IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3398/2003

In the matter between:

LEE-ANN VAN NIEKERK Plaintiff

and

ESTELLE BARNARD Defendant

CORAM: KRUGER J

HEARD ON: 12, 13, 15 OCTOBER 2004

JUDGMENT: KRUGER J

DELIVERED ON: 22 OCTOBER 2004

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[1] Plaintiff instituted action against the defendant for alienation of affection and adultery. The defendant denies the alienation but as to the adultery, pleads as follows in paragraph 3 of her plea:

"3.1 Verweerderes erken dat sy gemeenskap gehad het met die gemelde Jacobus Johannes Van Niekerk tydens die bestaan van die huwelik tussen Eiseres en gemelde Van Niekerk terwyl sy bewus daarvan was dat Eiseres en gemelde Van Niekerk getroud was, maar ontken sy dat sy sedert 2000 en te die plekke soos beweer deur Eiseres owerspel gepleeg het met gemelde Jacobus Johannes van Niekerk;

3.2 Verweerderes pleit dat alhoewel sy kennis gdra het van die huweliksband tussen Eiseres en gemelde Jacobus Johannes van Niekerk, sy nie *animus iniuriandi* gehad het nie en ontken sy dat haar optrede onregmatig was omrede sy te alle materiële tye onder die redelike en *bona fide* geloof verkeer het dat Eiseres en gemelde Jacobus Johannes van Niekerk nie meer as getroude eglede saamgewoon het nie, dat hulle van tafel en bed geskei was en dat hulle nie meer huweliksregte gedeel het nie;

3.3 In die vooropstelling, ontken Verweerderes dat gemelde gemeenskap owerspel daargestel het op grond waarvan en/of onder omstandighede wat 'n skuldoorsaak vir

skadevergoeding daarstel."

[2] The plaintiff was married to John van Niekerk (John) on 30 July 1988. They had 4 children – A. aged 15, C. 12 and a half, S. 9, A. 4 and a half (born on [day/month] 2000). The plaintiff and John were divorced in this Court on 11 March 2003. The summons for divorce was issued during or about March 2002.

[3] Plaintiff testified that they resided in Durban when they were married. They stayed there for about three years. Then they moved to Marquard. John was a qualified chartered accountant. He got a job there with Sparta Beef where he was the financial manager. This was about in April 1992. The eldest child was then two and a half years old. They are English speaking. There was no English school in Ficksburg and they moved to Ficksburg after three years during the year before which the eldest child had to go to school in order to put this child through pre-school. They stayed there for five years until about the year 1997. Then she moved to

Klerksdorp. That was because the Klerksdorp gymnastic club was a very good one and the eldest daughter was very good in gymnastics and as a matter of fact in the year 2000 was the South African champion in her type of gymnastics.

[4] Plaintiff testified that she and John intended to emigrate to Australia. At first she was not keen, but John was set upon it. The first time they went was during June 1997. All of them went and the three children they had at the time, for three weeks. They looked at opportunities to emigrate.

[5] In October 1998 they went for the second time. They all again went. That was a short holiday. They looked for jobs and three of the visas were then stamped.

[6] In January 2000 they went for their third visit, for one week, to look for a position for John.

[7] Their fourth visit was in May – June 2000 which lasted six days. A. had by then been born. At that stage they left the two elder children and took the two little ones because they had to get the visa of the youngest stamped.

[8] She testified that during the period 1998 to 2000 the marriage relationship was fine. They were planning to go overseas at the end of that period. She testified that in 2001 she was living in Klerksdorp with the children. Their daughter won the SA gymnastic championship and their son, C., was number five in SA tennis for his age group. She said that John was happy with their achievements.

[9] John resigned at Sparta Beef during about August 2001. At that stage he wanted to go three months before her and she then planned to get a container for their furniture. There was at that stage she said no sign of any breakdown in their marriage and all of them were exited to go to Australia. Then, about two weeks later, he retracted his resignation and said to her that it was not for discussion, we are not going anymore. At that stage he was living between Welkom and Marquard and commuting to the house in Klerksdorp. She was not happy to live in Klerksdorp and she felt that they needed to live together as a family again. She says that John felt that she should move to Bloemfontein and she and

the children then moved to Bloemfontein at the end of 2001. He said to her that he did not want her to live in Welkom. She said that she could just as well live in Welkom because that would have been as far from him but that was not acceptable to John. She said she looked at houses and then John bought her a house in Heuwelsig, Bloemfontein. Then she saw John every weekend and when he came home they slept together Friday, Saturday and Sunday. There were no problems in the marriage at that stage.

[10] On 14 February 2002 it was Valentine's Day. They went out. She sent him a present and they had a happy evening and slept together.

[11] About two weeks later, one Saturday afternoon, towards the end of February 2002 John was at her house in Bloemfontein. He was in his son's bedroom and said to her that he wanted a divorce. Up to that point his behaviour had been fine and there had been no lack of affection and no arguments. This was a bombshell to her and she asked him

why, but he denied an affair. Later on she got a summons after he had still been coming back home and she said that they even continued with sexual relations. She had actually asked him when she was going to get her summons. They still slept together in March. She said she only got the summons two months later. John left towards the end of February and she said to him if that is what you want, you must pack up and go and he then packed his things and did not come back to the home.

[12] The plaintiff testified that she had known the defendant for about 12 to 13 years for as long as she and John worked together at Sparta Beef. The defendant's father is the owner of Sparta and she worked first as an attorney in Clocolan and thereafter since the beginning of 2001 as a legal adviser and person responsible for farmers and human resources at Sparta. She worked together with John. The plaintiff says that she had a feeling that the defendant was involved in the change of mind of John not to go to Australia. The defendant was still married in February 2001 and she had

three children and the defendant and her husband were also divorced during that year. Their divorce went through during August 2002. Plaintiff testified that the defendant moved in with John during about August 2002 and they are still living together. (The defendant testified that she and John intend getting married during March 2005.)

