

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1459/2011

In the matter between:

SAKEUS KAGWE

PLAINTIFF

and

VIKTORIA KAGWE

DEFENDANT

Neutral citation: *Kagwe v Kagwe* (I 1459/2011) [2013] NAHCMD 71 (30 January 2013)

Coram: GEIER J

Heard: 28 & 29 January 2013

Delivered: 30 January 2013

Flynote: Action for divorce - on grounds of constructive desertion - Plaintiff must prove three aspects in the preliminary proceedings for a restitution order – first - that the court has jurisdiction – second - that there has been and still is a marriage; - and third - that there has been malicious desertion on the part of the defendant - The onus of proving both the factum of desertion and the *animus deserendi* rests throughout upon the plaintiff - The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion –

In order to discharge the onus plaintiff must prove conduct which one must not expect in the ordinary course of marriage' – more particularly such ' ... conduct ... need not to have amounted to a matrimonial offence such as cruelty or adultery but ... it must exceed in gravity such behaviour vexatious and trying though it maybe, as every spouse bargains to endure when accepting the other 'for better or for worse'. The ordinary wear and tear of conjugal life does not itself suffice' -

Action for divorce – Plaintiff's self- admitted adultery – Condonation therefore - Two main considerations will influence the court in deciding whether the plaintiff's adultery should be condoned - They are –firstly, the respective blame-worthiness of the parties; secondly, 'the interest of the community at large to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of union which has utterly broken down - The court is in no way fettered in the exercise of its discretion.

Summary: The plaintiff had sued the defendant for divorce - The action was defended and the defendant filed a plea and counterclaim - The counterclaim was dismissed as a result of the defendant's non-compliance with an order compelling the defendant to respond to a request for further particulars - The matter proceeded thereafter to trial - Main question which arose was whether the plaintiff had succeeded in discharging his onus of proving constructive desertion which would result in the granting of a restitution order - The secondary question which arose was whether the court should condone the plaintiff's adultery.

Held: that plaintiff had succeeded in discharging his overall onus in respect of some of the relied upon grounds of divorce.

Held: that on the aspect of the respective blameworthiness between the parties no evidence had been placed on the record which explained why and in what circumstances the adultery had been committed. What however plays an important

part in this regard is that the defendant herself, as the affected party, has belatedly condoned the plaintiff's conduct.

Held: that it was an important consideration that where there were no reasonable prospects for the resumption of a joint and further harmonious married life it could not be in the interest of public policy to insist on the maintenance of a union which only one partner seemingly wishes to perpetuate and the other not.

Held: that in the circumstances the condonation sought should be granted.

ORDER

The Court grants judgment to the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return or receive the plaintiff on or before the 11th day of March 2013, failing which to show cause, if any, to this court on the 9th day of April 2013 at 08h30 why:

1. The bonds of marriage subsisting between the parties and the defendant should not be dissolved;
2. Each party should not bear its own costs.

JUDGMENT

GEIER J:

[1] The plaintiff has sued the defendant for divorce.

[2] The action was defended and the defendant duly filed a plea and counterclaim. This counterclaim was however dismissed as a result of the defendant's non-compliance with an order compelling the defendant to respond to a request for further particulars.

[3] The matter proceeded thereafter nevertheless to trial.

[4] At the commencement thereof the parties' legal practitioners indicated to the court that they were agreed that the matter would proceed only on the question of desertion as the issues of custody, maintenance and the proprietary consequences of the marriage had been agreed upon.

[5] It emerged further from the pleadings and the case management records that it was common cause between the parties that they were domiciled in Namibia, that they were married to each other on 29 November 1997, at Ondangwa, out of community of property, by virtue of the Native Administration Proclamation 15 of 1928, which marriage still subsists, and that three minor children were born of the marriage.

