

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 670/2012

In the matter between:

MICHAEL HANS WALTER JASPERT

PLAINTIFF

and

EUGENE BERNARD JOHAN SIEPKER

DEFENDANT

Neutral citation: *Jaspert v Siepker* (I 670/2012) [2013] NAHCMD 267 (30 September 2013)

Coram: UEITELE J

Heard: 11 & 13 March 2013

Delivered: 30 SEPTEMBER 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.

Summary: The plaintiff instituted action against the defendant for payment of N\$1 500 000 as damages for adultery and loss of consortium. The plaintiff was married on 19 May 1993 to Susanne Jaspert and it is common cause on the pleadings that the defendant was aware of the existence of the marriage at all material times.

The defendant states that he believed that he played no role in the termination of the marriage between the plaintiff and Susanne as he already believed the marriage to be over by the time that he befriended Susanne.

The plaintiff's cause of action is the *actio iniuria*. 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 rights.

Held that the plaintiff's claim for damages must be strictly confined to the *contumelia*. Claim for loss of consortium not proven.

Held further that the factors which influence the assessment damages for *contumelia* appear to be 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. (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, plaintiff cannot expect substantial damages; (ii) a wife suffers more through losing a husband than vice versa. Despite the altered mores, a woman in South Africa 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) That the adulterous co-respondent is grossly impudent and unrepented will aggravate damages. (e) Courts apparently regard the loss of a modern "liberated" woman less seriously than that of her predecessor.

Held further that in all the circumstances defendant is ordered to compensate the plaintiff in damages in the amount of Ten Thousand Namibian Dollars (N\$10 000).

ORDER

- a) That the defendant is ordered to compensate the plaintiff in damages in the amount of Ten Thousand Namibian Dollars (N\$10 000).
 - b) Interest a tempore morae on the amount of N\$10 000 at the rate of 20% per annum from date of judgment until date of final payment.
 - c) That the plaintiff is awarded costs.
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JUDGMENT

UEITELE, J

INTRODUCTION

[1] By summons dated 13 March 2013 the plaintiff instituted action against the defendant for payment of N\$1 500 000 (N\$ 750 000 for *contumelia* and N\$ 750 000 for loss of consortium) as damages for adultery and loss of consortium. The plaintiff was married on 19 May 1993 to Susanne Jaspert (I will in this judgment refer to her as Susanne) and it is common cause on the pleadings that the defendant was aware of the existence of the marriage at all material times.

[2] The action is founded on allegations to the effect that:

‘5. Despite the defendant’s knowledge as aforesaid and with full awareness of the consequences thereof, the defendant unlawfully and intentionally committed adultery with the said Susanne Jaspert on diverse occasions and places as from June 2010 and continues to do so as to date hereof.’

[3] In his plea the defendant admits that he knew that the plaintiff was married to Susanne, that he had entered into an adulterous relationship with Susanne and that the adulterous relationship continued to date he filed his

plea. He however also pleaded that he and Susanne entered into the adulterous relationship after Susanne indicated to him that the marital relationship with the plaintiff has broken down irretrievably. He denies that the plaintiff suffered any damages.

THE EVIDENCE

The Plaintiff's evidence

[4] The plaintiff testified that their marriage was always a happy one. The only exception was approximately 11 years ago when in February 2002 the plaintiff was in South Africa for 5 days. When he came back he learned that his wife had an 'affair' with another man. According to him she admitted she had a relationship. The parties then went to marriage counselling. The plaintiff requested her to leave the common home in May 2002, but Susanne did not want to do so. She terminated the relationship and was thereafter very thankful to be able to continue with the marriage. The plaintiff could not sleep for a period of 5 years.

[5] The plaintiff testified that Susanne started to sing in the choir 10 years ago. The Plaintiff did not know what the choir was called. In 2010 she was chosen as one of the Voices of Namibia (a Namibian choir) and was to represent Namibia overseas. June 2010, was the first time she left without the children when she travelled overseas to represent Namibia. While on this tour, in China, she committed adultery with the defendant in China on the 9th of July 2010. He stated that both the defendant and Susanne admitted their adultery.