[13] The plaintiff was asked in chief about her feelings for John. She responded: "I still love him. He is the father of my children. We have memories." She says that if he had admitted to the affair she would have taken him back. In summary she said that their marriage was fine until February 2002. They had their ups and downs, but they had children and she said "my marriage was fine". When asked how she feels now, she said: "I am finished. I booked myself and my children into therapy." It is now 18 months further and she lives in Durban. She gets maintenance of R12 550,00 per month. She never worked during the marriage. She went to start work about two months ago and has still not started earning any money. When asked about her dignity, she

said: “Your friends are married. Children have divorced parents. Children carry a stigma.”

[14] During cross examination she was asked about the summons approximately a month after John had told her of the divorce, she phoned her attorney and he said there was no summons and she asked how long it takes. It was put to her that she was eager to get the summons and she said she is a serious person. She was devastated and a whole month had gone by without anything happening. She said they were sitting on air and if this was where they were going she wanted to get it done. She said that John had left at the end of February. She told him to go and take his clothes and move to Marquard. After that he came to visit the children during weekends. She was devastated but they did not talk about the matter. She says they still had intercourse because he still loved her. He wanted the divorce merely because of the defendant, was her feeling. The defendant was the boss’s daughter.

[15] When asked about adultery, she admitted that the defendant had cheated on her before. The first time was when the youngest child was about eighteen months old and he came home with love bites. She was hurt. She said John is a womaniser. She said he puts his hands up women's skirts at functions and squeezes their boobs right in front of where she is. He carried on with the ladies, but she says he always came home to her. It was put to her that in the particulars of claim of the divorce she had said the plaintiff committed adultery on various occasions. She said that concerned her, but that was something which she accepted throughout the marriage. She said: "I took a lot of nonsense from him. I put up with a lot from him". The anger in her came up. "It was part and parcel of our marriage. He had been doing it for such a long time. I put up with it, because I loved him."

[16] She admitted that John drank a lot. He enjoyed getting himself hammered, as she put it. It was put to her that at Marquard she pulled him out of the pub and made a scene and she denied that. She said drinking was stress relief for

him. That is the type of person he is and she accepted him like that. She also testified of an office function in 2001 where she said he was “finished”. He was speaking to defendant most of the evening. He tried to sit on a friend’s lap and he said to the plaintiff that he did not deserve her; she must go and find someone else. He disappeared at some stage. After that he went to another place and two people had to carry him out, but she could not remember that she had said that she had felt embarrassed about it.

[17] As to assault she testified that he had assaulted her in the kitchen once. He was sitting on the couch and was looking at her and for no reason he snapped, he grabbed her and pushed her back. She was at that stage seven and a half to eight months pregnant. He had hit her before that. He had a bad temper. The first time, when they were still in Durban, it happened twice. He just snapped. He is an affectionate person. They went on holiday together, but these assaults did happen. I interpose here to give John’s version of the assault. He said that on the particular day he and his friends

were sitting together having tequilas at the dining room table and his friends were spitting lemon pips onto the table. This upset the plaintiff enormously and she chased his friends out of the flat. He snapped and moved towards her in an aggressive fashion. That is all that he said, happened. This version, it will be noted, differs markedly from that given by the plaintiff and to my mind the version given by John, has more of a ring of truth than that of the plaintiff.

[18] It was put to her that she had said in the divorce particulars of claim that the defendant lied to her. She admitted that was so and John also admitted that. She said it was just towards the end. When pressed further upon this, she said that John is a type of person who will say what he needs to say. He is a person who does not mind lying. He is a lying person. He has to cover himself. She said on the other hand she was a Christian and believed that she had to speak the truth and she did. I shall revert to the veracity of her evidence later on.

[19] The plaintiff was asked whether the defendant mentally abused her and she said that he played mind games with her. He was not a confrontational person, but he would play mind games with her.

[20] It was then put to her that this was not a happy marriage and she said yes it was not a perfect marriage, but it would have been in order if the defendant had not come onto the scene. She felt that the defendant was the reason for the breakdown, but could take the matter no further than that.

[21] The plaintiff was asked whether she had brought the children with her from Durban for this court case. She admitted that she had brought the children with her. She said she had told the children the truth; namely that if it was not for the defendant they would still have their father. Also one day they had been in church when the minister had given a sermon on adultery and the one child had then said to her: “Mommy isn’t this what Daddy is doing?” It was put to her that she told John that she was going to bring the children to

Court to see the woman and John and to see what they have done to them. She admitted that she had done that and said the children were indeed there.

[22] In summary she was again asked about their life in Ficksburg. She said he had come home every evening when he was working. (John said that he came back two or three nights per week. He had meetings on other days. There was also accommodation for him in Marquard.) As to Klerksdorp, John testified that he did not even know where the house was. She said she had to give him directions how to get there, but they had chosen the house together. She was also asked whether at the end of 1999 beginning 2000 John did not talk to her about the pink house in Marquard that he wanted to buy. She said he had indeed done so but at that stage they were intent on going to Australia and she felt it would be a waste of money to buy the house. The point which John made and which was made on behalf of the defendant was that she was not interested in getting the family together again. She was just interested in her own

affairs.

