

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-MAT-2021/03719

In the matter between:

VENACIO SANDJONDJO HOMBA

PLAINTIFF

and

MEDIA KACHANA KAMWI HOMBA (Born KAMWI)

DEFENDANT

Neutral Citation: *Homba v Homba* (HC-MD-CIV-ACT-MAT-2021/03719) [2022]
NAHCMD 600 (3 November 2022)

Coram: MASUKU J

Heard: On the papers filed on 25 October 2022

Delivered: 3 November 2022

Flynote: Law of Persons – Divorce proceedings – Restitution of conjugal rights (RCR) – Whether or not it is appropriate to issue a final order of divorce where there is an existing final protection order.

Summary: The plaintiff instituted divorce proceedings against the defendant. The defendant defended the matter and further filed a counter-claim in which she sought a decree of divorce and payment of a certain amount to her by the plaintiff. The defendant, however, insisted that the divorce be dealt with together with the other pending issues. The court, nonetheless, proceeded to deal with the divorce proceedings first in order to eliminate issues not in contention between the parties. It became evident

that there was a final protection order granted in favour of the plaintiff against the defendant on 14 June 2022. This protection order was valid for a period of two years. The plaintiff led evidence during the RCR proceedings and upon finality thereof submitted that a final order of divorce would be appropriate in this instance instead of the RCR proceedings, because of the protection order.

Held: that the order for restitution of conjugal rights is issued by the court in circumstances where there is a genuine and serious intention and willingness by the parties to resume the marital relationship.

Held that: it is inadvisable for the court to order restoration of conjugal rights where allegations of violence are pleaded in the papers and where a protection order is granted against one of the parties.

Held further that: it would send wrong signals to order a restitution order in the face of a protection order as it would seem to bystanders that the courts are speaking in contradictory terms.

A final order of divorce was thus granted in favour of the plaintiff and the matter referred to case management in respect of the outstanding issues.

ORDER

1. A final order of divorce is hereby issued and in terms of which the bonds of marriage solemnized between the plaintiff and the defendant be and are hereby dissolved.
2. The matter is postponed to 10 November 2022 at 08:30 for a further case management conference.
3. The parties are ordered to file a revised joint case management report and a proposed draft case management order on or before 7 November 2022.

JUDGMENT

MASUKU J;

Introduction

[1] The parties, in this matter, being Mr. Venacio Sandjondjo Homba and Mrs Media Kachana Kamwi Homba (*Nee Kamwi*), were joined in matrimony in a ceremony that took place in Windhoek on 25 May 2012. Unfortunately, as some marriage relationships are wont to, this marital relationship, traversed tempestuous waters. As the waves of marital tempests and tribulations battered the parties' marital ship, it unfortunately succumbed and became shipwrecked.

[2] As a result, the plaintiff instituted divorce proceedings before this court. The defendant, for her part, did not sit idly. She not only defended the action but also filed a counter-claim, in which she also sought a decree of divorce and an order that certain immovable property owned by the parties be sold and the proceeds thereof be applied in settling the parties' indebtedness to the Development Bank of Namibia.

[3] Furthermore, the defendant claimed payment of an amount of N\$600 600, which she alleges is due and payable to her by the plaintiff. The indebtedness is alleged to have arisen from a loan that the defendant advanced to the plaintiff in the amount of N\$800 000 and of which the plaintiff only repaid N\$296 400. This claim is defended.

[4] It became plain to the court and the parties that properly considered, there was no real impediment to the hearing of the divorce, although there was a measure of reluctance on the part of the defendant, who insisted that the matters be dealt with once and for all. The court took the view that it would be appropriate to deal with the divorce issue and put it out of the way, reserving the balance of the court's time and processes, to the real issues that remain in dispute. That is the course that was eventually followed. This judgment is concerned with the divorce matter, with the other matters to be dealt with in due course.

The divorce proceedings

[5] The plaintiff adduced oral evidence as the divorce eventually proceeded unopposed. The only question that the court is confronted with at this juncture, is to decide whether this case constitutes an appropriate one in which to grant a restitution order notwithstanding the common cause fact that the plaintiff obtained a final protection order, which in effect prohibits the defendant from coming to or near the plaintiff or his residence.

[6] The final protection order was issued by the Magistrates Court Domestic Violence Unit. It is dated 14 June 2022 and it is valid for a period of two years. The violation of that order, it is stated in clear and unambiguous terms and for that matter in bold in the said order, results in a criminal offence, rendering the party violating the said order liable to imprisonment for a period of two years or a fine of up to N\$8 000 or to both a fine and imprisonment.

The applicable considerations

[7] Mr Shimakeleni, who represented the plaintiff in the matter moved the court to grant a final order for the reason of the valid protection order. It was his argument that in the context of the present case, if the court were to order the parties to restore conjugal rights, which is the ordinary course followed where adultery is not alleged and proved to the satisfaction of the court, that would be a violation of the protection order, rendering the parties, especially the defendant, liable to the penalty set out in the protection order and stated in the immediately preceding paragraph.

[8] It is perhaps necessary to delve a little into the whole concept of restitution of conjugal rights. In *K v K*¹ the court, in reference to the learned authors Hahlo, '*The South African Law of Husband and Wife*'² quoted the following excerpt:

¹ *K v K* (I 2987/2015) [2018] NAHCMD 126 (14 May 2018) para 17.