[6] The Plaintiff testified that Susanne came back a complete different person. All her values had changed and she did not show him any love anymore. She was critical of him and he complained that she did not engage in sexual intercourse with him on a regular basis. This continued until December 2010 when the parties travelled to Cape Town. When they returned from Cape Town, the situation became better. He stated that during this period, the children took incredible strain as Susanne took to shout at the children.

[7] He further testified that on the 31st of December 2010, the parties had a New Year's Eve party at Tiger Reef where the plaintiff introduced Susanne to a lady he was driving with. According to him Natalie (their daughter) later ran away because of the strange conduct of Susanne who was apparently jealous of the plaintiff's relationship with this lady.

[8] The plaintiff stated that he and Susanne had sex the last time in April 2011. He continued with his testimony that Susanne was always busy with the choir during 2011, that she came back home late in the evenings but that he did not query it. According to him, he always supported her. On the 19th of August 2011 (it was the birthday of Susanne), she decided to move out of the common bedroom.

[9] The plaintiff then continued to describe the incident when he learned about the adulterous relationship. According to him it was the 9th of December 2011 when Susanne returned at 07h00 in the morning. He got hold of her second cell phone while she was in the shower when he discovered the 'SMS's' between her and the defendant. When he confronted her, she told him that she had sex many times with the defendant. According to the plaintiff, Susanne then moved out of the common home on the same day.

[10] The Plaintiff concluded his evidence by stating that he actually could not live in Namibia anymore as his whole reputation was shattered. According to him he went to numerous doctors. His immune system broke down. He could not work anymore and landed in Morningside Hospital in South Africa. He lost one of the biggest contracts of his career as he had to terminate it, because he could no longer function. According to him he is no longer the person he was. He has lost clients and only earns two thirds of his usual income. He cannot get up in the morning and only gets up at approximately 09h00 to 10h00.

[11] According to the plaintiff, he tried to speak to the defendant who was not interested to communicate with. The plaintiff also stated that the defendant forwarded a threatening SMS to him. During his cross-examination, the plaintiff was unable to explain why Manfred Janik, a clinical psychologist who saw Mr

and Ms Jaspert during January 2013, found that the plaintiff was coping well with the emotional turmoil of the divorce.

[12] The only examples the plaintiff could advance about his reputation being allegedly shattered, were vague references to jokes being made about him at Joe's Beerhouse, Dylan's and other places of merriment. These statements were made by people who seemed to be consuming alcohol on a regular basis.

[13] Plaintiff also referred to loss of work at Bank of Namibia but conceded that he could not give any documentary proof as he failed to discover his financial statements as he deemed it irrelevant. The Plaintiff further acknowledged that he alerted the people at Bank Windhoek (his only other client) of the adulterous relationship.

The Defendant's evidence.

[14] The Defendant called three witnesses, namely Mr Siepker himself, Susanne and a Ms Katherina Dierkes:

MR. SIEPKER

[15] The defendant testified that he and Susanne met each other during 2008 when he re-joined the choir. He left the choir again when he became involved in a relationship with a member of the choir and again returned in 2010. During this period he realized that Susanne was getting thinner and expressed his concern as he felt sorry for her.

[16] He testified that Susanne told him that she was sick, but did not say anything bad about her husband. During the Voices of Namibia tour, he and Susanne realized that they had much in common because of their respective unhappy marriages. Their relationship became closer and closer. Susanne also told him about the plaintiff was refusing to allow her and the children medical treatment. He admitted that the parties entered into an intimate relationship on the 9th of July 2010 in Austria. He was not certain whether they had sexual intercourse on that evening as they had consumed alcohol because of their victory. He, however, conceded that they could have had sexual intercourse.

