



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT

Case No: I 1704/2009

In the matter between:

HARALD GUNNAR VOIGTS

PLAINTIFF

and

SITTA ELKE VOIGTS (Born WALDSCHMIDT)

DEFENDANT

Neutral citation: *Voigts v Voigts* (I 1704/2009(B))[2013] NAHCMD 281 (11 October 2013)

Coram: DAMASEB, JP

Heard: 2nd October 2013

Delivered: 11th October 2013

Flynote: Husband and wife – Divorce – Action for divorce – Constructive desertion – RcR granted – On return date, onus is on the defendant to prove to the court that the tender of the restitution of conjugal rights is genuine.

ORDER

I hereby grant the plaintiff a final order of divorce, with costs, to include the costs of one instructing and one instructed counsel.

JUDGMENT

DAMASEB, JP: [1] On this extended return day of an order for restitution of conjugal rights (RcR), the defendant whose constructive desertion led to the breakdown of the marriage, bears the onus to show that her offer to return is bona fide.

[2] On 24 June 2013, after hearing the evidence and argument, I gave judgment in a contested divorce in which the husband relied on the wife's constructive desertion. I made, as against the defendant, the critical finding that her improper and unwifely association with the man she had admitted to committing adultery with during her marriage to the plaintiff, was the cause of the breakdown of the marriage; and that even while denying any association with him to the plaintiff, she in fact continued that association and was emotionally dependent on the man with whom she had committed adultery. I also found that the plaintiff was deeply hurt by the defendant's continuing association with the man who brought pain in the marriage but that the defendant was indifferent to the plaintiff's feelings of hurt. I described that as callous conduct.

[3] It is necessary to briefly set out what happened since I issued the rule *nisi*. Based on the affidavits filed by the parties, the following transpired: The *dies* for the RcR, in terms of the court's order, were to expire on 05 August 2013. On that date, it is common cause, the defendant's legal practitioner of record, directed a letter to plaintiff's legal practitioner in the following terms:

'FROM: Theunissen, Louw & Partners

Our Reference: V3545.16/EG/mb

05 August 2013

Behrens & Pfeifer

FAX: 061 – 220968

WINDHOEK

Dear Sir,

RE: VOIGTS vs VOIGTS

The above-mentioned matter bears reference.

Kindly take notice that we hold instructions to address this letter to you on behalf of our client who has instructed as follows:

1. That she herewith unequivocally and without reservation return and/or tenders her return to the plaintiff and to receive the latter as spouse.
2. That her return and/or offer of restitution of conjugal rights is genuine and bona fide and accompanied by a serious intention to do so with the intent to resume marital cohabitation in all its forms and ways.

Kindly take further notice that this letter serves to inform you that our client would consequently oppose the moving of a final decree of divorce set down for the return date being the 3rd of September 2013 in the High Court of Namibia.

We trust that you find the aforesaid in order.

Yours faithfully

E F P Gous'

[4] On the same day, the defendant filed of record an affidavit in which (and because of its brevity I will quote it in full), she states the following:

'On the 24th day of June 2013 this Honourable Court ordered me to restore conjugal rights to the plaintiff, or for me to return to him on or before the 5th day of August 2013 and failing such restoration, return or receipt, to show cause before this Honourable Court on the 5th day of September 2013 why the bonds of Marriage between us should not be dissolved and certain ancillary relief not granted to him.

I herewith unequivocally and without reservation return and/or tender to return to the plaintiff and to receive the latter as spouse. In doing so I further wish to state that I

have at all relevant times hereto cohabitated with the plaintiff in the same common home situate on the farm Otjozonjati nr 69, Okahandja District and would continue to do so in order to resume life with the plaintiff as husband and wife.

I further wish to state that I currently no longer have any contact with Mr. EH, either on the basis of private or otherwise and that I have no intentions to resume future contact with Mr. Hoff.

I further wish to state that my restitution of conjugal rights to the plaintiff is genuine and bona fide and accompanied by a serious intention to do so with the intent to resume marital cohabitation in all its forms and ways.'

