G.P.-S.51994—1976-77—3 000 (P)

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(..... **~~Provincial~~ Division)**
(..... **~~Provinsiale~~ Afdeling)**

Appeal in Civil Case
Appèl in Siviele Saak

K. W. C. Power ..... *Appellant,*

versus

S. C. Power ..... *Respondent*

Appellant's Attorney ..... *Respondent's Attorney*
Prokureur vir Appellant ..... *Prokureur vir Respondent* .....

Appellant's Advocate H. J. Schwarzer *Respondent's Advocate* P. A. M. Wagner
Advokaat vir Appellant ..... *Advokaat vir Respondent* .....

Set down for hearing on 23. 11. 1978
Op die rol geplaas vir verhoor op .....

Dec. 1st 14 Feb. 79

Coram: Rumpff C.J., Wessels, Katzen, Diemont J.J.A. et Hofmeyr A.J.A.

9.45 am ——— 1.00 am
11.15 am ——— 1.15 am

C. A. V.

The Court dismisses the appeal with costs. (Judgment per Diemont J.A.)

7.8 12 Bills taxed—Kosterekenings getakseer

	Date Datum	Amount Bedrag	Initials Paraaf
Writ issued Lasbrief uitgereik			
Date and initials Datum en paraaf			

M.P.
(392/77)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EDMUND WILLIAM O'CARROLL POWER Appellant

and

SHEILA KATHERINE POWER (Born SUMMERS) Respondent

CORAM: RUMPFF, CJ., et MULLER, KOTZÉ, DIEMONT, JJA., et HOFMEYR, AJA.

HEARD: 23 November 1978

DELIVERED: 1 December 1978.

J U D G M E N T

DIEMONT, J.A.

This is a matrimonial dispute.

I shall refer to appellant as defendant and to his wife, the respondent, as plaintiff. The plaintiff sued the defendant in the Durban and Coast Local Division of the Supreme Court for an order for the restitution of

conjugal/ .....

conjugal rights and failing compliance therewith, for a decree of divorce. The matter came before the Court on 2 September 1977 in the form of an undefended action, and a restitution order was made calling on defendant to restore conjugal rights on or before 4 October 1977, and failing that, to show cause on 14 October 1977 why a decree of divorce should not be granted.

On the extended return day, 8 November 1977, both parties were represented by counsel but only the defendant gave evidence. After hearing argument, Milne, J., gave a short judgment in which he recorded his reasons for coming to the conclusion that defendant had failed to restore conjugal rights. He accordingly ordered the bonds of marriage between the parties to be dissolved and the defendant to pay the costs caused by his opposition subsequent to the return day. The custody of the four minor children was given to the plaintiff with an order on the defendant for the payment of nominal maintenance.

This is a somewhat unusual case, described in the Court a quo as difficult in the sense that it was so

distressing. In order to have a better understanding of the evidence which the defendant gave, it is necessary to look not only at the particulars of claim, but also at the evidence which the plaintiff gave at the trial. As was pointed out by Greenberg, J.A., in Sequeira v Sequeira 1946 A.D. 1077 at P.1083:

> "Even though the sole question for investiga= tion on the return day is whether the defendant's offer to return is bona fide, it is clear that the earlier attitude of the parties towards each other may often have a material bearing on the question of the genuineness of the offer to return, and some of the cases that I have just quoted recognise this, but it is said, for instance, in Coetzee v Coetzee (supra, at p.126) that the question whether the defendant was the deserting party cannot be re-opened."

Although there are earlier conflicting decisions as to where the onus of proof lies in a case such as this, it is now established that the burden rests on the defen= dant - see the judgment of Galgut, A.J.A. in Holland v Holland 1975 (3) S.A. 553 and more particularly the

authorities /.....

authorities cited at pages 559 and 560 of the report.

Counsel for the plaintiff argued that not only was the onus of proof on the defendant but it was reasonable to expect greater or more cogent proof of a change of heart in a case where the desertion was constructive. For this proposition he cited "The S.A. Law of Husband and Wife" Hahlo 4th edition 417. It may well be that where the desertion is physical in the sense that the defendant has walked out and slammed the front door behind him there may be little difficulty in deciding subsequently whether or not he has come back to his wife, whereas in the case of constructive desertion the enquiry may be more difficult since it is defendant's state of mind coupled with his behaviour which constituted the desertion. But difficulty of proof does not mean that greater proof is required. The standard of proof remains unaltered; - the defendant must show on a balance of probabilities that there exists in his mind an intention to desist from his former conduct. A mere offer to return made for some ulterior motive, will not be enough. This was pointed out by Duncan, A.J., in Sandler v Sandler 1946 CPD 649 at 653:-

"...In order /....