[17] He continued to state that he believed that he played no role in the termination of the marriage between the plaintiff and Susanne as he already believed the marriage to be over by the time that he befriended Susanne. He also forwarded an SMS to the plaintiff to apologize for any hurt that he might have caused him. He further stated that he encouraged Susanne to make certain that her marriage was indeed over before leaving her husband.

[18] The defendant denied that he ever forwarded a threatening SMS to the plaintiff. The plaintiff however forwarded derogatory e-mails regarding the defendant to Susanne stating *inter alia* of and about the defendant that he (defendant) is a Mr Bean; is a monkey; sleeps with his students; sleeps with his colleagues.

MS. KATHERINA DIERKES:

[19] Mrs Dierkes testified that she is a good friend of Susanne and that their children are in the same school. They know each other for approximately 15 years. Susanne was unhappy with her marriage and generally complained about the lack of affection and the plaintiff's lack of involvement with the children.

[20] She testified that she was aware that the parties (i.e. the plaintiff and Susanne) went to marriage counselling and according to her there was a slight improvement in the marriage for a short period. She was unaware of the relationship between Susanne and the defendant and only found out about it when the plaintiff called her and informed her about it. She was later informed by Susanne that the plaintiff threw her out of the house when he found out about the relationship and that she had to obtain police assistance to get her car and bank cards from the matrimonial house.

[21] After the relationship (between the defendant and Susanne) came to light, Ms Dierkes saw the plaintiff on occasion at Andy's. He did not look depressed and actually told her about his 26 year old girlfriend. He informed her that he is enjoying his freedom.

MS. JASPERT:

[22] Susanne testified that she and the defendant were married in 1993 that she is a German citizen and that she and her former husband have been living in the Republic of Namibia since 1994. Two children were born from the marriage between her and the plaintiff.

[23] Susanne testified that her marriage to the plaintiff was not really as colourful and wonderful as the plaintiff attempted to portray it. She cited as an example the fact that during the marriage she wanted a second child but the plaintiff did not want. She testified that the plaintiff only agreed to have the second child when she undertook to carry all the costs relating to the upbringing and education of the child (She handed up an email confirming the agreement as exhibit).

[24] In support of her allegation that, her and the plaintiff's marriage was not a happy one she handed up a copy of her counterclaim in the divorce proceedings and she confirmed the allegations contained in particulars of claim regarding the plaintiff's behaviour. In the particulars of claim Susanne amongst others made the following allegations towards the plaintiff:

- '7.1 He (i.e. plaintiff) elicited unnecessary quarrels with the defendant (i.e. Susanne);
- 7.2 He showed no serious intention to continue with the marriage;
- 7.4 He showed no love and respect towards the defendant
- 7.5 He assaulted the defendant whereafter he locked the defendant out of the common home and threw her belongings through the window;
- 7.6 He told he defendant to leave the common home on several occasions
- 7.7 He psychologically and sexually denigrates the defendant;
- 7.8 He told other people that the defendant is frigid;
- 7.9 He told the defendant to find a boyfriend and that he will similarly find a girlfriend
- 7.10 he has regularly threatened to leave the defendant and to relocate to another country never to return to the republic of Namibia...'

[25] Susanne furthermore gave two examples of the plaintiff's behaviour towards her, as follows: The first is that she was involved in a car accident (which was not her fault). The plaintiff, instead of supporting her, shouted at her about her stupidity of being in another accident. The second example was that she on another occasion accidentally broke her tooth while biting on an olive pip. The Plaintiff once again shouted at her for being stupid and was only concerned about the medical costs related thereto. She stated that he showed now sympathy for her pain.

[26] She testified that during April 2010, she contracted bronchitis. The plaintiff refused to allow her to seek medical attention. She further stated that she was in a position to pay for the treatment herself and in the premises, obtained such treatment eventually although plaintiff wanted to prevent her from doing so. She confirmed that she and the plaintiff went for marriage counselling. According to her the real problem in the marriage was the plaintiff's inability to show affection and his failure to talk about certain subjects. Her sexual relationship with the plaintiff was based on duty according to her and she stated that if she did not do it, his mood was very bad and that there was no harmony in the house.