[23] Asked about the move to Bloemfontein, she said that John had said to her he did not want her in Welkom. She had to go to Bloemfontein. His version was a different one, that she actually chose to go to Bloemfontein. Mr Williams, on behalf of the plaintiff, tried to make the point that in the rule 43 application of their divorce John had said that it was his decision to go to Bloemfontein whereas he now denied it. The context of that document however shows that it is more relevant to the schooling at the time and Welkom does not come into the picture as to the weighing up of the interests relating to Welkom and Bloemfontein which was relevant for present purposes of the present hearing. Another important point relates to whether the plaintiff and John were living together at the time she was living in Bloemfontein during the last part of the marriage. She said they were sleeping together Friday, Saturday and Sunday and he said he was sleeping in his son's bedroom. In this regard the evidence of both of them that the conversation relating to the divorce took place in the son's room indicates to me that he was sleeping in his son's room. He testified, which was not contested, that he was lying on the bed in his son's room, where he slept when he was at home, on the Saturday afternoon, when she came in and the conversation about the divorce started. That indicates to me that he was not living in the same room with her and that his evidence is to be preferred above her evidence. This is in direct contradiction to the portrait she tried to paint of a loving caring marriage.

[24] Plaintiff was asked about the question of prostitutes. She said that yes when they cancelled the Australian trip John had said to her that he had been sleeping with prostitutes. That was when they were on their way to Bloemfontein. She says: "I was quite shocked. I did not believe him." Asked

about why she consulted a private detective she said she thought there might be some truth in it. She said she had told the private detective to watch John to see if he is still seeing this type of prostitute. This I find not the action of a person who is concerned about the marriage and wants to save the marriage. On the contrary that is rather symptomatic of a very troubled marriage.

[25] A further troubling aspect of the plaintiff's evidence relates to the question about the abortion of A.. Again this is evidence she did not give in chief but she readily conceded that there was talk about an abortion of A. at the time she was to be born. She said that the defendant did not want A. and wanted her to have an abortion. His version was that because of the age of the plaintiff at that stage there was a risk of the child being mentally or otherwise defective and therefore they should rather have an abortion. She did have the tests and did have the child. Again these are not the actions of parties who have a caring and loving relationship.

[26] It was put to the plaintiff in cross examination that she told people and specially people in Marquard that John was having an adulterous affair with the defendant, that she spread the news. This she readily admitted. She was not ashamed of it. Again it appears that she did not phone her friends to get sympathy. It is rather to me an indication of a person who tries to harm someone else and merely wishes to obtain some satisfaction of telling stories of people she does not really care about. At that stage it appears clear to me that it was obvious that her marriage was over. The divorce proceedings were pending and she was not really concerned about the divorce. She simply wanted to spread the rumours further.

[27] A further aspect which emerged in cross examination was that at some stage during the divorce proceedings, she saw John in a bar with his arm around another woman who was not the defendant. Again this must have indicated to the plaintiff that the defendant was certainly not such an important person in John's life to the extent that she had been responsible for the breakdown of the marriage.

[28] In re-examination she said that she suspected an affair and she said the story of the prostitutes might have been a smokescreen. This I simply do not understand. Why she

would have thought it was a smokescreen and what type of smokescreen it was, I do not understand and why she appointed a private investigator to investigate it to find out whether it was a so called smokescreen, I don't follow what she intended to do. If she wanted to save her marriage, surely she should have spoken to him about it and considered counselling. That she did not do. It is quite clear to me that their marriage was not a stable relationship.

[29] In view of the assessment of the evidence which I have given above it is clear that where there is a conflict between the evidence of the plaintiff on the one hand and that of the defendant and John on the other. I prefer the evidence of the latter.

[30] John testified that in about July 1991 he worked in Marquard and did not go home every night. When the plaintiff went to Klerksdorp the relationship had started to deteriorate. It was a blessing in disguise that he did not have to go home every night. The plaintiff had secretly sent the child to the

Klerksdorp gymnastic club and thereby had caused trouble at the gymnasium in Marquard. An apology was demanded for the plaintiff fighting with the coach and the child was then suspended. Plaintiff refused to give the apology and the child remained suspended. When asked why he decided not to go to Australia, he said there were several reasons but the major one was that he felt he was not getting on with his wife at the time. The additional stress of living with her under one roof he felt would be impossible for him to live with. He said he realised that she had been living here with three servants. That would not be possible in Australia and also when they had gone to Australia, the two of them, he had lived with her for five days. That was as he put it, “hell” and he did not think that would be possible. The other reason was that he would have to take a significant decrease in earnings. After he had come back he looked at the available jobs and saw what he could earn and realised that with the lower income they would have to lower their standard of living which would make life very difficult for him. As to Welkom he says the plaintiff flatly refused to move to Welkom at the time that she

moved to Bloemfontein. He said in June 2001 there was no real relationship and no sexual relationship between him and the defendant. He opened up to her and told her about the type of life he had been leading. He had said there was nothing between him and the plaintiff. Another reason for his leaving the plaintiff was that he felt they were living a lie. He was making as if he was a married man, but yet he was living as a bachelor. This evidence was confirmed by the defendant who said that she and other people in Marquard saw him as a bachelor. He was always drinking and socialising with the boys and she very seldom saw him with his wife and people did not experience him as a married person.

[31] He also testified about his dealings with prostitutes and said that the plaintiff had accused him of being the father of one child. It subsequently appeared that this might have been the child of the defendant they were referring to and he had said well go and look at the child and you will see it is not my child, but that evidence is not clear at all.

