



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: I 3793/2012

In the matter between:

**WILHELMINA SOPHIA VAN WYK**

(previously ISAAKS, born VAN WYK)

**PLAINTIFF**

and

**OWEN SAMY VAN WYK**

**FIRST DEFENDANT**

**SHANTAN DU PLESSIS**

**SECOND DEFENDANT**

**Neutral citation:** *van Wyk v van Wyk (I 3793/2012) [2013] NAHCMD 125 (14 May 2013)*

**Coram:** SCHIMMING-CHASE, AJ

**Heard:** 6 March 2013

**Reasons Delivered:** 14 May 2013

**Flynote:** Husband and Wife – Divorce – Delicts – Action for damages for adultery, loss of consortium and *contumelia* – principles restated. Damages – measure of - factors to be taken into account – Although society views adultery with less disapprobation, marriage remains the cornerstone of society – Plaintiff experiencing disintegration of her marriage, after first defendant commenced relationship with second defendant who was callous and unrepentant in her continuation of the relationship with the first defendant despite pleas from the

plaintiff to terminate the relationship. She further sent insulting text messages to the plaintiff who was humiliated by the contents of the messages. Award of N\$40,000.00 damages for *contumelia* and loss of consortium.

**Summary:** Plaintiff instituted an action for divorce against first defendant on the grounds of his adultery with second defendant. In her second claim, the plaintiff sued the second defendant for damages on the grounds of her alleged adultery with the first defendant. The defendants did not defend the action. It appeared from the plaintiff's evidence that she had a happy marriage with a man who cared for her emotionally, physically and financially until the affair with the second defendant commenced. The second defendant was a friend of the couple who attended the wedding of the plaintiff and first defendant. The plaintiff requested the second defendant to stop her relationship with the first defendant on a number of occasions. The second defendant sent text messages to the plaintiff intimating that the first defendant spent money on her and that the first defendant preferred her because the plaintiff is fat. The first defendant lost interest in the plaintiff and asked for a divorce after admitting his affair some time after it commenced and withdrawing entirely from the plaintiff. Plaintiff instituted proceedings thereafter.

Held, the plaintiff proved her grounds of divorce based on adultery with the second defendant. A final order was granted.

Held, as regards the claim for damages against the second defendant: the concept of a claim for damages for adultery may be seen by some as outdated and it may well be that society views with less disapprobation than in the past, the commission of adultery. However, marriage remains the cornerstone of our society. The court recognises this and must apply the law taking cognisance of factors to be considered in awarding damages in actions of this nature. The plaintiff requested the second defendant to cease seeing her husband on a number of occasions. However, the affair continued quite brazenly and the first defendant lost interest in the plaintiff not long after the affair began, but he only admitted some time later that he was involved with the second defendant. Second defendant aggravated matters by sending insulting text messages to

the plaintiff causing her humiliation. This behaviour of the second defendant was viewed as aggravating. The court accordingly awarded the plaintiff N\$40,000.00 damages for the loss of consortium and *contumelia*.

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## ORDER

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### Claim 1

1. The bonds of the marriage subsisting between the plaintiff and the first defendant are hereby dissolved.
2. The first defendant forfeits the benefits derived from the marriage in community of property.
3. The first defendant shall pay rehabilitative maintenance for the plaintiff personally in the amount of N\$2,000.00 per month for a period of 3 years, or until she remarries, whichever is the earlier.
4. The defendant is ordered to pay the plaintiff's costs of suit in respect of the divorce action.

### Claim 2

5. The second defendant shall pay to the plaintiff the amount of N\$40,000.00.
6. The second defendant shall pay interest *a tempore morae* on the said amount at the prescribed rate of 20% per annum from date of judgment to date of payment.
7. The second defendant is ordered to pay the plaintiff's costs of suit in respect of the claim against her.

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## REASONS

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### Schimming-Chase, AJ

[1] On 6 March 2013, after hearing the plaintiff's evidence an order as set out above was made. That order did not include the question of costs and that issue is clarified and amended in this judgment. The reasons follow.

[2] The plaintiff instituted an action for divorce against the first defendant based on *inter alia* adultery alleged to have been committed by the first defendant with the second defendant. In her claim against the second defendant the plaintiff claimed damages in the amount of N\$40,000.00 on the grounds of her adultery with the first defendant which led to the break down of the marriage. Although personally served, the defendants did not defend the action. The plaintiff testified herself and no other witnesses were called.

[3] As regards the action for divorce, I do not propose to deal with the plaintiff's alternative claim of desertion in view of the order I make.

[4] In support of her claim for a final order of divorce against the first defendant, the plaintiff in her particulars of claim alleged that "on diverse occasions at Windhoek and at other places in Namibia, particulars of which are not known to the plaintiff, the first defendant committed adultery with the second defendant".