[6] The central allegations around which the trial thus turned were pleaded by the plaintiff as follows:

'6. During the subsistence of the marriage between the parties, the Defendant with the fixed and determined intention to terminate the marital relationship between the parties wrongfully and maliciously engaged in the following conduct:

- 6.1. She shows no love and/or affection towards Plaintiff;
- 6.2. She refuses Plaintiff his marital privileges;
- 6.3. She physically abuses Plaintiff;
- 6.4. She quarrels and fights with Plaintiff in front of the minor children;
- 6.5. She refuses to go with Plaintiff to the traditional common home;
- 6.6. She fails and/or refuses to assist Plaintiff with the household duties

7. By reasons of the Defendant's unlawful conduct as aforesaid continued cohabitation with the Defendant has become dangerous and/or intolerable for Plaintiff as a result he left the common home on or about 16 April 2011.

10. During or about February 2011 the Plaintiff committed adultery with a certain third party for which adultery the Plaintiff humbly intends seeking condonation from the above Honourable Court.'

[7] Flowing from these allegations made in the particulars of claim the plaintiff then sought an order condoning his adultery with a third person as well as a restitution order failing which a decree of divorce.

[8] To these allegations the defendant raised the following plea:

'AD PARAGRAPH 6 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof

AD PARAGRAPH 6.1 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof

In fact it is the Plaintiff who fails to show Defendant love and affection.

AD PARAGRAPH 6.2 THEREOF

The Defendant admits that he only denied Plaintiff marital privileges when he refuses to use protection (condoms) as they were advised by medical practitioner to do so due to their positive HIV status.

AD PARAGRAPH 6.3 – 6.4 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof.

In amplifications Defendant pleads that she never abused Plaintiff in any way. As regards the quarrels and fights it is in fact Plaintiff that initiates quarrels in front of the children.

AD PARAGRAPH 6.5 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof.

In amplification of the above denial the Defendant pleads that Plaintiff directed Defendant not to go to the traditional common home and threatened her should she consider going there.

AD PARAGRAPH 6.6 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof.

In amplification of the above denial the Defendant pleads that she always assisted to the extend she could. In fact Plaintiff often neglected his duties in relation thereto.

AD PARAGRAPH 7 THEREOF

Each and every allegation contained herein is denied as if specifically traversed and denied and the Plaintiff is put to the proof thereof.

In amplification of the above denial the Defendant pleads that Plaintiff left for no good reason and in fact indicated that he is going to look for younger ladies and those that are prepared to have unprotected sex with him despite his HIV status....

AD PARAGRAPH 10 THEREOF

The contents hereof are noted and Defendant has not and is not prepared to condone Plaintiff's adultery.

THEREFORE DEFENDANT PRAYS THAT PLAINTIFF'S CLAIM BE DISMISSED WITH COSTS'.

THE APPLICABLE PRINCIPLES

[9] 'Three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: first that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant. The onus of proving both the factum of desertion and the animus deserendi rests throughout upon the plaintiff. The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.'¹

¹See in this regard for instance the unreported judgment in the case of *Vatilifa vs Vatilifa* Case P (I) 3276/2006 delivered on 19 September 2007 by Frank AJ at p 3

[10] It is common cause that the court has jurisdiction in this matter and that the parties were married and are still so married.

[11] In such circumstances, it is clear that the main question which arises is whether the plaintiff has succeeded in discharging his onus of proving constructive desertion which would result in the granting of a restitution order.

THE PLAINTIFF'S EVIDENCE

[12] In support of his quest to obtain such an order the plaintiff testified that there was no cooperation and understanding between him and the defendant any longer and that there was no love from either side. He complained of the fact that the defendant would not wash his clothing and that she, and I quote 'does not give him sex', that she would only try to verbally attack him and that she would refuse to come to the north with him to the traditional common home.

[13] Without providing any detail he stated that the last time that they physically fought, she took out a fire arm which she threw on the ground in the presence of the children. He denied that he was the initiator of these fights and that she refused to have sex with him as he insisted that this occur without a condom.

[14] He testified further that he tried to speak to her about these problems but that this was without a result.

[15] He admitted to having committed adultery with a third part during February 2011 and requested that this be condoned. He also told the court that he had asked the defendant to forgive him, which forgiveness was not given.