[32] In cross examination mr Williams tried to stress the fact that all of a sudden in August 2002 and after the divorce proceedings were pending, the relationship between John and the defendant all of a sudden started up. He said it was a type of whirlwind romance. John was clear that this was not the case. He said they had a type of relationship, but certainly not a sexual relationship and at that stage he simply went to live with her. He said in 2001 he had approached the defendant, but she did not respond to his approaches and they had left it at that. They were working together at the time. She was still married. Nothing happened. Then something happened later on. Looking back over events one has to be careful to distinguish between causality and events which follow upon each other. The fact that after the plaintiff and John had separated he then embarked on a relationship with the defendant, does not mean that that had existed previously or had caused the break-up. Even if it had, as I shall presently point out, that still does not give rise to a cause of action for alienation of affection.

[33] During cross examination John listed the grounds for his divorce:

(i) Already during 2001 there was no longer a relationship. He was living apart from her.

(ii) The general manager had acted contrary to his contract and was suspended. He had been a good friend of John and a mentor and this incident had a sobering effect on John.

(iii) There was a strike and he had to deal with that at the factory.

(iv) The defendant's brother had a brain tumour.

(v) Early in June 2002 his sister was diagnosed with a brain tumour. John then testified when these things happen you sit and start thinking of your life. He said he hates hypocrites. He was living the life of a hypocrite. He was married yet he was not living a

married life.

(vi) Peter Manning, a friend of his, went out with John and they were discussing the defendant who had actually had the courage of moving out of her house. They discussed the issue and they said that the defendant had the guts to go with her convictions. John says that was a life changing event. After that he had the courage to tell the plaintiff that he would be moving out.

(vii) Another important incident concerned a person by the name of Rene Younger, the café owner, who said to him: "John what are you doing?" She said her biggest regret was that she had not left her husband, Gregory, twenty years ago. She did it for the children, but they had told her it was no good, she should have moved out earlier.

[34] After all these events and in particular the last couple of events, namely the discussion with Peter Manning and that with Rene Younger, John had decided to take the step of

getting a divorce. Asked further why he did not get divorced in 1995 he said he believed it was wrong to do so. His mother had said that one must live in the bed that you make. Her father had told her one does not get a divorce because of the stigma of the children. In 1995 his sights were set elsewhere. When he was asked what happened in 2002 he said it was a combination of events. If one looks back over this marriage and the events described by John and especially the last few events of his discussion with the other people about the divorce and his seeing that the defendant had the courage of her conviction, then one has to understand that it was indeed a combination of events which then led him to decide. There is simply no evidence that the defendant enticed him away. John testified that the plaintiff had had various other relationships subsequent to the divorce. When he was asked whether the plaintiff was distressed, he said he did not think so. She propagated the story. When asked why shy did not move to Welkom, John said that she had made derogatory comment and said that Welkom was a town of Dutchmen and she did not wish to

live there. That evidence was never given earlier and there was no attempt to contradict it. When it was put to John that she wanted to know the reason for the divorce he said that he tried to tell her but she never listens. When told about the house that he purchased, he said it was the only way he could get her to move and he said she would do nothing unless there was some or other financial benefit to her. It is important to note that these derogatory comments were not made during his evidence in chief, but were made as responses to questions put to John in cross examination. He did not try to run down the plaintiff, but when pressed he gave evidence as to what he thought of her. During re-examination John reiterated that the defendant never even went so far as to say to him that he must make up his mind. He said there was no influence from her. Again this is uncontested evidence.

[35] The defendant testified. Her testimony largely confirms the evidence of John. She said he lived like a bachelor and she said in September already she was very unhappy in her own

marriage, but she did not discuss that with John and she said she did not experience John as a married person because he lived the life of a bachelor. She was asked whether John had played any role in her decision to get divorced and then she said definitely not. When asked whether she had played any role in his divorce, she said not that she knows about. She said that because she did not know his reasoning. She was of the impression that there wasn't a marriage relationship between him and plaintiff. When it was put to her that the plaintiff was humiliated, she said she did not see that there was a problem. Her impression was that their marriage was not a good one. Her testimony was that when she first decided to have intercourse with John it did not have a particular influence on her decision that plaintiff and John were not living together. She says even if that had not been the case she was going though a divorce at the time and the fact that she and defendant were not working together anymore at that stage also influenced her. She said she was vulnerable at the time and would probably have done what she did in any event. As to morality she said when she

decided that her marriage could no longer go ahead, she was amenable to another relationship. As to the influence she might have had on John she said she did not know whether she had perhaps indirectly influenced him because of the fact of his evidence which he gave namely that he had seen that she had had the courage of her convictions. She was asked about her future with John. She said everyone has baggage. She accepts his baggage. He is an honest person. She is willing to live with that.

[36] I found the defendant a satisfactory witness. She is a woman in a managerial position in a workplace still dominated by men and to that extent sensitive to her position, but certainly not mendacious and she did not try to entice John to leave the plaintiff.

[37] In summary on the plaintiff's evidence I find her a poor witness. She made a bad impression in the witness box. She interrupted counsel often. Her answers were contradictory and the picture which emerged of the marriage

during cross examination, was a vastly different one from the happy marriage with one or two ups and downs she tried to portray in her evidence in chief. As to the bland allegations in the particulars of claim of adultery, assaults, alcohol abuse, womanising, prostitutes, nothing of that was said in her evidence in chief and all that had to be drawn out. During cross examination I find her a wholly unsatisfactory witness.

[38] Both the defendant and John gave carefully considered answers and I do not find their evidence improbable or untruthful in any respect. The most serious allegation made in this regard by mr Williams, is the fact that John in his rule 43 affidavit said about the move to Bloemfontein that it was his decision whereas the evidence was now that it was actually the plaintiff's decision. Read in context what was addressed in the rule 43 affidavit was not so much who decided as to the question of what type of schooling it was. The other criticism levelled against John during his evidence, was that in the plea to the counter claim he had denied the

adultery whereas in his evidence he admitted it. Again that plea is a normal type of pleading that the grounds for divorce are denied to be those alleged by the defendant and repeated to be those of the plaintiff. I do not believe that any criticism can be levelled against John for that reason either.

