



CASE NO. I 1361/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between

WILLEM ALBERTUS KOCH

PLAINTIFF

and

BABARA GAIL KOCH (BORN TENNANT)

DEFENDANT

CORAM: Tommasi, J

HEARD ON: 16 - 18 June 2009

DELIVERED ON: 31/01/2011

JUDGMENT

TOMMASI, J

[1] The Plaintiff and the Defendant were married to each other on 8 March 2000 i.e for about 7 years when the Plaintiff instituted a divorce action against the Defendant on 18 May 2007. The Defendant filed a counterclaim and for the purposes hereof, I shall refer to the parties as in convention.

[2] The Plaintiff's cause of action raised in his particulars of claim, is actual

desertion by the Defendant on 3 April 2007. The plaintiff also made averments in respect of the conduct of the Defendant in his Particulars of Claim and incorporated it into his plea to the Defendant's Counterclaim. Since the cause of action of the Plaintiff is actual desertion these averments will be dealt with as his Plea to the Defendant's Counterclaim.

[3] These averments are: the Defendant indicated that she wanted to have nothing to do with him and indicated that she wanted a divorce; she lied to him; she allowed her minor son from a previous marriage to provoke, threaten and assault him; believed the lies of her minor daughter; laid false criminal charges (Rape) against him; had an inappropriate relationship with another man; insulted him using vulgar and profane language and; in extravagant manner burdened the joint estate with debts she expected him to pay. The Plaintiff claimed forfeiture of benefits, transfer of the immovable property into his name and cost of suit.

[4] The Defendant pleaded that the Plaintiff made co-habitation intolerable through his conduct contained in her Counterclaim in which she claims a divorce on the ground of the Plaintiff's constructive desertion. She avers that no malice was intended.

[5] Defendant in her counterclaim aver that: the Plaintiff failed to communicate with her, showed her no love and affection; frequently started meaningless quarrels with her; used grossly abusive language toward her in the presence of her minor children, showed no interest in the continuation of the marriage; assaulted the Defendant's minor son of a previous marriage; sexually abused her

minor daughter; leads an extravagant lifestyle thus encumbering the joint estate with unnecessary debts; frequently threatened to kill the defendant particularly during March 2007 i.e shortly before she left the common home. The Defendant claimed division of the joint estate.

[6] The Plaintiff was represented by Mr Karstens of the firm Neves Legal Practitioners and the Defendant appeared in person.

[7] The only real dispute between the parties is whether this Court should grant a forfeiture order (Plaintiff's claim) or division of the joint estate (Defendant's claim). Much of the evidence presented by the parties centered on the assets of the joint estate and very little evidence was led to support the claims made by the parties. Both parties did so at the expense of giving this Court a detailed account of what brought about the breakdown of the marriage.

[8] Plaintiff's Claim

It is common cause that the Defendant moved out of the common home on 3 April 2007. The Defendant admitted that she informed the Plaintiff that she wants a divorce; that she consulted a lawyer with the aim of instituting divorce action and that she subsequently moved out of the common home.

[9] In *VAN VUUREN v VAN VUUREN 1959 (3) SA 765 (A)* it was held that a party seeking an order for restitution of conjugal rights on the ground of malicious desertion, has the onus of proving both the *factum* of desertion and the *animus deserendi* (that is to say the intention to terminate the marital relationship without justification therefor), unless he is relieved of the burden of proof by admissions made in the plea.

[10] Although the Defendant admitted that she left the common home, she placed in dispute that she has done so maliciously and the burden remains with the Plaintiff to prove that the Defendant left the common home with the intention to terminate the marital relationship without justification.

[11] The parties were both divorcees when they first met. They first resided in South Africa and moved to Namibia in January 2006. No children were born of the marriage between the parties. Two minor children, a son and a daughter of the Defendant from a previous marriage, resided with the parties.

[12] It appears from the evidence that the final breakdown in the marriage occurred in the months between January 2007 and March 2007. In January 2007 the Defendant's 14 year old son, was involved in a motor vehicle accident and sustained severe bodily injuries inter alia, a broken pelvis. He was hospitalized in Windhoek and the Defendant accompanied him.

[13] The Defendant's minor daughter was left in the care of the Plaintiff. The Plaintiff sent her with a lift to Windhoek as she wanted to be with the Defendant. During their stay in Windhoek, the minor daughter informed the Defendant that the Plaintiff sexually molested her. The Plaintiff testified that he distanced himself from the minor children of the Defendant as a result of this allegation. From his testimony it may be inferred that the Plaintiff came to hear of this allegation whilst he was still residing with the Plaintiff. According to the evidence a charge was laid subsequently although it is not clear from the evidence when this took place. The plaintiff averred in his particulars of claim and in the further particulars thereto that a false charge of rape was made to the Namibian Police. This would indicate that the charge was already made by 18 May 2007 when the Summons was issued. No evidence in respect of the commission of the offence was admitted since the matter was pending in the Criminal Court.

[14] The minor son was bedridden and on crutches for a period of three months i.e from January to March 2007 and the Defendant stopped working to take care of her son. The Plaintiff did not challenge the testimony of the Defendant that he, during this period, removed them as members of his medical aid scheme.

