REPORTABLE
CASE NO: SA 7/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between

FERNANDO SHANINGWA VAHEKENI **APPELLANT**

And

KATRINA - NDAMONO VAHEKENI **RESPONDENT**

Coram: Shivute, CJ, Maritz, JA *et* Chomba, AJA

Heard on: 2008/03/17

Delivered on: 2008/07/14

APPEAL JUDGMENT

SHIVUTE, CJ: [1] The central issue for decision in this appeal is whether a Court, having issued a *rule nisi* calling upon a defendant to show cause why an order for the restitution of conjugal rights and other ancillary relief should not be made final, is in law precluded from reconsidering those parts of the rule relating to ancillary relief if confirmation thereof is opposed on the return date.

[2] The appellant (as plaintiff) instituted a matrimonial action against the respondent as defendant in the High Court claiming an order of divorce and ancillary relief. The respondent defended the action, and in reconvention, instituted a counterclaim against the appellant claiming *inter alia* restitution of conjugal rights; failing which, an order of divorce, custody and control of their minor children, maintenance for each child and other ancillary relief.

[3] On the trial date the appellant was absent and an application for a postponement moved from the bar by his counsel was refused. The Court *a quo* proceeded to hear evidence on the respondent's counterclaim on an unopposed basis.

[4] After hearing evidence the Court dismissed the claim in convention and, in respect of the respondent's claim in reconvention, issued an order for the restitution of conjugal rights and some ancillary relief, including custody of the minor children, payment of maintenance of the children and forfeiture of benefits in respect of a certain motor vehicle. The order directed the appellant to restore conjugal rights on or before 22 August 2005, failing which, to show cause on 19 September 2005 why the order should not be made final.

[5] On 22 August 2005 the restitution and return dates of the *rule nisi* were extended until 31 October 2005 and 25 November 2005 respectively. On the latter date they were again extended to 9 January 2006 and 6 February 2006 respectively. On 19 December 2005 the appellant filed an affidavit in which he purported to tender

restoration of conjugal rights and raised objections to the granting of the ancillary relief. The respondent filed an affidavit of non-return in which she dealt with the allegations contained in the appellant's affidavit. As previously stated, the *rule nisi* was again extended to 9 January 2006 and 6 February 2006. On the latter date and after some lengthy debate before another Judge, the *rule nisi* was extended until 27 February 2006 to afford the appellant an opportunity to file a replying affidavit.

[6] On 13 February 2006 the appellant filed a replying affidavit in response to the respondent's affidavit of non-return "on new issues raised therein".

[7] On 27 February 2006, being the extended return day as previously noted, the matter came before yet another Judge who proceeded to hear argument. It was argued on behalf of the appellant that, should the Court find that the appellant's offer of restoration of conjugal rights was not genuine and *bona fide*, the Court should nevertheless reconsider his opposition to the confirmation of the other parts of the order, namely, custody and control of the minor children, payment of maintenance, the firm of accountants to be appointed as the liquidator of the joint estate and the forfeiture of a vehicle in view of certain alleged new facts disclosed in the appellant's affidavit. Counsel appearing for the respondent in the Court *a quo* contended that by failing to appear in court on the hearing date the appellant had forfeited the opportunity to contest any part of the rule *nisi;* that every part of the rule was *res judicata* and the appellant could not request that it be reconsidered on the return day. The learned Judge ruled in favour of the respondent, but regrettably did not give a

reasoned judgment. Had the learned Judge taken time to peruse certain of the authorities cited by counsel for the appellant, the result may well have been different. The record of proceedings shows that, after argument was concluded, the Court ruled and ordered as follows:

> "Court: This matter can be disposed of by way of an order.
> Order: Having heard both counsel, the final order is granted in this matter."

[8] According to the notice of appeal, the appeal is directed only against incorporation of the following ancillary relief in the confirmation of the rule *nisi* by the learned Judge:

> "1. That the custody and control of the three minor children born of the marriage should be awarded to the Respondent, subject to the Appellant's right of reasonable access as per Annexure 'A';
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> 2. That the Appellant should pay maintenance in respect of the aforesaid minor children in the amount of N$2 000, 00 per month per child;
>
> 3. That the Appellant should pay 50% of all access (*sic*) payments in respect of reasonable medical, dental, pharmaceutical, hospital and ophthalmologic (*sic*) expenses (including contact lenses and spectacles) in respect of the aforesaid minor children;
>
> 4. The Appellant should pay all costs in respect of the minor children's tuition, scholastic expenses, extra mural activities, books and stationery (including hostel fees) as well as school clothes for extra-mural activities;
>
> 5. The Appellant should pay 50% of all fees due to an institution for higher learning attended by the said children in the event of the minor children displaying an aptitude for higher education, together with all costs relating to books and equipment in respect of the course in question, which obligations

shall continue for as long as the said children apply themselves with a due diligence and continue to make satisfactory progress;

