



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 3742/2010

In the matter between:

**ERNEST JOHANNES BURGER**

**PLAINTIFF**

and

**LISINDA BURGER**

**1<sup>ST</sup> DEFENDANT**

**GAWIE ROSSOUW**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Burger v Burger & another* ( I 3742/2010) [2012] NAHCMD 15  
(10 October 2012)

**Coram:** MILLER AJ

**Heard:** 02 October 2012; 03 October 2012

**Delivered:** 10 October 2012

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**ORDER**

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The second defendant is held liable to compensate the plaintiff in damages in the amount of Ten Thousand Namibian Dollars (N\$10 000 00). Interest a tempore morae

on the amount of N\$10 000.00 at a rate of 20% per annum from date of judgment until date of final payment. The plaintiff is awarded costs.

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## JUDGMENT

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MILLER AJ:

[1] In this matter the Plaintiff Mr. Ernest Johannes Burger instituted proceedings by way of action against his wife Mrs. Lisinda Burger and Mr. Gawie Rossouw as a 2<sup>nd</sup> defendant. He claimed from the 1<sup>st</sup> defendant an order for dissolution of the marriage and certain other relief. Those proceedings against the 1<sup>st</sup> defendant became finalized and the marriage was dissolved by order of this court.

[2] The proceedings before me concern only the plaintiff's case against the 2<sup>nd</sup> defendant to whom I shall for the remainder of this judgment refer to simply as the defendant. As against the defendant the plaintiff's claim is based on adultery in respect of which the plaintiff seeks damages in the sum of fifty thousand Namibian Dollars (N\$50 000-00). The second claim relates to the alleged loss of the affection, comfort, society and services of the Plaintiff's former wife and in that regard the plaintiff claims a further Fifty Thousand Namibian Dollars (N\$50 000-00) against the defendant.

[3] At the conclusion of the hearing Mr. Petherbridge who appeared on behalf of the plaintiff conceded correctly in my view that the plaintiff's claim in respect of the

loss of consortium cannot be sustained. It would appear that the marriage between the plaintiff and his former spouse became strained for financial reasons and that eventually led to the breakdown of the marriage.

[4] All that remains to consider as a consequence is whether the plaintiff is entitled to any damages based on the contumelia the alleged suffered as a result of the adulterous relationship between the defendant and the plaintiff's former wife. It must be borne in mind that since the defendant denies that there was an adulterous relationship between him and the plaintiff's wife, the onus of proving the case against the defendant rests upon the plaintiff. That onus the plaintiff must discharge on a balance of probabilities. I heard the evidence of 3 witnesses being the plaintiff, the defendant and the plaintiff's former spouse.

[5] In the end the dispute remains one of fact in the sense that I must consider whether on the facts accepted by this court and the probabilities of the matter and the circumstances surrounding the case, the plaintiff had succeeded in discharging the onus resting upon him and to which I have referred. I have to add immediately that it was not denied by any of the parties and indeed it was common course that during the latter stages of the marriage between the plaintiff and his former wife, a relationship of some sort had developed between the plaintiff's spouse and the defendant.

[6] All that remained in dispute virtually was what the nature of that relationship was. The defendant and the plaintiff's wife who both admitted the existence of some relationship, contented before me that relationship was no more than a platonic one at the time and they contend further that a sexual relationship developed after the marriage between the plaintiff and his wife was dissolved. There is no direct evidence before me that the defendant and the plaintiff's wife had committed adultery during the subsistence of the marriage.

[7] The question remains whether there is circumstantial evidence sufficient to discharge the onus resting upon the plaintiff to prove that an adulterous relationship had existed during the course of the marriage. I will have to consider the evidence and evaluate it and thereafter consider whether the plaintiff's case has been proved. The plaintiff's evidence and it is again is common course, is to the effect that the plaintiff, his wife and the defendant were friends who met on various occasions at functions and so forth. He testifies that on the 28 December 2009 he and his wife attended a function at Rosh Pinah were they all lived.

[8] During the course of the function he noticed that his wife had left the room in which they were and had gone outside. When she did not return after a while he went looking for her and found her with the defendant sitting on a bench in the vicinity of the swimming pool. According to him his wife was sitting across the length of the bench with her legs tucked underneath the defendant and he noticed that the defendant's left hand was between the legs of his wife.

[9] He later confronted the defendant of what he had seen and the defendant apologized and promised not to interfere in their relationship. He testified that shortly thereafter on the 3<sup>rd</sup> of May 2010 the parties were again at some function. He noticed his wife left in the direction of the toilets followed by the 2<sup>nd</sup> defendant. He also followed to see what was going on and in the vicinity of the toilets he found the defendant and his wife in an embrace and they were kissing one another. He testifies further that once more he noticed that the defendant had his hands between his wife's legs.

[10] He became angry and noticed that the defendant had locked himself in one of the toilets. He broke down the door and pulled the defendant out. Some other people intervened and the defendant left in his vehicle.

