



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 1704/2009

In the matter between:

VOIGTS HG

PLAINTIFF

and

VOIGTS SE

DEFENDANT

Neutral citation: *Voigts v Voigts (I 1704/2009)[2013] NAHCMD 176 (24 June 2013)*

Coram: DAMASEB, JP

Heard: 03-06 June 2013

Delivered: 24 June 2013

Flynote: *Obiter* – Divorce – Namibian divorce law outdated – Potentially goes against Article 8 of the Namibian Constitution – Seems to violate a person's dignity to be required to remain married, with all the obligations which go with marriage, where one

clearly does not intend to continue with the marital relationship – Urgent reform of divorce laws needed.

Flynote: Matrimonial – Divorce – Plaintiff suing on the basis of adultery – Both parties have entered into adulterous relationships with third parties – Plaintiff's adultery needs to be condoned first – No adultery if plaintiff had thereafter condoned the defendant's adultery – No desertion if the plaintiff is the one who left the common home – Constructive desertion established through the defendant's callous conduct - defendant offer for restitution of conjugal rights not genuine – Plaintiff's adultery condoned – RCR granted.

Summary: The plaintiff and the defendant were married to each other since 1985. The plaintiff brought a divorce action based on the defendant's admitted adultery. However, the plaintiff had also committed adultery with another woman, Ms NS (hereinafter referred to as NS) and as such asked for the court to condone his adultery. The adultery ground of divorce could not succeed since he had voluntary sexual contact with the defendant after knowing that she has committed adultery with another man, Mr EH (hereinafter referred to as EH). Such conduct in the eyes of the law obliterates all wrong in the adulterous acts of the defendant. The only remaining ground was constructive and/or malicious desertion from the defendant. The onus is on the plaintiff to prove both the *factum* of desertion and the *animus desiderandi* on the part of the defendant. Such ground could not be established since he left the common home to stay with the other women which makes him the deserter and not the defendant. On the question of whether the defendant showed no love and affection, the defendant acted with a clear intention to discontinue with the marriage through her continuance to meet EH, the same man whom she committed adultery with, without the plaintiff's knowledge and approval and such callous conduct goes against her tender of conjugal rights being genuine.

Summary: Namibia divorce law which requires an innocent deserted spouse to accept back the deserter if the latter tenders restitution bona fide, regardless of whether or not the innocent party has lost love and affection for the deserter, or has not interest in

being further married to the deserter in light of the desertion, is an anachronism and in need of urgent reform.

ORDER

1. The court grants judgment for the plaintiff for an order for Restitution of Conjugal Rights and the defendant is ordered to return to or receive the plaintiff on or before **05 August 2013**, failing which, to show cause, if any, to this court on the **03 September 2013 at 8:30 a.m.**, why:
 - a) The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved;
2. Costs are awarded to the plaintiff.

JUDGMENT

Damaseb, JP:

[1] The parties were married to each other on 18 June 1985 out of community of property, subject to the accrual system. They are currently residing at Farm Otjunzonjati, No 69, Okahandja where they carry on a hunting guest farm business. The farm belongs to the plaintiff, but it is common cause that the parties lived there most of their married life with their children. All three the parties' children are now majors. The plaintiff seeks a final order of divorce from the defendant on the ground of her adultery, alternatively an order for restitution of conjugal rights based on the wife's alleged malicious desertion. It is further common cause that both parties had entered into adulterous relationships: the defendant committed adultery first whereafter the plaintiff had an adulterous relationship. The plaintiff maintains that he became aware of the defendant's adultery only in April 2008. The defendant's version is that she confessed

the adultery in 2004 and that the plaintiff condoned it and that they continued to have a normal marital relationship until 2009 when the plaintiff returned to the matrimonial home, after spending time with his paramour (NS) on a neighboring farm, and begun to withdraw from the marriage. Even if it be found that she had deserted the plaintiff, the defendant maintains, she had always tendered restitution of conjugal rights and still offers it to the plaintiff.

[2] There is common ground that for about four years the marriage between the parties is an empty shell: There is no intimacy and they are literally leading separate lives in the common home.

Brief history of the pleadings

[3] In plaintiff's original particulars of claim filed on 20 May 2009, he relied solely on the alleged ground of the wife's malicious desertion. In May 2011, he moved another amendment to the particulars of claim seeking condonation for his adultery with NS which, according to him, started in October 2008 and terminated in the same month. The plaintiff again amended the particulars of claim on 21 October 2011 and included the adultery allegedly committed by the defendant with EH during 2003- 2006.

[4] In her pleadings the defendant had always denied deserting the plaintiff and tendered restitution in so far as it may be necessary. When the plaintiff introduced the defendant's adultery with EH as a ground of divorce, the defendant amended her plea; first admitting that she committed adultery with EH but that it lasted for only a brief spell in 2004; secondly that she confessed the adultery to the plaintiff who then condoned it in that they continued to have sexual relations as husband and wife after she had confessed the adultery.

