

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2018/03483

In the matter between:

A H Z D

PLAINTIFF

and

M H

DEFENDANT

Neutral Citation: *A H Z D v M H* (HC-MD-CIV-ACT-MAT-2018/03483) [2020] NAHCMD 109 (20 March 2020)

CORAM: **PRINSLOO J**

Heard: 12 - 13 March 2020

Delivered: 20 March 2020

Reasons: 23 March 2020

Flynote: Husband and wife – Divorce – Grounds: constructive desertion and refusal of marital privileges – Constructive desertion: plaintiff must show that the defendant acted with the fixed intent to put an end to the marriage – The onus of proving both the factum of desertion and the *animus deserendi* rests throughout

upon the plaintiff – If the defendant's conduct was so outrageous that he must have realised that it could only have the result of driving the plaintiff away and nevertheless persisted in it, reckless of the consequences, he cannot be heard to say that he did not intend to terminate the marital relationship

Summary: The plaintiff and the defendant were married on 21 April 2006 at Karibib in community of property and is still so married. On 30 August 2018 the plaintiff instituted divorce proceedings against the defendant and pleads in his particulars of claim that the defendant acted with the determined intention to end the marital relationship between the parties by wrongfully and maliciously conducting herself in the following manner: a) she failed to show love, affection and respect towards the plaintiff; b) she fails to communicate meaningfully with the plaintiff; c) she shows no respect towards the plaintiff; d) she denied the plaintiff conjugal rights; and e) continuously insults the plaintiff and elicit unnecessary fights and quarrels with the plaintiff. Plaintiff pleads that resultant to the defendant's behaviour he moved out of the common home during May 2018. Plaintiff further pleads that the defendant has wrongfully alternatively maliciously and/or constructively deserted the plaintiff in which desertion she persists.

The defendant opposed the divorce. The defendant's plea is one of a bare denial and she prays that the plaintiff's claim be dismissed with costs. The defendant did not file a counterclaim.

ORDER

1. The court grants judgment for the plaintiff for an order for Restitution of Conjugal Rights and orders the defendant to return to or receive the plaintiff on or before **01/05/2020**, failing which, to show cause, if any, to this court on the **29/05/2020** at **09:00**, why:
 - 1.1 The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
 - 1.2. The joint estate should not be divided.
2. Each party to pay their own costs.

JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff and the defendant were married on 21 April 2006 at Karibib in community of property and is still so married. One child was born from the parties in 1997 and was legitimised by the parties' subsequent marriage. The child is now a major and his best interests need not be considered in the greater scheme of things.

[2] On 30 August 2018 the plaintiff instituted divorce proceedings against the defendant and pleads in his particulars of claim that the defendant acted with the determined intention to end the marital relationship between the parties by wrongfully and maliciously conducting herself in the following manner:

- a) She failed to show love, affection and respect towards the plaintiff;
- b) She fails to communicate meaningfully with the plaintiff;
- c) She shows no respect towards the plaintiff;
- d) She denied the plaintiff conjugal rights; and
- e) Continuously insults the plaintiff and elicit unnecessary fights and quarrels with the plaintiff.

[3] Plaintiff pleads that resultant to the defendant's behaviour he moved out of the common home during May 2018. Plaintiff further pleads that the defendant has wrongfully alternatively maliciously and/or constructively deserted the plaintiff in which desertion she persists.

[4] The plaintiff seeks the following relief from this court:

- a) An order for the restitution of conjugal rights and failing compliance therewith;

- b) A final order of divorce.
- c) The defendant to leave the common home on the date on which the final order of divorce is granted.
- d) Division of the joint estate.

[5] The defendant opposed the divorce. The defendant's plea is one of a bare denial and she prays that the plaintiff's claim be dismissed with costs. The defendant did not file a counterclaim.

[6] The issues to be determined by this court were set out in the pre-trial order as follows and were limited to the grounds of divorce in respect of the issues of fact to be resolved and on the issues of law to be resolved the only two issues for determination were:

- a) Whether the defendant wrongfully alternatively maliciously and/or constructively deserted the plaintiff.
- b) Whether or not the plaintiff has a valid claim against the defendant for a final order of divorce.