[27] She testified that she was not sure as to when she started singing in the choir, but thought it to be during 2003 and confirmed that she knew of the defendant, but did not know him personally. She testified that she and the defendant only became closer to each other during the year 2009. According to her, the plaintiff was not very interested in her choir activities and told her that they were a bunch of idiots after he attended the first show. The plaintiff, unlike her, was not a registered member of the church and did not go to church with her. She testified that the plaintiff asked her on several occasions to leave the matrimonial home. She stated that they argued regularly when the plaintiff accused her about not being a virgin when they married, although the parties lived together for one year prior to their marriage.

[28] Susanne's testimony regarding the development of her relationship with the defendant corroborated that of the defendant. She further confirmed that she did not tell Ms Dierkes about her relationship with the defendant as she

wanted to keep the relationship discreet and she did not want to terminate her relationship with the defendant as she would have missed him as she loved him very much. She did not want to go back to her husband, whom she no longer loved as the plaintiff was unable to show her any love and did not change his ways.

[29] During cross-examination Susanne stated that she continued with her sexual relationships with both the defendant and the plaintiff until April 2011. She continued that she was in conflict about her love and the practical side of her marriage. She stated that she did not tell the plaintiff because she might have been scared as he would not have accepted that she did not want to continue with the marriage. When asked whether she can confirm whether the plaintiff was devastated when he found out about the relationship, she replied: "Yes, he cried a lot". She however denied that her marriage to the plaintiff broke down as a result of her relationship with the defendant.

DISCUSSION OF THE EVIDENCE AND THE APPLICABLE LEGAL PRINCIPLES

[30] The plaintiff's cause of action is the *actio iniuria*.¹ 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 rights.²

[31] In the present matter the plaintiff did not testify that the adultery between the defendant and Susanne was the cause of the breakup and disintegration of his marriage to Susanne, to the contrary Susanne testified that the cause of the breakdown up of the marriage was the defendant's misconduct. This aspect of Susanne's evidence was not disputed or countered by the plaintiff and I must therefore accept the version of Susanne's evidence in this regard. I am unable

¹ Viviers v Kilian 1927 AD 449; Foulds v Smith 1950(1) SA 1 (A).

² Neethling, Potgieter and Visser; Neethling's Law of Personality 2nd 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*.

to find a causal connection between the admitted adultery and any loss of consortium which the plaintiff may have suffered, I am therefore of the view that the plaintiff's claim for damages must be strictly confined to the *contumelia*.

[32] In this matter both the defendant and Susanne do not dispute the fact that they had a sexual relationship during June 2010 while on a tour with the choir in China. They both also admitted that they had a sexual relationship while the plaintiff was still married to Susanne. All that Susanne testified is that the marriage was already on the rocks. In the matter of *Viviers v Killian*³ Solomon, CJ said '*...whoever commits adultery with a married woman, even with her consent, inflicts an injury upon the husband, and is therefore in this respect liable to husband...*' There is therefore no doubt in this matter that the plaintiff has a claim. The amount to be awarded presents the only difficulty.

[33] In the matter of *Chapman v Chapman and Another*⁴ Van den Heever, J after stating that, one does not need authority for the proposition that it is impossible to convert, with any measure of precision, the damage suffered through *contumelia* and loss of consortium into hard cash; went on to outline the factors which influence the assessment of general damages through *contumelia* as follows:

- '(a) Where the plaintiff has condoned his/her spouse's adultery, the claim is not viewed sympathetically; and damages are for *contumelia* only.
- (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, plaintiff cannot expect substantial damages.
 - (ii) a wife suffers more through losing a husband than *vice versa*. Despite altered *mores*, a woman in South Africa 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.

³ *Supra* footnote 1 at 450-1.

⁴ 1977 (4) SA 142 (E).