[5] In his affidavit of 'non-return' filed of record on 28 August 2013, the plaintiff alleged that since the RcR was granted, the defendant had not once approached him personally with a view to saving the marriage and restituting conjugal rights. He added that they 'had absolutely no discussion on our marriage'. According to him, since the trial in June 2013 and since service of the RcR on her, the defendant had the opportunity of demonstrating whether she had changed her attitude and conduct in respect of the marriage but that she had not done so. He confirmed that the only contact made by the defendant was a letter by her lawyers to his'. The plaintiff also states that the manner in which restitution is tendered shows lack of bona fides on defendant's part. He maintains that given past experience he places no great store by the defendant's undertaking that she ended the relationship with EH. In a further affidavit filed of record, the plaintiff states that the relationship with the defendant has not improved since the RcR order. According to him, the relationship had in fact worsened 'to such an extent that the respondent currently refuses to sit at the dining table when hunting guests are present, something she always did in the past'. I wish to state here and now that this latter allegation remains undisputed.

[6] I sought to ascertain from the parties before we went into court on the day of the hearing if they were going to lead evidence. The parties, through their counsel, advised me then that they did not intend to and would rely on the affidavits to which I have made reference above. The result is that no oral evidence was led before me to determine if the defendant's offer of return is bona

fide. The rather curious election by the parties (especially by the defendant who bears the risk of non-persuasion on this return date) leaves me in the unenviable position that I was not able to see their versions tested under cross-examination in the witness box.

Summary of submissions

[7] Mr Corbett submitted that the defendant, who bears the onus, has not placed any facts before court showing that the situation has changed for the better since the RcR order was issued. He added that the offer to return is a 'formal' and 'mechanical' recitation intended to meet the requirements of the law and that on this return date the defendant has not placed before court any fact establishing her bona fides. According to Mr Corbett, the defendant's offer lacks bona fides in that it does not show: (a) what effort was made by her to improve communication between her and the plaintiff; and (b) how she proposes to resume a normal marital life with the plaintiff under 'reasonable conditions'. Mr Corbett placed great store by the manner in which the tender was made for the interference that it lacks bona fides. Given that the tender was made by defendant's lawyers to plaintiff's lawyers, Mr Corbett posed the rhetorical quotation: Was the plaintiff to accept the defendant back through the lawyers? Counsel for the plaintiff then highlighted the fact that since the RcR order issued, the defendant made no effort to approach the plaintiff to initiate a meaningful discussion on how to change things for the better. As I understood counsel, given that the breakdown in the marriage was the consequence of the breakdown in trust brought about by the defendant's improper conduct, it was important for the defendant to do more than just make a formal and mechanical offer such as she did. I have great sympathy for this view. I agree with the observation of the learned author of *Hahlo and Kahn* that 'the plaintiff may reasonably expect greater proof of a real change of heart where the desertion was constructive than where it was physical.'¹

[8] According to Mr. Corbett, the defendant's offer also falls short of a serious desire to end the relationship with EH and that a mere assertion that she has no intention of ever seeing EH again counts for nothing, if regard is had to the fact

¹Hahlo et al, *The South African Law of Husband and Wife*, 1975, p 417.

that her past promises in that regard were not true.² Against the backdrop of my findings that the prospect of violence loomed large in the marriage (violence attributed by the defendant to the plaintiff); and that the marriage was a loveless one, Mr Corbett argued that the tender by the defendant could not possibly be intended for the resumption of marriage under 'reasonable conditions'.

[9] Mr. Corbett referred me to *Kagwe v Kagwe*³, a case in which Geier J found that it was not in the public interest to preserve a marriage which, quite clearly, had broken down beyond all repair; and that the court may in its discretion, dissolve such a marriage in the public interest. It is common cause that the parties before me had lived separate lives for over four years without any intimacy.

[10] Mr Corbett therefore sought a final order of divorce, together with costs, to include the costs of one instructing and one instructed counsel.

[11] On his part, Mr. Strydom was firm in the view that the defendant had met all the requirements for the discharge of the rule *nisi* as she had unconditionally tendered to restore conjugal rights 'in all its forms and ways'; and that the plaintiff had failed to reciprocate by accepting the defendant back. Counsel for the defendant also argued that the improper association with EH was foundational to the court's finding of defendant's desertion and that in her affidavit of a tender to return, the defendant sufficiently undertakes to end that association and to resume normal marital life with the plaintiff. Mr Strydom strenuously argued that the plaintiff, who, before the RcR, had left the common bedroom and still stays away from it, is now the actual deserter as he had made no effort to normalize relations with the defendant. Mr Strydom also argued that after the defendant tendered restoration, the plaintiff was, in law, obliged to accept the defendant back and that absence of affection for the defendant is irrelevant.