The evidence adduced

On behalf of the plaintiff

[7] The plaintiff testified that emotional and psychological abuse started very early in their marriage. The plaintiff testified that the defendant conducted herself in a disrespectful manner and continuously verbally assaulted him and at times it would become physical to the extent that the defendant would throw the plaintiff with any item that was within her reach and this resulted in the plaintiff having to physically restrain the defendant by holding her.

[8] According to the plaintiff he could not take the abuse any longer and decided to move out of the common home in 2007. However, prior to moving out he approached the Magistrate in Karibib to seek advice and direction. At that stage he moved out of the common home for a period of 7 months. The common home was a

house awarded to him by his employer by virtue of the position that he held with his employer.

[9] During the period that the couple lived apart the defendant approached the maintenance court in Karibib to seek maintenance for her and their minor child. The issues between the parties were resolved during this period and the plaintiff moved back to the common home.

[10] The plaintiff testified that the peace in the house was short lived as the abuse started soon thereafter. The plaintiff testified that when the defendant acted in this abusive manner he would remain quiet in order to avoid trouble and as it is not in his nature to be abusive.

[11] The parties approached the magistrate in Omaruru twice to try and resolve their marital issues but nothing came of it. In fact the situation escalated to the extent that the defendant threatened to kill the plaintiff and their child and then kill herself. The defendant would also behave erratically by taking the car and leave without informing the plaintiff where she was going and then stay away for up to two days at a time.

[12] The plaintiff testified that the verbal and emotional abuse would happen regardless of who was present. This would include the children (their child and the defendant's child from a previous relationship), friends and family.

[13] The plaintiff further testified that from mid-2017 the defendant would refuse him conjugal rights and told him that he should divorce her. This refusal to be intimate continued up to May 2018 when the plaintiff moved out of the common home.

[14] The plaintiff testified that the defendant made living with her intolerable due to her abusive behaviour and continuous accusations of extra marital relationships. In an attempt to save their marriage the plaintiff called several family meetings but the defendant would either tell the family that there are no issues between them as a couple or she would be unmannerly and not show up to the meetings. As a result

none of the meetings were held. Plaintiff testified that before he moved out for the second time he again went to the magistrate's court in Karibib where he sought assistance.

[15] After he moved out the plaintiff moved into a shack (informal dwelling) without any water, electricity or sanitation. Plaintiff however testified that he has managed to secure accommodation with a colleague and is no longer residing in a shack.

[16] According to the plaintiff the defendant did not cease with her abuse after he moved out and would constantly harass him telephonically or wherever she would find him and followed him around as well. The plaintiff testified that this got to the point that he approached the Magistrate's Court in Karibib to obtain an interim protection order, which was granted in his favour on 7 February 2019.

[17] The plaintiff testified that what he is seeking is a divorce and that whatever possessions they own as a couple can remain with the defendant. All that he wants is his mother's special pot and a braai-stand.

[18] On the issue of assets the plaintiff testified that the couple owns no immovable property or motor vehicles and only acquired a small estate consisting of movables such as furniture and clothing. The plaintiff testified that the vehicle he is using belongs to his uncle and presented proof of ownership in that regard and further testified that although he looks after the livestock of his elderly mother none of it belongs to him. The plaintiff also presented proof of the livestock brand that belongs to his mother.

[19] The plaintiff testified that to his knowledge the defendant was suspended from her employment at QKR Navachab Gold Mine Pty (Ltd) and as a result he is paying her maintenance in the amount of N\$ 1000 per month to assist her. To date the defendant is still residing in the company house that was allocated to the plaintiff and request this court to make an order that the defendant vacates the said house upon granting a final order of divorce.

[20] During cross-examination Ms Siyomunji put to the plaintiff that the defendant never deprived him of his conjugal rights nor did she fail to show him love and affection. The plaintiff however denied these statements.

[21] It was also put to the plaintiff that they never had fights (physical) as a couple but would quarrel like any other couple. The plaintiff indicated that that was not correct and stated that the defendant on more than one occasion begged for his forgiveness for what she did to him.

[22] Ms Siyomunji also raised the issue with the plaintiff that although he is professed to want to save his marriage he chose to leave the common home. The plaintiff recapped the steps taken in order to resolve the issues between the parties and reiterated that it became unbearable to remain in the same house with the defendant.

[23] In respect of the interim protection order the plaintiff testified that to his knowledge no final order was granted as they did not attend to court on the return date of the interim order. He testified that he is unable to say if the interim order was served on the defendant as it was the duty of the Namibian Police to do so.