² H R Hahlo, '*The South African Law of Husband and Wife*' 3rd ed at p 410.

'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.'

[9] It accordingly becomes plain that the order of restitution of conjugal rights is issued by the court in circumstances where there is a genuine and serious intention and willingness by the parties to resume the marital relationship. They must be willing to bury the hatchet and turn a new page in their otherwise stained marital relationship.

[10] It is an order that is normally granted by the court in good faith with the express intention to afford the parties an opportunity to resuscitate the marital relationship, which may have, for whatever reason, ceased to exist. This is not an order that must be issued casually and in order to merely go through the motions, in the absence of a genuine intention to resume the marital relationship.

[11] I am of the considered view that in cases where allegations of violence which are pleaded in the papers or where, as in this case, there is a protection order issued, it is most inadvisable for the court to order restoration of conjugal rights in that scenario. That is so because where the parties resort to violence one against the other, in the course of complying with a restitution order, the marital home to which restoration is ordered, may be the very cradle of violence, if not the killing fields.

[12] I have stated above that even allegations of violence should deter the court from ordering restitution because proof of violence may be too ghastly to behold once the violence that was alleged eventuates. Life and limb may be in serious jeopardy, which is an eventuality that must be avoided at all costs.

[13] It has now become plain that in some cases, marriages have become loveless and the breeding ground for homicide, violence, verbal, economic and financial abuse. As such, where a likelihood exists that a party to a marriage may seize the opportunity provided by a restitution order, to engage in the assault and denigration of the bodily integrity and dignity of the other spouse, then the restitution order should not be granted.

[14] Its purpose is to afford the parties a time, place and opportunity to restore the marital relationship and not to destroy one another's life, person or dignity. A possibility that a person may be killed or maimed in the precincts of a marital home, in the name of restoration of conjugal rights, points inexorably to the inadvisability of granting that order.

[15] This reality and the possibly catastrophic results dawned on Cheda J in *Shitaleni v Shitaleni*.³ In dealing with the possibly calamitous consequences of issuing a restitution order, the learned judge remarked as follows:

'It is my considered view that this is one of those exceptional cases where plaintiff's desire for a Restitution of Conjugal Rights is sought as a matter of course and lacks bona fides. In her own words under oath she testified that she is afraid of defendant. I, therefore, do not see the logic of her accepting defendant back where there is a great possibility of violence or even death being carried out on her.

In my view to allow the defendant to go back to plaintiff is to tacitly grant him a licence to continue with his violent threats as he pleases. Infact, it is tantamount to asking (Dracula) the vampire to guard a blood bank. It is for that reason that I used my judicial discretion of granting the final order thereby putting the plaintiff's mind at rest.'

[16] I am in entire agreement with the approach and reasoning of the learned judge in the above case. The court should not grant orders in a mechanical fashion but should also take into account, depending on the circumstances, what the implications thereof may be. In this connection, orders issued, should allow those ordered to know that their rights to life, bodily integrity and dignity are not likely to be violated in the course of complying with a court order for restitution of conjugal rights. Where that possibility exists, the court should take active steps to guard against that possible harm eventuating by issuing an appropriate order.

[17] I am of the considered view that the facts in this matter call out loudly for the court to avoid presenting the defendant with a golden opportunity to perpetrate those

³ *Shitaleni v Shitaleni* (I 61/2015) [2015] NAHCLD 30 (08 July 2015) para 11-12.

very acts the protection order was designed and issued to forestall. The instant case present an even more compelling case for the granting of a final order, considering that another court has, after following the relevant procedures, issued a protection order in the plaintiff's favour against his wife.

[18] The restitution order should therefor not be granted in the instant case as it would constitute a latent licence for the defendant to carry out the very acts she was forbidden from committing. It would also send wrong signals to order a restitution order in the face of a protection order as it would seem to bystanders, that the courts are speaking in contradictory terms. On the one hand, a Magistrate's Court orders no contact between the parties, at the pain of a serious sanction and yet a higher court, in this instance, orders otherwise, by approving an order for restitution of conjugal rights.

[19] In point of fact, properly construed, the compliance with the restitution order, if issued by this court, would amount to a commission of a criminal offence, if regard is had to the terms of the protection order. There must be confluence in the actions and orders courts issue to parties appearing before them. An order that is appropriate and is in sync with the protection order and which also protects the life, dignity and bodily integrity of the plaintiff, is the issuance of a final decree of divorce in the instant matter.

Conclusion

[20] Having regard to the foregoing, and considering in particular, the existence of the final protection order, which remains valid, the appropriate order to issue in this matter is to grant a final decree of divorce to the plaintiff, which is in the event, unopposed.

Order

[21] In view of the considerations alluded to above, and the conclusion reached, the following order appears condign in the present circumstances:

1. A final order of divorce is hereby issued and in terms of which the bonds of marriage solemnized between the plaintiff and the defendant be and are hereby dissolved.

2. The matter is postponed to 10 November 2022 at 08:30 for a further case management conference.
3. The parties are ordered to file a revised joint case management report and a proposed draft case management order on or before 7 November 2022.

T S MASUKU
Judge

APPEARANCES

PLAINTIFF: A Shimakeleni
Of Appolos Shimakeleni Lawyers, Windhoek

DEFENDANT: A Feris
Of Sisa Namandje & Co. Inc., Windhoek