

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3813/2010

In the matter between:

B

PLAINTIFF

and

D

DEFENDANT

Neutral citation: *B v D* (I 3813-2010) [2013] NAHCMD 180 (28 June 2013)

Coram: VAN NIEKERK J

Heard: 14, 15, 16, 17 November 2011

Delivered: 28 June 2013

Flynote: **Husband and wife** – Adultery – Proof of – Claim for damages against third party.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

[1] The plaintiff, who is a married woman, instituted action against the defendant for damages in the amount of N\$55 000, plus interest and costs of suit. The claim arises from an alleged adulterous relationship between the defendant and the plaintiff's husband (also referred to herein as Mr B).

[2] In her particulars of claim the plaintiff alleges, *inter alia*, that the defendant entered into this relationship during September 2009; that she left the common home as a result of this relationship; that the defendant was aware of the fact that the plaintiff and her husband were married; that as a result of the relationship she has been deprived of the companionship and *consortium* of her husband; and that during their marriage the husband had contributed to the common household, to the purchase of a vehicle and in general to the wellbeing of the plaintiff and their child, a boy, born during July 2009.

[3] The alleged damages are set out as being N\$27 555 for the loss of the 'companionship, consortium, comfort, society and services' of her husband and N\$27 500 for *contumelia* inflicted upon the plaintiff.

[4] The defendant admits that she was at all relevant times aware of the marriage, but denies the existence of an adulterous relationship. She denies that the plaintiff suffered any damages and the quantum thereof.

[5] The plaintiff was the only witness called to testify in support of her case. In summary the relevant aspects of her evidence is as follows. She stated that she was married in community of property on 11 October 2008 after a relationship with Mr B which lasted about five years. She became pregnant shortly afterwards and on 21 July 2009 their son was born. At the time of the trial she was the defendant in a divorce action instituted against her by her husband on 11 November 2009. Mr B was employed at NAC.

[6] She left the common home because Mr B allegedly abused her emotionally and verbally. According to her things began to go wrong in the marriage since about May 2009. Her husband, who had always been very loving, compassionate, caring and supportive, especially during her early pregnancy, suddenly began to abuse her verbally. He told her that she was a coward, a backbiter and a common prostitute. He allegedly said that she should take her belongings and 'fuck off' out of his house because he has someone else in his life and she has no-one. During this time he also left the common bedroom and moved to the spare room where he slept on a single bed.

[7] Initially the plans had been that she should give birth in Lüderitz, but because of her husbands' abuse she decided to pack up and travel to Keetmanshoop to stay with her mother for the confinement. When she returned home with the baby during about September 2009, Mr B had moved the double bed from the main bedroom to the spare room. As she had had a Caesarean section and could not sleep comfortably with the baby on the single bed, which was broken, she slept with her husband on the double bed in the spare room. Later she bought a new double bed and moved back to the main bedroom with the baby.

[8] She continued staying in the common home until March 2010. Since May 2009 she had hoped that matters would improve after the birth of the baby, but the marital relationship deteriorated even further. During July 2009 before she left for her confinement, Mr B used to return home in the early morning hours. She confronted him, but he said that it had nothing to do with her, that she was nothing to him and that she should 'fuck off'. He also told her not to prepare food for him, or do his laundry, or clean the house and that he would do these things himself. She eventually rented a house and moved out of the matrimonial home with the baby during March 2010.

[9] As I understand it, the plaintiff at a certain stage learned from others that Mr B's work vehicle was often seen at the defendant's house. During August 2009 while she was in Windhoek she telephoned the defendant and asked her about this, also pointing out that Mr B was married and that the defendant was single. The defendant reacted aggressively, saying that Mr B was her friend and visits her, but that, if it were a problem for the plaintiff, she would simply tell Mr B to stay away from her. The plaintiff also called her husband, who said that he was giving the defendant a lift to work and back.

[10] The plaintiff mentioned several other examples of how her husband's attitude and conduct changed since May 2009. For instance, she said that Mr B used to make his personal vehicle available to her for use when her vehicle gave problems. However, after she moved out of the common home and when her vehicle broke down in November 2010, Mr B no longer assisted her. She had to walk to work or take public transport about 500 metres from her home, often in very strong winds.

