



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1625/2012

In the matter between:

1.1.1.1.

HENDRICK USEB
PLAINTIFF

And

GEORGE LUCKY GAWASEB

DEFENDANT

Neutral citation: *Useb v Gawaseb* (I 1625/2012) [2014] NAHCMD 283 (1 October 2014)

Coram: UEITELE J

Heard: 06 & 07 June 2013

Delivered: 01 October 2014

Flynote: Husband and Wife – Delicts – Action for damages for adultery, loss of consortium and *contumelia* – principles restated - Damages – measure of - factors to be taken into account.

(b) **Summary:** The plaintiff was married to

Helen Charmaine Useb (Born Tsaes) on 03 September 2005 at Outjo. Two children were born of the marriage. On 25 November 2011 Charmaine left the plaintiff. She subsequently divorced the plaintiff and is presently living with the defendant in Windhoek.

On 25 July 2012 the plaintiff caused summons to be served on the defendant in which summons the plaintiff is claiming damages in the amount of N\$95,000.00 on the grounds of the defendant's alleged adultery with the plaintiff's former wife, Charmaine. The defendant defended the action.

Held that the plaintiff's cause of action is the *actio iniuri*, that the plaintiff draws the *onus* to prove the infringement of his personality rights and that damages are awarded on two grounds; first on the ground of the injury or *contumelia* inflicted upon the husband/wife, and second, for the actual damage which the plaintiff may have sustained by reason of the loss of society, comfort and assistance of his wife in consequence of the adultery.

Held further that both the defendant and Charmaine admitted that they entered into a romantic relationship prior to the dissolution of the marriage between the plaintiff and Charmaine. In view of this admission this Court finds that the defendant committed adultery with Charmaine when he stayed with her from May 2012 until when the marriage between the plaintiff and Charmaine was dissolved by this Court.

Held further that the plaintiff's evidence is generally, unsupported by details and this Court rejects it as false. Charmaine's evidence is supported by the evidence of friends, that she was thoroughly unhappy during the subsistence of the marriage. This Court is unable to find a causal connection between the admitted adultery and any loss of consortium which the plaintiff may have suffered.

Held further that plaintiff has failed to discharge the *onus* upon him to prove the loss of consortium.

Held furthermore that as regards the injury to his dignity and feelings this Court is not satisfied that defendant's adultery with Charmaine caused him any distress or

injuria whatsoever. Under the circumstances he is not entitled to more than nominal damages.

ORDER

- 1 The plaintiff is awarded an amount of N\$1 as damages for adultery.
 - 2 For the rest, the plaintiff's claim is dismissed, and the plaintiff is ordered to pay the defendant's costs.
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JUDGMENT

UEITELE, J

A Introduction

(c) The plaintiff was married to Helen Charmaine Useb (Born Tsaes) (I will in this judgment refer to her as Charmaine) on 03 September 2005 at Outjo. Two children were born of the marriage. On 25 November 2011 Charmaine left the plaintiff. She subsequently divorced the plaintiff and is presently living with the defendant in Windhoek.

(d)

(e) On 25 July 2012 the plaintiff caused summons to be served on the defendant in which summons the plaintiff is claiming damages in the amount of N\$95,000.00 on the grounds of defendant's alleged adultery with the plaintiff's former wife, Charmaine. The defendant defended the action.

(f) In support of his claim against the defendant, the plaintiff alleged that:

'4 On or about during the course of 2011/2012 until a date unknown to the plaintiff and at or near Windhoek the defendant committed an act/acts of adultery with plaintiff's wife, which adultery the latter has admitted to plaintiff during the course of 2012 at Windhoek.

5 As a result of the adultery aforesaid Plaintiff's wife left the common home during the latter part of 2011, and the said wife subsequently instituted divorce proceedings against the plaintiff. In the alternative the said adultery contributed to the plaintiff's wife leaving the common home and institution of divorce proceedings against the plaintiff.'

(g) The plaintiff claimed damages of N\$47,500 for *contumelia* and N\$47,500 for loss of comfort, society and services of the first defendant.

(h) The defendant defended the action and in his plea the defendant pleaded as follows:

'AD PARAGRPH 4 THEREOF (I.E.OF THE PARTICULARS OF CLAIM)

The contents hereof are denied as if each and every allegation was specifically traversed and denied and plaintiff is put to the proof thereof:

4.1 The Defendant without derogating from the generality of his denial aforesaid pleads that he entered into a love relationship with the plaintiff's wife during February 2012.

4.2 The defendant pleads that before commencing the said relationship with the plaintiff's wife the plaintiff's wife indicated to him that she has instituted divorce proceedings against the plaintiff as he had cause her severe psychological damage which had led to her losing all the love she felt towards the plaintiff.

4.3 The defendant further pleads that the plaintiff had indicated to him that she had separated herself from the marriage and consequently freed herself from the vows of the marriage.