[16] He then left the common home on 16 April 2011 as he did not want to fight any longer.

[17] He finished off by stating that it was impossible for him to stay with a person whose cooperation he did not have.

[18] The initial part of cross-examination was focused on the plaintiff's reason why he had given up his gainful employment as a driver with Etosha Transport in order to look after his mother in the north, as there were 7 sisters and 2 brothers, who could do this.

[19] He admitted that both he and the defendant had contracted a serious sexually transmitted illness and it was put to him that this was the reason why the defendant had insisted on protected sex.

[20] He was questioned about when he had asked the defendant for forgiveness and responded by stating that this incident had occurred in the Windhoek home of the parties, during April or May 2011 and that she started to quarrel with him. As a result he told her that he could no longer stay together with her and that he only thereafter returned to the common home on a few occasions to take 'things' for the children.

[21] After being questioned further by Mr Kamanja, who appeared on behalf of the defendant, regarding the aspect of condonation, it was also disclosed that the defendant subsequently even refused that the children attend his late father's funeral.

[22] It was put to the plaintiff by Mr Kamanja that it was him that had actually forbidden the defendant to go to the common traditional home in the north. This the plaintiff denied.

[23] He denied also that he was living with a girlfriend at present and insisted that he was living alone.

[24] The plaintiff was informed that the defendant would come and testify that there were no unnecessary quarrels between them and that they were merely disagreements and that the disagreements between them were merely normal ones.

[25] Finally he denied that he left the defendant in order to look for younger 'ladies' with whom he could have unprotected sex and that it was him that showed no love and affection for the defendant.

THE DEFENDANT'S EVIDENCE

[26] The defendant on the other hand indicated that she did not agree to a divorce. She denied that she had acted with any intent to terminate the marriage or that she failed to show any love and affection. She reiterated that she loved her husband to whom she had been 'an obeying person for 25 years'.

[27] She further denied having verbally attacked him or that she had refused to have sex with him, after all three children had been born to the parties.

[28] She explained and expounded on the history of the parties' sickness as a result of which they started to have protected sex.

[29] She testified that she did wash the plaintiff's clothes and denied the incident in which she was alleged to have thrown a fire arm to the ground and or that she ever quarrelled in front of the children. She clarified the situation about the homes of the parties situated in the north of Namibia, on communal ground, and stated that they stopped to go there together.

[30] She also narrated how she found out about the plaintiff's adultery and she denied that the plaintiff had come in April/May 2011 to ask for forgiveness for his adultery.

[31] Under cross examination she was asked by Mr Swarts, who appeared on behalf of the plaintiff, to explain why she had changed her version and why her

testimony was at variance with her pleadings. The defendant put the blame on her erstwhile legal practitioner, Ms Shilongo, who had got her version wrong as 'she gave her the full story'.

[32] She confirmed that there were never any quarrels between her and the plaintiff and that she would 'tell him in a good way'.

[33] She stated in no uncertain terms that she forgave the plaintiff for the adultery and if 'he would have asked for it she would have given it, but he never asked'.

[34] It was then pointed out to her that it appeared from the pleadings that she was not prepared to condone the plaintiff's adultery. She denied this and blamed it on a mistake and that in any event this was not her fault as she was no lawyer.

[35] It was then put to her that this was not a small problem as she had even filed an entire counterclaim. Again she did not agree.

[36] When asked whether or not she wanted to punish the plaintiff she responded by stating that 'it was his problem as he wanted to go with other women'.

[37] It was then put to her that the plaintiff would never return to her to which she replied that 'he could stay there and that she would still stay in the house and still be married'. When asked whether staying in the house was her main concern she replied that 'it was not because of the house'.

[38] It was then put to her that in contradiction of her evidence it had been pleaded in the counterclaim that the marital relationship had become intolerable, unsupportable and impossible to which the defendant replied that this was not true.

