

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-MAT-2021/00137

In the matter between:

NATANGWE LINUS

PLAINTIFF

and

NDAPANDULA NDAMANGULUKA TEELELA PETRUS

DEFENDANT

Neutral Citation: *Linus v Petrus* (HC-NLD-CIV-ACT-MAT-2021/00137) [2023]
NAHCNLD 41 (02 May 2023)

CORAM: **MUNSU J**

Heard: **27 February 2023**

Delivered: **02 May 2023**

Reasons: **09 May 2023**

Flynote: Husband and Wife – Divorce – Claim by plaintiff – Counterclaim by defendant – Marriage out community of property.

Summary: The husband instituted action for divorce against the wife on the ground of malicious and constructive desertion. The defendant defends the action and

delivered a counterclaim for divorce also based on malicious and constructive desertion.

Held that the court accepts the version of the plaintiff and grants an order of restitution of conjugal rights in favour of the plaintiff.

ORDER

The court grants judgment in favour of the Plaintiff for an order of Restitution of Conjugal Rights and orders the Defendant to return to or receive the Plaintiff on or before 13 June 2023, failing which to show cause, if any, to this court on 11 July 2023 at 10h00 why:

1. The bonds of marriage subsisting between the Plaintiff and the Defendant should not be dissolved.
2. The Defendant's counterclaim is dismissed.
3. There is no order as to costs.

JUDGMENT

MUNSU J:

Introduction

[1] The plaintiff (husband) instituted action for divorce against the defendant (wife). The basis of the plaintiff's action is malicious and constructive desertion.

[2] In his particulars of claim, the plaintiff alleges that during the subsistence of the marriage, the defendant, with a settled intention to terminate the marriage between the parties:

- (a) shows no love and affection towards the plaintiff;

- (b) shows no respect towards the plaintiff;
- (c) fails to communicate meaningfully with the plaintiff;
- (d) she abuses alcohol;
- (e) shows no serious intention to continue with the marital relationship.

[3] The plaintiff, therefore, claims that the defendant has constructively and maliciously deserted him and accordingly seeks an order for the restitution of conjugal rights, failing compliance therewith, a final order of divorce.

[4] The defendant defends the action and has filed a plea and counterclaim.

[5] The basis of the defendant's counterclaim is also malicious and constructive desertion. In her counterclaim, the defendant alleges that, during the subsistence of the marriage between the parties, the plaintiff, with a fixed and malicious intention to terminate the marital relationship:

- (a) abused the defendant emotionally;
- (b) showed no respect towards the defendant;
- (c) showed no love and affection towards the defendant;
- (d) refuses to communicate meaningfully with the defendant;
- (e) he does not show any serious intention of continuing with the marital relationship.

[6] The defendant claims that the plaintiff has maliciously and constructively deserted her and seeks an order for restitution of conjugal rights, failing which, a final order of divorce.

[7] The defendant further claims that during the subsistence of the marriage, the defendant loaned and advanced an amount of N\$ 8 000 to the plaintiff, at the latter's special instance as contribution towards the construction of a shebeen. The defendant alleges that the said amount was not a gift and is now due, owing and payable.

Background

[8] The parties got married to each other on 28 February 2020 at Ondangwa out of community of property, which marriage still subsists. There are no children born from the marriage between the parties.

Issues for determination

[9] The issue for determination by the court is:

- (a) Which party has succeeded in discharging the *onus* of proving malicious desertion and therefore entitled to an order for restitution of conjugal rights;

The plaintiff's version

[10] The plaintiff testified that the defendant does not show serious intention to continue with the marital relationship. According to the plaintiff, during June 2021, the defendant packed all her belongings and left the common home and has not returned. In light thereof, the plaintiff testified that defendant has maliciously deserted the plaintiff.

[11] The plaintiff testified that he never borrowed the sum of N\$ 8 000 from the defendant. According to the plaintiff, the defendant never contributed towards the construction of the shebeen. Furthermore, the plaintiff testified that he purchased the building materials and employed two male persons to make bricks and further hired one Benny to build the shebeen. He attached bank statements reflecting various transactions at various shops where he bought the building materials. According to the plaintiff, he is not indebted to the defendant in the amount of N\$ 8 000 or any other amount.