[39] There was no evidence at all that the defendant had enticed John to leave. There was a troubled marriage and there is no evidence at all, even by the plaintiff that the defendant wanted him to leave the plaintiff and come and live with the defendant. It is simply something which happened when the divorce proceedings were pending and there is no evidence to support any enticement by defendant. The defendant denied that she had asked him to leave and John also said that nothing of that happened. On the evidence before me I can certainly not find that there was any enticement at all. John is clearly an intelligent person. He carefully considered his answers. He freely admitted his relationships and the deficiencies in his character as to womanising. He admitted that he did lie as to his whereabouts to the plaintiff and said

that he did not lie about other things. In chief he did not attack the character of the plaintiff but in cross examination he did say some unflattering things about her, for instance that money was very important to her and that she was not concerned about him. He also said that she had had several relationships since the divorce which evidence was not disputed and this evidence gives the lie to her evidence of this loving husband which she would take back tomorrow.

ALIENATION OF AFFECTION

[40] Alienation of affection is a difficult cause of action to prove. This is clearly illustrated by the case of **GOWER v KILLIAN 1977 (2) SA 393 (ECD).** The facts in that case were that the defendant had admitted that he was responsible for the break-up of the marriage and had offered to make a certain payment. The Court found that there was no affirmative evidence of enticement by the defendant and also found that the fact that the wife left after being in defendant's company, is not enough:

> gIt must be shown that the defendant coaxed the plaintiff's wife away from him, that he talked her over and persuaded her to leave him."
>
> (At 395 E – F)

In that case the defendant was found to be an unsatisfactory witness. In this case the converse applies. I found the defendant and John to be satisfactory witnesses. There is no evidence of coaxing away. There is no evidence of any causality and there is no basis upon which the claim for enticement can succeed. The claim for enticement must therefore be dismissed. The fact that events happened in time after each other, does not mean that there was a causal connection. In life events follow upon each other and looking back upon them, one seems to be able to discern events which led to each other. This one cannot always do and one has to look at what happened at the time. At the time there was no enticement and no intention to entice.

ADULTERY

[41] John and defendant both testified that they slept together for

the first time towards the end of February 2002, and on several occasions thereafter. The first time was at a date after John had told plaintiff that he wanted a divorce. As far as the defendant and John were concerned, the marriage relationship between plaintiff and John was over at that stage.

[42] In **MELIUS DE VILLIERS: THE ROMAN AND ROMAN DUTCH LAW OF INJURIES (1899 at p. 55)** the following is stated:

> "gThus, a person who commits adultery with a married woman inflicts an injury upon the husband, the dishonour of the wife bringing with it also, more or less according to circumstances, the dishonour of the husband."

It appears that the mere fact of the intercourse with a married person, without looking too closely at the intention of the defendant means that adultery did take place. This is clearly put by Van den Heever J.A. in **FOULDS v SMITH 1950 (1) SA 1 (A) at 11:**

> "gTrouens enige aanmatigende inbreuk op die regte van 'n ander is verkleinerend, selfs indien die dader 'n ander oogmerk vervolg het."

He says that a person who opens a cheese factory does not intent to create a bad smell in the area, but the fact of the opening of the cheese factory has such result:

> "gIndien ek op my perseel kaas maak is my direkte oogmerk om kaas te besit; maar indien en daarby so stank veroorsaak dat jy dit in jou huis eenvoudig nie kan uithou nie, dan stel my aanmatigende en eiegeregtige gedrag my bloot aan die *actio iniuriarum*."
>
> (At 11).

[43] When committing adultery the intention is not necessarily to inflict damage on the other spouse. Van den Heever J.A. says that is an inevitable result. Several writers have commented on the question of intention and I intend to deal with this aspect briefly. In his dissertation **PERSOONLIKHEIDSKRENKING EN SKULD IN DIE SUID-**

AFRIKAANSE PRIVAATREG – 'N REGSHISTORIESE EN REGSVERGELYKENDE ONDERSOEK by P.C. Pauw 1976 Leiden the learned author says that in the initial cases that Court did not deal specifically with *animus iniuriandi*. Pauw says the following at page 192:

> 'gDie skuldvereiste wat hier gestel word, is nog nie deur die howe ontleed nie. Dit wil nie sê dat daar noodwendig opset in een of ander vorm aanwesig moet wees nie. Dit is bes moontlik dat *dolus eventualis* aanwesig kan wees, maar dit word nie vereis vir aanspreeklikheid nie. Indien dit die geval was, sou dwaling 'n verweer gewees het, byvoorbeeld dwaling of die man van die owerspelige vrou toegestem het of dat hy nie sou omgee nie, soos in die geval waar die man en vrou van tafel en bed geskei is. In so 'n geval doen die feit dat die partye nie saamwoon nie, nie afbreuk aan die eis van die onskuldige party nie. Soos daar reeds vroeër opgemerk is: seksuele delikte lewer probleme op omdat die skuld en moraal daar nie suiwer te skei is nie.
>
> In hierdie geval sou mens 'n *culpa*-konstruksie op die

> handeling kon plaas: as redelike man moes die dader besef het dat hy, deur owerspel te pleeg, die *dignitas* van die man/vrou van sy mede-owerspelige kan krenk. Hierdie *culpa* kom egter baie na aan 'n fiksie, aangesien daar geen verwere hierteen bestaan nie. Aanspreeklikheid sonder werklike skuld van die dader is dus nie uitgesluit nie.
>
> Hierdie is dus 'n tipiese geval van 'n *iniuria* wat in die Suid-Afrikaanse reg 'n nuwe ontwikkeling ondergaan het, maar nie meer inpas in die *actio iniuriarum*, waarvoor *dolus* 'n vereiste is nie."