Mr B used to take responsibility for the Friday evening meal, which he later no longer did. The good times they used to spend together were no more.

[11] Although she attempted to discuss these problems with Mr B, he would respond by hurling insults. He also stated that she was no longer his responsibility. He removed her as a beneficiary on his medical aid plan immediately after their child was born.

[12] The plaintiff introduced certain photographs into evidence. Exhibit "B(3)", allegedly taken on 25 March 2009 at 9:05pm shows the defendant and her daughter sitting in Mr B's work vehicle. On Exhibit "B(1)", allegedly taken on 2 May 2010 at 4:14pm the defendant and Mr B are shown sitting side by side very close together. She has her arm around his shoulders and leans her legs against his thigh, while he rests one arm on her thigh. Exhibit "B(2)", allegedly taken on 18 December 2010 at 5:07pm depicts only their heads and part of the upper body, but it is evident that they are lying down and that she is lying with her head on his shoulder with her eyes closed. The defendant's young child is partly visible in the same photograph, lying just behind the defendant. The plaintiff identified the location as her and Mr B's bed. Photographs "B(4)" and "B(5)" are head and shoulder shots of the defendant and Mr B. On the one photograph they are posing with their heads together and on the other the defendant is resting her head on Mr B's chest.

[13] Before March 2010 the defendant stayed in a house about 10 minutes' walk away from the matrimonial home. Since then she moved to another house about 3 – 5 minutes' walk away. Since she moved from the common home the plaintiff often used to see Mr B's vehicle parked at the defendant's house during the late afternoon.

[14] The plaintiff described her feelings when her husband chased her away. She said that she felt very indignant at the thought that she was only his wife for a short period of seven months before the defendant stepped in and became the object of Mr B's special treatment and was transported with Mr B's car, while she had to walk. She also described how their sexual relationship changed from loving and frequent encounters to a complete cessation of any intercourse during May 2009. After she moved from the common home she at times observed the defendant and Mr B in

town doing shopping for groceries and driving in Mr B's car. She felt that it was as if they were a married couple.

[15] The plaintiff made the outright allegation that the relationship between the defendant and Mr B is adulterous based on all the circumstances and especially the photographs. As she is a practicing Christian to whom the institution of marriage is holy, she feels particularly hurt by the relationship. She stated that she felt that Mr B had sold her out, that the defendant had stolen her husband and that the marriage bed was soiled. The plaintiff further testified that she was an active church and community group member who served in the church council. She had to endure talk and questions about her husband's behaviour which led her to withdraw from community and sport activities, as she began to feel like an outcast and as if she was the guilty one. She also feels aggrieved that their son has to live in circumstances where his father, who should be his role model, is not part of his daily existence.

[16] During cross-examination she conceded that their town is small, that there are only two grocery shops and that it would be easy to meet someone by chance while shopping there.

[17] The defendant testified that through her employment she knew Mr B since 2003. At a certain stage in the course of his work he began to deliver invoices to her home because at that time her employer's offices were closed. She knew that he was married. She used to walk to work or catch a lift with someone. At some stage during 2009 Mr B started giving her a lift halfway. At about this time the plaintiff telephoned her and asked whether there was a relationship between her and Mr B. She denied it and said that he gives her a lift to work. She offered to tell Mr B not to come to her house anymore, but she did not actually do so as they were friends. She said that Mr B was one of many other friends and that he visits her just like they do. She denied that the relationship is sexual and denied any adultery.

[18] She explained the photographs as follows. She confirmed that Exhibit "B(2)" was taken in the bedroom of Mr B's house. She explained that it was taken on a Saturday afternoon. Mr B had returned home from leave that day with his children (born before his relationship with the plaintiff). As she was looking after his house

she went there with her daughter of about 4 years old and saw his car outside. She knocked at the door with the purpose to greet him. One of his children opened the door and invited her inside. Mr B called her and she found him lying on his bed looking at photographs on his cellular phone which his children had taken on their trip. He invited her to lie down and look at these photographs with him. He then took the particular photograph. After they had looked at the photographs she went to sit on a chair in the bedroom while they chatted. She was there only for about 5 – 10 minutes and then left.

