REPUBLIC OF NAMIBIA

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

JUDGMENT

Case no: I 73/2015

In the matter between:

SAMUEL ANDREAS **PLAINTIFF**

And

HILENI KAULUMA **DEFENDANT**

Neutral citation: *Samuel Andreas v Kauluma* (I 73/2015) [2016] NAHCNLD 10 (12 February 2016)

Coram: CHEDA J

Heard: **10 August 2015; 28 Sept. 2015; 17 Nov. 2015 & 23 Nov. 2015**

Delivered: **12 February 2016**

Flynote: In a divorce matter where a Restitution of Conjugal Rights has been granted together with ancillary relief the defendant is entitled to contest the said ancillary relief as she should have her day in court.

Summary: Plaintiff sued defendant for divorce. A Restitution of Conjugal Rights was granted with ancillary relief. Defendant consented to the divorce, but, contested the ancillary relief. Plaintiff argued that she cannot revisit the ancillary relief as this

was *res judicata*. Defendant had not been heard by the court. Held that the matter was not res judicata. Held that defendant was entitled to her day in court.

ORDER

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1. The defendant is allowed to revisit the ancillary relief of forfeiture of benefits derived from the marriage in community of property.
2. Plaintiff to pay the costs of these proceedings.

JUDGMENT

CHEDA J:

[1] On the 08 April 2015 plaintiff issued summons out of this court against defendant to whom he was joined in holy matrimony on 21 August 1991 which marriage produced the legal consequences of a marriage in community of property by virtue of a verbal declaration made by the parties. Five children were born out of this union.

[2] The grounds for divorce clearly appear on the summons and/or particulars of claim. As the said grands are for the time being, not an issue I will not delve into them. In his prayer the following is asked for by plaintiff:

> **" An order for the restitution of conjugal rights, failing compliance therewith; a final divorce order containing the following orders:**
>
> 1. an order awarding custody and control of the minor child to plaintiff subject, to defendant's right of reasonable access as per Annexure "A".

2. an order for maintenance in the amount of N$300-00 per month, per child to be paid by Defendant until such that time the minor children attain the age of majority or become self-supporting whichever occurs first.
3. an order for the forfeiture of benefits derived from a marriage in community of property in favour of plaintiff, alternatively division of the joint estate.
4. Cost of suit (only if defended)
5. Further and/or alternative relief."

[3] On the 01 June 2015 plaintiff approached the court for a Restitution of Conjugal Rights order which was granted by my sister Tommasi, J. On the 30 July 2015 defendant filed an appearance to defend which was followed by an affidavit wherein she consented to the divorce being granted, but, opposed the order for forfeiture of benefits derived from a marriage in community of property in favour of plaintiff.

[4] Plaintiff relies on defendant's alleged constructive desertion and not malicious desertion or adultery. In light of defendant's opposition to the order for forfeiture, plaintiff raised a *point in limine* wherein he argues that the matter is now *res judicata* as this court made a determination regarding the forfeiture of benefits in favour of plaintiff when it granted the Restitution of Conjugal Rights.

[5] In his argument, through his legal practitioner Mr. J. Greyling (Jnr) he pointed out that in terms of our law a party who institutes a divorce on the basis of adultery or malicious desertion is entitled to forfeiture of benefits and the court has no discretion in that regard.

[6] I am comfortable and unreservedly agree with the current legal position as stated by plaintiff's counsel as this was clearly and ably laid down in *Gates v Gates 1940 NPD 361* and quoted with approval *in Carlos v Carlos I 141/2010* delivered 10 June 2011 (HCMD). Gates case is in all fours with the present case, save that in the former, one of the grounds for divorce was adultery while in the present is that of constructive desertion.

[7] It is plaintiff's argument that defendant constructively deserted the matrimonial home which resulted in him obtaining a protection order against her. This was due to her unbecoming violent threats and some such other conduct which is generally repugnant to a normal marital relationship.

[8] It is further his argument that the guilty or otherwise of defendant was determined when the Restitution of Conjugal Rights was granted by this court on the 01 June 2015. The argument, further goes, that plaintiff led evidence in court which convinced the court that defendant indeed constructively deserted plaintiff.