[39] Further cross examination was conducted on the issue of how it came about that the defendant's pleadings did not reflect her instructions on which score she confirmed that both her previous and her current legal practitioners were Oshiwambo

speaking which is also the defendant's home language. She explained that she had not told Ms Shilongo that she wanted to return to the plaintiff as she was not yet divorced and as she had also not been asked this question. She also disclosed that she did not inform Mr Kamanja of this.

[40] A little later however she posed the question: ' why should she be forced to get divorced - she had not committed adultery - she had been in the house and in the plaintiff's main bedroom'.

[41] She then disclosed that she had informed Mr Kamanja of this decision and that she had instructed Mr Kamanja that 'they were going to fight so that she would not get divorced'.

[42] As the fact that the defendant was prepared to restore conjugal rights had not been raised on the pleadings I allowed the plaintiff to reopen his case on this issue.

[43] The plaintiff then confirmed that he would not accept this offer as he did not want 'the bad that had happened to him to re-occur for which he could not forgive her'.

[44] Mr Kamanja expressed his surprise with this reply and put it to the plaintiff that he had expected the plaintiff to accept the defendant's forgiveness, after all, it was on the plaintiff's version that he sought her forgiveness – and nevertheless at the same time indicate that he still desired a divorce.

[45] Finally the plaintiff testified that he remained of the view that - taking into account all the things that had happened - that the parties should separate.

ARGUMENT

[46] In argument Mr Swarts submitted that the defendant had essentially presented three versions to the court and the question thus arose which version was the true one. The plaintiff on the other hand had stuck to his guns. He pointed out

that the defendant testified what had not been pleaded and that even after such testimony the pleadings had not been amended. There were major contradictions on the defendant's evidence even if one would accept that lawyers could make mistakes. This was however unlikely as the lawyers were Oshiwambo speaking and that all in all, the defendant's evidence was thus unsatisfactory and should be rejected.

[47] He submitted that on the evidence, the plaintiff had made out a case and that the defendant's offer to restore the marriage was not genuine, for which there had been ample opportunity before but by doing so at a late stage this tender was surely made solely to prevent the divorce.

[48] Mr Kamanja on the other hand pointed out that the plaintiff cannot come to court in order to rely on the shortcomings of the defendant's evidence. Plaintiff was obliged to discharge an onus and that he had to show on a balance of probabilities that he was entitled to a divorce, but had not done so. He went on to analyse the various denials of the defendant regarding the various grounds of divorce as advanced by the plaintiff.

[49] He submitted further that it was the court that had to grant condonation to the plaintiff for his admitted adultery and that the plaintiff had advanced no grounds in this regard and that it was not enough for the defendant to forgive the plaintiff.

[50] Some argument also turned on what the defendant's pleadings should have contained and whether the defendant's tender to take the plaintiff back should have been pleaded and in which respects one would have expected the pleadings to be amended.

[51] Finally Mr Kamanja closed his argument by reiterating that Mr Swarts had focused his argument on attacking the defendant's credibility despite the defendant testifying cogently and that the plaintiff had failed to prove his case.

DID THE PLAINTIFF DISCHARGE HIS ONUS?

[52] Turning now to the consideration of whether or not the plaintiff has discharged his onus in this matter, I keep in mind what was said by Frank AJ that 'there must be conduct which one must not expect in the ordinary course of marriage' and in respect of which it was further stated

'the conduct ... need not to have amounted to a matrimonial offence such as cruelty or adultery but ... it must exceed in gravity such behaviour vexatious and trying though it maybe, as every spouse bargains to endure when accepting the other 'for better or for worse'. The ordinary wear and tear of conjugal life does not itself suffice'.²

[53] If one then considers the evidence of the plaintiff it will appear at first glance that his evidence lacks detail. Although he generally narrates the grounds of divorce, as pleaded, one does not find any specifics, such as dates and places of the incidents referred to, save in regard to the incident where he requested the defendants condonation for his adultery.

[54] The Plaintiff's averments that the defendant does not wash his clothes where countered by the defendant effectively and accordingly I cannot make finding in this regard on the probabilities in favour of the plaintiff.