[19] Exhibit “B(3)” was actually taken by Mr B on 18 November 2010 at some time after work. She stated that the date and time indicated on the photograph is wrong as there was a problem with the camera’s batteries. She had returned from work and she and her older daughter were on their way to see a big passenger ship that had docked in the harbour. Mr B, who was also going to look at the ship, had given them a lift. He also took photos of the ship. She testified that she is certain of the date because the ship’s visit to the town was an important annual event.

[20] Exhibit “B(1)” was taken at the local museum where her eldest daughter worked. Mr B had brought his children there to visit the museum. They took several photographs that day of themselves and the children in various poses. The reason why they all sat close together was because there was only one chair on which they had to sit.

[21] Exhibits “B(4)” and “B(5)” were taken by Mr B on his cellular phone.

[22] She denied having gone shopping for groceries with Mr B. She did sometimes meet him in the shop by chance. She stated that she usually cooked in the evenings for herself and her children. Mr B asked her during October 2009 whether she would also cook for him as he did not trust eating the food the plaintiff cooked at home. Usually he would collect the food the next morning when he picked her up for work.

[23] The defendant denied having a romantic relationship with Mr B. She said she knew nothing about the plaintiff and that Mr B never discussed the reasons for instituting a divorce action against the plaintiff. She stated further that they travelled

together in Mr B's car to Windhoek for the court case, but that they stayed at different places, each with a relative.

[24] The defendant called Mr B as a witness. In confirmed most of the defendant's evidence. He gave detailed testimony about his marriage relationship with the plaintiff. It is not necessary to deal with all he said. I shall concentrate on the essential evidence relevant to this case. He testified that the marriage with the plaintiff soon produced problems. He and the plaintiff each entered into loan agreements to finance the wedding. However, just before the wedding there was money short and he had to hastily obtain an additional loan from his mother. After the honeymoon he discovered that the plaintiff had instead used some of her money to pay other personal accounts. He later had difficulty in getting the plaintiff to pay back the money to his mother. He stated that he was very disappointed by her behaviour and began to lose trust in her. He also recounted further examples of dishonest behaviour related to their financial arrangements. This caused tension and ill feelings in their relationship which sometimes lasted for a week or two. Gradually the relationship deteriorated as they began to differ about more and more issues. This also led to communication problems. He experienced her as spiteful. During July 2009 the plaintiff stopped cooking and washing for him. He did it himself for a while. He stated that he used to have regular sexual intercourse with the plaintiff before the marriage took place, but because of the problems that arose between them, he lost interest in her.

[25] Two weeks before the plaintiff went on maternity leave they again had arguments. He found out from the pastor that the plaintiff wanted to go to Keetmanshoop for the confinement, although their agreement had been that the birth would take place in the town where they stayed. During her absence they did not communicate as they were not on speaking terms. He visited the plaintiff and the baby once in Keetmanshoop on his way back from Windhoek after an operation. Without informing him the plaintiff returned to the common home after two months just before she had to commence her work again. Mr B slept in the main bedroom for one night and then moved out into the guest bedroom. The plaintiff would lock herself and the baby into the main bedroom when she returned from work every day. They hardly communicated. Matters continued like this until about October 2009

when Mr B became afraid to eat or drink anything at home. For reasons that are not relevant here Mr B feared for his life. He then asked the defendant to cook for him. As she did not want compensation, he offered to give her a lift to and from work every day. Every morning when he picked her up, he also fetched the food which she had prepared the previous evening. He divided the food into two meals for the day. He knew her since 2003 as he had to deliver invoices to her home at the end of every month. These deliveries stopped at the end of November 2009.

[26] During August 2009 the plaintiff contacted him from Windhoek while she was on maternity leave and confronted him about rumours that his car was frequently parked at the defendant's house. He confirmed this and explained that he went to pick up his food and also gave her a lift. He also denied that they ever went shopping together. He further confirmed the evidence given by the defendant about the photographs.

[27] Mr B testified that he had a 'clean' relationship with the defendant, by which I understand that there was no sexual intimacy. At first he stated that he has never been alone with the defendant as one or the other of her or his children is always present. Later he conceded that they have been alone once or twice. He did not visit her during the week, but sometimes did so on weekends. Sometimes they would socialize in a bigger group of friends. He expressly denied that they ever had sexual intercourse. When cross examined about his need for sex, his answer was to the effect that he was experiencing much stress, *inter alia* as a result of the litigation between him and the plaintiff, the current case and because of a pending rape charge the plaintiff had laid against him which led to him being held in custody for a while and that as a result, his libido is much diminished. This concluded the evidence presented.