6. The Appellant should forfeit the 1998 Ford *Mondeo* motor vehicle with registration number N83799W in favour of the Respondent;

7. That KPMG Chartered Accountants should be appointed as liquidators of the joint estate and their fees should not (*sic*) be paid out of the joint estate;

8. Cost of suit;

9. Further and/or alternative relief (*sic*)."

[9] In this Court the appellant was represented by Mr Hinda and, although heads of argument were filed timeously on behalf of the respondent, there was initially no appearance on her behalf when the appeal was called. After a short adjournment, Mr Sarel Maritz appeared but indicated to the Court that even though he had attended to the preparation of the heads of argument, another counsel who apparently did not appear was briefed to argue the appeal on behalf of the respondent and that he, Mr Maritz, was not in a position to do so. It was apparent from Mr Maritz's explanation that there was a regrettable - but nevertheless unacceptable - breakdown of communication between him and the legal practitioner who was supposed to argue the appeal on behalf of the respondent.

[10] The appellant's position was that the appeal should nevertheless proceed. Having heard brief argument from Mr Hinda and in the absence of an application or any good cause shown for a postponement, the Court decided to proceed with the

hearing. Consequently, neither the respondent nor her legal representative further developed the arguments envisaged in the heads of argument filed on her behalf in the appeal. The Court has nevertheless had regard to them.

[11] Two points *in limine* were raised in the heads of argument filed on behalf of the respondent and they may be disposed of shortly. The first point *in limine* concerns the alleged failure to lodge the record of appeal with the registrar within the prescribed period and to deliver the record of appeal to the respondent as required by Rule 5(5)(b) read with Rule (6)(b) of the Rules of this Court.[1]

[12] If I understand the argument correctly, it is submitted that by the time of the drafting of the heads of argument on behalf of the respondent, counsel could not ascertain whether the record of proceedings had been lodged with the registrar within the prescribed period, since no copy thereof had been delivered to the respondent.

[13] Even if the Court were to accept that the respondent had not received a copy of the record of proceedings and, without deciding, that the provisions of sub-rule (6)

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[1] Sub-rule 5(b) of Rule 5 insofar as it is relevant to the point *in limine* reads as follows:
"After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice-

(a)...
(b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting such leave;
(c)...

lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary: Provided..."
Sub-rule (6)(b) of Rule 6 provides:
"If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her counsel for consent to an extension thereof and given notice to the registrar that he or she has so applied, he or she shall be deemed to have withdrawn his or her appeal".

(b) of Rule 6 apply, it is apparent from the wording thereof that an appeal is deemed to have been withdrawn in the context of that sub-rule only if an appellant has failed to lodge the record of proceedings with the registrar within the prescribed period - and not, as the respondent seemingly contends, when the appellant has failed to deliver copies thereof to the respondent. Whether an appellant's failure to deliver such number of copies of the record to the respondent as may be considered necessary by rule 6(5) may or may not have other consequences to a defaulting appellant has not been raised in this appeal and it is therefore not necessary to further elaborate thereon in this judgment. Suffice it to note that, in the present matter, the record was lodged timeously with the registrar and the first point *in limine* must therefore fail.

[14] The second point *in limine* is that the notice of appeal was in part defective in that it sought to appeal also against relief that was not granted in the Court *a quo*, specifically the relief contained in paragraphs 7 and 9 of the notice of appeal. It will be recalled that these paragraphs are formulated in the notice of appeal as follows:

> "7. That KPMG Chartered Accountants <u>should</u> be appointed as liquidators of the joint estate and their fees <u>should not</u> be paid out of the joint estate.
>
> 8. …..
>
> 9. <u>Further and/or alternative relief.</u>"

[15] It was argued, correctly, that the underlined parts did not form part of the order issued by the Court *a quo*.

[16] Although the Final Order of Divorce incorporating the ancillary relief did not form part of the record of proceedings, the copy of the order obtained from the registrar bears out the argument. The order formulated and signed by the registrar shows that the parts of the order appealed against are embodied in paragraphs 2, 3, 4, 5, 6, 7 and 9 of the order. It is also apparent from the order that the phrase "should not be paid" does not appear in the relief granted under paragraph 9 of the order, which paragraph 7 of the notice of appeal purports to reflect. On the contrary, the order reads:

> "That KPMG Chartered Accountants be appointed as liquidators of the division of the joint estate and their fees are paid out of the joint estate." (My emphasis)