[55] As for the allegation regarding the refusal of marital privileges the issue eventually turned on the request of the plaintiff to have unprotected sex. In view however of the detailed history volunteered by the defendant relating to the discovery that plaintiff had contracted the HIV virus and that counselling was received in that regard and the subsequent conduct of the parties as a result, I will find - and so much was conceded in argument - that the defendant's demands - that the plaintiff use a condom - was reasonable in the circumstances.

[56] Also the further testimony of the defendant that she resorted to using a femidom to accommodate the plaintiff's needs is accepted as reasonable. Also the detailed exposition of the defendant given in this regard, in the course of which she

²Prof HR Hahlo *'The Law of Husband and Wife'* 4th Ed at page 394 - *Vatilifa vs Vatilifa* op cit at p 4

even disclosed her own HIV status, do lead me to infer that I must accept her version of the evidence relating to this ground of divorce.

[57] It is clear however, that as the parties were actually separated and no longer lived under one roof since April or May 2011 except for the odd occasion on which the plaintiff visited the Windhoek home, to bring 'things' for his children. It must be accepted that parties no longer engaged in any sexual activity since then.

[58] As far as the relied upon instances of abuse are concerned it was noted that the plaintiff's pleading speaks of physical abuse as well as quarrels and fights in front of the minor children. In court the Plaintiff confined his evidence to verbal abuse and he stated in this regard that only during the last time that they physically fought, the defendant took out his fire arm, which he threw on the ground.

[59] I am inclined to believe his testimony that the disclosure of his adultery led to another quarrel although this version is denied by the defendant.

[60] If one considers the defendant's case in this regard it just seems too good to be true. Firstly she denied ever verbally attacking the plaintiff. She testified further that she was never involved in a fight with the plaintiff and that she does not beat him - if there were disagreements she would 'tell him in a good way'. This evidence is directly contradicted by what was pleaded on the defendant's behalf in the counterclaim, which she instituted, and where it was expressly alleged that it was the plaintiff, who during the subsistence of the marriage, with the fixed and malicious intention to terminate same, *inter alia* also unlawfully and wrongfully physically abused the defendant. Whatever the precise nature of the altercations between the parties was, I find it more probable than not that, also in this marriage, the frequency and the intensity of the quarrels between the parties increased and even escalated with a passage of time to such a degree that it prompted the plaintiff to ultimately testify that he had reached the stage where he did not want to fight with the defendant any longer. This evidence was echoed under cross-examination when the plaintiff was recalled and where he stated that he had come to the conclusion that

after all the 'things' that had occurred - meaning that - after all the 'things' the defendant had done -the parties should separate.

[61] As far as the alleged refusal of the defendant to accompany the plaintiff to the traditional home is concerned it is firstly clear that, after the parties separated in April/May 2011, that there was no longer any such accompaniment. Both parties narrated their reasons in this regard in respect of which I am unable to find any indication which would swing the balance of probabilities on this ground in favour or either party.

[62] This brings me to the important question of whether or not there was any love and affection left between the parties and whether or not this ground was proved and whether or not the offer of the defendant to restore the marriage was genuine or not.

[63] At the outset it seems fairly obvious to me from my observation of the demeanour of the plaintiff that certainly he, on his part, had lost all love and affection for the defendant. Upon my observance of the demeanour of the defendant I could not avoid thinking of what was stated in Hamlet : '*the lady doth protest too much me thinks*'³. But I hasten to add that this was an impression based upon my observations of the manner in which the defendant testified.

[64] I have already mentioned herein above that it came as a surprise - given the state of the pleadings and the issues defined therein for trial - that the defendant now came and testified that she had forgiven the plaintiff, intending to convey thereby, that she had also condoned his adultery, that she still loved him and that nothing should separate them except death and that she did not want to get divorced at any cost and therefore would even be prepared to accept that 'he would stay in the North while she would continue to stay in Windhoek'.