[5] In support of her claim against the second defendant, the plaintiff alleged that:

"The second defendant at all relevant times hereto was aware of the fact that the plaintiff and first defendant were lawfully married to each other. Despite the second defendant's knowledge as aforesaid and with full awareness of the

consequences thereof, the second defendant unlawfully and intentionally committed adultery with the first defendant, alternatively entered into an extra marital affair with the first defendant which extra marital affair is still continuing.”

[6] The plaintiff claimed damages of N\$20,000.00 for *contumelia* and N\$20,000.00 for loss of comfort, society and services of the first defendant.

[7] The plaintiff and first defendant were married to each other on 4 December 2010 at Windhoek in community of property. No children were born of the marriage.

[8] The plaintiff testified that she knew the second defendant, who was even a guest at their wedding. According to the plaintiff, the relationship between the first and second defendants started during February 2012 when the second defendant started calling the first defendant. It would appear that they also started sending each other text messages. When she found out, the plaintiff told the first defendant that he could not be friends with the second defendant because he was a married man. She also phoned the second defendant during February 2012 and asked her to stop “inviting” her husband. However, they continued texting each other. During March 2012 the plaintiff went to the second defendant’s residence with a former social worker and spoke to her about her relationship with the first defendant. According to the plaintiff, the second defendant was “cocky” towards the plaintiff and said that she would not stop her relationship with the first defendant because he came to her.

[9] The relationship between the plaintiff and first defendant started to deteriorate from about April 2012, though it appears that at that stage the first defendant did not admit to the relationship with the second defendant. The first defendant started staying out until late and also stopped being intimate with the plaintiff. The plaintiff testified that the first defendant also stopped taking care of the common household in the way that he used to. According to the plaintiff the first defendant deposited most of his income into her bank account. In this regard she testified that the first defendant, a pipe fitter and boiler maker, earned an average income of N\$40,000.00 per month. This money was used to

purchase groceries and pay municipal bills. The plaintiff's salary covered the house payments, car payments and medical aid only. The plaintiff testified that once these payments were made from her gross monthly income of N\$21,000.00, there was nothing left to cover these additional costs which the first defendant covered by paying his salary into her bank account. The plaintiff testified that she also used part of this money to send to the first defendant's children in Johannesburg and the rest she spent on herself.

[10] The relationship continued to deteriorate and from about August 2012 the plaintiff testified that the first defendant started sleeping out over weekends. When the plaintiff confronted him about his behaviour, he admitted his involvement with the second defendant. This is when, according to the plaintiff, the second defendant started sending text messages to the plaintiff in Afrikaans. Loosely translated, the gist of the texts were that she was sleeping with the plaintiff's husband in the plaintiff's car, that she was entertaining him, and she further invited the plaintiff to visit her apartment and her bedroom where the first defendant wanted to sleep at night. The second defendant also intimated that the plaintiff was showing off her worldly goods when her marriage was in a mess. When the plaintiff read these text messages into the record there was to my mind some element of provocation as well as glee from the second defendant regarding the plaintiff's circumstances.

[11] The text messages did not end there. The second defendant referred to the plaintiff as "full moon". The plaintiff testified that the second defendant referred to her as such because she is fat. One message stated, loosely translated, "Full moon is insecure, you are only there for the house and I am there for being shown off and sexy and an ass that drives him crazy" and further "That which you get, I also get LOL"<sup>1</sup>

[12] After receiving these messages, the plaintiff went to make a case at the Katutura Police Station. At the station, it appears the second defendant was

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<sup>1</sup> Acronym for laugh out loud.

contacted telephonically and apparently wanted to ask for forgiveness, but the plaintiff testified that she was advised by the officer assisting her that if the second defendant asked for forgiveness, the plaintiff could not use the information against her in a divorce case. The plaintiff was then advised to make a civil case. The second defendant, who apparently also wanted to ask for forgiveness in writing did not do so. In any event, the text messages from the second defendant ceased immediately thereafter.

[13] The plaintiff testified that after the above episode the defendants became more brazen about the relationship, even though the plaintiff clearly laboured under a hope that the relationship would stop after the second defendant manifested an intention to ask for forgiveness. One evening, the plaintiff saw the first defendant's car parked when she was on her way to Khomasdal. She drove closer and saw the defendants in the car. When the second defendant saw her she got out of the car, and the first defendant drove away. Thereafter the first defendant asked the plaintiff for a divorce, which led to the institution of these proceedings.

[14] The plaintiff testified that the above events traumatised her and she became an emotional wreck. She then went to a rehabilitation centre in Namibia for psychological treatment as she became severely depressed as a result of the affair between the defendants, the treatment she suffered at the hands of the defendants and the end of her marriage.