On behalf of the defendant

[24] The defendant testified that she does not want the divorce as she is of the opinion that they can resolve their issues and requested the plaintiff to give their marriage another chance.

[25] The defendant further testified that the plaintiff is a loving person and a good provider and he took her child, who was born prior to their marriage and fathered by another man, into his house without asking questions and has been the provider for this child ever since.

[26] The defendant testified that they quarrelled like any other couple but these quarrels never escalated in any physical violence. The witness stated that during the course of their marriage there was a breakdown in their communication and at one

stage the plaintiff left the house to stay at the cattle post for an extended time but she was of the opinion that he went to stay at the cattle post to train a new employee. It appears that was in 2007 when the plaintiff moved out of the common home.

[27] The defendant denied that she refused the plaintiff from exercising his conjugal rights and went further to state that it pains her to hear that the plaintiff alleges that they did not have sexual intercourse. The defendant testified that they had an active sexual relationship. The defendant went as far as saying that she loved sex like she loved food and the plaintiff loved it even more. The defendant further testified that she felt it would embarrass the plaintiff should she discuss their sexual relationship and she does not want to do so. According to the defendant the plaintiff made himself guilty of infidelity on three occasions. She testified that she confronted the plaintiff and he asked for forgiveness and they discussed it and they moved on in their relationship.

[28] The defendant confirmed that she is still residing in the company house and testified that in April 2019 she was dismissed from QKR Navachab Mine and has no income currently. She testified that she appealed the dismissal and the appeal is set down to be heard in April 2020. The defendant further testified that depending on the outcome of the appeal she will either seek new employment or return to her previous employment. In the interim the, plaintiff is contributing N\$ 1000 to the defendant in the form of maintenance.

[29] The defendant confirmed that they do not own any immovable property but stated that the vehicle which the plaintiff currently drives and which he alleges belongs to his uncle is in fact the property of the plaintiff as he paid this vehicle off over an extended period of time.

[30] The defendant further testified that when she came to know the plaintiff he was a farmer and is still farming and she is questioning the evidence that the livestock belongs to his mother. She testified that at some stage the plaintiff even donated a cow to her and their son also own some livestock.

[31] During cross examination by Ms Angula the defendant conceded that she does not have any proof to substantiate her evidence in respect of the motor vehicle and the livestock.

Evaluation of the evidence

[32] The only two witnesses who testified in this matter is the plaintiff and the defendant.

[33] The plaintiff's evidence was clear and concise and to the point without any inherent improbabilities. During his testimony the plaintiff comprehensively sketched the background that led up to him leaving the common home.

[34] The cross-examination of the plaintiff was very brief and the plaintiff remained steadfast in respect of his evidence. The plaintiff made a good impression on the court.

[35] The same cannot be said for the defendant as she unfortunately did not impress as a witness and had difficulty in sticking to a point and answer the questions posed to her and as a result the real issues were never addressed or answered.

[36] The defendant was literally all over the proverbial place with her evidence. On the one hand the defendant professed her love for the plaintiff, asking him not to proceed with the divorce matter and telling the court what a generous and goodhearted person the plaintiff is and in the very next breath she accuses the plaintiff of adultery, on three occasions with three different ladies no less, and of extreme dishonesty. The defendant accuses the plaintiff of lying about the ownership of the vehicle and the livestock on the farm.

[37] The allegations that the defendant made in her evidence in chief regarding the plaintiff's alleged infidelity and his alleged dishonesty regarding the assets were

neither pleaded nor alluded to in her witness statement. It is important to note that the plaintiff was also not cross-examined on the issue of infidelity.

[38] The defendant insisted during her evidence in chief that the plaintiff was lying about the ownership of the car and the livestock. The allegations that the plaintiff was the owner of both the car and the livestock was also never canvassed during cross-examination with the plaintiff, in spite of his direct evidence in this regard.

[39] Further to the above the joint pre-trial order contradicts the evidence of the defendant as the parties agreed that the parties do not own any immovable properties or motor vehicles and acquired a small estate consisting of only movables such as furniture and clothing. The motor vehicle is therefore specifically excluded from the joint estate otherwise the parties would have dealt with it accordingly in the pre-trial order. No mention is made of the livestock either and this court must thus accept that the couple does not own any livestock.