[5] On 14 August 2012, the defendant filed of record a conditional counterclaim in which she, in addition to denying malicious desertion, alleged that the plaintiff frequently engaged in emotional outbursts directed at her and, on occasion, physically assaulted her and broke her kitchen utensils and furniture. She also alleged that the plaintiff frequently insults and belittles her. The conditional counterclaim never saw the light of day because I dismissed it upon application by the plaintiff in terms of rule 37(17) on

account of the defendant's remissness. As I will show presently, in her evidence at the trial the defendant made allegations of violence and aggression towards her by the plaintiff. It is apparent from the defendant's ill-fated counterclaim and from her evidence at the trial as will soon become apparent, that the prospect of violence looms large in this dysfunctional union.

Namibia's divorce law is an anachronism and in urgent need of reform

[6] The divorce law of Namibia is archaic and demonstrably in need of reform. The government of the day has inexplicably failed to initiate the much needed reform. Under our current divorce law, when it comes to considering dissolution of a marriage, it matters not that the spouses do not love each other or that the marriage has irretrievably broken down. A court may only grant divorce upon proof that a spouse committed a matrimonial offence. Except in case of adultery, where a party relies for divorce on the malicious desertion of the other spouse, the wish of the one seeking divorce is defeated if the guilty spouse offers to return. It matters not that because of the desertion of the guilty spouse the innocent party no longer loves the deserter. If the deserter offers to return and the tender is genuine, she must receive him back. The deserted spouse's subjective feelings towards the deserter are irrelevant.¹ If she refuses to take him back, she becomes the deserter and may be sued for divorce.² In that event she may even lose the right to maintenance if the original deserter chooses to divorce her. That is so because, under our common law, a party loses the right to maintenance if she was the cause of the breakdown of the marriage.³

[7] This is a ludicrous state of affairs for a country which, quite justifiably, abhors abuse and violence in the family by especially men. The present state of our law has been justified in pre-constitutional decided cases on the 'sanctity of marriage'. As Hahlo observes:⁴

¹ HR Hahlo *The South African Law of Husband and Wife* 4th ed, p 416 and authorities collected at fn 185.

² *Serfontein v Serfontein* 1974 (1) SA 287(NC).

³ *NS v PS* 2010 (2) NR 418 (HC) at 427, para 32, citing *Croes v Croes* 1960 (4) SA 211(C).

⁴ *Hahlo*, p-408-409.

'Since a restitution order is made in order to provide the defendant with a *locus poenitentiae*—a final opportunity of changing his mind— the state of mind of the plaintiff is irrelevant. In the majority of cases the return of the defendant is the last thing the plaintiff desires. His object is to obtain a divorce. But even though the suit be not instituted with the bona fide object of obtaining restitution, and even though the plaintiff may candidly state in evidence that she will not under any circumstances resume life with the defendant, the court has no discretionary power to refuse a restitution order. The plaintiff's claim is for a divorce on the ground of malicious desertion and the order for restitution is a necessary preliminary step towards its attainment. Nor may a restitution order be dispensed with if the defendant states in the most emphatic terms that he will not return to the plaintiff. He must have his final chance.'

[8] There is, to the best of my knowledge, not a single modern constitutional democracy where the fault based principle of divorce has not been abandoned in favour of 'irretrievable breakdown' or some other more flexible criteria such as the parties having lived apart for a certain period of time. The state of our law is such that even if a court is satisfied that a marriage between two people has no hope ever of being salvaged, the court must keep them together as long as one spouse wants to remain married. In fact, Mr Strydom for the defendant argued as much and, supported by archaic authority, pointed out to me that, under our law, love is an irrelevant consideration when it comes to whether or not a deserted spouse who does not want to continue with a marriage, should be granted her wish. A more fertile ground for violence in the family is hardly imaginable!

[9] 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 in 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'.

[10] It is an open question whether the fault-based principle, in particular the requirement that a spouse who has been deserted and wants to end a marriage, must accept the deserter if the offer is genuine⁵, is not in conflict with article 8 of the Namibian Constitution which guarantees the right to human dignity.⁶ Marriage is the most intimate personal relationship between two people. Amongst others, it imposes an obligation on spouses to share a bed and to offer and show each other intimacy. What could be more undignified and denigrating than requiring a person to remain married to a person whom she no longer loves? Yet that is the law which I must apply as best I can, guided by common law principles which were developed in a time and age when men were often the ones who played the dominant role in a marital relationship!

The alleged grounds of divorce

[11] In the amended particulars of claim, the plaintiff, while seeking condonation for his adultery with NS, relies on the defendant's alleged adultery with EH during February 2003 to end of 2006 and, in the alternative, on the following alleged grounds of desertion by the defendant:

- a) That the defendant left the common home for long periods;
- b) That the defendant showed him no love and affection;
- c) That the defendant showed no serious intention of continuing with the marital relationship with him.

[12] The defendant denies all the grounds relied on by the plaintiff. As regards the ground of adultery with EH, she states in her plea filed of record on 26 October 2011

⁵ Regardless of whether or not the innocent spouse has lost love and affection for the deserter as a result of the desertion.

⁶ In full, the art reads as follows:

'Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

that the plaintiff had condoned it and in fact resumed cohabitating with her. She further denies having unlawfully, maliciously and constructively deserted the plaintiff and in any event tenders restitution of conjugal rights to the plaintiff.