[17] Although the objection is perhaps technically sound, nothing of substance turns on it. It is evident from the appellant's affidavit that he never objected to the payment of the receiver's fees from the estate. He questioned the impartiality of the particular firm appointed as receiver because of the alleged continuing working relationship between it and the respondent and that issue is pertinently raised in the Notice of Appeal prior to its amendment. At best for the respondent, the inclusion of the word "not" in the Notice of Appeal is a drafting or typographical error. The effect thereof is, however, inconsequential in defining the real issues in the appeal. Even if the objection were to be upheld, it will not in effect dispose of the appeal or any of the real issues therein either in whole or in part. The same goes for the inclusion of the

expression “Further and/or alternative relief” in the Notice of Appeal. It is therefore not necessary for purposes of this appeal to decide the second point *in limine.*

[18] It remains then to consider the merits. Mr Hinda reiterates that the appeal does not lie against the Court *a quo*’s finding that the offer of restoration of conjugal rights by the appellant was not *bona fide* and genuine, nor is the grant of a final order of divorce appealed against. The appeal is essentially against the Court *a quo*’s decision to decline to hear and decide the appellant’s objection against confirmation of the ancillary relief. He contends that those parts of ancillary relief granted in a *rule nisi* are not *res judicatae* and could therefore be revisited on the return day. Mr Hinda relies for this proposition on the decision of the Witwatersrand Local Division of the Supreme Court of South Africa (as it was then known) in *Chouler v Chouler,*[2] an authority on which another counsel who represented the appellant in the Court *a quo* heavily relied for the contention advanced by Mr Hinda.

[19] If one were to consider the heads of argument filed on behalf of the respondent, it would appear that counsel for the respondent also agrees with the proposition advanced on behalf of the appellant. He relies on the same authority for the very same proposition. It seems therefore that as far as the law and its application to the facts of the case are concerned in this appeal, the parties are essentially *ad idem*. It is therefore not altogether clear on which basis the respondent is opposing the appeal.

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[2] 1973 (4) SA 218 (W)

[20] I consider it useful to start with a brief examination of the respective roles that Judges play in a restitution action at the trial stage thereof and at the stage of the confirmation or discharge of the order. As Schreiner, J (as he then was) - Malan J and Price AJ concurring - in the Transvaal Provincial Division decision of *Juszkiewicz v Juszkiewicz*[3] points out, a restitution order is a double order in the sense that there is an order calling upon the defendant to return to the plaintiff and one calling upon him or her to show cause in the event of his or her failing to return.[4] Schreiner, J describes the respective duties of the Judges dealing with the trial in a restitution action and on the return day as follows:

> "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, i.e., 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 a 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. 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".[5]

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[3] 1945 TPD 48
[4] At 51
[5] *Ibid*.

[21] But does it mean that every part of the rule, including ancillary relief, is *res judicata* and cannot be revisited on the return day? This issue was not considered in *Juszkiewicz v Juszkiewicz* (*supra*) since the issue for consideration in that case was whether aspects such as desertion and jurisdiction having been canvassed at the trial could again be raised and considered on the return day. The question, however, was pertinently raised and stood to be considered in *Chouler v Chouler* (*supra*), a decision on which as previously stated, Mr Hinda strongly relies for the proposition in effect that the question should be answered in the negative.

[22] In *Chouler v Chouler* (*supra*) Marais, J was confronted with facts that were not dissimilar to the facts in the present case:[6] The defendant husband, who had allowed the action of his wife to proceed without opposition, sought on the extended return day of the rule *nisi* to persuade the Court to reconsider three parts of a rule *nisi:* the amount of maintenance he was ordered to pay to his wife, the amount of maintenance payable to his children and the award of a sum of money to the wife. Like in the present case, it was contended on behalf of the plaintiff wife that the defendant husband could not contest any part of the rule, since every part thereof was *res judicata*.

[6] In the Court *a quo* counsel for the wife argued that the facts in *Chouler v Chouler* were distinguishable in that whereas in *Chouler v Chouler* the defendant did not oppose the action, in the present matter the case was defended and that the husband simply chose to stay away from the trial of the action. In the view I take of the matter, it is immaterial whether in one case there was opposition initially. The effect in both cases is the same: the evidence at the critical stage of the action went uncontested. The distinction counsel sought to draw from the facts of the respective cases appears to me to be a distinction without a difference. The facts in the two cases are in my view hardly distinguishable.