[12] Mr. Strydom repeatedly pointed out that the state of our common law is that love between the parties is an irrelevant consideration once the defendant

²It is trite that the previous history of the marriage may be material in so far as it throws light on *bona fides* of a tender to restore conjugal rights: *Anderson v Anderson* 1941 WLD 39; *Coetzee v Coetzee* 1945 WLD 122 at 126; *Sequiera v Sequeira* 1946 AD 1077.

³[2013] NAHCMD 71 (30 January 2013) at para 74.

has tendered to restore conjugal rights.⁴ He also maintained that just as before, the defendant remains in the common bedroom, has not left the family home and that, on the contrary, the plaintiff has not returned to the common bedroom and is now the deserter having neglected or failed to comply with the legal obligation now falling on him to accept the defendant back.

[13] Mr Strydom accordingly called for the discharge of the rule *nisi*, with costs, including the costs of one instructing and one instructed counsel.

[14] Mr. Strydom's line of reasoning downplays the stark reality that it was the defendant, not the plaintiff, whom I had found was the deserter. It is the deserter defendant, not the deserted plaintiff, who bears the onus of showing that the offer to return is genuine: the test is not of any offer made; it is a bona fide offer that obliges the deserted spouse to receive back the deserter.

[15] It is incongruous to rely on the plaintiff's state of withdrawal from the marriage prior to the RcR being granted – which state of withdrawal persists after the RcR is granted – to advance the argument that the plaintiff is the deserter. That state of withdrawal (constructive in nature) is the product of the defendant's conduct. It is that conduct which must be shown to have changed for the better. *Bona fides* is a state of mind and of affairs: by both the deserter and the deserted spouse. It does not seem to me to be reasonable to expect the deserted spouse to be the one to assume the responsibility of welcoming the deserter back, unless the deserter demonstrates that *that* which drove the husband away from her has come to pass and that normal married life has, by that fact, become feasible.

[16] To, in the face of an RcR order, wait until the last day before the *dies* run out, and by means of a letter from her lawyers to those of the husband, make a written offer to restore conjugal rights, is to reduce human relationships to a condition of cold frigidity which, in my view, was never the intention of the common law rule which Mr. Strydom during argument repeatedly advanced was to the effect that love is unimportant in marriage and that as long as the deserter

⁴Kings v Kings 1947 (2) SA 517 (N) at 522.

tendered restoration, the deserted spouse was obliged to receive the deserter back.

[17] The rationale for the common law rule, as I understand it, is that marriage is more than just the sharing of affection and intimacy and that support of each other is just as important a factor. The reasoning also goes that the older the parties become, sexual contact may not be as important as when the parties are relatively young. Mr Strydom placed great accent on this score. The difficulty confronting him of course is that although the parties are respectively 58 and 54 years old, the plaintiff still considers intimacy to be an important aspect of the marriage. Besides the evidence shows that these are still sexually active individuals except that they engaged in it with the wrong people. In any event, it does seem clear to me on the authorities that the circumstances of each case will determine where the emphasis ought to lie.

[18] Mr. Strydom also ignores the reality that restoration of conjugal rights must be bona fide before the deserted plaintiff must receive the deserter back. We must always remind ourselves that marriage is a union between two human beings who have fears, expectations and feelings. The approach contended for by Mr. Strydom frightfully comes close to reducing human emotions to the sort of irrelevance where humans become robots designed to perform mechanical functions regardless of the consequences. That could never have been the rationale underlying the common law.

[19] The plaintiff's obligation to receive the deserter back is triggered, not by any offer to restore conjugal rights, but by a bona fide offer to return. The defendant, who bears the onus, has not as much as demonstrated that she took the initiative to meet with the plaintiff to assuage his concerns about her relationship with EH; or to ascertain from the plaintiff the sort of steps he would find necessary and or desirable on her part to deal with his insecurity, to mention only a few examples. If, in the face of such efforts by the defendant, the plaintiff showed no interest in allowing the defendant to demonstrate her *bona fides*, Mr. Strydom's refrain that it is the plaintiff who is the deserter would have borne resonance.