[13] If the plaintiff proves adultery committed by the defendant and that he had not condoned it, he is entitled to a final order of divorce. If he fails on the latter score, he must satisfy the court on a balance of probabilities that the defendant deserted him. Given that the defendant tenders restitution of conjugal rights if she be found to be the deserter, she must, upon plaintiff proving her desertion, prove on a balance of probabilities that her tender of restitution is genuine.

Defendant's alleged adultery with EH

[14] The only dispute between the parties as regards the adultery committed by the defendant with EH is when it occurred and whether or not the plaintiff condoned it. The plaintiff's version is that the defendant confessed her adultery to him in April 2008 and that since then he left the common bedroom and never had sexual contact with the defendant. That is the version the plaintiff gave under oath in chief in these proceedings. But when one has regard to the version he gave in cross-examination, a different picture emerges as regards when he left the common home and whether or not he cohabited with the defendant since, on his version, he became aware of the adultery in April 2008. In an affidavit deposed on 16 July 2012 in related interlocutory proceedings and in his evidence -in -chief, the plaintiff stated that he moved out of the common home in April 2008 and upon his return in June 2009, never shared a bed with the defendant. It became apparent under cross-examination that since April 2008, the plaintiff regularly returned to the common bedroom and shared a bed with the defendant. He also conceded that during December of 2008 he went to Wlotzkasbaken on a family holiday with the defendant and the children and shared the same bed with the defendant. These concessions fly in the face of the plaintiff's strenuous assertion that he left the common home in April 2008 after the defendant admitted committing adultery, and never again shared the same bed with her. This circumstance makes the defendant's version that she and the plaintiff had sexual relations between April 2008

and 2009 when plaintiff withdrew from normal married life with her, more probable than not.

[15] Perhaps even more telling is the manner in which the plaintiff gave instructions to his legal practitioners on the basis of which his pleadings were prepared. He issued summons for the first time on 20 May 2009. In those particulars of claim he relied on malicious constructive desertion by the defendant. Even if I were to accept his version that he did so as agreed with the defendant, there is no reasonable explanation why after it became clear that the defendant opposes the divorce, the plaintiff did not specify and rely on the ground of adultery. As it happens, the ground of adultery was introduced for the first time in his amended particulars on 21 October 2011. In plaintiff's evidence-in-chief and in his affidavit deposed to on 16 July 2012, the plaintiff stated that it was agreed between him and the defendant that he would not rely on adultery as a ground of divorce and that he could proceed to obtain a 'soft divorce' as he called it. In my considered view, the probabilities favour the inference that, with full knowledge of the defendant's adultery, the plaintiff had sexual contact with her after April 2008 and cannot for that reason rely on the adultery with EH to seek a final order of dissolution of the marriage. The plaintiff most probably did not appreciate the legal significance of engaging in sexual relations with the defendant after he became aware of her adultery. But that is of no moment: A voluntary act of sexual intercourse with the spouse who has committed adultery obliterates all wrong in that act in the eyes of the law and the wronged spouse may not later rely on it as a ground of divorce.⁷ The defendant has therefore discharged the onus that the plaintiff condoned her adultery with EH.

Manifestations of malicious desertion

[16] The most common manifestations of malicious desertion are: (i) actual or physical, (ii) constructive, or (iii) refusal of marital privileges. Adultery is, by far, the worst form of desertion.⁸ The onus of proving both the factum of desertion and the *animus deserendi* rests throughout upon the plaintiff. The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff,

⁷ *H v H* (I 675/2011)[2013] NAHCMD 123 (7 May 2013).

⁸ Hahlo, *supra* at 391.

for in that case there is no longer desertion.⁹ In considering whether the plaintiff has discharged the onus, Frank AJ stated¹⁰ that there must be conduct which one must not expect in the ordinary course of marriage and that:

‘the conduct . . . need not to have amounted to a matrimonial offence such as cruelty or adultery but . . . it must exceed in gravity such behavior vexatious and trying though it maybe, as every spouse bargains to endure when accepting the other “for better or for worse”. The ordinary wear and tear of conjugal life does not itself suffice.’

The allegation that the defendant deserted the common home for long periods

[17] This ground postulates actual or physical desertion by the defendant, as opposed to conduct that rendered cohabitation intolerable for the plaintiff. It is trite that conduct amounting to malicious desertion means no more than unjustifiable.¹¹ As the court pointed out in *Kagwe v Kagwe*¹², three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: First that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant.

[18] I do not wish to spend a lot of time on this ground on account of its obvious lack of merit. The plaintiff on his own admission left the common home and bedroom in April 2008, when he went to live with NS and, upon return, moved out to stay in the guest room. Although I do accept that the defendant’s admitted adultery with EH made the plaintiff lose interest in the defendant, he had condoned it by having sexual contact with her thereafter. There was therefore no justification in law for him to have left the common home or bedroom solely on the ground of the adultery which he condoned. In that sense, he was the deserter for the period that he went to live with NS away from the matrimonial home. Whether or not the defendant constructively deserted the plaintiff is a separate question and one I turn to next.

⁹ *Kagwe v Kagwe* (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), para 9.