[28] At this stage I think I should briefly state my impressions of the witnesses and some aspects of their testimony. The plaintiff was inclined to exaggerate by painting an idyllic picture of the extent and degree of domestic and conjugal harmony and bliss that existed until May 2009. Her account that all this changed from one day to the next when Mr B suddenly became a villainous brute for which the defendant is to blame because she 'stole' her husband is so one sided and oversimplified that even

her own counsel was not prepared to argue the case on this basis. It is clear from Mr B's account that there were several incidents over a period of time which left him with a lack of trust in the plaintiff. On his version there was a gradual deterioration of their relationship since the wedding which became progressively worse over time. Counsel for the plaintiff submitted that Mr B relied in this Court on petty and flimsy reasons for his alleged lack of trust in the plaintiff to cover up the real cause of the problems in the marriage, which was that he wanted to be free to pursue an adulterous relationship with the defendant. However, there are indications that he did not make up the story about a lack of trust for purposes of this trial. He already relied on a lack of communication and trust when the particulars of claim were drawn up in October 2009 for the action for divorce against the plaintiff. He already in October 2009 indicated to the defendant that he does not want to eat anything prepared at his home. It is also common cause that he had paternity tests done to check that the child was his, indicating a further lack of trust in the plaintiff.

[29] While I accept that the plaintiff is religious and a person of some standing in her community, she did come across as sanctimonious. My initial impression of her testimony was strengthened when Mr B described her as hypocritical and pretending to the outside world to be someone that she is not. The reason for his view was, *inter alia*, that she told him lies and that she was dishonest in her dealings with him about the marital and household finances; that she gave spurious reasons for removing photographs of his children from a prior marriage; and that she entered his room without his permission and surreptitiously removed certain items she had previously given to him as gifts. He experienced her as spiteful and vindictive and suspected that she married him only to reap financial and proprietary benefits.

[30] As far as the defendant is concerned, she was inclined to say as little as possible in the witness box. Perhaps she felt safer this way. I find it improbable that she knew so little about the plaintiff and the problems in the marriage as she professed to know whilst being obviously a close friend of Mr B. There are some discrepancies in the evidence of the defendant and Mr B. By all accounts she had only started to cook for him in October 2009. He could therefore not have picked up his food during August 2009 as he testified he did when he was confronted by the plaintiff. I also understood him to testify that he offered to give her a lift in exchange

for her cooking his food. This could therefore not have been the reason why his car was parked at the defendant's house during August 2009 when the plaintiff confronted him. However, the plaintiff testified that when she confronted him during August he did say that he was giving the defendant a lift to work.

[31] Mrs *Petherbridge* during argument also pointed out that the defendant stated that he used to visit her every evening to fetch his food and that sometimes they were alone, whereas Mr B said he only visited her on week-ends, and that he collected his food in the mornings. He at first stated that they were never alone and later conceded that they were alone once or twice. She submitted that these discrepancies went to the root of the defendant's defence that she was only friends with Mr B. Coupled with what she submitted was a clear and glaring intimacy between them as evident from the various photographs, especially Exhibit "B(2)", counsel submitted that the Court would be justified in making the inference that the relationship between the defendant and Mr B was adulterous.

[32] Mrs *Möller* for the defendant, on the other hand, submitted that the clearest evidence was required of the relationship being adulterous and that there was no such evidence. She prayed that the plaintiff's claim be dismissed with costs.

[33] Although the standard of proof required to prove adultery in a matter such as this is the same as in all civil cases, namely a preponderance of probabilities, the clearest evidence is required to satisfy that standard (*Gates v Gates* 1939 AD 150 at 154-5).