- 4.4 The defendant further pleads that the plaintiff's wife and due to the plaintiff's unwarranted conduct towards her, she left the parties' common home during November 2011 after the plaintiff and his wife had agreed before family members that one of them institute divorce proceedings against the other on the ground of the irretrievable breakdown of the marriage same having reached a state of disintegration.
- 4.5 The defendant further pleads that having been advised that there were no reasonable prospects of the restoration of a normal marriage relationship between the plaintiff and his wife commenced with the love affair.'

The plaintiff did not replicate to these allegations.

B THE EVIDENCE

The Plaintiff's evidence

[6] The plaintiff testified in his case and he called no other witnesses; He testified that his relationship with Charmaine can be characterized as a normal average relationship for most of its existence. He said that for approximately six years he and Charmaine had no significant discord apart from occasional differences. He testified that they used to share and contribute to the common household, they did things together and invested their respective incomes towards the betterment of their lives and that of their children.

[7] The plaintiff further testified that during the subsistence of the marriage there were times that Charmaine would inform him that she is going to visit a cousin of hers who was in prison, but she always arranged her visits in such a manner that she would go alone or that it was never required of him to pick her up at the prison or drop her off. He further testified that he later gained information that the defendant spent some time in prison. He furthermore testified that Charmaine and the defendant knew each other prior to marrying her and that they (i.e. Charmaine and the defendant had a romantic relationship prior to plaintiff's and Charmaine's marriage). He testified that he learned that his wife was visiting the defendant whilst he was serving his prison sentence. He testified that between September 2011 and November 2011 the defendant was released from prison.

[8] On 25 November 2011 he dropped off Charmaine at work as usual, and the arrangement was that he would pick her up again in the afternoon when she knocked off from work. But that was not to be, as Charmaine never contacted him. He attempted to contact her but her mobile phone was either switched off or went unanswered. He further testified that on Friday (25 November 2011) evening he stayed up until very late in the evening waiting for Charmaine to come home, but the wait was in vain. He testified that he waited so long that the following day he reported his wife as missing at the Namibian police.

[9] He testified that Charmaine only returned home on Sunday afternoon (i.e. 27 November 2011). When she returned he demanded to know from her where she was, and her reply was that she would not inform him. The argument then become heated and Charmaine grabbed some of her clothing and again left the common home, only to come back the following day but again to collect her belongings. He testified that when she left she first went to stay with a cousin of the defendant and thereafter moved in with the defendant and that they are still living together.

The Defendant's evidence

[10] The defendant testified in his own defence and called three other witnesses, namely Charmaine, Ms Cecilie Haosemab and a Ms Frieda Hoebes.

MR. GAWESEB

[11] The defendant testified that he and the plaintiff were schoolmates during 1986 or 1987 but that they were not close friends. He further testified that he and Charmaine knew each other before the said Charmaine got married to the plaintiff. He testified that he and Charmaine were in romantic relationship between 2000 and 2003 and that during the period of that relationship he was residing in Windhoek and Charmaine was residing in Walvis Bay. He testified that during 2003 he moved to Rundu and the relationship between him and Charmaine slowly died as a result of the long distance between them.

[12] The defendant further testified that during the year 2003 he was convicted and sentenced to serve a custodial sentence and he was in prison from that date

(i.e. 2003) until he was released on 30 September 2011. Upon his release he spent the whole of October 2011 in Okombahe with his parents and relatives and the whole of November 2011 in Walvis Bay with his father's relatives. He testified that he was not aware that the plaintiff and Charmaine were married until about 2007, whilst he was still serving his prison term he was taken to the Polytechnic of Namibia to register and that is where he met Charmaine and the plaintiff and when they met she introduced the plaintiff to him as her husband. He further testified that during his term in prison he had no contact with either the plaintiff or Charmaine. He only started to communicate with Charmaine mainly via the phone and in particular via text messages towards the end of December 2011.

[13] He testified that during their communication Charmaine informed him of her marital experiences which were, according to her, unpleasant and that she had moved out of the marital home during November 2011. The defendant further testified that Charmaine informed him that she and the plaintiff had reached a mutual agreement that the marriage between them should be dissolved and that she had instituted divorce proceedings and that it was just a matter of time before the marriage was dissolved.

[14] He continued to testify that he played no role in the termination of the marriage between the plaintiff and Charmaine as Charmaine had informed him that the marriage relationship between her and the plaintiff had irretrievably broken down and that there were no prospects of reconciliation by the time that he (i.e. the defendant) and Charmaine entered into a romantic relationship. He testified that the visits between him and Charmaine stated in January 2012 and the love relationship between him and Charmaine started in May or June 2012 that is months after she had moved out of the common home.