¹⁰ HR Hahlo, p 394, cited in *Kagwe v Kagwe* (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), para 52.

¹¹ *Weber v Weber* 1915 AD 246.

¹² *Kagwe v Kagwe* (I 1459/2011) [2013] NAHCMD 71 (30 January 2013), para 9.

No love and affection/ no serious intention to continue with the marriage

[19] I will treat these two grounds together. They allege that the defendant:

‘6.1 showed no love and affection towards plaintiff;

6.2 showed no serious intention of continuing with the marital relationship.’

[20] These grounds are what is referred to in legal parlance as constructive desertion. Constructive desertion arises where the defendant, with the settled intention of terminating the marriage, engages in conduct which forces the plaintiff to ‘withdraw from a state of things’¹³ - being the state of cohabitation. Thus, it has been held that:

‘There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.’¹⁴

[21] I caution myself at the outset that:

‘[T]he policy of the courts is to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social life, the family. . . It is for this reason, too, that the orbit of the doctrine of constructive desertion should not be extended.’¹⁵

[22] It is trite that the omission of a specific averment in the particulars of claim that the defendant engaged in or committed the alleged acts of desertion with the intention of permanently ending the conjugal relationship, is not fatal to the plaintiff’s claim – as long as the conduct complained of is of such a nature as to justify, prima facie, the inference that the defendant acted with such an intention.¹⁶ The present is such a case as will soon become apparent. I am also satisfied that the issue of defendant’s post-adultery association with EH constituting plaintiff’s belief that the defendant had no

¹³ Per Sir Henry Duke P in *Pulford v Pulford* [1923] P 18 at 21.

¹⁴ *Sickert v Sickert* [1899] P 278 at 282.

¹⁵ *Belford v Belford* 1961 (1) SA 257 (AD) at 259.

¹⁶ *Stolle v Stolle* 1952(1) PH B6 (O).

serious intention of maintaining the marital relationship, was exhaustively debated during the trial and both parties had every facility to deal with the issue.¹⁷

[23] In his evidence-in-chief the plaintiff pertinently testified that because of the adultery with EH and her resultant lack of interest in him, the defendant had unlawfully, maliciously and constructively deserted him and persists with such desertion. The plaintiff further testified that from 2008 to date, the defendant had not shown him any love or affection. He added that the defendant's conduct demonstrates that she has no serious intention of continuing with the marriage. He further testified that because of these circumstances, he no longer loves the defendant and that there is no basis upon which the parties can continue with the marriage. Significantly, the plaintiff testified that he no longer trusts the defendant and that normal marriage life is out of the question.

[24] Mr Corbett for the plaintiff made clear to the defendant during his cross-examination of her that her insensitivity towards the plaintiff by continuing to meet EH behind plaintiff's back, weighed against her own admission that he was jealous and often accused her of extra-marital affairs, constituted conduct of the kind that shows no love or affection or serious intention to continue with the marital relationship as her conduct only fuelled plaintiff's jealousy and insecurity. Thus approached it is irrelevant for the purpose of the alternative grounds of constructive desertion that the defendant no longer had sexual contact with EH.

[25] The essence of the defendant's case is that she, for a brief spell in 2004, committed adultery with EH. She then realized the folly of her ways, ended the sexual relationship with EH and confessed the adultery to the plaintiff who forgave her and accepted her back and they had a happy marriage since then, until 2009. Under cross-examination, she admitted to meeting EH occasionally since she allegedly ended the sexual relationship. She sought however to convey to the court the impression that the occasional meetings between her and EH were innocent and were by happenstance.

[26] To digress, during cross-examination of the plaintiff, defendant's counsel introduced two documents into evidence, apparently as evidence that the plaintiff,

¹⁷ *Shill v Milner* 1937 AD 101 at 105.

contrary to his suggestion otherwise, was already in 2005 and 2006 aware of her adultery with EH. The one document is addressed to the defendant and dated 11 March 2005. It states the following:

‘Hallo Sitta,

I am again receiving calls *from people we both know* that you and Egbert were seen together again. My answer now was that *I have no energy any more for unnecessary stress and that we two will go our separate ways*. Thus, if there is a rumor in Windhoek that we will get divorced then that rumor originated from me and not others.’ (Emphasis is mine.)

[27] The other letter is clearly intended for EH and is dated 15 August 2006. This letter states the following:

‘That you had an affair with my wife (That you had sex with my wife) was a shock *I have not yet coped with*. When one wants to read the e-mail after one or two weeks and *one immediately notices Egbert Hoff 4 times* and congratulations for her birthday with “greetings Egbert” signed so large then that is very noticeable. Is that on purpose or do you have no feelings for other people. (This shows what a heartless person you are.) *Do you not think that I have feelings too. She loves you and you her*. She does not want to leave here and you don’t want a divorce. This is the situation. Now please come with a solution. Sitta and I cannot talk with each other. Sitta and I cannot talk with each other. Sitta does not talk to me or say for instance that we will not solve the problem alone except for a divorce with (legal practitioners), with attorneys. I am waiting patiently.’ (My emphasis).