See also the discussion of **Amerasinghe, <u>ADULTERY AS AN INJURIA IN SOUTH AFRICAN AND CEYLON LAW in ACTA JURIDICA</u> 1968** p. 111 and specifically at p. 130 footnote 135 where the author says:

> gOnce the illegality is established there does not seem not to be any point in discussing anything else. The question of *dolus* is relevant to determine whether the *factum* was delictual in nature. Further, an evil intention must be proved if 'evil

intention' means 'improper motive'."

[44] In his article "Owerspel as onregmatige daad tussen eggenotes" **P.J.J. Olivier in the HULDIGINGSBUNDEL PROFESSOR DANIëL PONT 1970 at p. 272** says that the action against a third person for adultery is based on delict and there is an *iniuria.*

[45] In his dissertation **DIE PRIVAATREGTELIKE BESKERMING VAN DIE HUWELIK, J.C. Sonnekus Leiden 1976** deals specifically with the requirement of intention at pages 253 and following. He says at page 253 to 254:

> "gTen einde met die *actio iniuriarum* te slaag, word volgens die heersende Suid-Afrikaanse reg opset by die dader vereis."

At page 254 he refers to **FOULDS v SMITH** (which I have already referred to) where Judge van den Heever simply says that the intention is presumed. There does not even need to be an allegation of intent. At page 255 the learned

author says:

> gOpset om die daad te pleeg is nie gelyk te stel aan die opset om die persoonlikheidsregte van die eiser te krenk nie. Regter van den Heever laat na om hierdie onderskeid te tref."

Then he quotes from page 11 of the Foulds-case:

> gDie blote feit dat beweer is 'met mekaar egbreuk gepleeg' is voldoende om dit duidelik te stel dat beide partye opset gehad het."

Sonnekus continues to say:

> gUit Amerasinghe se behandeling van die opsetvereiste blyk dieselfde verwarring tussen die opsetvereiste as skuldelement en die vereiste wilskeuse by die handelingselement. 'n Verweer van onkunde omtrent die getroude status van die vrou, raak wel die opset om owerspel te bedryf, dog sê nog niks omtrent die opset om die persoonlikheidsregte van die eiser te krenk nie. Nie sondermeer beteken die verwerping van die verweer dat opset wel aanwesig was nie."

Sonnekus goes further and says that:

> gIndien die Suid-Afrikaanse reg reeds so vêr gevorder het dat opset altyd vermoed word in hierdie gevalle waar met die *actio iniuriarum* geëis word, is dit reeds na aan 'n onweerlegbare vermoede? Die navolging wat die uitspraak geniet het, dui beslis daarop. 'n Onweerlegbare vermoede en 'n fiksie is dikwels moeilik te onderskei. Fiksies word aangewend om die substansiële vereistes van die reg te verander. Dieselfde funksie word nie aan onweerlegbare vermoedens toegeskryf nie. In hierdie geval van die eis om troosgeld na owerspel wil dit tog voorkom of dit dieselfde effek het. In *Pearce v Kevan* gaan r Selke so ver om te beweer dat die vordering baseer is op '…intentional as distinct from negligent, conduct on the part of the defendant…'
>
> Die voortgesette toepassing van hierdie vordering met negering van die werklike opsetsvereiste, dui m i daarop dat die vordering om troosgeld inderdaad daarsonder moontlik is ondanks die verklaarde vereistes van die *actio iniuriarum* in die Suid-Afrikaanse reg."

[46] This survey of the Law can be concluded with reference to **NEETHLING'S LAW OF PERSONALITY, by Neethling Potgieter and Visser** where the learned authors say at page 231:

> gIt goes without saying that in order to succeed with the *actio iniuriarum,* all the requirements must be met. In the first instance, therefore, it must be clear that the personality of the innocent spouse has indeed been infringed. This may be a problem where the spouses are living apart from one another (whether in terms of an order for judicial separation of otherwise). It should be pointed out in advance that 'the fact that a separation exists does not in itself, according to our law, disentitle the husband from claiming damages'. The claim for satisfaction is forfeited only if the adultery caused neither loss of *consortium* nor *contumelia.* This was the case in *Michael v Michael and McMahon.* Here the plaintiff neglected and deserted his wife. While she and the children were living apart from the plaintiff, she committed adultery with the defendant. The court found that under the circumstances there was neither loss of *consortium* nor *contumelia.* With regard to

the latter Mason J stated:

> I do not think that it necessarily follows because a man has abandoned his wife that he cannot recover for any *contumelia* inflicted on him, but a strong case is required. Here the evidence is that the adultery was not felt by the plaintiff as an injury or as an insult to his honour, and that this action was not brought until the plaintiff found that there was some chance of the co-defendant being able to pay damages."

