



*bona fide* — Plaintiff failing to discharge onus — On evidence apparent that offer to resume cohabitation simply a ruse to avoid divorce order and inevitable consequence of an award of proprietary rights, maintenance and custody and access to the minor children – Court however cannot disregard the issues raised by the plaintiff relating to the ancillary relief claimed by the defendant and more specifically the issue regarding custody and access to the minor children – These are issues that are extremely important and no final decision should be made without hearing the parties.

**Summary:** The parties to this matter were involved in divorce proceedings dating back to September 2015 wherein the plaintiff instituted divorce proceedings against the defendant. The defendant opposed the action and filed her counterclaim against that of the plaintiff and the proceedings had to be put on hold pending a report to be compiled by a social worker regarding the minor children.

In correspondence received from social worker on 24 January 2017 it was indicated that the report was delayed due to the unwillingness of the plaintiff to cooperate with the said social worker and the legal practitioner of record for the plaintiff also withdrew from the matter citing the same issues of non-cooperation from the plaintiff. Ultimately, the plaintiff's claim and plea to counterclaim was struck and the defendant (plaintiff in reconvention) was allowed to proceed with her counterclaim. A restitution order was granted in favour of the defendant on 28 September 2017.

On 25 October 2017 the aforesaid court order was personally served on the plaintiff by the Deputy Sherriff, which return was filed by the defendant.

The defendant also filed an affidavit of non-return. In the affidavit of non-return the defendant indicated that the plaintiff failed to restore conjugal rights to her or to receive to her or to return to her before 09 November 2017. She further stated in the aforesaid affidavit that on 07 November 2017 a letter was received from the plaintiff in which he purportedly offered to restore conjugal rights to her. The defendant however submitted

that the offer of restoration was not genuine and proceeded to set out her reasons for making such statement.

On 07 December 2017 the plaintiff made an appearance in court during which appearance he indicated to the court that he no longer wish to get divorced.

In order to give the plaintiff the opportunity to show cause why the restitution order should not be made final the matter was postponed and subsequently on 06 April 2018 the court heard *viva voce* evidence by the plaintiff.

Although the plaintiff professed his love for the defendant during his *viva voce* evidence it would appear that the plaintiff has resigned himself to the fact that the divorce was inevitable but took issue with the ancillary relief that the defendant claims in her prayer in respect of proprietary rights, maintenance and custody and access to the minor children.

Held – on the return date the sole task of the court is to determine whether there has been proper service of the restitution order and whether the defendant had restored conjugal rights to the plaintiff. Any ancillary relief relating to custody and maintenance of the children may be raised on the return date and retried.

Held – The court will not revisit the merits of the case and will only take cognisance of the history of the marriage insofar as it throws a light on the intention of the plaintiff, i.e. whether his offer to return is genuine.

Held – There is nothing before this court to show that the plaintiff is *bona fide* in his offer to restore conjugal rights to the defendant after three years of separation.

Held – the court cannot disregard the issues raised by the plaintiff relating to the ancillary relief claimed by the defendant and more specifically the issue regarding

custody and access to the minor children. These are issues that are extremely important and no final decision should be made without hearing the parties.

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**ORDER**

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- a) I hereby grant the defendant a final order of divorce, with costs.
- b) The plaintiff is allowed to revisit the ancillary relief provisionally granted in paragraph 2- 6 in the *rule nisi* dated 28 September 2017.
- c) The case is postponed to 07 June 2018 at 15:00 for a status hearing.

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**RULING**

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Prinsloo J:

Introduction:

[1] This case before me has a long history that started on 07 September 2015 when Mr. K filed for divorce based on constructive desertion. In his particulars of claim he set out the conduct that Mrs. K made herself guilty of the following:

‘During the subsistence of the marriage between the parties, the Defendant acted with the fixed and malicious intention to terminate the marriage relationship between the parties in that she:

- 1.1 Continuously quarrelled with the Plaintiff.
- 1.2 Go out in the evening without informing the Plaintiff of her whereabouts.