[28] It is clear from these documents that the defendant knew the plaintiff continued to be suspicious that she met EH without his knowledge or approval, but in circumstances where that information was passed on by acquaintances to the plaintiff who then accused her of continuing an improper relationship with EH.

[29] It was also established that the defendant and EH continued to have contact of some sort even after April 2008, being the relevant date according to the plaintiff that the defendant confessed her adultery with EH. That much is clear from the evidence of both defendant and EH. The defendant does not deny that she in fact continued to meet EH well after that date. She sought to persuade the court that what contact there was

between EH and she was by way of chance encounters. Initially, the defendant testified under cross examination that her meetings with EH were always 'by accident' and that she would meet him for coffee like she did 'any other friend'. Incongruously, she then testified that their meetings during the period of 2004 and 2008 were 'regular' and that she called EH a lot. She also stated that she considered EH to be a 'close friend'; that she does not have a lot of friends and that EH was the one person with whom she shared things concerning her personal life as she counted on him not to turn around and gossip about her. Again and in apparent contradiction, the defendant testified that the last time she saw EH was in 2007 at Ferreiras when they had coffee.

[30] EH was called as a witness by the defendant to buttress her version that the two were no longer having an adulterous relationship. EH testified in evidence-in-chief that he and the defendant, subsequent to ending the adulterous relationship, remained 'friends on account of us seeing each other regularly at horse riding events and the like'. The picture painted by EH was rather different to the defendant's. He made it clear that he and the defendant continued to meet, and did so as late as 2012. EH also testified, contrary to defendant's suggestion otherwise, that the duo planned their meetings. He even described these meetings as 'dates'. It was clear from EH's evidence that the meetings with the defendant were not chance happenings: He added:

'Well sometimes she phoned and sometimes I phoned and sometimes I have been in town and then she asked me whether I have been in town and we met quickly for a cup of coffee'.

[31] EH was emphatic that the meetings with defendant were not chance happenings. When asked if his wife was aware of the meetings with the defendant, EH testified that she was not as she was in jail for an alleged conspiracy to kill him. When asked what they discussed when he met the defendant, he rather ominously stated the following:

'Talking to each other. We remain friends talking to each other *how is it going at her home, how is it going at my home...*' (My emphasis)

This against the backdrop of EH's admitted problems in his marriage! It stretches credulity to suggest that against all these circumstances nothing untoward was taking place between the defendant and EH.

[32] The defendant was untruthful when she suggested that her meetings with EH subsequent to 2004 were unplanned, largely at least because she also admitted to meeting him for a cup of tea now and then, while EH quite candidly admitted to the two of them regularly having planned 'dates' at coffee shops and at restaurants. He even stated that he last met with her in 2012.¹⁸

[33] For all these reasons, I am unable to agree with Mr Strydom's contention that the defendant's evidence was of the quality that it is to be preferred over that of the plaintiff on the material contested issues. When it suited the context she gave one version, only to change it when she realized that it painted her in bad light. This case falls to be determined on the common cause facts and the probabilities.

Defendant's callous conduct proved

[34] The defendant testified that the plaintiff has a jealous streak. This was of course not put to the plaintiff in cross-examination and Mr Corbett objected to it at the time. Be that as it may, she continued to detail how the plaintiff during the subsistence of the marriage accused her of having extra-marital affairs; persistently demanded to know where she was going if she went anywhere; where she had been and with whom if she went anywhere; called her unnecessarily on the cell phone to find out where she was; and so forth. At some point, she testified, she decided to actually commit adultery so the plaintiff had reason to be jealous.

[35] I find it established on preponderance of probabilities that the plaintiff suspected that there was something more than just friendship between the defendant and EH at the time and told the defendant as much. It appears from the evidence that the plaintiff did not confront EH about his suspicions. The one person who should have put EH on notice was the defendant. Yet, on EH's version in response to the court's questions, he was not aware or made aware that the plaintiff disapproved his close friendship with the

¹⁸ By which time plaintiff's divorce was pending.

defendant. Quite clearly, the defendant did not wish to discourage EH from continuing with the relationship: She enjoyed EH's companionship and was in all probability emotionally attached to him and had no desire or intention to end the association with EH – and on the probabilities the defendant cared less that it hurt the plaintiff. That is callous conduct and inconsistent with a desire to continue the marital relationship with the plaintiff. The defendant's callousness towards the plaintiff is further exacerbated by the fact that even after she had, on her own version, confessed to the plaintiff about her adultery with EH, her close (if suspect) friendship with him continued.

[36] It is also more likely than not that the defendant continued to commit adultery with EH well after 2004 and that she is being untruthful that no adultery took place between them after 2004. She sought to downplay a concession she made in her affidavit filed on 10 July 2012 in support of her rule 24(1) wherein she stated as follows:

'I admitted the relationship but already did so *at the time when this happened during 2007* whereupon the respondent forgave and condoned the adultery. Based on the fact that we could sort matters out then I labored under the hope that we could do so again once he took the decision to terminate his relationship with the said Ms [NS].' (My emphasis)

[37] On cross-examination, the defendant stated that the reference to 2007 was a mistake. The damage was done, especially after no further effort was made in re-examination to explain how the mistake could have occurred. The clear implication therefore is that the adulterous relationship between the defendant and EH commenced in 2004 and continued well into 2007. I find it callous in the extreme that a married woman who confesses to adultery not only continues the adulterous relationship, but continues to meet privately with the same man without her husband's knowledge or approval, yet does so in circumstances where other people observe them and bring it to the attention of the husband who, as the evidence amply demonstrates, becomes angry about it.

