CASE NO. I.77/96

THE HIGH COURT OF NAMIBIA

In the matter between:

TULIHONGENI TUYENEKELAO AMADHILA
(Born Shiluwa) **Plaintiff**

and

MATTI AMADHILA **Defendant**

CORAM: MARITZ, A.J.

Heard on: 1996-11-1
Delivered on: 1996-11-8

JUDGMENT

MARITZ. A.J. : Whilst still in exile during 1989, the plaintiff and the defendant married one another at Lubango, Republic of Angola. The marriage was contracted in accordance with the provisions of the SWAPO Family Act, 1977. It is this marriage which the plaintiff is seeking to dissolve.

That Act, approved by the Central Committee of the South West Africa People's Organisation of Namibia, was promulgated by the SWAPO Government in exile on 1 December 1977. It is premised on the fundamental principle of equality of men and women and was conceived to, amongst others, regulate the family relations of the many thousands of Namibians who had left their country to participate in the struggle for independence. It deals, *inter alia,* **with the contraction, institution and dissolution of marriage, the matrimonial property consequences thereof and the legal relationship between parents and children.**

When Namibia became independent on 21 March 1990, the SWAPO Family Act, 1977 (to which I shall hereinafter refer to as the *"Family Act')* **was not amongst those pre-independence laws which were kept in force by Article 140(1) of the Namibian Constitution. It thus became necessary for Parliament to recognise and regulate the status of those marriages and to provide for matters incidental to the dissolution thereof. On 11 December 1990 the Recognition of Certain Marriages Act, 1991 was promulgated. Section 2 thereof provides as follows:**

> *"(1) Subject to the provisions of this section, every marriage which was contracted outside Namibia by a competent authority as contemplated in the Family Act -*
>
> (1) *before 21 March 1990;*
>
> (2) *in accordance with the provisions of the Family Act,*

shall be recognised, from the date it was contracted, as a marriage which has the status in law equal to that of a mamage contracted by a marriage officer as defined in the Marriage Act, 1961 (Act 25 of 1961), as if it had been contracted in accordance with the provisions of that Act.

(2) ....

(3)(a) Notwithstanding the provisions of any law or the common law, the rights and obligations relating to the matrimonial property of the spouses of a marriage recognised by subsection (1) or in the case of the dissolution of such mamage, shall be governed by the provisions of the Family Act.

(b) For the purposes of paragraph (a), any reference in the Family Act to the agency competent for matrimonial and family affairs shall be deemed to be a reference to the High Court of Namibia.

(4) Save as is otherwise provided in this Act, any mamage recognised by subsection (1) shall, from the date of commencement of this Act, for all purposes, be governed by the laws relating to mam'ages in Namibia."

With the exception of the rights and obligations of the spouses in relation to the matrimonial property (both during the subsistence of the marriage and on dissolution thereof), the status of all marriages contracted outside Namibia prior to the date of independence in accordance with the provisions of the Family Act, is in all respects the same as those marriages contracted in terms of the Marriages Act, 1961. It follows that, notwithstanding the wide ranging grounds for dissolution of a marriage provided for in articles 55 to 63 of the Family Act (some of them rather progressive but alien to our common law), the grounds on which one or both partners in such a marital relationship can sue for divorce are the same as those applicable to common law marriages.

The plaintiff is seeking an order for the restitution of conjugal rights against the defendant and, failing compliance therewith, a final decree of divorce and certain ancillary relief relating to custody, control and maintenance of the minor children born of the marriage, division of the joint estate and costs. Her cause of action is founded on the defendant's alleged matrimonial misconduct, which she pleads was unlawful and intended to terminate the marital relationship. She alleges in the pleadings that the defendant failed to maintain her and the minor children, abused alcohol, neglected her and the minor children and absented himself from the common home without furnishing any explanation to her. In doing so, she says, he made it impossible and intolerable for her to continue with the relationship, thereby maliciously deserting her in a constructive manner. The defendant, who has been without legal representation in these proceedings, denies the allegations of matrimonial delinquency and, in particular, denies that he has had any fixed or settled intention of terminating the marriage. He alleges that the plaintiff has left the common home on 24 December 1995 for no apparent reason. His attitude is that the marriage should not be dissolved.