1.3 Allow her family to interfere with the marriage of the parties continuously.

[2] The Defendant defended the matter on 23<sup>rd</sup> of October 2015. Defendant filed her plea and counterclaim on 19 February 2016. In her counterclaim the defendant alleged that during 2012 the plaintiff had an adulterous affair which she condoned on condition that the affair ceased. The adulterous affair did not cease and the defendant did not condone the continuation of the affair. In the alternative the defendant alleged that the plaintiff constructively deserted her by wrongfully and maliciously conducting himself in the following manner:

- a) Showed the defendant no love, affection and respect. He disregarded and neglected the defendant emotionally because of his adulterous affair as set out above.
- b) Absent himself from the common home for prolonged periods of time without any explanation seemingly to entertain his adulterous affair.
- c) He failed to communicate meaningfully with the Defendant.
- d) Showed no interest in the marriage, is emotionally, physiologically and physically abusive.
- e) Plaintiff is manipulative and a liar, which is evident of his affair.

[3] In April 2016 a social worker report was requested by the court regarding the minor children and hereafter the matter was postponed repeatedly to obtain the said report. In correspondence received from social worker concerned on 24 January 2017 indicated that the report was delayed due to the unwillingness of the plaintiff to cooperate with the said social worker. The difficulties in this case was however not limited to plaintiff's non-communication with the social worker as the plaintiff's erstwhile

legal practitioner had the same issues with the plaintiff and subsequently withdrew as legal practitioner of record.

[4] This matter reached a point in September 2017 where the claim of the plaintiff and plea to counterclaim was struck and the defendant (plaintiff in reconvention) was allowed to proceed with her counterclaim.

[5] A restitution order was granted in favour of the defendant on 28 September 2017 ordering the plaintiff to return to or receive the defendant on or before 09 November 2017, failing which, to show cause, if any, to this court on 07 December 2017, why the bonds of marriage subsisting between the parties should not be dissolved and why the ancillary relief (as set out in said order) should not be granted.

[6] On 25 October 2017 the aforesaid court order was personally served on the plaintiff the Deputy Sheriff, which return was filed by the defendant.

[7] The defendant also filed an affidavit of non-return. In the affidavit of non-return the defendant indicated that the plaintiff failed to restore conjugal rights to her or to receive to her or to return to her before 09 November 2017. She further stated in the aforesaid affidavit that on 07 November 2017 a letter was received from the plaintiff in which he purportedly offered to restore conjugal rights to her. The defendant however submitted that the offer of restoration was not genuine and proceeded to set out her reasons for making such statement.

[8] In summary the defendant stated her reasons as follows:

- a) That the plaintiff was obstructive when the social worker's report had to be compiled regarding the minor children, which caused a delay of months;

- b) During the time that the divorce proceedings was pending the plaintiff was aggressive towards the defendant because she instituted a counterclaim seeking custody of the minor children.
- c) During the marriage the plaintiff was emotionally, physiologically and physically abusive and she cannot return to a marital relationship that was characterised by abuse.
- d) As a result of the abusive marital relationship the defendant was admitted for psychiatric treatment in Cape Town, South Africa for about two weeks. When she informed the plaintiff of her health condition the plaintiff did not enquire about it.
- e) The plaintiff gets agitated and angry when defendant ignores his text messages saying he loved her. Defendant submitted that plaintiff is controlling and egocentric and she and the children were always expected to please him.
- f) That if the plaintiff was genuine in his offer to reconcile he would have withdrawn his action against the defendant timeously.
- g) Plaintiff does not have regular contact with the children and does not discuss any issues pertaining to the minor children with the defendant and pays maintenance irregularly.
- h) She instituted previous divorce actions because of the abusive marital relationship but has withdrawn the proceedings after promises by the plaintiff to change his ways.
- i) The defendant in conclusion expressed her concern that the plaintiff would harm or even kill her should the marital relationship be allowed to continue.

[9] On 07 December 2017 the plaintiff made an appearance in court during which appearance he indicated to the court that he no longer wish to get divorced.

[10] In order to give the plaintiff the opportunity to show cause why the restitution order should not be made final the matter was postponed and subsequently on 06 April 2018 the court heard *viva voce* evidence by the plaintiff.

[11] In support of his contentions that the court should not grant a final order of divorce the plaintiff filed a document that somewhat resembles an affidavit during which the plaintiff attempted to reply to the averments made by the defendant in her affidavit of non-return.

[12] The court had the opportunity to hear the *viva voce* evidence of the plaintiff in support of his opposition to the granting of a final order. In reply of to the averments made by the defendant the plaintiff stated that he filed for divorce after he was assaulted by the sister and brother of the defendant. He filed a criminal case but later withdrew the case. In turn the plaintiff denied ever having abused the defendant either physically or psychologically or emotionally. He alleges that the defendant in this instance is the deserter on the instructions of her family for unknown reasons.