[38] The plaintiff testified that he was not sure if the 15 August 2006 letter intended for EH was ever delivered but expressed doubt it was. One significance about this letter however lies in the fact that it was the defendant who had it in her possession and

introduced it in evidence. The other significance in relation to both letters is the plaintiff's state of mind at the relevant time and the conduct he imputes therein to the defendant. It is apparent from the letters that the plaintiff harbored the belief that the defendant was not interested in resolving their marital problems and that she was in love with EH but opportunistically preferred to stay on at the farm. It also shows that the plaintiff had access to e-mail correspondence between the defendant and EH at a time when, according to the defendant, the adultery with EH had ended. What troubles me most about this is the fact that the defendant had no qualms about the plaintiff becoming aware of this correspondence. The plaintiff makes it clear that it hurt his feelings. The defendant knew it did because she had the letters in which he states as much. Yet she does not stop the contact with EH. Clearly, she was determined to give the plaintiff reason to be jealous and to feel insecure. The attitude which she formed at the time she started committing adultery never ended: She wanted the plaintiff to have reason to be jealous!

[39] There was no suggestion whatsoever on defendant's part that the allegations made in the missives are unfounded. Even if they were, the content clearly demonstrates that the plaintiff harbored the very strong belief that there was something untoward happening between the defendant and EH. I need to make the point at once that the two letters are not consistent only with the inference that at that stage the defendant had owned up to the adultery and had been forgiven by the plaintiff. The matter-of-fact statement 'you had an affair with my wife' certainly leads to the strong inference that the defendant had told the plaintiff about the adultery, but it certainly puts to paid any suggestion that the plaintiff had made peace with the adultery committed by the defendant or that he was unaware of a continuing association between the defendant and EH. He categorically states in that letter that the adultery 'was a shock I have not yet coped with'. In the letter written to the defendant the plaintiff unequivocally threatens divorce as the only solution to the problem. It defies logic that in light of that the defendant maintains that after her confession the parties had a normal marital relationship.

[40] Assuming that the defendant was the one to whom the plaintiff gave the letter intended for EH, or that she picked it up in the house at some stage without plaintiff's knowledge, given that her position is that in 2006 there was normal married life between the parties as the plaintiff had forgiven her adultery, it beggars belief that, as we now know, she continued to meet EH behind the plaintiff's back and without his approval. That is, in my considered view, a clear pointer that the defendant had no serious intention of continuing the marital relationship with the plaintiff. Given the consistency with which she makes the claim to an entitlement to be on the farm¹⁹, that conduct is strong corroboration of the fact that she never really intended to continue the marital relationship with the plaintiff but had to say so in order to continue to be on the farm. That is callous conduct. Such conduct, I am satisfied on balance of probabilities, in time led to alienation of affection by the plaintiff towards the defendant – frightfully to the point of resentment. It was not lost on me that the defendant in her own words conveyed to me that the acrimony had reached the point where the parties 'hated' each other.

[41] The plaintiff clearly lost respect, trust in and love for defendant: on defendant's own version the plaintiff thereafter engaged in an extramarital affair with another woman and unashamedly admitted it (without promising to end it immediately) and said he was only having fun and that he was not serious with the other woman. It later led to the point where, again on the defendant's own version, the plaintiff no longer showed her any love or affection; denied her marital privileges for the past four years; became frigid towards her as he never even wanted to be touched by her or to drink a cup of coffee

¹⁹ That much is clear from her evidence in chief and her affidavit in support of her rule 24 (1) application where she sates as follows: 'Prior to the institution of the divorce action by the plaintiff he confessed to me that he became involved in an adulterous affair with the said NS. He thereupon and during the latter part of 2008 left the common home and moved in with the said NS. Be that as it may he returned a year later, June 2009, and moved back with me in our common home. However he was still involved with the said NS. At the time and bearing in mind that we have been married in excess of 20 years I decided to wait it out and see whether my husband would not come to his senses and return to me. I consequently was prepared to forgive him provided that he would terminate the adulterous relationship and return to me. However the respondent thereupon decided to institute divorce proceedings against me on the feeble grounds referred to hereinbefore. Being mindful of my decision and also considering the effort and labour that we both imparted into our marriage, the children as well as the farming business over the years I decided to resist the divorce action on the basis that I did not want to get a divorce. Consequently I tendered restitution insofar as it may be necessary, being attendant to the fact that it was the respondent who was involved in an adulterous relationship and as such he wanted a divorce and not me'.

made by her for him; poured water on the bed on which she slept; sprayed doom in the room in which she slept; and so on. I cannot imagine a worse case of alienation of affection than this. Yet, according to the defendant, all is fine and the two of them can still make up, and for good measure, that the absence of intimacy between them is not important as they are advancing in age. The plaintiff painted a completely different picture and confirmed that he considers sexual intimacy as an essential aspect of a healthy marriage.