[65] It had been pertinently pointed out to her in cross-examination, an aspect that was also carried through in argument, that this evidence flew in the face of what had been pleaded at paragraph 11 of her plea, in which it had been expressly stated on

³Queen Gertrude in Shakespeare's 'Hamlet' Act III scene II

behalf of defendant, that the defendant was not prepared to condone the plaintiff's adultery. This testimony was also directly contradicted by the institution of the counterclaim, in which the defendant sought a divorce on her own terms.

[66] The defendant tried to blame this divergence on her lawyers with whom she shared the same mother tongue and where she had stated in regard to Ms Shilongo that they never got to the stage of considering the aspect of condonation and any resultant tender of the restitution of conjugal rights. Although it is possible that Ms Shilongo might have misunderstood some detail, or incorrectly pleaded same in the defendant's plea, such as for example whether or not the quarrels were physical or not, it seems highly unlikely that she would have misunderstood the defendant's instructions regarding the institution of an entire counter claim accompanied by detail which Ms Shilongo surely would not have invented in the abstract.

[67] Although the defendant testified further that she informed her current legal practitioner in this regard also such instructions seem unlikely in the absence of Mr Kamanja even attempting to amend his client's pleadings in order to bring them in line with this client's alleged instructions and intended evidence.

[68] In such circumstances it must be concluded that the plaintiff has also succeeded in proving this ground of divorce on a balance of probabilities and that the defendant's belated offer, to condone the plaintiff's adultery and to restore conjugal rights, was not *bona fide* and constituted a mere stratagem to escape a restitution order and a divorce.

[69] I was left with the distinct impression, despite this being denied, that it was indeed of consequence to the defendant that she could remain resident in the Windhoek property and that this was the real reason, or at least was one of the main reasons, for her turn-about. This finding is to some extent also corroborated by her evidence which she gave in response to being asked, when it was put to her that the plaintiff would never return to her, that she stated that this would not be a problem for

her as the 'plaintiff could stay there', meaning in the North, and that 'she would stay – in Windhoek - and that they would still be married'.

[70] I thus conclude on those grounds of divorce, which the plaintiff has been able to prove, that he has been able to discharge his overall onus.

CONDONATION FOR ADULTERY OR NOT

[71] What remains to be determined is whether the court should condone the plaintiff's adultery.

[72] The two main considerations which will influence the court in deciding whether the plaintiff's adultery should be condoned are.

'First, the respective blameworthiness of the parties; Secondly, 'the interest of the community at large to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of union which has utterly broken down. ... The court is in no way fettered in the exercise of its discretion ...⁴.

[73] On the score of the respective blameworthiness between the parties there was no evidence placed on the record which explained why and in what circumstances the adultery had been committed. What however plays an important part in this regard is that the defendant herself, as the affected party, has belatedly condoned the plaintiff's conduct.

[74] It is also clear to me - I have already alluded to this - that I formed the distinct impression that, from the plaintiff side, the marriage was 'irretrievably broken down' and that there are no reasonable prospects for the resumption of a joint and further harmonious married life. It cannot be in the interest of public policy to insist on the maintenance of a union which only one partner seemingly wishes to perpetuate.

⁴The Law of Husband and Wife' op cit at page 370 to 371

[75] In the circumstances the condonation sought in this regard is granted.

[76] It should have emerged from the analysis of the evidence that the plaintiff has just managed to escape absolute and I cannot say that it was totally unwarranted for the defendant to try and rescue her marriage in respect of which she however lost sight of the fact of how far her marriage was actually already on the rocks especially after the actual separation of the parties for nearly two years already.

[77] These considerations have impacted on the way in which I will exercise my discretion regarding the costs order which I will make.

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

The Court grants judgment to the plaintiff for an order for the restitution of conjugal rights and orders the defendant to return or receive the plaintiff on or before the 11th day of March 2013, failing which to show cause, if any, to this court on the 9th day of April 2013 at 08h30 why:

1. The bonds of marriage subsisting between the parties and the defendant should not be dissolved;
2. Each party should not bear its own costs.

H GEIER
Judge

APPEARANCES

PLAINTIFF:

N Swarts

Swarts & Bock Legal Practitioners, Windhoek.

DEFENDANT:

AEJ Kamanja

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