[40] The defendant is grasping at straws and this court cannot give any weight to these allegations which are without substance.

Malicious desertion

[41] According to Halho HR in his authoritative work *The South African Law of Husband and Wife*¹ there are four forms of malicious desertion, namely: a) actual or physical desertion; b) constructive desertion; c) refusal of marital privileges and possibly d) sentence to death or life imprisonment.

[42] The plaintiff pleaded malicious desertion in two specific forms, namely and specifically constructive desertion and refusal of marital privileges. Halho² discussed constructive desertion as follows:

¹ 4th ed Juta & Co Ltd at 391.

² *Supra* at 392.

'... it is not the guilty, but the innocent party that left the matrimonial home: the defendant, with the intent to bring the matrimonial relationship to an end, has driven the plaintiff away by making life in common dangerous or intolerable to him or her.

Gorell Barnes J in a classic passage in *Sickert* put the matter thus:

"In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party leaves the other, but it is not always or necessarily the guilty party that leaves the matrimonial home....The party who intends to bring the cohabitation to an end, and whose conduct in reality brings cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion."

[43] In the case of constructive desertion the plaintiff must show that the defendant acted with the fixed intent to put an end to the marriage.

[44] Three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed³:

- (i) 'The consortium of the spouses must have come to an end as the result of the plaintiff's having left the defendant;
- (ii) It must have been the defendant's unlawful conduct that caused the plaintiff to leave;
- (iii) The defendant's conduct must have been attributable to a fixed intention to put an end to the marriage. '

[45] In Halho's subsequent discussion of the requirements the following becomes clear:

- a) The plaintiff must be the one that leaves the defendant;
- b) There must be conduct which one must not expect in the ordinary course of marriage ;

'the conduct need not to have amounted to a matrimonial offence such as cruelty or adultery but it must exceed in gravity such behavior vexatious and trying though it maybe, as every spouse bargains to endure when accepting

³ *Supra* at 393.

the other “for better or for worse”. The ordinary wear and tear of conjugal life does not itself suffice.⁴

- c) There must be a fixed and settled intention by the defendant to terminate the cohabitation with the spouse. Only then will both the factum and the animus of desertion will be present. Once intention is established then the motive is not relevant

Did the defendant constructively desert the plaintiff?

[46] I am faced with two mutually destructive versions in the matter in casu and for the plaintiff to succeed he must demonstrate to this court that the balance of probabilities favour him.

[47] What emerges from the evidence placed before me is that during May 2018 the plaintiff moved out of the matrimonial home and they have not lived together as husband and wife since. During his evidence the plaintiff made it clear that he could not tolerate living with the defendant anymore. The troubles started shortly after their marriage and he moved out for the first time as early as 2007 after approximately one year of marriage. After being separated for seven months the plaintiff moved back home to attempt to revive their ailing marriage.

[48] The plaintiff blames the defendant for the breakdown of their marriage and the defendant in turn denies that she was at fault. The defendant insisted that as a couple they had quarrels but nothing beyond the regular, however she did not address the plaintiff’s version that they went to the magistrates court Omaruru twice to attempt to resolve their issues. The defendant also did not address the issue that the plaintiff called for family meetings to discuss their issues with the elders and to seek their guidance. The plaintiff also testified that the defendant at some point threatened to kill him, their child and then herself. This issue was never canvassed with the plaintiff during cross-examination and never denied by the defendant.

⁴ HR Hahlo *The South African Law of Husband and Wife* p 394, cited in *Kagwe v Kagwe* (I 1459/2011) [2013] NAHCMD 71 (30 January 2013) para 52.

[49] There is also the issue of the interim protection order which was granted in favour of the plaintiff. This interim protection order was obtained in 2019, which was a few months after the plaintiff moved out of the common home. The plaintiff testified that the defendant continuously pursued him and made public scenes and that is why he found it necessary to obtain an interim protection order against her. I accept the fact that the interim protection order was not served on the defendant but the defendant cannot gainsay the fact that the plaintiff went as far as successfully seeking an interim order against her.

[50] The defendant is clearly living in denial. Her perception that their relationship and the plaintiff's perception thereof is light years apart. The question must be who was at fault?

[51] Things must have been unbearable for the plaintiff to move out of the common home, which was a company house where he had all the necessities, to move into a shack without electricity and running water and sanitation.

