



**CASE NO. I 758/08**

**IN THE HIGH COURT OF NAMIBIA**

**NORTHERN LOCAL DIVISION**

**HELD AT OSHAKATI**

In the matter between

**ANITA TJOMBE (born IZAAKS)**

**PLAINTIFF**

and

**FERDINAND TJOMBE**

**DEFENDANT**

**CORAM:** Tommasi, J

**HEARD ON:** 15, June 2009

**DELIVERED ON:** 15 June 2009

**REASONS RELEASED ON:** 15 March 2012

---

**REASONS FOR ORDER GRANTED ON 15 JUNE 2009**

[1] The plaintiff, an adult female instituted action against the defendant, for divorce. On 30 March 2009 the Court granted an order for the restitution of conjugal

rights calling upon the defendant to return to the plaintiff on or before 11 May 2009 failing which to show cause, if any on or before 8 June 2009 why the bonds of marriage between the plaintiff and the Defendant should not be dissolved and why the agreement between the parties, annexed to the order as annexure “B”, should not be made an order of Court. This order was served on the defendant on 23 April 2009 and the plaintiff filed an affidavit of non-return on 19 May 2009.

[2] On 8 June 2009 the return date of the *rule nisi* was extended to 15 June 2009 and the Court ordered the Defendant to pay the wasted costs.

[3] On 11 June 2009 the defendant, without the assistance of a legal representative, filed the following documents: Notice of intention to defend; Notice of application for legal aid; Notice of intention to request postponement of the case; Notice of intention to apply for permission to submit documents as court records.

[4] The plaintiff on the same date filed an additional affidavit of non-return.

[5] Ms Duvenhage, appearing on behalf of the plaintiff submitted that the plaintiff had served the restitution order on the defendant, has shown to the Court that the defendant did not restore conjugal rights to the plaintiff, and that the plaintiff was under these circumstances entitled to a final order of divorce. She referred the Court to *Vahekeni v Vahekeni*<sup>1</sup>. It is indeed so that the function of the Court at this stage of the proceedings is to:

*“... see that there has been due service of the restitution order, and whether there has been return on the part of the defendant.”*<sup>2</sup>

---

<sup>1</sup>VAHEKENI v VAHEKENI 2008 (1) NR 125 (SC)

<sup>2</sup> Juszkeiwicz v Juszkeiwicz, 1945 TPD 48 cited in VAHEKENI v VAHEKENI supra

[6] The defendant, appearing in person, submitted to the Court that he needed a postponement in order to further oppose the granting of a final order herein. He submitted that he had offered to restore conjugal rights and that he wished to place further facts before the Court in order to have the agreement, which he had signed under duress, set aside.

[7] The notice for permission to file further documents incorporated a notice that the defendant intended to apply for an order in terms whereof the Plaintiff is ordered to refrain from her persistent unacceptable, malicious and unlawful conduct in that she had claimed that the bonds of marriage between them had been legally terminated; sold property belonging to the joint estate; made false claims of harassment; preventing the defendant access to the management of a business operation which legally belongs to him, preventing him from investigating irregular practices in his afore-said business; preventing him access to his children since February 2008; and making physical threats that her brothers would do him bodily harm. It should be noted that the parties had already entered into an agreement wherein they agreed on the division of the joint estate. The defendant in terms thereof had agreed that the plaintiff should be the sole and exclusive owner of the member's interests in the business operation referred to herein by the defendant.

[8] Letters were attached to this notice wherein that the defendant stated that he became aware of the fact that plaintiff sold a vehicle leased by the defendant during April 2009. The defendant waited until 11 June 2009 to give notice to the plaintiff of his intention to further litigate. The plaintiff had every expectation that the defendant has withdrawn his opposition to the divorce action, that the custody and control, access and maintenance of the minor children; and the division of the joint estate had been settled between the parties. The reason advanced by the defendant for this

delay was the lack of financial resources to employ the services of a legal representative. In this regard the defendant filed a notice of intention to apply for legal aid. The Defendant therefore had not done anything in the interim to apply for legal aid. The Defendant addressed a letter to Trusco Namibia Ltd to request the said company to restore his insurance contract in order to secure coverage for legal costs. This letter was also only dated 9 June 2009. No reasonable explanation was advanced for the delay by the defendant to timeously inform the plaintiff of his intention to bring all these applications.

[9] The matter has been settled almost a year after it was instituted and issues such as the custody and control, access and maintenance of the minor children were finally resolved. A further delay would not only prejudice the plaintiff, who according to defendant had already acted on the strength of the settlement agreement, but also the well being of the minor children whose. No cost order would be able to remedy this.

[10] The facts of this case differ from the facts in *Vahekeni v Vahekeni*, as the defendant herein had entered into a settlement agreement wherein the ancillary matters were disposed off by way of compromise reached between the parties. The defendant would still be in a position to approach the Court to file the various applications he intended to bring whereas the plaintiff and the minor children's status would remain hanging in the balance.

[11] The plaintiff had filed two affidavits wherein she informed the Court that the defendant had shown by his actions that he had no intention to return to her. The defendant submitted that he had offered to restore conjugal rights to the plaintiff who refused to receive him. The defendant in the aforesaid letters he had written, complained about the plaintiff's conduct and described her as being deceitful and

malicious. It was evident that the relationship between the parties had become extremely acrimonious. A cursory look at the documents filed by the defendant disclosed that he still harbored feelings of resentment toward the plaintiff and that he had no intention to in fact return to the plaintiff. The clear intention of the defendant was to further litigate against the plaintiff and to this end the submission that he wished to return to the plaintiff was merely a ruse to afford him more time to do so.

[12] The defendant was served with the restitution order on 23 April 2009 and he failed to approach his legal practitioner of record with instructions to make a formal offer to return to the plaintiff and raised it for the first time when addressing the Court to request a postponement herein. The onus is on the defendant to, on the return date, show that he had returned to the plaintiff or that he had made a genuine offer to resume a lasting marital life which he had failed to do.<sup>3</sup>

[13] The acrimony between the parties, the wellbeing of the children, the clear delaying tactics of the defendant; and the failure of the defendant to make a genuine attempt to restore conjugal rights, motivated the Court not to grant a further postponement.

[14] The Court was satisfied that the Court order was served on the defendant, that he had sufficient time to restore conjugal rights and that he had failed to do so. For these reasons the Court granted an order that the bonds of the marriage subsisting between the Plaintiff and Defendant to be dissolved; and that the agreement between the parties filed of record and marked "B" to be made an Order of Court.

---

<sup>3</sup>JAMES v JAMES 1990 NR 112 (HC)

**TOMMASI, J**

**COUNSEL ON BEHALF OF THE PLAINTIFF:**

Ms H Duvenhage

**INSTRUCTED BY:**

Etzhold-Duvenhage

**COUNSEL ON BEHALF OF THE DEFENDANT:**

In person

P.O.Box 22127

Windhoek