> "..... In order to restore conjugal rights it was essential for the defendant to change his manner towards the plaintiff. A mere offer to receive the plaintiff would not be enough; there would have to exist in his mind an intention to desist from the former conduct, which had made life intolerable for the plaintiff. If his intention was to receive the plaintiff, but to continue his former conduct then his offer was not a compliance with the Court's order."

The learned judge in this case found that the defendant had failed to discharge the onus which rested on him and granted a decree of divorce. The defendant has appealed against that order and asks the Court to reinstate his marriage.

Two questions arise for consideration: Firstly, what was the unlawful conduct complained of which caused the plaintiff to refuse to have marital relations with her husband in January 1977 and resulted in the grant of a restitution order in September 1977, and secondly, did the defendant desist from his former conduct so as to justify the inference that he genuinely intended to restore

conjugal rights.

Before dealing with these questions, however, it is of importance to have some regard to the background of this unhappy affair. In particular, I apprehend that the personality, temperament and disposition of defendant are factors which are relevant in weighing the merits of his offer to restore conjugal rights to his wife.

The parties had at the time of the trial been married for 13 years. The plaintiff was then 40 years of age and her occupation was that of a clinic sister. The defendant was aged 42 years and was described in the particulars of claim as an attorney, but it was stated at the trial that he was no longer practising as an attorney.

It is common cause that he was discharged from the King George V Hospital on 24 January 1977 and that after 5 days he returned to the psychiatric section of that hospital where he remained for four months. He then

went/ .....

went to live at an institution known as Mariannhill where he could be near a psychiatrist who lived on the premises.

Unfortunately the Court a quo was given no information as to defendant's mental state. Evidence on this score might have thrown light on the problem to be resolved and have assisted the Court; the reticence of the parties is to be deprecated. There is no need, however, to read between the lines of the record to come to the conclusion that defendant is unbalanced and this fact was conceded by his counsel in the course of argument. The evidence shows that he is a man with a temper - this is a matter to which I shall refer again - and that forget= ful of the French saying: "In jealousy there is more of self-love, than of love", the defendant admitted suffering from unbridled jealousy when his wife spoke to any man.

The problems which beset this marriage were not made less complex by the defendant's archaic attitude to marriage. When he was asked:

"Would / .....

> "Would it be fair to say that you took an early Victorian attitude to your marriage in the sense that you regard the husband as the complete master of the home and the complete ruler of his wife?"

he replied:

> "I would not say it is early Victorian: I would say that it goes back to biblical times".

This reply lends weight to the allegation made by plaintiff in the affidavit filed before the return day:

> "The defendant's attitude to me manifests a determination that he wants you to be his possession and his chattel to dominate and to do exactly as he requires."

Moreover on a number of occasions defendant made statements in the witness box which suggest insensitivity and a lack of understanding of what is accepted as normal behaviour in marriage. So, for example, when he was asked whether he admitted threatening to have his wife and children evicted from their home by the police if he were not received back by a certain date, he answered affirmatively and added:

> "..... I think my behaviour, although a little bit exaggerated is not out of character with the normal behaviour of husbands."

Then again when asked:

> "Did you shout and scream at the plaintiff on frequent occasions when you were married to each other, or when you were living together, put it that way?"

he replied:

> "I would think no more than the average husband screams at his wife."

There is one other feature of this marriage to which I must allude; both parties are members of the Roman Catholic faith. Initially plaintiff intended instituting action for judicial separation but, at the defendant's instigation, changed her cause of action and sued for restitution of conjugal rights. The defendant stated in evidence that he very much regretted not having entered an appearance to defend the proceedings, and told the Court that he "abhorred the whole object and aspect of divorce."

It was /.....

It was this attitude which led counsel for the plaintiff to contend that it was not defendant's intention to restore conjugal rights but rather that his true motive was to prevent a decree of divorce being granted.

I return to a consideration of the two questions: What conduct led to the issue of a restitution order and to what extent, if any, did the defendant thereafter desist from his wrongful conduct.

In the particulars of claim, plaintiff set out her cause of action as follows:

> "6. By virtue of his unlawful conduct, particulars whereof are hereinafter set forth, the Defendant has rendered continued cohabitation between himself and the Plaintiff intolerable and insupportable.
>
> Particulars:
>
> (a) Throughout the marriage the Defendant has been subject to violent outbursts of temper.
>
> (b) On frequent occasions the Defendant has threatened to assault the Plaintiff.