[34] Adultery may be, as plaintiff's counsel emphasized, proved by circumstantial evidence. In *Kleinwort v Kleinwort* 1927 AD 123 the Appellate Division held (at p124):

'There was no direct evidence of misconduct; but it is not always necessary, because misconduct may be inferred. The parties may be found in such a compromising position that any reasonable man would draw the inference that adultery had been committed. Or opportunity may be sufficient, coupled with such other factors as the evidence of a guilty attachment, or of a mutual passion of such a nature as to satisfy a reasonable man that the parties had taken advantage of the opportunity of indulging their passion. But the evidence must be strong enough to warrant the

inference, not merely that adultery might have taken place, but that it actually did take place.'

[35] In *Van Deventer v Van Deventer and Another* 1962 (3) SA 969 (N) the Court made these useful remarks (at p.971A –E):

'There are doubtless many possible stages between an innocent, platonic association and an adulterous one. In order to succeed, plaintiff must satisfy me, on a balance of probability, that the relationship between the defendants on that night was an adulterous one and that they in fact committed adultery. The fact of adultery, as it has frequently been stated in judgments of the Courts, may properly be inferred where the evidence establishes that the parties strongly desired one another, had the opportunity to indulge their passion and showed a willingness to do so. (*Kleinwort v Kleinwort*, 1927 AD 123 at p. 124; *Groundland v Groundland and Alger*, 1923 W.L.D. 217 at p. 219; *Ricketts v Ricketts*, 1922 CPD 335; *Truter v Truter and Another*, 1938 NPD 250 at p. 254). The relationship and behaviour of the parties prior to the alleged adultery might furnish cogent evidence of their desire, and possibly also of their willingness, to commit adultery; the circumstances in which they are found might in themselves give rise to the inference that they not only were desirous of and willing to commit adultery but that they in fact did so. It was pointed out by GREENBERG, J.A., in *Goodrich v Goodrich*, 1946 AD 390 at p. 395, that

'these so-called rules are merely particular examples of the wider test involved in the wider question which must be considered in all cases of circumstantial evidence, viz. whether the circumstances justify the inference'.

Where, on a consideration of all the evidence, the Court is convinced that that inference is the correct one on a preponderance of probabilities, the plaintiff will have discharged the onus resting upon him. (*Gates v Gates*, 1939 AD 150).'

[36] I further bear in mind that where, as here, the allegation of adultery rests upon circumstantial evidence, the approach to be followed is as was set out in *Smit v Arthur* 1976 (3) SA 378 (AD) at p384G – H:

'But the proper resolution of the issues in this case must be sought not by appraising each incident simply on its own circumscribed facts, but by a careful survey of the whole of the history of the relationship of the parties and of their behaviour at all relevant times. All the relevant facts must necessarily go into the melting pot and the

essence must finally be extracted therefrom. While the triad of desire, opportunity and willingness will often be sufficient to justify the inference of adultery, it does not follow that each of those elements must be independently proved; depending upon the circumstances, proof of the first two of those elements might justify an inference that the third, too, was present.'

[37] In my view the defects in the defendant and Mr B's evidence are not such that they are necessarily indicative of guilt to adultery, although it is likely that their relationship is closer and more intimate than they are willing to admit. It is so that 'innocent persons may be strongly tempted to conceal facts from which they think that an inference against them might be drawn' (*Smit v Arthur supra* at p385H). The main reason why I declined to grant absolution from the instance at the close of the plaintiff's case, was because of the photograph taken on the plaintiff's bed (Exhibit "B(2)"), and to a lesser degree because of the photograph handed in as Exhibit "B(1)", considered against the background of Mr B's changed behaviour towards the plaintiff. I was in agreement with plaintiff's counsel that the photographs and his conduct should be explained. However, now that it has been done, the furthest I think the evidence goes is to establish that the defendant and Mr B are physically comfortable with each other, that he trusts her and that they appear to be close. However, I am not persuaded that the evidence establishes a mutual desire to commit adultery, nor can I draw the inference that in fact adultery took place at any specific time or that the relationship is adulterous. Ultimately there is not sufficient evidence on which any of the legs of the triad may be established on a balance of probabilities.

[38] The result is that the plaintiff has failed to establish her claim and that it must be dismissed with costs.

K van Niekerk

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Judge

APPEARANCE

For the plaintiff:

Mrs M C Petherbridge

of Petherbridge Law Chambers

For the defendant:

Mrs S Möller

of Van der Merwe-Greeff Inc