[13] It would appear that the parties have been separated for a period of three years and during this period the parties had limited contact with one another. According to the plaintiff he was unaware of the health conditions of the defendant and only came to know of it when he got payment notifications from his medical aid.

[14] Although the plaintiff professed his love for the defendant during his *viva voce* evidence it would appear that the plaintiff has resigned himself to the fact that the divorce was inevitable but took issue with the ancillary relief that the defendant claims in her prayer in respect of proprietary rights, maintenance and custody and access to the minor children.

Position in law:

[15] It was pointed out in the matter of *Juszkiewicz v Juszkiewicz*<sup>1</sup> that on the return date the sole task of the court is to determine whether there has been proper service of the restitution order and whether the defendant had restored conjugal rights to the plaintiff. Any ancillary relief relating to custody and maintenance of the children may be raised on the return date and retried.

[16] The court will therefore not revisit the merits of the case and will only take cognisance of the history of the marriage insofar as it throws a light on the intention of the defendant, i.e. whether his offer to return is genuine,<sup>2</sup> which the defendant maintains is not.

[17] Hahlo, in his authoritative work *The South African Law of Husband and Wife* 3rd ed at page 410, sums up the law in this regard in the following words:

'A final decree of divorce may not be granted if it appears on the return day that the defendant has complied with the restitution order by restoring or offering to restore conjugal rights to the plaintiff.

Restitution of conjugal rights means the restoration of cohabitation as man and wife. The factum of the return must be accompanied by the intention to restore the marital relationship. There is consequently no restoration of conjugal rights if the defendant returns to the plaintiff under circumstances which show that he has no intention to resume marital cohabitation.'

Hahlo continues at 411:

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1 1945 TPD 48 at 52

2 *Anderson v Anderson* 1941 WLD 39; *Coetzee v Coetzee* 1945 WLD 122 at 126; *Sequeira v Sequeira* 1946 AD 1077

'The return or offer to return must be genuine and bona fide, and not a mere ruse or stratagem to escape an order of divorce. In *Corbett v Corbett* the defendant wife returned to the plaintiff and lived with him for a few days. Then she deserted him again. The Court held that the defendant's return was not bona fide, but was a ruse on her part. In *Schepers v Schepers* the fact that the parties had had intercourse on an isolated occasion was held not to amount to a resumption of cohabitation as man and wife.'

And later on the same page:

'An offer to return, as distinguished from an actual return, can only be taken into consideration by the Court if it was made within the time fixed for compliance with the restitution order. The offer "must be genuine, and not merely simulated for the purpose of temporarily defeating the decree, without any real intention of afterwards carrying out the offer". It "must be made honestly in the hope that it will lead to a lasting resumption of normal marriage relations". The deserting spouse "must show something more than a fluctuating desire to resume cohabitation; she must show a fixed and settled intention to offer a resumption of marital life under reasonable conditions".' The onus is on the plaintiff to show that his offer to return is genuine. The test is not of any offer that is made, it is a *bona fide* offer that obliges the deserted spouse to receive back the deserter.

[18] In the matter of *Voigts v Voigts*<sup>3</sup> at para 15 Damaseb JP stated as follows:

'*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.'

[19] As indicated the parties had limited communication during the period of their separation and the plaintiff confirms that an offer of restoration of conjugal rights was made by correspondence to the defendants counsel.

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<sup>3</sup> (I 1704/2009(B)) [2013] NAHCMD 281 (11 October 2013).

[20] There is nothing before me to show that the plaintiff is *bona fide* in his offer to restore conjugal rights to the defendant after three years of separation. The plaintiff denies any abuse on his part but remains quiet about the adulterous affair that he engaged in and also continued with without the defendant having condoned same.

[21] However, having said that I cannot disregard the issues raised by the plaintiff relating to the ancillary relief claimed by the defendant and more specifically the issue regarding custody and access to the minor children. These are issues that are extremely important and no final decision should be made without hearing the parties.

[22] My order is therefore as follows:

- a) I hereby grant the defendant a final order of divorce, with costs.
- b) The plaintiff is allowed to revisit the ancillary relief provisionally granted in paragraph 2- 6 in the *rule nisi* dated 28 September 2017.
- c) The case is postponed to 07 June 2018 at 15:00 for a status hearing.

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J S Prinsloo  
Judge

APPEARANCES:

FOR PLAINTIFF:

In Person

FOR DEFENDANT:

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