MS. HELEN CHARMAINE TSAES

[15] Charmaine testified that she knew the defendant prior her to marriage to the plaintiff. She went on to testify that from the time she met the plaintiff and during the subsistence of the marriage up until the very last days of it, she had absolutely no contact with the defendant. She proceeded to testify that she only started communicating with the defendant towards the end of December 2011.

[16] Charmaine further testified that she and the plaintiff had endured great difficulties in their marriage and in particular from 2009. She narrated the difficulties that she endured as follows: She married the plaintiff on 03 September 2005 in Outjo and they left Outjo for Windhoek on 25 September 2005 and on that day she discovered that the plaintiff was involved in an adulterous relationship with a certain lady named Jacky Manga. Charmaine testified that when she discovered the adulterous relationship she confronted the plaintiff and his reply to her was in Afrikaans and he said to her *'fokkof, gaan naai, moenie vir my kak vertel nie'* loosely translated it means 'fuck off go fuck and do not tell me shit.' The confrontation led to a situation that they were not on speaking terms for a few days. The plaintiff later apologised and promised that he will not repeat his mistakes.

[17] Charmaine further testified that after the plaintiff apologised they stayed peacefully until December 2005 when they went to visit plaintiff's mother in Outjo. She testified that what the plaintiff would do was to leave her at his mother's house and he would go and hang around in the streets and returned at about 03H00 or about 04H00 in the mornings. She further testified that he also had another girlfriend called Ndapewa, she testified that how she came to know about Ndapewa was that the plaintiff would call Ndapewa in the morning whilst he was sleeping next to her and she could hear the conversation between them (i.e. between Ndapewa and the plaintiff). When she confronted the plaintiff the plaintiff just stood up and left. She later moved out of the common home and moved to her sister's house (that was in 2006) and she stayed at her sister's house for about three weeks, but during those three weeks he would approach her almost every day and beg her for forgiveness promising her that he would not repeat what he did. She testified that her sisters and cousins later convinced her to forgive the plaintiff and return to him, which she did.

[18] She testified that despite the plaintiff's repeated requests for forgiveness he never stopped his extra marital affairs and in 2009 she found pornographic pictures of the plaintiff and a lady called Ricarda on plaintiff's mobile phone. When she confronted him about the pornographic pictures his reply was that there was no more love between him and her and that she can do whatever she feel like doing and that she should proceed with her life. She then decided to institute divorce

proceedings, she approached Shikongo Law Chambers for them to institute divorce proceedings. When Charmaine caused summons to be issued the plaintiff approached a cousin of his named Mathew Haradoeb and requested him to speak to Charmaine for her to give the plaintiff another opportunity. Mathews spoke to her and she decided to give the plaintiff another opportunity and she withdrew the summons. Charmaine testified that apart from the extra marital affairs, in which the plaintiff involved himself there were also other issues at home, she testified that the plaintiff would not buy food, she and her children would beg for food from other people, he would not pay the municipal service account and the water supply to their residence was, disconnected during 2009. She said the mortgage bond instalments were being deducted from her salary and she was also responsible for debts which she and the plaintiff incurred and as a result she could not afford to buy food or pay the Municipal services accounts. Charmaine testified that she had two children (daughters) from pre-marital relationship and the plaintiff ill-treated the children. She said that when she travelled out Windhoek or out of the country on her return she would find that the plaintiff had chased the children from home. She said the ill-treatment of the children by the plaintiff caused her to resent the plaintiff so much that at times she even thought of killing him while he was asleep.

[19] With regards to her moving out of the common home she testified that during September 2011 the plaintiff informed her that he no longer wants to live with her children (i.e. the two daughters from her previous relationship) and that she had to choose between the children and him. He told her that if she wants to remain married to him, she must give her children to her sister. When she refused to accede to his demand the plaintiff suggested that one of them should institute divorce proceedings. Ms Haosemab was called, she intervened and spoke to everybody and the children asked for forgiveness where they wronged the plaintiff and they all agreed to forgive each other, but just a day later the plaintiff called Ms Haosemab and informed her that he was not accepting the apologies he stated that he was proceeding with the divorce action. He also advised her that they should sell the common house and share the profits equally and each one must look for a place where he or she will stay. Charmaine further testified that at that juncture she resolved that she would take her younger daughter to her sister in Swakopmund but her eldest daughter was in Grade 10 and she was busy preparing for her final examination so she decided to hang on with her until after the

examination. She testified that on the day that her eldest daughter finished writing her last exam she informed the plaintiff that she was traveling to Swakopmund to go and leave her daughters with her sister and that on her return she would look for a place to stay and she testified that she informed the plaintiff that she is going to temporarily stay with a certain Heidi (she said that Heidi was a childhood friend of hers) where she will stay while looking for accommodation of her own so that by January 2012 she would have a place of her own and that is what she did. She testified that she stayed with Heidi until the end of December 2011 and in January 2012 she secured a flat of her own.