[15] According to the Plaintiff it was during this time that the children of the Defendant informed him that the Defendant was having an affair with another man. One would have expected the Plaintiff to have given a little bit more

information, other than the hearsay evidence presented, as to why he believed this to be true. On the evidence presented it cannot be said that the belief held was a reasonable belief. The Plaintiff for this reason admitted that he in this period did not show the Defendant love and affection. Despite this knowledge the Plaintiff continued living with the Defendant. No evidence was led that sexual intercourse between the parties were discontinued.

[16] Plaintiff testified that the parties had "frequent disagreements" because of the behavior of the Defendant and her minor children.

[17] A bare allegation was made by the Plaintiff that the Defendant's minor son was threatening and assaulting him without evidence being led as to the circumstances date and place where this occurred. Without the evidence to support this denial the Court is unable to find that this in fact took place.

[18] The Defendant averred that it was in fact the Plaintiff who assaulted her minor son. She testified that he hit him with a hose-pipe, he hit him in his face and on his ear. She testified further that the Plaintiff pushed her son when he was on crutches i.e during the period between January and the time that she left, causing him to fall. Apart from a bare denial of assault by the Plaintiff this testimony was not challenged under cross-examination. The

Plaintiff however admitted to disciplining the minor son like a father would by hitting him on his buttocks. No details as to dates and places were given and insufficient evidence exist for this Court to determine whether the Plaintiff acted in the manner described by the Defendant.

[19] The Defendant averred in her pleadings that the Plaintiff threatened to kill her with a fire-arm and in March 2007. She testified to the effect that the Plaintiff reached for his fire-arm when they were having disagreements and held it to her head on one occasion. The Plaintiff denied this allegation but did not challenge the evidence of the Defendant in cross examination. The Plaintiff admitted that his firearm was seized by the Police in South Africa after they received a call from the Defendant. The fire-arm was retrieved by the Plaintiff the next day at the behest of the Defendant's plea to the Police Officer. The Defendant failed to give details of the date, place and circumstances that led to these incidences. There is thus insufficient evidence adduced by the Defendant to support this allegation.

[20] Both parties were *ad idem* that there was constant disagreement in respect of the minor children of the Defendant. The Plaintiff felt that the minor daughter lied to the Defendant which she believed but felt himself compelled to believe the children of the Defendant when they made allegations of the Defendant's affair with another man. I am convinced that both parties quarreled and said things that were better left unsaid. For reasons stated hereunder it appears that during the last three months most of the disagreements were initiated by the Plaintiff as he appears to have had difficulty with the behavior of the Defendant and the

children.

[21] In the same vain it is abundantly clear from the evidence that both parties entered into debts and that this happened from the beginning of the marriage. Both parties benefited from these arrangements and this may have been the cause of many disagreements between the parties but certainly was not the reason why the Defendant left the common home.

[22] The real reason for the Defendant leaving the common home was apparent from the following testimony by the Defendant when she was asked if she had discussed the behavior of the Plaintiff with him:

"Yes, Your Worship, but I also just believe and I felt after what he had done to my children, I could not expose them to that life anymore. It is not acceptable; it is not decent, it is not appropriate. I do not want to be with him, I could not allow that for my children, I really could not"

[23] It was common cause between the parties that a criminal charge was made based on an allegation by the daughter of the Defendant of sexual molestation. Plaintiff denied the allegation of sexual abuse and took issue with the fact that the Defendant believed her daughter's lies. Any reasonable parent has to pay close attention to allegations of this nature and it cannot simply be ignored. Not only did the Defendant belief her daughter but she also took steps shortly after she left the common home to report the matter to the Police as was her right to do. The Plaintiff was also unhappy that a false charge of rape was made. Whether or not those charges were falsely made can only be determined after the trial in a

court with the necessary jurisdiction.

[24] The issue is not whether it was true but the fact that the Defendant believed and her daughter and whether such belief was indeed reasonable. In *MOHAUD v MOHAUD 1964 (4) SA 348 (T) VIEYRA J* at p 350 D-E stated the following where the deserting party raised the justification of adultery:

but it seems to me that in our law too an honest, reasonable belief that adultery had been committed would justify the deserter whose conduct had been impelled by such belief. I leave aside the question as to whether there may not be instances of a bona fide belief not based on objectively reasonable grounds which might yet negative the animus deserendi."

[25] The fact that the allegation was made left the Defendant no choice but to report it to the authorities. The Defendant was limited by the Court to go into great detail on the merits of the criminal case therefore not making it possible to provide the court with facts to determine whether such a belief was a reasonable belief. On the other hand it is expected of any reasonable parent to take the necessary steps for the protection of her child inclusive of removing the child from an environment threatening her safety and wellbeing. The Defendant's genuine belief of the allegation is manifested in her pressing charges. I am of the view that this constitutes sufficient justification for the Defendant to have left the common home. I have to emphasize that this is not a determination of the guilt or innocence of the Plaintiff but a finding that the Defendant genuinely believed her daughter and was justified to move out of the common home.

