v C; L v L*,[12] in which the High Court deals with the issue of forfeiture in detail and cautions that, when it comes to specific forfeiture one must be careful not to ignore the guilty spouse's contributions to the estate in respect of the property whereof no forfeiture order is sought. In the words of the High Court:

> '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?'[13]

[11] In *Gates* an equal share in such growth is suggested.
[12] *C v C; L v L* 2012 (1) NR 37 (HC).
[13] *Supra* at 47.

[29] In *C v C; L v L*, the High Court had this to say in respect of specific forfeiture orders or quantified forfeiture orders. Specific forfeiture orders relate to such orders in respect of certain identified property and quantified forfeiture orders relate to orders where the trial court must assess the quantum or percentage itself based on the evidence before it:

> ‘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.
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> 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).'[14]

[30] Courts do not normally do the quantification exercise. It has been a very long standing practice that courts, when it comes to the normal 'forfeiture of benefits' order, which is for the asking by the innocent spouse, simply grant such order. It is then for the parties to resolve in what percentage the common estate should be divided and failing to agree, the court can be approached to appoint a referee to assess the various contributions by the parties and to make a recommendation to the court. Should either one of the spouses wish to attack such recommendation, the court will then make a final determination so as to quantify the extent of the forfeiture.[15] Experience has taught us that it is very seldom that the parties revert to court subsequent to a forfeiture order being granted.

[31] For the reasons set out above, the courts very seldom undertake the task of quantifying the exact percentage of the forfeiture of benefits and rightly so. This is in essence a debatement of contribution issues and better left to persons with accounting or bookkeeping skills. The court will undertake this exercise only in cases where it will be a quick and simple exercise relating to, eg one asset where the contributions by the respective parties are not an issue. Of course where the parties are not satisfied with the recommendations of a referee and approach the court to resolve the issues following from the referee's recommendations then the court will finally determine the quantum or percentage of forfeiture but then it would be limited

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[14] *Supra* at 46-47.
[15] *Gillingham v Gillingham* 1904 TS 609, *Johnson v Johnson & another* 1935 CPD 325 and *Nghimtina v Nghimtina* paras 19-21.

to resolving the disputed issues flowing from the report of the referee and not an extensive bean counting exercise (with the hearing or evidence) by the court.

[32] Where the parties, as in this case, settled the proprietary aspects save for their respective claims in respect of the three mentioned properties, it means that the other assets of the estate are no longer relevant to the forfeiture of benefits order sought. To in such circumstances grant a forfeiture of benefits order in respect of the remaining disputed property, which I must point out is not the same as seeking an order that the innocent spouse is to be declared the sole owner of each of the properties, is for practical purposes no different from a general forfeiture order where the parties have settled the bulk of their property disputes. The parties' contributions in respect of the still disputed property must be established so as to determine the matter, the amount or percentage of the forfeiture in respect of the property remaining in dispute. Where, as in this case, it was common cause that in respect of one of the properties in dispute the party at fault made no contributions and in respect of the other disputed property she clearly did not make contributions that would even closely approach 50 per cent of the value of such other property, the court *a quo* was not wrong to declare the respondent the sole owner of Plot Dagbreek. (Applicant, as stated in the introduction, has now also settled this aspect with respondent to this effect.)

Decision of 10 March 2021

[33] Despite asserting in the application for review that what was sought was to restore the decision of 10 March 2021 so that the applicant can appeal against the general forfeiture order, she now seeks to review this order as well so as to erase the

forfeiture order in total which in effect will be an order for division, and to presumably leave it to the respondent to appeal the resultant order. Applicant was granted leave to seek a review of the order of 10 March 2021 and on the basis that a general forfeiture order was never sought but was granted. The court *a quo* stated that:

> 'In the absence of sufficient evidence for this Court to order specific or quantified forfeiture, a general order of forfeiture would suffice.'

[34] I should point out that this is the only aspect of this application that the respondent takes issue with. Respondent states that the order should not be altered to his prejudice so as to force him to appeal the matter. According to the respondent, the court *a quo* made the order subsequent to hearing the evidence and it should stand pending an appeal by the applicant as she undertook in her petition.