[47] One is here dealing with a claim for a loss suffered by the plaintiff. Even if the delict was committed because the intention lies only in the fact of committing the act with a married person, the question remains whether any *contumelia* or loss of *consortium* was suffered by the plaintiff. That is the central issue in this case and it has been necessary to deal with the evidence to the extent that I have and to deal with the law to the extent that I have in order to answer this question. There appears to be an almost irrebuttable presumption of intent from the act. However even if there is deemed to have been intent to injure it does

not mean that the plaintiff was in fact injured. If not on the merits, it is relevant to quantum. The plaintiff will only be compensated if the Court is satisfied that she did actually suffer damage, in either the loss of *consortium* or *contumelia.*

CONSORTIUM

[48] I deal firstly with the issue of *consortium.* In this regard mr Williams, for the plaintiff, referred me to the case of **GROBBELAAR v HAVENGA 1964 (3) SA 522 (N).** With reference to English authorities the Court there says at 525 E that it means the companionship, love, affection, comfort, mutual services, sexual intercourse, which all belong to the married state. It appears to be an abstraction. He also refers (at 526 C) to the situation that it is the duty of spouses to consort with each other and the third person who intentionally causes the wife or the one spouse to violate this duty, commits a wrong against the other spouse. In **PETER v MINISTER OF LAW AND ORDER 1990 (4) SA 6 (ECD)** at

9 G - H the Court says that the concept of *consortium* is an abstraction which embraces intangibles such as loyalty and sympathy, care and affection, concern, as well as the more material needs of life such as physical care, financial support, the rendering of services in the running of a common household.

[49] On the evidence that I have accepted (and I have said that I accept the evidence of the defendant in preference to that of the plaintiff and especially the evidence of John) I accept that there was no *consortium* between John and plaintiff for a long time and especially there was no *consortium* which could be broken at the time of the alleged adultery. Therefore there can to my mind be no damages at all awarded for any loss of *consortium* because that had long ago been lost and certainly was non existent at the time of the adultery.

CONTUMELIA

In **FOULDS v SMITH 1950 (1) SA 1 (A)** the Court (at 10) says that *contumelia* is rather a fact than a question of law. The following passage in the judgment of **Solomon C.J. in VIVIERS v KILIAN 1927 AD 449 at 456 – 457** is instructive, also because the facts resemble the present:

> gThere remains, however, the claim for sentimental damages due to the injury or *contumelia* inflicted upon him by the person who has committed adultery with his wife. And it is evident that the estimate of the damages recoverable on this ground may vary greatly. Take, for instance, the case of a refined woman to whom her husband is greatly attached, and who has been debauched by some designing profligate. The husband, out of his affection for her, is prepared to forgive her and condone her misconduct, but if he nevertheless decides to proceed against her seducer, there is no reason why substantial damages should not be awarded. Again an extreme case on the other side would be where the husband is married to a prostitute; in such a case it is difficult to conceive of a Court awarding any damages. The present case falls between these two extremes, though it approximates more nearly to the latter. For, though, Mrs. Kilian can in no sense be described as a prostitute, she certainly was

> a woman, as I have already said, of low moral character and of a very coarse nature, who had very little idea of faithfulness to her husband. The dishonour done to a husband by adultery with a woman of that nature cannot be estimated at a high figure. Indeed, it is difficult to understand the mentality of a man who, in circumstances such as are here disclosed, could bring an action of this nature. One would have expected that, if he decided to condone his wife's offence, he would have been only too anxious to cover up her misconduct instead of publishing it to the world by taking these proceedings and putting her into the witness box to proclaim in open court her own adulterous intercourse with the appellant. He can scarcely, one would think, be a man of any delicacy of feeling;"

[50] As to the factual inquiry, in the case of **BRUWER v JOUBERT 1966 (3) SA 334 (A)** Judge Rumpff says that there are several factors which are considered in deciding whether there should be an award for damages. He says the following:

> gNie net verswarende omstandighede nie, maar ook omstandighede wat die skade temper moet in ag geneem word, en hieronder sal veral die moontlike gevoelloosheid van die gehoonde, sowel as 'n swak karakter van die oorspelige eggenoot in oorweging geneem word."

(At 338 D – E)

The case of **VAN DER WESTHUIZEN v VAN DER WESTHUIZEN AND ANOTHER 1996 (2) SA 850 (C)** is possibly the high watermark for a plaintiff. There the plaintiff had brought the defendant into his house and given the defendant a job and the defendant had abused that position and embarked upon an adulterous relationship with the plaintiff's wife. The facts in the present case are very different.

[51] The evidence shows that defendant and John did not intend to insult plaintiff by their conduct. There are several facts which indicate that the plaintiff is not entitled to any damages and did not suffer any *contumelia.* They have already been listed in the discussion of the cross examination of the plaintiff and I again refer them briefly:

(i) The plaintiff had several adulterous relationships during the course of the marriage. He said there were five or ten such incidents. Some of them were with the same person. Some of them were one night stands but there were several. Plaintiff testified that she was aware of those adulterous relationships and said that the first was eighteen months after their first child was born.

(ii) John was involved with prostitutes. She knew about this. She appointed an investigator to confirm it. She was aware of this and she accepted it. Her evidence was that that was the type of person he is.

(iii) John assaulted her. The assault she described was quite a serious assault while she was 7½ to 8 months pregnant. That is the assault which she remembered, yet she was willing to live with that man. Again not symptomatic of a great marriage.

(iv) John drank excessively. Her evidence was that John enjoyed getting himself “hammered”, as she put it. She also testified of office parties where he drank to excess. He testified that he was dragged out to great embarrassment of himself and other people. It is common cause that he is a heavy drinker which she knew and accepted.

(v) The evidence of the plaintiff was that he is a womaniser which is abundantly confirmed by the evidence. He had his arm around another woman during the divorce. There were several one night stands. He was involved with prostitutes. He liked to charm other women. His evidence was that it took him fifteen minutes to get a woman into bed. This was the type of person he was and this is the type of person the plaintiff preferred to live with.