[42] I am satisfied that on account of defendant's callous behavior towards him, the plaintiff lost love and affection for the defendant and that she has, as a result, constructively, maliciously deserted the plaintiff. I am thus satisfied that the plaintiff has on a balance of probabilities established that the defendant showed him no love and affection and showed no serious intention in continuing the marital relationship with the plaintiff.

Is the defendant's tender of restitution genuine?

[43] Although I am satisfied, to the required standard of proof, that the defendant's conduct amounts to constructive desertion, it is not the end of the matter as the defendant tenders restitution to the plaintiff. She bears the onus that the offer of restitution is genuine and bona fide and not merely a ruse or stratagem to escape an order of divorce.²⁰ The plaintiff maintains that the tender is not genuine and is actuated more by the defendant's desire to continue to keep her horses on the farm and to receive maintenance from him. It is common cause that the defendant breeds horses on the plaintiff's farm. In her evidence the defendant had stated that she, alongside the plaintiff, invested a lot in the farm to make it the success it is and that it is unfair for the plaintiff to get her off the farm through divorce. The vexed question I have to determine is whether the defendant's tender, against the backdrop of all that has happened between the parties, is genuine.

[44] In my view, whether or not a tender of restitution of conjugal rights is genuine, can be assessed by reference to the past conduct of the party tendering restitution and

²⁰ *James v James* 1990 NR 112 (HC) at 115B.

the history of the marital relationship.²¹ I have demonstrated already the callous conduct engaged in by the defendant towards the plaintiff over a long period of time. As the defendant stated herself under oath in an affidavit in the rule 24 proceedings, she had committed adultery with EH in 2007. In addition, the defendant was plain untruthful about the nature of her relationship and contact with EH even in most recent times.

[45] The defendant has therefore deliberately engaged in and persisted with conduct which any normal person would regard as calculated to make the plaintiff husband withdraw from cohabitation. It is reasonable in the circumstances to therefore infer that she acted with the intention of bringing the marital relationship with the plaintiff to an end.²² Coleman J held in *Froneman v Froneman*²³ that the *animus* for constructive desertion is either satisfied upon proof of *dolus directus* or *dolus eventualis*. In the latter respect it is established if the defendant is shown to have had the knowledge that the probable or possible effect of his or her conduct would be termination of cohabitation, coupled with the willful disregard of that possibility or probability. I am in respectful agreement with the view expressed by Hahlo²⁴ that in case of constructive desertion the defendant who tenders restitution must provide 'greater proof of a real change of heart where the desertion was constructive than where it was physical'. The defendant had continued an association with the man with who she had previously committed adultery and aroused the ire of her husband. She continued with it even while denying such a relationship and lied about it. In my view she failed to provide sufficient proof that her offer to return to the plaintiff is genuine when that which caused him hurt was continuing, even when the present divorce was pending. The genuineness of the tender is further undermined by what appears to be a deep emotional attachment between the defendant and EH.

[46] It is apparent to me from the evidence of both the defendant and EH that these two individuals are emotionally very dependent on each other. They discuss inner-most

²¹ *Ackerman v Ackerman* 1941 WLD 39; *Coetzee v Coetzee* 1945 WLD 122 at 126; *Sequira v Sequira* 1946 AD 1077 at 1083.

²² Hahlo, HR, *The South African Law of Husband and Wife*, 4th ed. P 396, citing *Crouse v Crouse* 1957 (2) PH B14 (O).

²³ 1972 (4) SA 197 (T) at 198.

²⁴ *Supra*, at 417.

secrets and appear to bare their souls to each other. This is a most unsatisfactory situation for two people who are known to have in the past engaged in an adulterous relationship. To crown it all, they both have marital problems and, in the case of EH, his marriage is inevitably headed for termination in view of the alleged conspiracy by his wife against his life. That two individuals who are bonded by such unfortunate personal circumstances would not be intimate with each other – given the events of the past – does not sit comfortably with the probabilities pointing in the opposite direction. In nothing that either has said under oath do I get the impression that they realize the gravity of the impropriety of their relationship and that it must come to an end if defendant's marriage has any chance of survival. Although tendering restitution of conjugal rights, the defendant never at any stage undertook to disavow EH and to terminate her association with him. Given the impropriety of that relationship on account of the effect it has on the plaintiff, her tender is not genuine and is a ruse to avoid an order of divorce so she can continue to live on the farm and to carry on her horse breeding business. But that is not all.

[47] It is trite that the court may have regard to the fact that serious allegations were made by the parties against each other as a factor in determining if the tender of restitution of conjugal rights is genuine.²⁵ The defendant has both in her ill-fated conditional counterclaim and in her evidence-in-chief accused the plaintiff of violence against her. 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.