[26] Under the circumstances I find that the Plaintiff failed to discharge the onus that the Defendant had maliciously deserted him.

[27] Defendant's Counterclaim

This Court has to determine whether the Defendant has succeeded in establishing that there has been constructive desertion. In *MORGAN v MORGAN 1964 (1) SA 687 (O) COLMAN J* stated at page 689 A-B that:

"It is well established that there are two elements in a constructive desertion. There must be unlawful conduct, and the conduct must be committed with the intention of putting an end to the marital relationship."

He further indicated that:

" It may, in certain circumstances, be possible to infer that conduct such as that referred to by Prof. Hahlo was committed with A that intent; but, in my judgment there must be facts, other than the bare commission of the offence, to support that inference with regard to intention."

[28] One of the main issues between the parties is the allegation made by the Defendant's minor daughter. This Court deemed it necessary to exclude this evidence since this matter was pending in the criminal court. This conduct cannot in any way be ascribed to the Plaintiff until the matter has been adjudicated on.

[29] The Defendant complained that the Plaintiff failed to show her love and affection, failed to constructively communicate with her, started meaningless quarrels with her and used foul and abusive language. The Plaintiff denied having frequent quarrels with the Defendant and alleged that she was the one who used foul and abusive language. He however testified when asked why felt there was communication between the parties, that they had "frequent disagreements because of the Defendant's behavior and the children's behavior". This, with all due respect, can hardly be described as constructive communication.

[30] The Plaintiff's admitted not showing the Defendant love and affection as follow:

"... toward the end of this before she left, that is true, I showed no love or affection toward the Defendant"

When asked why he responded as follow:

"....it is because I found out through her own children that she was involved in affairs (sic) with another man. And that naturally moved me to not want much to do with her (sic)

I have already indicated that the belief held by the Plaintiff was not a reasonable one. The right to love and affection is an important part of the marital state and forms part of what is often referred to in our Courts as *consortium*.

[31] I have already dealt with the allegation by the Defendant that the Plaintiff threatened to kill her with a firearm during March 2007.

[32] The Defendant intimated that the Plaintiff was extravagant from the beginning of their marriage. Suffice it to say that it was clear that both parties accused the other of being extravagant when the undisputed evidence indicated that both of them: entered into credit agreements with various institutions binding the joint estate; both parties contributed to the joint estate and; both parties benefited from the credit agreements entered into. No disclosure was made by both parties prior to the commencement of the trial and neither was an application brought to Court for disclosure during trial. Not having the benefit of the documentary proof it is difficult to determine the veracity of these allegations. It can hardly be said that by buying the Defendant expensive gifts such as a Mercedes Benz, that he intended, in this manner, to terminate the marriage.

[33] I have already dealt with the Defendant's allegation that the Plaintiff assaulted the Defendant's minor son. The unlawfulness of this has not been proved on a balance of probability and therefore the Court cannot consider it as a contributing factor to the breakdown of the marriage.

[34] Having considered the above I find that the Defendant, on a balance of probability, proved that the Plaintiff unlawfully: failed to show the Defendant love and affection; failed to communicate in a constructive manner with the Defendant and initiated frequent disagreements. This behavior was designed to punish the Defendant for her behavior and to make co-habitation intolerable.

[35] The allegation by the Defendant's daughter clearly made the Plaintiff

unhappy as well as the belief that the Defendant was having an affair with another man. In his own words the alleged affair "*moved me to not want much to do with her*" thus indicating that he was no longer interested in being in a marital relationship with the Defendant. His defense or reason for not showing the Defendant love and affection i.e that he believed that the Defendant had an affair is not a reasonable one. His statement is a clear indication of his intention to terminate the relationship between the parties.

[36] The Plaintiff testified that the frequent disagreements were attributed to the behavior of the Defendant and her children. Since Plaintiff had taken issue with their behavior it stands to reason that he would be the one raising or initiating the "frequent disagreements" were initiated by the Plaintiff.

[37] The Court is satisfied that the Plaintiff intended to make co-habitation intolerable for the Defendant and in this manner terminate the marital relationship between the parties.

[38] Having considered all of the above I am satisfied that the Defendant proved, on a balance of probability, that the Plaintiff constructively deserted the Defendant.

[39] Counsel for Plaintiff urged the court to determine the manner in which the joint estate is to be divided. I have decided against this as no discovery was made between the parties. The Defendant also indicated to the Court that she does not

persist with her claim for costs and therefore not cost order will be made.

[40] In the premises it is the ordered that:

1. the Plaintiff's Claim is dismissed and;
2. the defendant is granted the following:

2.1. A rule nisi be issued calling upon the Plaintiff (Defendant in re-convention) to return to the Defendant (Plaintiff in re-convention) on or before 14th day of March 2011 or, failing which, to show cause on 11th day of April 2011:

- (a) why a decree of divorce should not be granted and;
- (b) why the joint estate should not be divided.

TOMMASI, J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Mr L Karstens

INSTRUCTED BY:

Neves Legal Practitioners

COUNSEL ON BEHALF OF THE DEFENDANT:

In Person