



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 455/2012

In the matter between:

CHANTEL DOROTHY DLAMINI (born Littler)

Plaintiff

And

NKOSINATHI GORDON DLAMINI

Defendant

Neutral citation: *Chantel Dorothy Dlamini v Nosinathi Gordon Dlamini (455/2012)*
[2013] SZHC 112 (10June 2013)

Coram: **M. Dlamini J.**

Heard: **8th April 2013**

Delivered: **10 June 2013**

Exception – prayer for restoration of conjugal rights – basis that plaintiff has failed to establish that she is prepared to restore conjugal rights herself – court – no need for plaintiff to establish same – party that has deserted the other should restore.

Summary: The plaintiff instituted action proceedings for restoration of conjugal rights failing which a decree for divorce on basis of desertion by defendant. Defendant has raised an exception on the basis that before plaintiff can call on the other party to restore conjugal rights, she should herself establish in her pleadings that she is also prepared to restore the same.

[1] The question for determination is whether it is a requirement of the law for the other party to show to the court that she is ready herself to restore conjugal rights when praying for the other spouse to restore conjugal rights on grounds of desertion.

[2] **H. R. Hahlo** “**The South African Law of Husband and Wife, 4th Ed.** at 407 writing on proceedings for divorce based on malicious desertion stated:

“This action consist of two actions rolled into one: a preliminary action in which the plaintiff asks for an order for restitution of conjugal rights; and a final action in which, failing compliance by the defendant with the restitution order, the plaintiff prays for a decree of divorce.”

[3] The learned author expatiates:

“In old law two separate and distinct actions had to be brought, but in modern law they may be combined by asking in one and the same action for an order for restitution of conjugal rights and, failing compliance therewith, a decree of divorce. However, restitution and divorce still form two distinct stages in the proceedings.”

[4] On the basis of the above, it was in order for plaintiff to pray for restitution as a preliminary action before the prayer for decree of final divorce.

[5] The issue at hand is therefore whether plaintiff is bound to prove to the court that she too will restore conjugal rights.

[6] The requirements for an order based on ground for malicious desertion was laid down by **Juszkiewicz v Juszkiewicz 1945 T.P.D. 48** where the court held at page 51:

“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.”

[7] The rationale for the prayer for restitution before a prayer for final decree of divorce was well divulged in **King v King 1947 (2) S.A. 507** at 520 where the court held:

“In cases of this sort the matrimonial offences which justifies a dissolution of the marriage is malicious desertion, and it is the function of the trial court to decide whether malicious desertion has been proved or not. But, on grounds of public policy, it has been laid down that, before the marriage is dissolved on the ground of malicious desertion, the defendant shall be given a final opportunity of showing that he has changed his mind. If he does so, the marriage is not dissolved, not because the plaintiff has not established malicious desertion, but because, in the public interest, it is desirable that a broken marriage should be mended, if that is at all possible.”

[8] The defendant supports his ground of exception by referring to plaintiff assertion in her particulars of claim at paragraph 9 page 6 of the book which reads:

“9. As a result of the various acts of constructive desertion by the Defendant as aforesaid, the parties’ matrimonial relationship has irretrievably broken down and as such there are no prospects of reconciliation.”

[9] He states that by so stating that “*there are no prospects of reconciliation*” plaintiff herself is seeking for an impossible prayer. He then concludes that plaintiff ought to have stated that she is ready herself to reconcile with the defendant.

[10] The learned judge, **Broome J.** in **King supra** hit the nail on the head when he stated on the issue raised by defendant *in casu*:

“*Seeing that it is the defendant who has broken the marriage, it must lie on his shoulders to satisfy the court that, notwithstanding his default he is prepared to make amends.*”

[11] He emphatically continues on this duty by defendant:

“*He must show that he intends, notwithstanding his previous default, to do all he can to restore the marriage which he has himself broken. In other words, he must satisfy the court that his offer to return is genuine. The onus of proof is thus on the defendant.*”

[12] I understand the honourable judge when he states “*he must show that he intends notwithstanding his previous default, to do all he can to restore the marriage*” to be saying that if it means reproposing to his wife or buying her flowers in order to appease her sorrowful heart, he should do so. It is certainly not the duty of the innocent party to show the defaulting party that she is willing to accept him, not at least in these proceedings. It is his duty to amend.

[13] In **Malele v Malele 1947 (2) S.A. 271** the plaintiff instituted divorce proceedings on grounds of desertion. The defendant filed a claim in reconvention, on the same grounds. The *court a quo* ordered plaintiff to restore conjugal rights and also defendant to do the same. Setting aside the double order of restitution, his **Lordship Barry J. P.** held:

“I agree with Mr. Bliss that on the evidence it appears that the plaintiff in convention was to blame and that no reason was given by the President of the native appeal court as to why the innocent party is ordered to return.”

[14] The learned judge concludes:

“...and there is no justification for making an order against the person who appears from the evidence to be the innocent spouse.”

[15] In view of the above authorities, grounds for exception has no basis in law.

[16] In the result, the following orders are made:

1. Defendant exception is dismissed;

2. Defendant is ordered to pay costs.

**M. DLAMINI
JUDGE**

For Plaintiff : Mr. J. T. Rodriques

For Defendant : Mr. T. Ndlovu