Both the plaintiff and the defendant testified at the hearing. The plaintiff also called her sister, one Shiluwa Amenenge, to corroborate her evidence about the defendant's conduct. In her closing argument, Ms Figueira, counsel for the plaintiff, conceded that the plaintiff had failed to show on a balance of probabilities that the defendant had failed to maintain her and the minor children. That concession was properly and correctly made. The evidence showed that the defendant consistently paid

approximately 50% of his gross monthly income towards the reduction of a mortgage bond registered against the title deed of the common home, maintained premiums on a number of policies and contributed within his means towards other household necessities. The plaintiff, also employed in the Ministry of Defence, earns a net salary more than double that of the defendant. Her complaints that the defendant was not contributing towards her maintenance and that of the children within his means are without substance. She had a similar duty and was required to contribute equally towards the maintenance of the children and their joint

household. I agree with the remarks of Joubert, J made in Jodaiken v Jodaiken, 1978(1) SA 784 (W) at 788H to 789 C:

> *"One of the legal consequences of marriage, whether in or out of community of property, is that the spouses owe each other a reciprocal duty of maintenance according to their means. Voet, 25.3.8; Crouse v Crouse, 1954 (2) SA 642 (0) at p. 643; Plotkin v Western Assurance Co. Ltd. and Another, 1955 (2) SA 385 (W) at pp. 394 - 395; Gildenhuys v Transvaal Hindu Education Council, 1938 W.L.D. 260 at pp. 263 - 264. Another legal consequence of mamage, whether in or out of community of property, and whether stante mathmonio or after dissolution by divorce, is that the duty of maintaining their minor children is common to the parents and must be borne by them according to their means. Voet, 25.3.4, 6, 16; Van Leeuwen, R. H. R., 1.13.7, 1.15.6; Censura Forensis, 1.1.10.1; Shanahan v Shanahan, 28 N.L.R. 15 at pp. 16 - 17; Union Government v Wameke, 1911 AD 657 at pp. 668 - 669; Farrell v Hankey, 1921 T.P.D. 590 at p. 596; Fillis v. Joubert Park Private Hospital (Pty.) Ltd., 1939 T.P.D. 234 at p. 237; Hartman v Krogscheepers, 1950 (4) SA 421 (W) at p. 423D; Ferreira v Minister of Social Welfare, 1958 (1) SA 93 (E) at p. 95E - F; Herfst v Herfst, 1964 (4) SA 127 (W) at p. 130C - D. Furthermore, a duty to maintain a person depends upon the reasonable requirements or needs of the person claiming it and the ability of the party from whom it is claimed to furnish it. Oberholzer v Oberholzer, 1947 (3) SA 294 (O) at p. 297. Another relevant circumstance is the social position of the parties. Shanahan's case, supra at p. 16, and cases already referred to."*

The plaintiff's testimony, however, also painted a sorry picture of alcohol abuse on the part of the defendant and the all too familiar destructive consequences thereof on their relationship. To his credit, I must remark, the defendant never assaulted the plaintiff or the children whilst under the influence of intoxicating liquor, but his frequent drinking bouts led to neglect of his family, his duties as husband and father and ultimately diminished the plaintiff's love, affection and respect for him. The defendant did not seriously contest the allegations of alcohol abuse, the resultant neglect of his family and regular absence from home to indulge in such abuse. In cross-examination and in evidence he endeavoured to diminish the extent thereof. Without detailing the sordid particulars of the evidence in that regard, suffice it to say that after consideration of the evidence as a whole, I am satisfied that the plaintiff proved on a balance of probabilities that the defendant had made himself guilty of such conduct.

The defendant strenuously denied that he conducted himself in the manner complained of with the settled intention of terminating the marital relationship. He recognised that their children would be the innocent victims of their divorce and that

he and the plaintiff will one day stand in judgment before their children for having failed to give them a loving and complete family environment within which to grow up and to

develop. Moreover, he testified, his parents and that of the plaintiff was not favouring a divorce and, after all, life being full of problems there is no reason why the plaintiff and he cannot solve theirs.