(c) On .....

(c) On divers occasions the Defendant has assaulted the Plaintiff.

(d) On frequent occasions the Defendant has used vile and abusive language of and concerning the Plaintiff.

(e) The Defendant has habitually falsely accused the Plaintiff of associating with other men.

7. The defendant conducted himself in the manner described in Paragraph 6 hereof with the intention of terminating the said marriage."

In her evidence at the trial which, as I have said, was not defended, plaintiff testified briefly as to her husband's hostility, lack of trust and suspicion over the preceding two and a half years and to threats of assault, actual assault and abuse. These allegations were amplified in a replying affidavit filed by the plaintiff, but I do not deem it necessary to detail these allegations, since they were in the main not disputed when defendant gave evidence on the return day. Milne, J., drew attention to defendant's candour in the witness box:

"To a / .....

> "To a very large degree he adopted an attitude of frankness in his evidence and conceded, on a number of occasions in respect of a number of points, that he had behaved badly."

The learned judge recorded further that:

> "The defendant admits that on many occasions he has been guilty of the conduct which is described in detail in the replying affidavit of the plaintiff."

The defendant unashamedly conceded that he had from time to time lost his temper and shouted and screamed at his wife although he quibbled as to the meaning of a "violent temper" and was somewhat evasive as to the frequency with which these unhappy occurrences took place. He admitted committing minor assaults - clenching his fists, pushing his wife around, pushing her head into a wash-basin when she was washing her hair, and when asked if his wife was "dead scared of him" said that he could not deny her fear. Questioned as to his wife's association with other men, he admitted that this was a "weakness on his part" but he did not wish his wife to talk to men, even during the course of her employment as a nurse. When asked by the

judge to explain whether his objection was to any particular man, he replied that there "wasn't any specific man" it was just the principle of the thing "that she should not talk to other men".

The defendant was closely cross-examined as to his behaviour subsequent to the grant of the order for restitution of conjugal rights and the answers which he gave show, only too clearly, that virtually every meeting between the parties ended in unpleasantness. I think I need go no further than to cite from the heads of argument filed on behalf of the defendant:

> "It is conceded that on numerous occasions and in particular on 15th September, 29th September and 7th October 1977, Defendant persisted in that conduct which justified the granting of the restitution order."

Mr. Schwarer, who appeared for defendant on appeal, argued that defendant's conduct must be viewed, not in isolation, but in relation to the attitude of the

plaintiff and he drew attention to the words of Watermeyer, J.A., reported in Abramson v Abramson 1942 A.D. 58 at p.69.- 70

> "Again, an order for restitution of conjugal rights is an order which cannot be 'complied with' by a defendant alone against the will of a plaintiff. It requires an attitude on the part of the plaintiff which does not make approaches on the part of the defendant impossible or fruitless, and the purpose of it is really to afford time and opportunity for the defendant to make an approach to the plaintiff and for the parties, if so minded, to come together again."

In this case, so it was contended, the plaintiff refused to believe that her husband had reformed and rebuffed all his attempts at reconciliation. The defendant could not be expected to continue banging his head against a brick wall.

It is in my view clear, from a reading of the evidence, that plaintiff was fully entitled to harbour doubts as to her husband's reform and indeed he conceded as much under cross-examination. The way he set about

regaining his wife's confidence and affection was strange. Apart from the attempts to force her to attend religious and marriage guidance meetings - attempts which were pathetic but completely unsuccessful - he resorted to hectoring, quarrelling and aggression. I need refer to only one incident to illustrate defendant's failure to curb his emotional outbursts.

On 10 October 1977 the defendant returned one of the children who had spent the day with him to plaintiff's flat. The child went indoors and shortly afterwards her father stormed into the flat. The defendant, it appears, was affronted because his wife had not come out to greet him while he sat waiting in the car outside. He said in explanation of his conduct:

> "I lost my temper outside and said to myself:
>
> 'I'll go in and give her a shake up as to why she has not appeared ....
>
> I gave her hell on the question of her bad manners and then I think there was a certain amount of pushing around the house ....."

The/ .....

The evidence continues:

"Would it be correct to say, irrespective of what the order was of the discussion on the 10th October, would it be correct to say that you screamed at the plaintiff and demanded to know why she did not come out to meet you and you accused her of despicable behaviour? - - Yes, I remember that.