[11] From certain cell phone records that were handed in, it appears that there was regular, almost daily contact between his wife and the defendant. He also testifies that his wife stayed out late at night and sometimes only returned at 3 or 4 o'clock in the morning.

[12] He says that on one occasion he drove in the direction of the defendant's house and parked some distance from the house. He phoned his wife, but she did not answer her phone. He then phoned the defendant. The defendant answered the

phone and upon enquiries by the plaintiff as to where his wife was, the defendant mentioned to him that his wife was not at his house and that he the defendant had already gone to bed. Shortly thereafter he noticed his wife emerge from the house of the defendant.

[13] As I had indicated the defendant and the plaintiff's wife while admitting the relationship between them, testified to the effect that the relationship remained a platonic one at all prevalent times.

[14] More particularly the evidence of the defendant and the plaintiff's wife was to the effect that on both occasions, that is when they were at the swimming pool and the occasion of the 3<sup>rd</sup> May 2010 that the defendant did not have his hand between her legs.

[15] This evidence if accepted will indicate that the relationship was not as platonic as the defendant and the plaintiff's wife wish it to be.

[16] It is also common cause that on the evening of the 3<sup>rd</sup> May 2010 when the defendant and the plaintiff's wife where at the toilets, they were in fact kissing. The plaintiff's wife's testimony is to the effect that this was a spur of the moment impulse which she could not otherwise explain.

[17] I found the plaintiff to be a good witness. The only possible criticism of his evidence is that he contended that as a result of the relationship between his wife and the defendant he will be denied promotion at his work. That I find improbable and the plaintiff admits that thus far his fears in that regard had not materialised.

[18] As far as the 2<sup>nd</sup> defendant and the plaintiff's wife are concerned, my impression of them is in that both tried to minimize the extent of relationship and in so doing were not fully honest with the court. I have indicated that both on the occasions of the 28<sup>th</sup> December 2009 and the 3<sup>rd</sup> May 2010, the plaintiff's evidence was to the effect that the defendant had his hand between the legs of the plaintiff's wife. This rather crucial and very relevant fact was not disputed by the defendant in the cross-examination. It was first denied during the course of the defendant's evidence.

[19] During the course of argument I raised this aspect with Mr. Small who appeared for the defendant. Mr. Small's attitude was that this allegation relating to both occasions was indeed denied and put to the plaintiff during cross examination as being false.

[20] I did not have a note of Mr. Small's contention and I thereafter postponed the proceedings in order that the cross-examination of the plaintiff by Mr. Small be transcribed. I have since been provided with a transcript and it is apparent that this particular allegation was never put to the plaintiff as being false.

[21] I will not go so far as to content or to say that Mr. Small tried to mislead the court, but counsel must be careful that they do not make positive assertions that the record will not bear it out.

[22] There is further a direct conflict between the defendant and the plaintiff's wife as to her alleged presence at the home of the defendant on the occasion that the plaintiff said he had gone there.

[23] The defendant flatly denied that the plaintiff's wife had been to his house at that time. His evidence was to the effect that the plaintiff's wife never came to his house in the early hours of the morning. When the plaintiff's wife gave evidence, she admitted to having been there on one occasion and went on to explain that her presence there was accounted for by the fact that after the bar at which she was had closed, she and some other friends went to the defendant's house for a night.

[24] Considering the evidence in its totality, I am persuaded that the evidence of the defendant and the plaintiff's wife as to the nature of their relationship is patently false.

[25] I find that in fact the relationship between the defendant and the plaintiff's wife was anything but merely a platonic relationship. Looking at the facts in their totality, I



am satisfied that on a balance of probabilities the relationship was an adulterous one. And I find accordingly.

[26] As far as the quantum of the plaintiff's damages of are concerned, I take account of the fact that he lives in a small community where people know each other's affairs and accept that as a result of these incidents he had lost some friends and his social life became impaired.

[26] As I had indicated his evidence to the effect that his chances of promotion at his place of work are jeopardized is not borne out by the evidence and the probabilities of the case. I will also take into account the fact that modern day society has become more tolerant towards incidences of adultery and that must reflect on the amount of damages I must award.

[27] I also take account of the fact that this relationship between the defendant and the plaintiff's wife developed after the marriage relationship between the plaintiff and his wife had become strained and was in the process of breaking down.

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

- 1) That the defendant is ordered to compensate the plaintiff in damages in the amount of Ten Thousand Namibian Dollars (N\$10 000 00).
- 2) Interest a tempore morae on the amount of N\$10 000.00 at the rate of 20% per annum from date of judgment until date of final payment.
- 3) That the plaintiff is awarded costs.

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P J Miller  
Acting Judge

#### APPEARANCES

PLAINTIFF : I PETHERBRIDGE  
Of Petherbridge Law Chambers

DEFENDANT: A SMALL

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Instructed by Cronje & Company