[48] The evidence paints for me a picture of a wife who had no intention whatsoever of ameliorating the insecurity and jealousy felt by her husband – by continuing to have a secret association with the man whom she had committed adultery with and had allegedly stopped being amorously involved with. I am compelled to agree with Mr Corbett's submission that the defendant's persistence to meet with EH despite being threatened with divorce as shown in the letter she introduced into evidence, is clear evidence that she was quite prepared to jeopardize the marital relationship with the plaintiff for the sake of EH. Whether or not a spouse's tender is genuine cannot be

²⁵ *K v K* 1950 SR 1 cited by *Hahlo* at p 417, footnote 196.

judged solely by what she says but must be tested against her objectively ascertainable conduct. The conduct on defendant's part shows that she was determined to hurt the plaintiff's feelings by continuing to have secret contact with the man with whom she had committed adultery.

[49] The defendant's demonstrable deceit towards the plaintiff regarding her association with EH leads me to the conclusion that she never ended her association with EH and has no intention of doing so. In such circumstances, her tender of restitution, while continuing an association with a man who caused so much trouble in her marriage with the plaintiff, cannot be genuine. I am satisfied that the defendant had not established that her tender of restitution of conjugal rights is genuine. It is more her desire to continue to live on the farm and to breed her horses there, that is the motivation for the tender, and not the wish to have a meaningful marital relationship with the plaintiff.

Should the plaintiff's adultery be condoned?

[50] I now have to consider whether to condone the plaintiff's admitted adultery with NS. In determining whether or not to condone the plaintiff's adultery I must have regard to the parties' respective degrees of blameworthiness and the interests of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the retention of a union which is utterly broken down.²⁶ A plaintiff's own adultery is not an absolute bar to an action for divorce on the ground of the defendant's malicious desertion.²⁷ In *Kagwe*, Geier J reasoned that the fact that a relationship had 'irretrievably' broken down and that a normal marriage life was no longer possible between spouses constitutes just as powerful a public interest consideration as the public interest in respecting the sanctity of marriage. The court has discretion in the matter, to be exercised judicially. I have already made reference to the scourge of violence against woman in our society. In my view, the prevalence of the scourge of violence in the family has decidedly tilted the legal convictions of the

²⁶ Hahlo, at 370-371.

²⁷ *NS v RH* 2011 (2) NR (HC) at 495-496, para 31.

community in favour of condoning adultery and ending the marriage where the prospect of violence looms large in a dysfunctional union.

[51] The defendant has conceded that the plaintiff's adultery with EH had ended. She stated in her evidence that the plaintiff returned to the common home because he was chased away by NS. In fact she gives that as the reason why she feels there are prospects of reconciliation with the plaintiff. I have already come to the conclusion that the marriage is an empty shell: It is a frightfully loveless marriage. In her conditional counterclaim the defendant herself alleged that the plaintiff does not show her love and affection. It is common cause that the defendant's adultery preceded that of the plaintiff. It is that adultery that primarily led to the change in plaintiff's affection for the defendant. The defendant's blameworthiness is exacerbated by her continuing deceit towards the plaintiff by continuing to retain an association with the very man with whom she had committed adultery, without the plaintiff's approval or knowledge, but sufficiently open for acquaintances of the parties to take notice of it and to bring it to plaintiff's attention and thus further aggravating him. For the same reason that the court may have regard to the fact that serious allegations were made by the parties against each other as a factor in determining if the tender of restitution of conjugal rights is genuine, it may also have regard to that consideration in the exercise of its discretion to bring the marriage to an end.

[52] The defendant has, both in her conditional counterclaim and in her evidence-in-chief accused, the plaintiff of violence towards her. 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 addition, the parties no longer have minor children to care for. I am satisfied that this is a proper case for the exercise of my discretion to condone the plaintiff's adultery and to grant him the relief on the ground of the defendant's malicious desertion.

[53] For all of the foregoing considerations, I am satisfied on balance of probabilities that the defendant's offer of restitution of conjugal rights, viewed against the backdrop of

the resentment towards her (so palpable during the trial) is not genuine. Having observed the demeanour of the plaintiff during the trial, I am satisfied that there is no prospect at all, in view of the defendant's 'particularly unwifely'²⁸ conduct, that they could ever have a normal marital relationship. The defendant herself said that much.

Costs

[54] I see no justification to depart from the normal rule that costs follow the event. I am satisfied that the plaintiff is entitled to recover his costs in the present case.

Order

[55] In the premise, it is ordered that:

1. There shall be judgment for the plaintiff for an order of Restitution of Conjugal Rights and the defendant is ordered to return to or receive the plaintiff on or before **05 August 2013**, failing which, to show cause, if any, to this court on the **3 September 2013 at 8:30 a.m.**, why:
 - a) The bonds of the marriage subsisting between the plaintiff and the defendant should not be dissolved;
2. Costs of suit should not be awarded to the plaintiff.
3. A copy of this judgment must be provided by the registrar to the Minister of Justice, the Attorney General, the Minister of Gender and Child welfare, and the Chairman of the Law Reform and Development Commission.

PT DAMASEB
JUDGE PRESIDENT

²⁸ To borrow the words of De Villiers AJA in *Weber v Weber* 1915 AD 239 at 265.

APPEARANCE:

PLAINTIFF

AW CORBETT

INSTRUCTED BY

BEHRENS & PFEIFFER

WINDHOEK

DEFENDANT

JAN STRYDOM

INSTRUCTED BY

THEUNISSEN, LOUW & PARTNERS

WINDHOEK