

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3140/2012

In the matter between:

N

PLAINTIFF

and

B

DEFENDANT

Neutral citation: *N v B* (I 3140-2012) [2013] NAHCMD 222 (29 July 2013)

Coram: VAN NIEKERK J

Heard: 14 June 2013

Delivered: 29 July 2013

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

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ORDER

There shall be absolution form the instance with costs.

JUDGMENT

VAN NIEKERK J:

[1] The particulars of claim in this matter state that the defendant, while knowing that the plaintiff and her husband were married, unlawfully and intentionally (i) had an

intimate relationship with the plaintiff's husband from 2011 in which relationship she still persists (at the time the summons was issued); and (ii) committed adultery with the plaintiff's husband on several occasions from February 2012 to date (at the time the summons was issued). The plaintiff claims damages of N\$65 000 from the defendant for *contumelia* and loss of comfort, society and services by the husband as a result of the adultery.

[2] The action is undefended. The plaintiff testified, but her testimony veered sharply from the allegations in the particulars of claim. No amendments were moved. She stated that she became aware of what she called a romantic affaire between her husband and the defendant in January 2012. She had seen a photograph of them on her husband's cellular phone. She confronted her husband who admitted the affaire. The husband was not called as a witness and therefore the testimony about his admission is inadmissible to prove the truth of its contents.

[3] Around March 2012 her husband left the common home. The plaintiff made the bald allegation that the husband went to live with the defendant in a room the latter was renting. This evidence is based on what others had told her and is also inadmissible hearsay. At times when she was on her way back from work, she saw her husband sitting near the door of this room. She also presented inadmissible hearsay evidence that a maintenance order she had obtained from the local maintenance court was served on the husband at the defendant's address. The plaintiff never spoke to the defendant about the situation. She heard that the defendant moved to another town during July 2012. It is not clear from the evidence whether the husband then returned home, but my understanding is that the plaintiff when in the witness box implied that the affaire ended in July 2012. She did not testify that it still persisted at the time summons was issued in October 2012 as impliedly alleged in the particulars of claim.

[4] The plaintiff gave no evidence about any adultery between the husband and the defendant. The only mention that was made about the subject was when her counsel asked her whether she gave any permission to the defendant to have adultery with the husband, to which question she replied in the negative.

[5] Stripped of all the hearsay evidence presented the plaintiff's testimony does not go much of a length at all to establish her claim of adultery.

[6] The plaintiff gave some evidence about the damages she suffered and the feelings she suffered. As a result of the unsatisfactory evidence in regard to the merits of her claim it is not necessary to deal with this in any detail.

[7] During argument Mr *Ipumbu* for the plaintiff stated that the damages should be higher because the defendant was aware that her lover was married to the plaintiff. Although this allegation was made in the pleadings, there is no such evidence on record. He also undertook to provide the Court by 15h00 with some authority in similar cases which he had allegedly prepared for trial, but mislaid. Nothing was received.

[8] The result is unavoidable that an order for absolution from the instance should be granted with costs.

____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mr T Ipumbu
of Titus Ipumbu Legal Practitioners