[52] It is common cause between the parties that the plaintiff is not an aggressive person and would also appear that he was not the one initiating conflict in the marriage. The plaintiff testified that the defendant did not respect him and she belittled him in front of friends and family on a regular basis. This also happened in front of the children who were sharing the house with them. The children would also witness the defendant's violent outbursts when the parties had a quarrel. The plaintiff testified that the defendant did not physically attack him but would throw whatever was closest at hand when the couple had a quarrel (which was often) and the plaintiff had to physically restrain her. The plaintiff testified that he does not abuse women and felt obliged to move out before things got out of hand and somebody got hurt.

[53] Then came the issue of the defendant's refusal to allow the plaintiff conjugal rights. This appears to have been the last straw that broke the camel's back.

[54] The defendant insisted that it is not true that she refused the plaintiff conjugal rights. In her witness statement the defendant alleges that they had intercourse occasionally yet during her oral evidence the defendant made the statement that 'she loves sex like she loves food' although they did not have sexual intercourse every day they had intercourse very often. 'The lady doth protests too much methinks', in the words of Shakespeare⁵. The defendant is not playing open cards with this court and this is yet another issue that the defendant contradicted herself on.

[55] As indicated above the defence of the defendant consists of bare denials but the defendant did not proffer any evidence to substantiate the denials.

[56] I have observed the plaintiff and defendant in court and have considered their evidence carefully and found, during the plaintiff's evidence, that: a) the defendant does not communicate with him in any civil manner; b) shows him no love and respect; c) denigrates him; d) elicited quarrels unnecessarily; and e) denied him conjugal rights, is probable and I reject the defendant's denials.

[57] I am satisfied that the plaintiff has shown on a balance of probabilities that the consortium of the spouses has come to an end as a result of the plaintiff's having left the defendant and I am further satisfied that it has been the defendant's unlawful conduct that caused the plaintiff to leave.

[58] The next question to consider is whether the plaintiff succeeded to prove that the defendant acted with the required *animus deserendi*.

[59] Hahlo⁶ stated that: '. . . it must also be borne in mind that *dolus eventualis* is equivalent to *dolus*. If the defendant's conduct was so outrageous that he must have realised that it could only have the result of driving the plaintiff away and nevertheless persisted in it, reckless of the consequences, he cannot be heard to say that he did not intend to terminate the marital relationship.'

⁵ Shakespeare's Hamlet, Act III, scene II.

⁶ *Supra* at 393.

[60] From the evidence before this court it appears that the intimate relationship of the parties ceased approximately at least one year prior to the plaintiff moving out of the common home. When the plaintiff apparently addressed the issue with the defendant she told him to divorce her.

[61] The defendant's refusal to allow the plaintiff conjugal rights was coupled with constant quarrels, constant verbal abuse, threats of harm to life and limb of the plaintiff and their child and lack of respect. The defendant professes to love the plaintiff and asked for a second chance but it would appear too little too late. No person can be expected to remain in a marriage where there is no intimacy and constant conflict, quarrels and abuse.

[62] I am satisfied that the defendant was reckless of the consequences of her actions and even invited the plaintiff to file for divorce when he confronted her regarding her refusal to allow him conjugal rights.

[63] I am thus satisfied that the plaintiff has proven the *animus deserendi* on the part of the defendant.

Conclusion

[64] The defendant raised the issue of maintenance in her evidence in chief but apparently lost sight of the fact that there is no claim for maintenance before this court as the defendant did not file a counterclaim.

[65] In respect of the plaintiff's claim that the court order the defendant to move from the common home, which is a company home, is something that will be left up to the plaintiff's employer and I do not intend to make any orders in this regard.

[66] In the premise, it is ordered that:

1. The court grants judgment for the plaintiff for an order for Restitution of Conjugal Rights and orders the defendant to return to or receive the plaintiff

on or before **01/05/2020**, failing which, to show cause, if any, to this court on the **29/05/2020** at **09:00**, why:

- 1.1 The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved.
- 1.2. The joint estate should not be divided.
2. Each party to pay their own costs.

JS Prinsloo

Judge

APPEARANCE

PLAINTIFF:

M Angula
Of Angula Co.
Windhoek

DEFENDANT:

Ms Siyomunji
Of Siyomunji Law Chambers
Windhoek