

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 61/2015

In the matter between:

A..... N..... S..... (Born S.....)

PLAINTIFF

And

L..... S.....

DEFENDANT

Neutral citation: *Shitaleni v Shitaleni* (I 61-2015) [2015] NAHCNLD 30 (08 July 2015)

Coram: CHEDA J

Heard: 27 April 2015

Delivered: 08 July 2015

Flynote: Court may use its judicial discretion to grant a Restitution of Conjugal Rights. If such grant will result in plaintiff being threatened or assaulted by defendant the court may refuse it.

Summary: Plaintiff issued summons against defendant for divorce. One of the grounds was that of violence by defendant which resulted in him being incarcerated

and was still in prison at the day of hearing. When an order of Restitution of Conjugal Rights was applied for, plaintiff expressed fear of being assaulted by defendant. Court used its judicial discretion and granted a final order in order to deprive defendant authority to return to plaintiff which could have resulted in him further assaulting and /or killing her.

ORDER

1. The decree of divorce is granted with all the ancillary relief prayed for.

JUDGMENT

CHEDA J:

[1] This is a matter which hinges on a certain aspect of Namibian divorce laws. The Plaintiff was joined in holy matrimony with her husband on the 19 July 2013 at Ondangwa and the said marriage still subsists.

[2] Their marriage started experiencing some matrimonial problems which resulted in her filing for a divorce. Amongst the reasons for divorce as stated by the plaintiff are that defendant was emotionally and physically abusive and in addition, thereto, has been negligent in his duties of looking after the family. Of serious concern was the threat to kill plaintiff which resulted in a report to the police and defendant was subsequently arrested and detained.

[3] Plaintiff gave evidence as is required by the Rules of Court in order to obtain a Restitution of Conjugal Rights order. In her testimony she stated that her husband was in custody as a result of threatening to stab her with a knife, which he was holding. The said threat was accompanied by words to the effect that he was going

to kill her, and, thereafter, take possession of their car. Despite the fact that he is in custody he sent a message through his friend that he would kill her when he comes out of prison.

[4] Ms. Kishi for plaintiff then applied for a final order of divorce in light of the threats of violence and the previous violent conduct of the defendant. After hearing this evidence I used my judicial discretion and granted a final order without the issuance of a Restitution of Conjugal Rights order and promised to give my reasons for my decision later and these are they. Plaintiff seeks a decree of divorce on the basis of amongst other grounds, violent conduct on the part of the respondent.

[5] In terms of our law, a marriage can indeed be dissolved on good grounds shown. However, the procedure, is that plaintiff should call upon the defendant to restore conjugal rights within a certain period, failing which a final order of divorce can be granted. The rationale of this requirement is the widely-held view of the sanctity of marriage.

[6] On that basis, our courts, do not encourage the dissolution of marriages, hence the stringent requirements for a Restitution of Conjugal Rights order before the final order is granted. This is the correct legal position and is indeed understandable.

[7] Of late these courts has been inundated with cases of domestic violence, some of which have resulted in heinous murders mostly perpetrated on women in matrimonial relationships which has put society in a state of shock. The whole nation is constantly in mourning as a result of heinous murders it is experiencing. Our courts have also added their voices in expressing their disgust in this regard. In Voigts v Voigts case I 170/2009 [delivered on 24/06/2013 Damaseb JP at paragraph 9, (as he then was) the learned Judge had this to say:

“It is a notorious fact that women bear the brunt of violence in our society. The majority of this violence is perpetrated on women by men with whom they are in

some sort of relationship: marriage is no exception. This is the phenomenon which is our public discourse is loosely referred to as 'passion killing'. It is a matter of public record that the Women's Council of the Ruling Party recently embarked upon a very courageous campaign to urge all women in Namibia to abstain from all sexual activity for a period of six months in order to focus public attention to the question of violence against women; not least in the family. It is a sad paradox that even against that backdrop Namibia retains a system of divorce laws which, rather than make it possible for women to extricate themselves from loveless marriages, require them to stay in there in the name of 'sanctity of marriage'." (my emphasis)

[8] Although the learned Judge was faced with a divorce matter which hinged on a fault principle he extensively interrogated the rationale of keeping this law in our statute books in light of the worrisome violent trend prevailing. In *casu*, plaintiff seeks to terminate this emotional and physical abusive relationship and has sought the courts to assist her in that regard. Under normal circumstances a final order should be granted after the expiry of a Restitution of Conjugal Rights order has not been complied with.

[9] The unavoidable question is, should the court close its judicial eyes and grant a Restitution of Conjugal Rights where the circumstances are that defendant is likely use that opportunity to return to his wife not for harmony but to perpetrate his abuse. The question then is, is this court prepared to take that conscious risk. The answer is certainly no, as by doing so it will be abrogating its duty of protecting the weak from the mighty. Murders of women where the courts have granted them protection orders in terms of the Combating of Domestic Violence Act are not uncommon. In the matter of Voigt's case (*supra*) the learned Judge went further at paragraph 52 and remarked:

"Violence against a spouse is a serious matter in our society. It is a criminal offence and is often the precursor to more heinous crimes in the family. This court cannot shut its eyes to that reality. I cannot conceive that there can ever be a normal marital relationship where a wife has accused the husband of violence against her. In my view, the prevalence of the scourge of violence in the family has decidedly tilted the

legal convictions of the community in favour of condoning adultery and ending the marriage where the prospect of violence looms large in a dysfunctional union." (my emphasis)

[10] The courts are enjoined to protect the weak from the powerful. I can do no more than to agree with the learned Judge that the courts cannot close their eyes in light of this scourge of violence in our society. Defendant has already demonstrated beyond any shadow of doubt that he is of a violent conduct. Despite his incarceration he continues to threaten plaintiff with death.

[11] 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.

[12] In my view to allow 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 plaintiff's mind at rest.

[13] In the result the following is the order of the court:

2. The decree of divorce is granted with all the ancillary relief prayed for.

M Cheda
Judge

APPEARANCES

PLAINTIFF: C. Tjihero
Of Dr. Weder, Kauta & Hoveka Inc., Oshakati

DEFENDANT: L. Shitaleni
In Person