- (c) The economic and social circumstances of the parties are relevant.
- (d) That the adulterous co-respondent is grossly impudent and unrepentant will aggravate damages.
- (e) Courts apparently regard the loss of a modern "liberated" woman less seriously than that of her predecessor.
- (f) To counterbalance (e) Courts should bear in mind that - purely as an example - a pint of beer with which to soothe one's sorrows costs at least half as much again today as it did a decade or so ago.'

[34] Applying the above factors to the evidence in the present case; the plaintiff indicated that he was at one stage prepared to condone Susanne's adultery, and it is undisputed that the plaintiff's conduct in one way or the other contributed to the disintegration of his marriage. As regards the economic or social circumstances of the parties the allegations before me were not substantiated with any real evidence. I thus have little evidence as to their social status.

[35] The marriage between plaintiff and Susanne was celebrated in May of 1993, and two children were born of the union. Plaintiff testified that he discovered his wife's infidelity during 2010. Susanne testified that plaintiff had pushed her away with his conduct and she found solace in the defendant. They however kept their relationship discreet. The defendant testified that he attempted to apologise to the plaintiff for any hurt he caused her but his apologies were not accepted.

[36] Plaintiff says that their marriage was a very happy one except for some minor issue which arose during the marriage. Susanne, however, disputes that, she denies that she and the plaintiff did things together and were friends as well as being husband and wife. She actually testified that the plaintiff had taken no interest in her hobbies (such as the choir and going to church), she testified that the plaintiff was contemptuous of her associates and termed them 'stupid'. In light of the fact that the plaintiff did not seriously contradict these portions of Susanne's evidence I am inclined to accept her evidence.

[37] The defendant testified that he was under the impression that the marriage between the plaintiff and Susanne was already broken down irretrievably and he believed that he would have left her in destitute circumstances, should he simply have terminate their relationship. He also testified that he tried to encourage Susanne to make sure that her marriage was really over before leaving her marriage.

[38] An important instrument in the quantification process is the consideration of previous awards. In the matter of *Burger vs Burger and Another*⁵ this court awarded the plaintiff the amount of N\$10 000. In the matter of *Mathews v lipinge*⁶ the Court found the amount (of N\$ 100 000) claimed to be rather high but having considered the peculiar circumstances (the circumstances were that a certain trend of insults and defamatory allegations were made on a rather continuous basis by the defendant against the plaintiff) the court awarded damages in the amount of N\$ 30 000.

[39] I find the circumstances I set out above to be mitigating. I furthermore take heed of the advice by Solomon in the matter of *Viviers v Kilian*⁷, where he said:

'It is not desirable that actions of this nature should be encouraged; but on the other hand it is only right that profligate men should realise that they cannot commit adultery with married women with impunity.'

I thus regard an award of N\$ 10 000 in respect of the damages arising from *contumelia* as adequate, and there will be judgment against defendant in this sum. As I have indicated above the plaintiff has failed to discharge the onus resting on him in respect of the loss of consortium.

[40] Ms Duvenhage who appeared for the defendant urged me to consider making an adverse cost order against the plaintiff because, so the argument goes, of the plaintiff's hugely inflated claim. It may be so that the plaintiff's

⁵ (I 3742/2010)[2012] NAHCMD 15 (10 October 2012).

⁶ 2007 (1) NR 110 (HC)

⁷ *Supra* footnote 1 at 457:

claim is inflated but, in the absence of any evidence that the defendant attempted to settle that claim I see no reason why I must depart from the general rule that cost must follow the course.

[41] In the premises, I will accordingly make the following orders:

- a) That the defendant is ordered to compensate the plaintiff in damages in the amount of Ten Thousand Namibian Dollars (N\$10 000).
- b) Interest a tempore morae on the amount of N\$10 000 at the rate of 20% per annum from date of judgment until date of final payment.
- c) That the plaintiff is awarded costs.

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF:

H Duvenhage
Of Etzold-Duvenhage

DEFENDANT:

C Brandt
Of Chris Brandt Attorneys