[35] It is not clear to me that to grant a general forfeiture order in the absence of a prayer for one was an irregularity in the circumstances of this case where the other assets were dealt with by agreement between the parties. But even if it was, this, per se, does not mean this Court will interfere unless the applicant can establish prejudice.[16] It must be borne in mind that where a general forfeiture order is granted the matter has not been finalised as the calculation as to the extent of the forfeiture and its monetary value still needs determination.

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[16] See *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (1) SA 113 (A) at 119H-120C and *Hip Hop Clothing Manufacturing CC v Wagener NO & another* 1996 (4) SA 222 (C) at 230.

[36] From the history of the matter set out above it is clear that the disputes between the parties relating to their movable properties were settled prior to the trial and that this partial settlement agreement was an order of the court. This involved three motor vehicles. As the furniture does not feature at all in the agreement or as a disputed issue in the proceedings it seems this was returned to the applicant prior to the settlement. It is further clear that the only remaining properties in dispute were the properties in respect whereof specific forfeiture orders were claimed, ie the marital home, the plot at Klein-Otavi and the butchery equipment. Applicant laid no claim to the plot at Klein-Otavi and she conceded she made no contributions whatsoever to this plot (as noted earlier, this plot is also no longer in dispute). She however maintains that she contributed to the common home and the butchery equipment and that it was thus necessary to determine her contributions as she would be entitled to the value thereof. From the context it is highly unlikely that her contributions were equal or exceeded 50 per cent of the value of these assets. Nevertheless as pointed out she is entitled to the value of her contributions.

[37] The fact that the parties settled the dispute relating to their movable properties does, in my view make their respective contributions to the total joint estate irrelevant in determining the value of applicant's contributions to the still disputed property. In essence, the parties agreed on a division of the properties forming part of the settlement agreement on the basis they deemed appropriate taking into account their respective contributions to the acquisition of that property and that is the end of the matter in respect of such property. On the papers before this Court she clearly did not contribute more than 50 per cent to the total estate but substantially less.

Significantly, she also does not suggest that her contributions to other assets in the joint estate will impact on the assessment of the degree of forfeiture in respect of the three items of assets in respect whereof the special forfeiture is sought. (Which, in view of the agreement between the parties in relation to the plot at Klein-Otavi, is now two items.)

[38] With the general forfeiture order handed down in the present matter it is highly unlikely that she will be prejudiced. This is because the assets in respect of which no settlement has been reached are clearly sufficient to cover any amount due to her on her own version once the forfeiture calculations are made. In short, no case has been made out for any prejudice, never mind substantial prejudice. In these circumstances an appeal, if so advised, must be a suitable remedy.

[39] As the order to restore conjugal rights was simply one for forfeiture of benefits, it is obvious that the parties will have to attempt to come to an agreement in respect to the still disputed properties relating to her contributions or they will have to approach the High Court for an appointment of a referee to assist the court in this regard or for the High Court to endeavour to finalise the issue itself through referring the remaining issues to a hearing of oral evidence.

Costs

[40] As is evident from the introduction to this judgment, the parties agreed to share the costs of this review. This undertaking on behalf of respondent was premised on

the undertaking that the applicant would seek only the setting aside of the order of 31 May 2023 and then she would then appeal against the order of 10 March 2021.

[41] Applicant went back on her undertaking and in this application sought the review of the order of 10 March 2021, which caused the respondent to enter the fray to oppose this relief so as to keep the order of 10 March 2021 as the last effective final order by the High Court in respect of leave granted relating to the divorce between the parties.

[42] As is evident from what is stated above, the applicant is unsuccessful in respect of the relief sought in respect of the order of 10 March 2021 and in these circumstances I am of the view that I should grant an order as to costs. Applicant's change of tact clearly caused respondent to incur costs, to which he is entitled in my view.

Conclusion

[43] In the result the following order is made:

1. The judgment and order of the High Court dated 31 May 2023 is herewith reviewed and set aside.
2. Paragraphs 3 to 6 of the order of the High Court dated 20 July 2022 is herewith reviewed and set aside.
3. The application to review and set aside the order of 10 March 2021 is declined.

4. The applicant is to pay the costs of this application.

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FRANK AJA

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SHIVUTE CJ

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DAMASEB DCJ

APPEARANCES

APPLICANT:	R Hite
	Instructed by Bruyns Legal Practitioners
RESPONDENT:	K Shakumu
	Of Kishi Shakumu & Co. Inc.