[9] It should be noted that under particulars of claim, plaintiff alleged that defendant constructively deserted him, but, in his Heads of Argument he argues that the court found that defendant was guilty of malicious desertion. The question which comes to mind is when this change from constructive to malicious desertion took place. These are two different circumstances altogether and cannot be used interchangeably. In malicious desertion, the offending party, in my view would have voluntarily and positively and without just cause taken a conscious step by abandoning the matrimonial home, while in constructive desertion the supposed offended party would have engineered or created a situation which renders the other party guilty yet in fact and in truth the natural environment would have been made hostile by himself or herself.

[10] Defendant has applied for condonation for her failure to comply with the order of the 10 August 2015 and an explanation has been made. It is her contention that she was indisposed and a letter from a Doctor's medical report was filed to that effect.

[11] I would like to digress a little and comment on this issue which is of great concern to me. A legal practitioner's failure to comply with rules of court and orders due to ill health should be viewed from a different pedestal. A legal practitioner being

an officer of the court, is sworn to uphold the law and his/her conscience is bound to tell the truth hence the profession being referred to as the honourable profession. For that reason, with all respect, I do not think that it is necessary for a legal practitioner to produce a medical report as proof of his/her failure to appear in court due to indisposition.

[12] In my view to visit that it should be demeaning of an officer of the court as it puts him/her on the same level with his/her litigants who can easily mislead the court in their endeavour to avoid appearing in court. It is for that reason that litigants are constantly reminded of the need to tell the truth, hence the subtle intimidation to their conscience by asking them to swear before the All Mighty thereby binding their consciences.

[13] In my respectful view it is not necessary for a legal practitioner to obtain a medical report unless the court has reasonable belief that such a legal practitioner maybe misleading the court. Under normal circumstances a legal practitioner is presumed to be honourable and one of the ingredients of that presumption is that he/she will tell the truth. For that reason I did not accept that Ms. Amupolo's medical report should form part of the record as it is purely a private matter and such inclusion into the court record, being a public document is an unnecessary invasion of her privacy.

[14] Now going to the merits of the matter Ms. Amupolo argued that plaintiff cannot rely on the Restitution of Conjugal Rights order as a judgment granting an order for forfeiture of benefits in his favour as the court did not determine her guilty or otherwise of malicious desertion. This is the gist of her argument against plaintiff's attempt to deprive her of the marital benefits.

[15] The question which falls for determination here in this matter and which calls for interrogation is that of *res judicata*. The requisites of *res judicata* are that:

a) the two actions must have been between the same parties;
b) concerning the same subject matter and
c) founded upon the same cause of complaint.

[16] In my view, the issuance of a Restitution of Conjugal Rights order is to afford defendant a chance to restore conjugal rights before a particular date failing which a final order shall issue. It is, therefore, obviously an interim order whose immediate objective is to call upon the other party to restore the status *quo ante* pending the final determination of the rights of the parties. It cannot bring the issue(s) to finality in the absence of a proper determination by the courts. A proper determination is grounded on the presentation of facts and legal submissions were necessary, by both parties. There is no court which can reach a determination where the other party has shown an intention to contest, but, has not been accorded a chance to do so.

[17] I can go further and convincingly state that in, my view, what is contemplated in the interim order is a relief pending final adjudication, and this presupposes a further or other final action until the matter is finally determined. In this view I am persuaded by the remarks by *Van Heerden JA in Airoadexpress v LRTB, Durban 1986 (2) 663 at 681 D-E* where the learned Judge stated:

> "According to Van der Linde Institutes 2.1.4.7, an applicant for an interdict who is unable to prove a clear right may obtain interim relief in order to enable him to establish his right "in een volledige Regtsgeding". The author therefore envisages a later and final determination of the existence of the right in question. Hence, as is stated in Joubert *The Law of South Africa vol 11 at 297*, an interim interdict does not involve a final determination of the rights of the parties and does not affect such a determination. In short, an interim interdict serves to adjust the applicant's interests until the merits of the matter are finally resolved. That final decision has to be arrived at by a court of law or, conceivably, another body or person such as an arbitrator." (my emphasis)

[18] I find no evidence that the court determined the issue of malicious desertion with a view of granting plaintiff an order for forfeiture of benefits derived from a marriage in community of property. It would not have been legally possible in the absence of defendant's evidence. In fact this would have offended the rules of natural justice i.e the (*audi alteram parten*). In my view the only order plaintiff is legally entitled to at this stage is a divorce order, which is clearly uncontested as defendant's affidavit filed of record clearly shows.