The family is recognised in Article 14(3) of our Constitution as the *"natural and fundamental group unit of society and is entitled to protection by society and the State".* **Families are the fabric of a healthy society and should be afforded within legal limits protection by our courts. I endorse the conclusion reached by Van Zyl, J after examination of a number of earlier decisions about the status of marriage when he stated in Ex Parte Inkley and Inkley, 1995(3) SA 528 (C):**

> *"What more needs to be said? The significance of marriage as one of the foundation stones of any civilised community still pertains to this day. It cannot simply be regarded as a consensual contract which can be breached and cancelled as easily as it was concluded. It is true that our legal system is a supple and dynamic one which will adapt to changing circumstances, just as the concept of public policy is not static. The values and attitudes of the community have not, however, changed in regard to the importance of maintaining healthy marriage relationships. It is still, in my view, characterised by a reluctance to see marriages dissolved without proper consideration being given to all the relevant facts and circumstances. And for this to be done, the Judge must be given the opportunity to consider and evaluate the relevant evidence at a hearing which must be commenced by action.....They likewise reflect the concern of our law, from the earliest times, in maintaining the marriage institution as a fundamental part of community life, thereby clothing it with a socio-legal rather than* **a** *purely legal character."* **(at 536F to I).**

It is therefore not surprising that, when dealing with actions for divorce based on the common law ground of constructive malicious desertion, the courts have consistently held that a vital element thereof must always be *"the serious, fixed and settled intention (as opposed to a transitory desire) of the defendant to terminate the marriage, or, at any rate, to terminate the cohabitation of the parties."* **See Benvenuti v Benvenuti, 1972(3) SA 587 (W) at 589F.**

In the absence of utterances by the defendant proclaiming such an intention, the court must ascertain his state of mind from his conduct and interaction with the plaintiff during the subsistence of the marriage. It has, however, been emphasised him of the consequences thereof on their marriage. Although the defendant initially heeded her requests, he soon thereafter again fell into his old ways. More recently, however, he simply ignored her pleas and threads. During the beginning of 1995 the plaintiff left the common home for the first time as a result of the defendant's conduct. She took up residence in Okahandja for a period of four months. During that time the defendant requested her to return to him and solemnly promised to reform. She eventually submitted and returned to him. For a few months it went well, but then the abuse and neglect started again. Matters got progressively worse, until the plaintiff again left the common home on 24 December 1995 and instituted this action.

Can it be said in the circumstances that the defendant did not desire separation and behaved in the manner he did without appreciating the consequences of his abuse and neglect on his marriage? I think not.

Although the plaintiff bears the burden to prove that the defendant's conduct is the cause of the unbearable or intolerable situation which had arisen and that he intended to bring about a termination of the marriage, it must be remembered that, as in all cases where intent is an indispensable element of that which the plaintiff is required to prove, no distinction is made between direct, indirect and legal intent. See: Viljoen v Viljoen, 1968 (3) SA 581 (A) at 588F. The law has been correctly summarised, in my opinion, by Colman, J, when he stated the position in Froneman v Froneman, 1972(4) SA 197 (T) at 198G to H as follows:

> *"The law, as I understand it, is this: No conduct, however reprehensible, will constitute constructive desertion unless the necessary animus is present. The animus may take the form of dolus directus in the sense of a positive intention to put an end to cohabitation; or it may take the form of dolus eventualis in the sense of a knowledge by the defendant that the probable or possible effect of his conduct would be a termination of cohabitation, coupled with a wilful disregard of that possibility or probability. The animus may be proved by direct or indirect evidence of the defendant's state of mind; it may, in a proper case, be inferred from the circumstances, including the nature of the defendant's unlawful conduct."*

Given the defendant's persistent misconduct of the nature disclosed by the evidence notwithstanding the repeated warnings by the plaintiff, her earlier departure from the common home as a result thereof, the numerous undertakings given by the defendant and (what must have been apparent to him) the neglect of on a number of occasions that, in evaluating a defendant's conduct, a court should be careful to apply the presumption that a defendant intends the usual and natural consequences of his or her conduct, without proper regard to the ^particular circumstances of the case and the character of the parties. See Collins v Collins, 1939 W.LD. 48 at 53, 54; Feldman v Feldman, 1949 (3) SA 493 (A.) at 504; Belfort v Belfort, 1961 (1) SA 257 (A) at 259F; Holland v Holland, 1975(3) SA 553 (A) at 561 A. This was also pointed out by Colman, J in Benvenuti's case, supra at •590G to H:

> *'The defendant's state of mind, according to such authorities as Belfort v Belfort, 1961 (1) SA 257 (A.D.), can be inferred from his utterances, his conduct and other relevant circumstances. The maxim that 'a man is presumed to intend the natural and probable consequences of his acts', although relevant, is not always a safe guide; nor is the fact that the defendant had been warned that the plaintiff would leave him or her if certain improper conduct was persisted in. It is pointed out in the authorities that even when there has been such a warning, the defendant's persistence in the conduct complained of may not be coupled with an intention to put an end to cohabitation. What the learned Judges who said that probably had in mind, among other things, was that there are, unhappily, husbands who persistently ill-treat their wives although they desire to continue cohabitation; that there are spouses who disregard warnings and threats of separation, not because they desire separation, but because they believe, or hope, that the threats will not be carried into effect, or because they are impulsive people who lose their self-control and act without appreciating, or being mindful of, the possible or probable consequences upon the marriage of their conduct."*

Had the defendant only occasionally indulged in *"insobriety of a not very serious kind'* **notwithstanding the plaintiff's protests and threats to leave him should he continue with such conduct, that in itself, no matter how reprehensible it may have been to the plaintiff, would not have been enough for the court to find that he had manifested such intention. Compare Collins v Collins,** *supra* **at 53.**

The presumption is however premised on logic and, provided that it is applied with the necessary circumspection, an important tool to ascertain the defendant's state of mind.

I accept the plaintiffs evidence that the defendant abused intoxicating liquor with such frequency and to such an extent that cohabitation with him became intolerable for her. She frequently pleaded with him to refrain from overindulging and warned his family and deterioration of the marital relationship, I am satisfied that he had, at the very least, the requisite legal intent to terminate the marriage. In arriving at this conclusion, I am mindful of the defendant's expressed wish to continue with the marriage. Regard being had to his continuous misconduct, it seems to me on the evidence that there is a marked difference between his intentions and his desires. The two concepts, as Wessels, J.A. pointed out in Viljoen v Viljoen, supra at 588G to 589A, should not be confused and, when it is clear on the evidence that the defendant intended to terminate the marital relationship, his wishes becomes of lesser importance.

I am fortified in this conclusion by the evidence of the defendant's persistence in the abuse of liquor whilst this case was pending. He would regularly arrive in the early morning hours at the plaintiff's present place of residence in an intoxicated state, knock on the door and windows for hours on end and otherwise disturb the occupants of the house. On one occasion he even used an axe to bang on the trellis and, although I accept that he did not intend to use it to gain violent entry into the house, the mere wielding thereof must have inspired fear in the minds of the plaintiff and the occupants.

The very nature of the relief prayed for by the plaintiff contemplates an opportunity to be afforded to the defendant to restore conjugal rights. Being unrepresented in these proceedings, he may be well advised to remember that he will have to show on a that balance of probabilities on the return day of the order I intend to make that he *bona fide,* **with a serious and genuine intent, offered to restore conjugal rights to the plaintiff — should he wish to continue with the marriage.**

In the premises, the order I make is as follows:

The defendant is ordered to restore conjugal rights to the plaintiff on or before 20 December 1996, and failing to do so, to show cause on 17 January 1997 why -

(3) **a final order of divorce should not be granted;**

(4) **custody and control of the three minor children born of the marriage should not be awarded to the plaintiff, subject to the defendant's**

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rights to reasonable access to them as detailed in annexure "A" hereto;

(5) **the defendant should not pay maintenance in respect of the minor children in the amount of N$100.00 per month per child;**

(6) **the joint estate of the parties should not be divided in terms of articles 53 and 54 of the SWAPO Family Act, 1977;**

(7) **the defendant should not pay the plaintiff's costs of suit.**

MARITZ, A.J.