(vi) When John told the plaintiff of the divorce she did not ask what the trouble in the marriage was of what she

could do to save the marriage. She simply asked whether there was another woman. She actually told him to take his things and leave. After some time she asked when her summons was coming. It is quite clear that she was keen to get rid of this man.

(vii) The parties had been drifting apart for a couple of years. They had been living apart for a long time. They shared very little, only the children. His evidence was that he went home only to see the children. He was, in the same position as a divorced person coming to have visitation rights with the children and simply staying in the house. He says he was living in a different bedroom while she was in Bloemfontein and that evidence I have accepted. The parties were therefore living apart long before. The divorce was mentioned and the adultery committed.

[52] One now considers these factors to decide whether the plaintiff is entitled to any damages in respect of *contumelia.*

In this regard ms Van Zyl referred to cases. The first is **MICHAEL v MICHAEL AND McMAHON 1909 TH 292.** The facts in that case were that the plaintiff had totally abandoned the defendant. The evidence was that the adultery was not felt by the plaintiff as an injury or as an insult to his honour and that the action was not brought until the plaintiff found that there was some chance of the co-defendant being able to pay damages. In those circumstances the Court found "I am satisfied that the plaintiff has not established a claim for damages on either ground." The Court found that the plaintiff failed to prove any damages and therefore did not grant any (at 293).

[53] The next case is that of **MASON v MASON AND ANOTHER 1932 NPD 393.** The facts in that case were that at the time the parties had left each other and there was a reasonable inference from the evidence of the plaintiff that she had definitely abandoned all idea of getting the other spouse back. In those circumstances the Court found that no damage could be awarded for *contumelia.* It is of interest to

note relating to *consortium* that as the *consortium* had long ceased. No damage could be proved in respect thereof either.

[54] The third case is **STRYDOM v SAAYMAN 1949 (2) SA 736 (T)** where the facts were that the parties had not been living together since the adultery. The wife testified that she could not divorce the defendant because if she was not at hand to restrain him, he would soon be in the gutter, but she said that as a result of his adultery, she would never be able to trust him again. In that case the Court awarded a sum of five pounds only. What was taken into account there was the character and habits of the defendant.

[55] The last case relevant on this aspect, is the case of **FRASER v DE VILLIERS 1981 (1) SA 378 (D)** where the evidence was that when the defendant stayed with one Irma, the marital relationship between her and plaintiff had already come to an end and the divorce action was pending. The Court found that it was unable to find any causal connection

between the admitted adultery and any loss of *consortium* and the Court says at 382 B – D:

> "As for *contumelia,* in view of the plaintiff's deplorable matrimonial record, his cavalier attitude towards marriage generally and marriage with Irma in particular, his own adultery with Penny, his attempt to mislead the Court by fabricating the May adultery and Wagonwheels Hotel incident, and his general mendacity, I am not disposed to accept his assertion that the defendant's adultery with Irma caused him humiliation and depression. The admitted adultery provided the plaintiff with a good cause of action which he exploited in the divorce proceedings and attempted to exploit further in these proceedings, but I am not satisfied that it caused him any distress or *injuria* whatsoever. Under the circumstances he is not entitled to more than nominal damages."

The Court awarded nominal damages of five rand. No cost order was made. These facts are very similar to the facts of the present case, and tie up to the facts in **VIVIERS v KILIAN** (above), where Wessels J.A. said at 459:

gAgain the *lex Julia* did not give an action to the husband in the case of any kind of wife. If she served in wineshops or mixed with mimes or persons of low degree, the husband could exact no penalty from a person who commits adultery with her. This shows that the civil law took into account the character of the wife in estimating the *contumelia* against the husband. The husband's character was also an important factor in the case. When, therefore, as in this case, we find that the husband has not lost the *consortium* of his wife but has retained her even though he knew that she committed adultery practically in a public street, and when we find that the wife, by her own evidence and by the letter she has written, proves herself to be a coarse woman of low moral character, we ought not to award substantial damages. If I had sat alone in first instance I doubt whether I should have awarded any damages, but in the circumstances I am not disposed to differ from my learned brothers in reducing the damages awarded from £50 to £5."

[56] Reverting to the facts of this case there was very little to be

lost by divorce, if anything, and it does not appear to me that the plaintiff suffered any injury to her person at all. Having seen plaintiff in Court and listened to the evidence, I am satisfied that plaintiff acted more out of a state of pique and spitefulness than genuine hurt. She is not entitled to any damages. The Courts have held that this type of litigation should not be encouraged. (**Viviers v Kilian** (above) at 457.) It became quite clear in the evidence of the plaintiff that her main purpose if not the only purpose was simply to embarrass the defendant and John in public. That she has succeeded in doing. The plaintiff testified, I am not sure how serious that concession was, that this litigation was not about the money. Why she should then find pleasure in humiliating them in this manner, I have difficulty to understand.

[57] Plaintiff's financial situation, which is relevant to costs, is that she started working two months ago. She has no income. It appears that she must be using the maintenance money she is receiving from John to fund this litigation. I do not believe that this litigation should be countenanced. She wanted her

day in Court and she has had that. She has not proved that she suffered any loss of *consortium* or *contumelia* and to that extent is not entitled to any award at all. As to costs it would not serve any purpose to order her to pay the costs. It is clear that if such cost order would be made, only the children would suffer. Therefore I propose to dismiss plaintiff's claims and make no order as to costs.

[58] The following order is made:

(i) The plaintiff's claims are dismissed.

(ii) No order as to costs is made.

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A. KRUGER, J

On behalf of Plaintiff: Advocate A. Williams
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On behalf of Defendant: Advocate C.van Zyl
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