[19] The issue of proprietary interest are an ancillary relief which can only be granted to plaintiff in the absence of an opposition, where a defendant contests an ancillary relief, it means that the issue becomes ripe and ready for further argument or trial as it is the only way the court can come out with a reasoned determination. Both parties referred me to *Vahekeni v Vahekeni 2008 (1) NR 125.* This case is authority to the effect that under the present rules governing divorce a Restitution of Conjugal Rights order relating to the restoration of conjugal rights is canvassed at the trial and the relevant order calling upon defendant to restore conjugal rights is issued. The role of a Judge in matrimonial matters were Restitution of Conjugal Rights is in operation was ably dealt with in *Juszkiewicz v Juszkiewicz 1945 TPD 48 at 51* quoted with approval in Vahekeni's case, where Schreiner J (as he then was) remarked:

> "in the case of an ordinary rule nisi, at the stage at which a rule is granted, the court's function is to see whether a prima facie case for relief is made out, ie, whether there is a sufficient case for the other party to meet, and the Judge comes to no final conclusion at all on any of the matters before him. But in the case of restitution proceedings the trial Judge's function is essentially different: he appreciates that in the ordinary course the proceedings on the return day will be largely a formality and that duty rests upon him at the trial stage to see that the evidence proves that there has been and still is a marriage, that there has been a desertion, and that the parties are domiciled within the jurisdiction of the Court. Upon those factors at least he must be finally satisfied at the trial. That is the function of the Judge at the trial. On the

> return day our practice certainly indicates a different function: in practice the Judge on the return day does not concern himself with the issues that were considered by the Judge at the trial; the transcript of the shorthand note of the evidence is not before the Judge on the return day, and ordinarily he will only concern himself to see that there has been due service of the restitution order, and whether there has been a return on the part of the defendant. That does not mean that his functions are thereby completely exhausted, although in the ordinary class of case that is the position." (my emphasis)

[20] The said order would be granted after plaintiff has satisfied the court that indeed defendant was at fault specifically by having committed adultery or maliciously deserted his/her. If this is proved to be the case the order is provisional and only becomes final upon the production of an affidavit of Non-Return filed by plaintiff. Married to this interim order will be, where applicable some ancillary relief as is in this case. In *Vahekeni's* case (supra) the Supreme Court adopted the reasoning in *Chouler v Chouler 1973 (4) SA 218 (W) at 220 D* where it was stated:

> "The action for restitution of conjugal rights is in the present case - as indeed in thousands of cases annually heard in this Division – a hybrid action. Many claims are incorporated in the summons which are ordinarily referred to as ancillary relief; and the ancillary claims are not of a uniform juristic nature either." (my emphasis)

[21] In the two cases referred to above it is clear that the courts held that some ancillary relief are in essence a hybrid of the main action. By deduction, therefore, the issue of ancillary relief can be revisited by the defendant. This was the position taken by our Supreme Court in Vahekeni (supra) where Shivute CJ at 131 – 132 (para 24) stated:

> "While it is not open to the defendant on the return day, except in exceptional cases, to request the reopening of the main claim – for as it was pointed out in Juszkiewicz v Juszkiewicz (supra) when dealing with the main claim the sole task of the judge on the return day is to determine whether there has been proper service of the restitution order and whether the defendant had restored conjugal rights to the

defendant – ancillary relief relating to custody and maintenance of the children may be raised on the return day and retried."

[22] Herein, lies the devil in the detail. The proverbial, hitting the nail on the head finds home in the above remarks. I am overly persuaded and bound by the finding and principle laid down by the Supreme Court. I should add here, that the reasoning infact is in accordance with the principle of the need for a fair hearing for all parties and the need for our courts to stand guard against the danger of violating public policy regarding the customarily and traditionally down-trodden and marginalised members of certain classes in our community. The ancillary relief contained in the Restitution of Conjugal Rights granted by the court does not qualify as *res judicata* and can therefore be revisited by defendant.

[23] The approach and conclusion reached in Vahekeni's case together with other relevant authorities referred to above confirms and fortifies the view that defendant must succeed. She is entitled to have her day in court.

[24] Accordingly, the following is the order of the court:

1. The defendant is allowed to revisit the ancillary relief of forfeiture of benefits derived from the marriage in community of property.
2. Plaintiff to pay the costs of these proceedings.

M Cheda

Judge

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APPEARANCES

PLAINTIFF: J. Greyling (Jnr)
Of Jan Greyling and Associates, Oshakati

DEFENDANT: M. Amupolo
Of Directorate of Legal-Aid, Oshakati