The word 'scream' is a good description of what you were doing, is it? - - Not all the time but obviously to part of it, yes, I am not prepared to quibble on that.

You wouldn't; and you then grabbed hold of her and shook her violently - did that happen?- - No, that is not true. What happened was that she got up to go out of the room or somewhere and I held her shoulders back against the wall and I said 'don't run away, I want you to know, I want to know what your feelings are'.

I see - - There was no violent shaking.

I see - Now, when you held her against the wall, did you do it - and you said 'don't run away', did you say it in the quiet way that you just said it in the witness-box? - - Well ... (Counsel intervenes).

Or did you / ...

Or did you shout and scream then too? - - Oh, I don't know about the shouting and screaming, but obviously voices were raised by then. I had already had to tick her off about her despicable behaviour which she denied, so it was not a tea-party we were at at that stage".

It was indeed no tea-party. The ugly scene closed with the plaintiff in hysterics, the children in tears and the defendant's brother-in-law being obliged to intervene. This "rumpus" as defendant was pleased to call it, took place only four days before he was due to appear in Court to prove that his intention to restore conjugal rights, was genuine.

There is no reason to suggest that plaintiff provoked the defendant on this occasion or that her in= transigence was to blame for what happened.

There were other incidents which ended in emotion and confusion and it may well be that the plaintiff was less than enthusiastic in her welcome to her husband, but the onus was on him to show by his conduct that he had

undergone / .....

undergone a change of heart. He failed to do so.

Milne, J., sums up that failure admirably in the penultimate paragraph of his reasons for judgment:

> "There is a logical difficulty about the defendant's proposition that he is genuine in his offer to restore conjugal rights. What does it mean when he says '1 am genuine in my offer'? It means, translating it from legal terms into practical terms, that he has had a change of heart, that he intends to change his ways. What are the ways that are complained of? They are: violence, loss of temper, intemperate language and excessive and unjustified suspicion of his wife's innocent associations with members of the opposite sex. When she does not respond to his overtures, what is his reaction? It is to behave in precisely the manner that the plaintiff has complained of. Even assuming in his favour, (which is a large assumption to make in this matter) that the plaintiff's conduct in refusing to accept his overtures was provocative, that does not justify him in behaving in the manner in which he did. In fact, his behaviour demonstrates that his impulses, emotions, call them what you will, to behave in the manner in which he did, are stronger

than / .....

than his desire to repair the marriage. That is the plaintiff's complaint and nothing which defendant has said has persuaded me at all that he has altered his ways. I do not mean to indicate that I find the plaintiff is free from blame. I have no doubt that the plaintiff, like all of us, is a fallible human being, but, nevertheless, I am quite unpersuaded that, despite the defendant's desire to repair the marriage, he has taken sufficient control of himself to put that desire into action in terms of practical behaviour. As I said earlier, he is to an extent the victim of conflicting and varying impulses and I find that he has failed to discharge the onus."

Counsel contended that in coming to the conclusion which he did the Judge a quo had erred since the defendant had made out a prima facie case in evidence and the plaintiff had failed to testify.

There is no substance in this contention. The fact that no oral evidence was given to contradict the evidence given by the defendant does not mean that the court was bound to accept everything that the defendant said. In

any event, the defendant substantially confirmed the statements made by the plaintiff in her replying affidavit, an affidavit which was sworn to only seven days before the hearing in court.

Counsel argued in the alternative that the Court should not have granted a final decree of divorce but should have extended the rule to give the parties a further opportunity of coming together to establish the genuineness or otherwise of the reconciliation. The case of Abramson v Abramson (supra) was relied on by counsel as authority for this course of action, but in that matter Watermeyer, J.A., came to the conclusion that it had not been reasonable for the trial judge to infer from the past conduct and the correspondence between the parties that the offer to restore conjugal rights was not sincere. He held that the proper course was to set aside the order of the trial court and to extend the return day so as to give the parties an oppor= tunity of coming together. The case is thus clearly distinguishable. In the matter now before us no good

reason has been given for disturbing the finding of the Judge a quo and consequently there is no ground for setting aside the order which he made and substituting an order extending the return day. I may add that the return day had already been extended once and there was no application on the final day for a further extension.

The appeal is dismissed with costs.

M.A. DIEMONT

RUMPFF, C.J.)
MULLER, J.A.)
KOTZÉ, J.A.) Concur
HOFMEYR, A.J.A.)

EDMUND WILLIAM O'CARROLL POWER

versus

SHEILA KATHERINE POWER

(born SUMMERS)