The defendant's version

[12] The defendant testified that she is presently not employed. She denied being the cause for the breakdown of the marriage. She testified that the plaintiff has not shown any serious intentions of continuing with the marriage.

[13] The defendant testified that during the subsistence of the marriage, and on a date she could not recall, the plaintiff informed her that he wished to construct a shebeen at his village and that she should loan him some money if she had any. According to her, the plaintiff indicated that he would pay her back from the proceeds of the shebeen once operational.

[14] The defendant further testified that upon the plaintiff's request, she loaned him a total of N\$ 8 000 which was utilised to purchase cement and stock for the shebeen.

Analysis

[15] The parties agree that the marriage has irretrievably broken down and that there are no prospects of reconciliation. However, the parties accuse each other for the breakdown of the marriage. Similarly, there are factual disputes between the parties regarding the issue of the alleged loan of N\$ 8 000 allegedly advanced by the defendant to the plaintiff. This requires an assessment of the evidence presented by the parties, including their credibility and the probabilities of each case.

[16] The defendant's overall impression in the witness box was not impressive. The manner in which she gave her evidence was not forthright. In some instances, she appeared evasive. She did not deal with the plaintiff's evidence to the effect that during June 2021 she packed all her belongings and left the common home and has not returned. This is one of the reasons the plaintiff contends that the defendant maliciously deserted him.

[17] On the other hand, I found the plaintiff to have been a credible and reliable witness. Under the circumstances where the evidence of the plaintiff conflicts with that of the defendant, I accept the version of the plaintiff and would grant an order for restitution conjugal rights in favour of the plaintiff.

[18] Regarding the issue of the loan, the defendant testified that it was during the subsistence of the marriage that she loaned the amount of N\$ 8 000 to the plaintiff. The defendant was not employed. According to her, the amount came from the donations she received for the wedding. I have taken note that the parties got married during February 2020 and the plaintiff filed for divorce during May 2021. That is a period of slightly over a year, which is relatively short.

[19] The plaintiff testified that:

'During the subsistence of the marriage, on a date I cannot recall, the Plaintiff informed me that he wished to construct a shebeen at his village and that I should loan him some money if I had any. He indicated that he would pay me back from the proceeds of the shebeen, when same would be operational'.

[20] Despite the parties' short-lived marriage, the defendant could not inform the court as to when (date, month or year) she expended the sum of N\$ 8 000 to the plaintiff. She bore the *onus* to prove her claim. The question is whether she managed to discharge her *onus*. In these circumstances where there is no documentary evidence of the loan, I find the defendant's evidence not sufficient to sustain her claim on a balance of probabilities and would dismiss the counterclaim.

[21] In addition, while the defendant's pleaded case is that she advanced the sum of N\$ 8 000 to the plaintiff during the subsistence of the marriage, the plaintiff on the other hand maintained that the shebeen was constructed before the parties got married. He presented documentary evidence of bank statements dating back as early as January 2017 until December 2018 showing the transactions in respect of the purchase of the building materials. The parties only got married during February 2020.

[22] In her evidence, the plaintiff related that the loan amount was also used to purchase stock for the shebeen. To the extent that this issue was not pleaded, I find it to be an afterthought.

Costs

[23] The defendant is legally aided. There shall be no order as to costs.

The order

[24] In the result, I make the following order:

The court grants judgment in favour of the Plaintiff for an order of Restitution of Conjugal Rights and orders the Defendant to return to or receive the Plaintiff on or before 13 June 2023, failing which to show cause, if any, to this court on 11 July 2023 at 10h00 why:

1. The bonds of marriage subsisting between the Plaintiff and the Defendant should not be dissolved.
2. The Defendant's counterclaim is dismissed.
3. There is no order as to costs.

D. C. MUNSU
JUDGE

APPEARANCES:

PLAINTIFF

T Shailemo

Of Shailemo and Associates, Ongwediva.

DEFENDANT

I Mainga-Sisamu

Of Inonge Mainga Attorneys, Ongwediva.