[15] Based on the plaintiff's evidence and considering that the defendants did not defend the matter, I find that her evidence is to be believed. She gave considered testimony and stuck to her story despite becoming distraught at times when dealing with certain aspects that caused her some humiliation at the hands of the defendants. At these times her evidence became somewhat confusing, but her demeanour indicated that she was telling the truth.

[16] The first defendant's adultery with the second defendant is clear. Both of them behaved in quite a callous manner towards the plaintiff albeit in different ways. The plaintiff has made out a case for a final order of divorce. The plaintiff

also prayed for an order that the first defendant forfeits the benefits derived from the marriage in community of property in her favour which is also granted, the court having no discretion once the adultery was proved.<sup>2</sup>

[17] As regards the plaintiff's claim for maintenance for herself, her testimony set out above shows that on her salary, she had nothing left after deductions and the first defendant took care of the other expenses. She only seeks an amount of N\$2,000.00 per month which is reasonable in the circumstances. Thus, she is also successful in her claim for maintenance, in the form of rehabilitative maintenance for a period of 3 years, or until she remarries, whichever is earlier.

[18] As regards the claim against the second defendant, the evidence shows that the affair between the defendants led to the breakdown of the plaintiff's marriage to the first defendant. Not only did the second defendant not hide it, she apparently also revelled in the plaintiff's discomfort. Her text messages to the plaintiff were humiliating.

[19] As far as the law is concerned, the authorities show that the mere fact of intercourse with a married person, without looking too closely at the intention of the guilty party, means that adultery was committed. This was clearly put by Van den Heever J in Foulds v Smith<sup>3</sup> when he stated that any arrogant or presumptuous violation of the rights of another is disparaging even if the perpetrator manifested a different intention. The intention is presumed unless the person did not know of the marriage.

[20] The plaintiff's cause of action is the *actio iniuria*.<sup>4</sup> The infringed interests of personality which feature most prominently with regard to adultery are feelings (particularly feelings of piety) and dignity. The plaintiff generally will base his or her action on two grounds namely *iniuria* and loss of consortium. The plaintiff draws the onus to prove the infringement of his or her personality

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<sup>2</sup> Carlos v Carlos, unreported judgment of the High Court delivered on 10 June 2011 at par 8.2 and 22.1.

<sup>3</sup> 1950(1) SA 1 (A) at 11

<sup>4</sup> Viviers v Kilian 1927 AD 449; Foulds v Smith 1950(1) SA 1 (A).



rights.<sup>5</sup>

[21] In Grobbelaar v Havenga<sup>6</sup> the court with reference to the English authorities said that consortium means the companionship, love, affection, comfort, mutual services and sexual intercourse, which all belong to the married state. At page 526 C of that judgment, the court stated that it is the duty of spouses to consort with each other and a third person who intentionally causes the one spouse to violate this duty commits a wrong against the other spouse.

[22] In Peter v Minister of Law and Order<sup>7</sup> the court pointed out 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 and the running of a common household.

[23] *Contumelia* on the other hand simply relates to the infringement of the plaintiff's right to privacy, dignity and reputation. In Foulds v Smith<sup>8</sup> the court stated that *contumelia* is rather a question of fact than a question of law.

[24] In an action for divorce where general damages are claimed from the second defendant on the grounds of his or her adultery with the plaintiff's spouse, factors which influence the assessment of the damages were held to include the following:

- (a) Where the plaintiff has condoned his/her spouse's adultery the claim is not viewed sympathetically and damages are for *contumelia* only;

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<sup>5</sup> Neethling, Potgieter and Visser; Neethling's Law of Personality 2<sup>nd</sup> ed Lexis Nexus at 208-209 and the authorities collected there. The learned author also opined that in the case of adultery, *iniuria* is often incorrectly equated with the contumelia or insult suffered by the plaintiff resulting in no scope under this head for the protection of other personality interests (especially feelings) and that consequently it is more appropriate and desirable to classify the non-pecuniary damage arising from loss of consortium as falling within the scope of the *actio iniuriarum*.

<sup>6</sup> 1964(3) SA 522 (N) at 525 E

<sup>7</sup> 1990(4) SA 6 (ECD) at 9 G-H

<sup>8</sup> *supra* at p 10

- (b) What it is that the plaintiff has lost is relevant:
  - (i) if the spouse that has strayed was in any event a poor bargain, the plaintiff cannot expect substantial damages;
  - (ii) a wife suffers more through losing her husband and vice versa. Despite the altered *mores*, a woman remains the hunted rather than the huntress. A man can go out and find a replacement for an adulterous wife whereas a woman must wait to be invited out for even an evening at the cinema. The position of a divorced woman is less enviable than that of her male counterpart;
- (c) The economic and social circumstances of the parties are relevant;
- (d) When the adulterous co-respondent is grossly impudent and unrepentant, this will aggravate damages;
- (e) Courts apparently regard the loss of a modern liberated woman less seriously than that of her predecessor;
- (f) To counter-balance(e), Courts should bear in mind that – purely as an example - “a pint of beer with which to soothe one’s sorrows cost at least half as much again today as it did a decade ago”.<sup>9</sup>