[20] In the case before me, it has always been common cause that:

- a) the defendant had instituted a divorce action against the plaintiff and had therein alleged that the plaintiff acted violently towards her;
- b) that the divorce action was dismissed on account of dilatory and remiss conduct by her legal practitioners and that but for that dismissal, the defendant also wished to divorce from the plaintiff;
- c) the defendant carries on a horse breeding business at the plaintiff's farm and desires to continue with her business on that farm. She is particularly unhappy about leaving the farm which she feels is what it is today because of their joint endeavours.

[21] In addition to the above, Mr Strydom repeatedly argued when I heard evidence to determine the grounds for divorce, and also on the return date of the rule *nisi*, that the plaintiff was the actual deserter and that upon the rule being discharged, the defendant would be entitled to seek divorce on the ground of his desertion. The conclusion is unavoidable that the defendant's true motive in tendering restitution may not be to resume cohabitation with the plaintiff, but largely to avoid a final decree of divorce in order that she may then pursue her ill-fated divorce action and or to remain on the plaintiff's farm to carry on her horse riding business.

[22] It appears to me that change of heart by the deserter and a commitment to reform are crucial elements of *bona fides*.⁵ Lack of *bona fides* was therefore found where a husband who had deserted his wife for twenty years, tendered to restore conjugal rights so that he could be financially supported by the wife.⁶ As was aptly put by Duncan AJ in *Sandler v Sandler*⁷:

‘... in order to restore conjugal rights it was essential for the defendant to change his manner towards the plaintiff. A mere offer to receive the plaintiff would not be enough; there would have to exist in his mind an intention to desist from his former conduct, which had made life intolerable for the plaintiff. If his intention was to receive

⁵Doyle v Doyle 1954 (1) PH B1 (C); Van Heerden v Van Heerden 1960 (2) SA 326 (O); Guba v Guba 1970 (2) PH B12 (T); Pape v Pape 1928 WLD 140; Robinson v Robinson 1954 (2) PHB 33 (O)

⁶Van der Merwe v Van der Merwe 1924 CPD 1

⁷1946 CPD 649 to 653

the plaintiff, but to continue his former conduct, then his offer was not a compliance with the court's order'

[23] I am prepared to accept that the common law postulates that given the importance of marriage to our social fabric, it is in the public interest that an errant deserter be allowed to mend ways and to return to the marriage and that the deserted spouse must accept that having entered into a marital union, he or she has accepted that for the survival of that institution, he or she may have to live with the past misconduct of the spouse. What I am not prepared to accept though, is the proposition that a deserter desiring to return to the deserted spouse is entitled to return to the marriage regardless of whether she has shown that the misconduct that had in the first place led to the action for divorce has come to an end and that she genuinely wants to save the marriage. That may, as it does in this case, require the deserter dealing with the emotional hurt that has been inflicted on the innocent spouse and demonstrating that its cause has come to pass. Therein the defendant has failed.

[24] Things as they stand on this return date are no different from what they were when the evidence was led before me: the defendant had acknowledged a relationship with EH which alienated her husband's affection for her. I had found that she was untruthful about when, how and whether or not it had ended. I also found that the defendant was emotionally dependent on EH – a very fertile ground for infidelity. In the latter respect, I had found that both the defendant and EH did not seem to appreciate that their association had to end if the defendant's marriage with the plaintiff had any chance of being saved. I had also found that, as the defendant herself suggested, the plaintiff was an insecure man – a state of mind not helped by her continuing association with EH without plaintiff's approval.

[25] Against the above factual backdrop, the most that the defendant does on the return day is to tell me in a rather terse affidavit of 'tender of return' that she has no intention of continuing the relationship with EH: Not a word is said by her about how she proposes to return the plaintiff's trust in her as far as that goes. There is also no indication of the steps she had taken to end the association with

EH and that he understands clearly that the two of them may no longer have any social contact in view of the history of the matter.

[26] The defendant has thus failed to discharge the onus on this return date and the plaintiff is entitled to a final order of divorce.

The order

[27] I hereby grant the plaintiff a final order of divorce, with costs, to include the costs of one instructing and one instructed counsel.

PT DAMASEB
JUDGE-PRESIDENT

APPEARANCE:

PLAINTIFF:

A CORBETT

Instructed by

BEHRENS & PFEIFFER, WINDHOEK

DEFENDANT:

A STRYDOM

Instructed by

THEUNISSEN, LOUW & PARTNERS,
WINDHOEK