[23] In a judgment rendered with admirable clarity, Marais, J pointed out that the action for restitution of conjugal rights is essentially a hybrid action: It incorporates many claims in the summons which are commonly referred to as ancillary relief. Claims, ancillary to the main claim for a restitution order may include the dependent claim relating to the custody of the children, which will come into play only if the main claim results in a divorce; the subsidiary claim for the maintenance of the children of the parties, which would take effect only if an order of divorce is granted; the dependent claim for the maintenance of the plaintiff, which will be dependent on the final decree of divorce being granted; independent proprietary claims and the independent claim for costs, which may be ordered even if some of the ancillary claims are abandoned or dismissed.[7]

[24] While it is not open to the defendant on the return day, except in exceptional cases,[8] 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[9] - ancillary relief relating to custody and maintenance of the children may be raised on the return day and retried.[10] This is so for the consideration that claims relating to custody and maintenance:

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[7] At 220C-F
[8] *Cf. Benvenuti v Benevenuti* 1972 (3) SA 587 (W) and *De Young v De Young* 1971 (2) SA 90 (C)
[9] See also *James v James* 1991 (3) SA 476 (NmHC) at 479E
[10] At 222C

> "[A]re entertained by the [High] Court in its office as upper guardian of all minors, and although customary to do so, there is no absolute duty on either parent to raise these issues at the trial of a restitution action: the Court may raise it *mero motu*, investigate the various possibilities, postpone a decision for any length of time prior to or subsequent to the return day or the final decree of divorce; or it may direct that the issue be decided by a children's court. The matter is not subject to any rule of *onus* or immutable practice. See *Short v Naisby* 1955 (3) SA 572 (D) at p. 574".[11]

[25] After a thorough analysis of the facts of the case and the law, Marais, J concluded:

> "I find that the matter of custody in divorce proceedings may be raised on the return day and retried, no matter how thoroughly it was canvassed at the first hearing; and that the question of maintenance, by whom and in what amounts is equally open for further consideration on the return day. The contention of the father that would be in most cases, as is it apparently going to be in the present case, that the mother did not put all the relevant and true facts as to the needs of the minors and the financial ability of the father before the trial court; but, even if he wishes to plead merely that the order given, provisionally or otherwise, should be amended, I can see no reason, other than abuse of proceedings perhaps, why he should not be heard on the return day."[12]

[26] I am in respectful agreement with the above *dictum* and with Marais, J's comprehensive analysis of the law and the conclusions he arrived at in that case. I also agree that the provisional nature of such rules in so far as they also relate to the payment of maintenance by one spouse to another or deal with their respective matrimonial property rights invite and allow a defendant to show cause on the return

[11] At 221C-E
[12] At 222C-E

day why the orders should not be made absolute. I consider that the reasoning in *Chouler v Chouler* is sound and should be followed by this Court.

[27] In the present case too the Appellant alleges in respect of custody that custody of the children was awarded to the respondent partly on the basis of a recommendation made by a clinical psychologist who, as part of her investigation, interviewed the respondent only; that while he had in principle no objection to paying maintenance for his children, the difficulty was that he could not afford the amount he was ordered to pay. He claimed furthermore that the then 17 years old child of the parties who was staying with the mother had voluntarily returned to live with him; that the bulk of the children's maintenance consisted of school fees that he was already responsible for paying before the court order and he had provided documents in support of his claim. In the court *a quo* there was only a cursory reference to the appellant's income. When it came to the point of maintenance, the respondent was asked by counsel how much the appellant had earned per month. She replied that he had earned "approximately between twenty and thirty (*sic*)." Regarding the forfeiture of benefits relating to the motor vehicle, the appellant alleges that the motor vehicle had been stolen prior to the conclusion of the divorce proceedings. The respondent, on the other hand, alleges that the appellant had simply hidden the vehicle in question. And as regards the appointment of KPMG as liquidators of the joint estate, the appellant avers, as previously alluded to, that the firm had a close working relationship with the respondent and that it may not therefore be objective. He insists that someone more objective be appointed instead.

[28] These matters (particularly as regards children) are so important that, given the appellant's application, they should not be decided without hearing the parties. They can and must be reopened so that the Court *a quo* could satisfy itself that the final order that it will make regarding these matters is in the best interests of the children and that it is fair to both parties.

[29] That the defendant in effect be given a second bite at the cherry in restitution action based on ancillary relief is quite implicit in a rule *nisi* which invariably calls upon the defendant “to show cause, if any, why” the orders provisionally made should not be made final.[13]

[30] In the final analysis, I have found that the learned Judge in the Court below should have ruled that the conditional orders included in the rule *nisi* were not *res judicatae* and should have allowed the appellant to reopen them so a to facilitate a proper and complete ventilation of those issues. It follows that the appeal must succeed.

[31] In the result the following order is made:

1. The appeal is allowed.

[13]Cf. *Chouler v Chouler* (*supra*) at 224D-F

2. The orders of the High Court made in paragraphs 2 - 9 of the final order of divorce on 27 February 2006 are set aside and the following order is substituted:

> "2. The rule *nisi* issued on 15 July 2005 is, in respect of paragraphs 2 – 9 thereof, extended to 11 August 2008."

3. The matter is remitted to the High Court for another Judge to consider the ancillary relief provisionally granted in paragraphs 2 to 9 of the *rule nisi* issued on 15 July 2005.

4. The respondent is ordered to pay the costs of the appeal.

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SHIVUTE, C J

I agree.

_____
MARITZ, J A

I agree.

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