[25] The learned author HR Hahlo in The South African Law of Husband and Wife, 3<sup>rd</sup> Ed, Juta, also dealt with the factors that influence the assessment of damages. He stated that in assessing the damages regard will be had *inter alia* to the economic and social circumstances and moral character of the parties

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<sup>9</sup> Chapman v Chapman and Another 1997(4) SA 142 E at 144 A – 145 A.

and to the financial loss occasioned to the plaintiff by the loss of his or her spouse. Damages are aggravated where the spouse who has gone astray was, as the case may be, a good husband and provider, or a good wife, housekeeper and mother. Lesser damages will be awarded where the plaintiff, prior to the adultery, had treated the other spouse harshly and unkindly than where he had treated her with kindness and consideration for in the former case the plaintiff is the party to blame for what has happened. Gross impudence and insult to the plaintiff aggravate the injury.<sup>10</sup>

[26] It may well be that in this age, society views with less disapprobation than in the past the commission of adultery. There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship. It must however be remembered that marriage remains the cornerstone and the basic structure of our society. The law recognises this still today and the court must apply the law.<sup>11</sup> One can also not ignore the possibility that a married person meets someone else, develops feelings for that person and falls out of love with his or her spouse without intending to. But the way in which the “guilty” spouse and third party behave thereafter, due regard being had to the innocent party’s personality rights, will determine the extent of an award of damages in an action for damages against the guilty party.

[27] It was stressed in the Chapman case<sup>12</sup> that it is impossible to convert with any measure of precision the damage suffered through *contumelia* and loss of consortium into hard cash and secondly that comparisons with other cases are only used for finding notional boundaries within which an assessment would be reasonable; since each case must of necessity depend on its own facts.

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<sup>10</sup> at 381-382 and the authorities collected there.

<sup>11</sup> Van der Westhuizen v Van der Westhuizen and Another 1996(2) SA 850 C at 852 I/J

<sup>12</sup> *supra* at 144

[28] The behaviour of the second defendant, who attended the wedding of the parties, and then knowingly entering into a sexual relationship with the first defendant is insulting. I can see why the plaintiff felt betrayed. More importantly, to aggravate matters, the second defendant sent distasteful and insulting text messages to the plaintiff, making it clear to the plaintiff that she was better and “thinner” than her, and that the first defendant preferred her, even though the plaintiff begged her to stop. She appears to have enjoyed humiliating the plaintiff and was blatantly unrepentant. This aggravates damages. Had the defendants handled the matter differently and with some form of decorum, damages would have been significantly less. But to sleep with someone’s spouse and then insult that person cannot be accepted, even in today’s more open-minded environment. It should be noted in this regard that the only remedy open to the plaintiff against the first defendant, who inflicted a more serious blow to the personality of the plaintiff would be an action for divorce and not the *actio iniuriarum* against him.<sup>13</sup>

[29] As regards the loss of consortium, the plaintiff testified that she had tried to talk to her husband about the affair but he did not seem interested anymore. I do believe that had he stopped the affair, the plaintiff would have forgiven him. She clearly was committed to saving her marriage. It is also clear that the first defendant’s behaviour towards the plaintiff changed after he became involved with the second defendant. She lost the caring, support and services of her husband. In Van der Westhuizen v Van der Westhuizen *supra*, the first defendant not only had an affair but brought the second defendant into the parties’ common home, and become violent after she confronted him. The court found that the plaintiff had experienced the disintegration of her marriage, the hostility of her husband and the hurt and humiliation of a woman whose marriage had been violated in the most grievous manner. The court further described the matter as a “disgraceful case of conscious and deliberate desecration of the marriage relationship”. An award of damages in the amount of N\$20,000.00 was made in 1996. In today’s terms that roughly calculates to approximately N\$48,000.00. Although the parties did not go that far, in this case the second

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<sup>13</sup> Neethlings Law of Personality *supra* at 208.

defendant's conduct in this matter is viewed with equal distaste and the plaintiff experienced the same emotional trauma.

[30] In my opinion the plaintiff has made out a case for the damages that she seeks and is awarded N\$20,000.00 for *contumelia* and N\$20,000.00 for loss of consortium as prayed.

[31] Considering that the plaintiff was successful in both actions, the first defendant is ordered to pay costs of suit in respect of the divorce action and the second defendant is ordered to pay the plaintiff's costs in respect of the damages claim.

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EM Schimming-Chase  
Acting Judge

## APPEARANCES

PLAINTIFF: Ilse Agenbach  
Instructed by Agenbach Legal  
Practitioners

FIRST DEFENDANT: No appearance

SECOND DEFENDANT: No appearance