[20] She further testified that she was scheduled to travel to the United States of America on Monday 29 November 2011, on Friday 25 November 2011 she informed the plaintiff that she will move out of the common house and move in with Heidi so that upon her return from the United States of America she would not return to the common home. On the Sunday prior to her departure to the United States she returned home to fetch some of her warm clothing on her return the plaintiff physically attacked her and assaulted her and she called in the aid of a City Police officer. Meetings with elders from both Charmaine and the plaintiff's side were held and at that meeting it was resolved that the plaintiff must institute divorce proceedings. When the plaintiff took too long to institute the divorce proceedings she decided to do so and in 2012 she obtained an order of divorce from this Court. She testified that while she was staying with Heidi in December 2011, she started to communicate with the defendant and started a love relationship with the defendant during May 2012 and the defendant moved into her flat during June 2012. She said the breakdown of her marriage to the plaintiff had absolutely nothing to do with the defendant but was caused by the propensity of the plaintiff to engage in extra marital affairs and his cruel and harsh treatment of her and her children.

MS. FRIEDA HOEBES

[21] Ms. Hoebes mainly corroborated some of the evidence given by Charmaine she specifically confirmed that she knows the plaintiff, the defendant and Charmaine and that she is in fact Charmaine's aunt. She testified that she was aware of the problems that the plaintiff and Charmaine experienced during their marriage because she was always called to attend meetings when the parties

experienced problems that they could not sort out. She testified that most of the problems emanated from the plaintiff involving himself in extra marital affairs. She testified that she attended no less than four different meetings aimed at addressing the problems in the marriage of the plaintiff and Charmaine. She further confirmed that she attended a meeting during November 2011 and that it was at that meeting that the plaintiff indicated to the elders and to Charmaine that he does not want to be with her and that he does not love her (i.e. Charmaine) anymore.

MS. CECILIE HAOSEMAB

[22] Ms Haosemab mainly corroborated some of the evidence given by Charmaine she specifically confirmed that she knows the plaintiff, defendant and Charmaine. She testified that she was aware of the problems that the plaintiff and Charmaine experienced during their marriage because the plaintiff always approached her for advice. She testified that on most occasions, the plaintiff complained about Charmaine's two daughters born of her previous relationship. That during September 2011, the plaintiff telephoned her and asked if he could see her urgently, she agreed as usual and as it was in the morning before going to work, the plaintiff agreed to pick her up from her home. That on their way to work the plaintiff told her that he has decided to divorce Charmaine because of the children as he could no longer tolerate them. That she advised the plaintiff that it is ridiculous to institute a divorce because of the children and it should not be the reason for ending his marriage.

[23] She further testified that she advised the plaintiff that she will go to their home in order to have a meeting with them and the children and that if that does not succeed, she was willing to take the girls. That the following day she went to the plaintiff's home and she had a meeting with the children in the presence of the plaintiff and Charmaine. After the meeting the children asked for forgiveness where they wronged the plaintiff. That the plaintiff advised her that he will see if there will be a change but the following day she received a call from the plaintiff advising her that he will institute divorce proceedings against Charmaine. She further testified that she enquired as to the real reason why he wanted to divorce Charmaine, his reply was that Charmaine lacked something that a woman should possess. She further testified that in her presence the plaintiff informed Charmaine that they must

sell the common home, share the profit and that Charmaine must find alternative accommodation as he will move in with his friend.

[24] Ms Haosemab further testified that she was aware that during November 2011 the plaintiff physically assaulted Charmaine as a result of the assault a meeting with the elders was called. That after long deliberations to endeavour to salvage plaintiff and Charmaine's marriage, the plaintiff indicated that there was nothing left between him and Charmaine and Charmaine indicated that if she had to stay with the plaintiff, she will die. Ms Haosemab further testified that she became aware of the relationship between the defendant and Charmaine during May 2012 (she testified that it was on mother's day) when Charmaine informed her that she and the defendant are in a romantic relationship.

DISCUSSION OF THE APPLICABLE LEGAL PRINCIPLES AND THE EVIDENCE

(i) [25] 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. In the matter of *Viviers v Killian*¹ 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...*' In that case the Court further set out the principles upon which damages are awarded in cases of this kind.²

(j)

(k) [26] Damages are awarded on two grounds; first on the ground of the injury or *contumelia* inflicted upon the husband/wife, and second, for the actual damage which the plaintiff may have sustained by reason of the loss of society, comfort and assistance of his wife in

¹ *Viviers v Killian* 1927 AD 449 at 450-1.

² The principles set out in the *Viviers v Killian* matter were accepted and applied by this Court in the case of *Mathews v Ipinge* 2007 (1) NR 110 (HC) and the unreported cases of *Jaspert v Siepker* (I 670/2012) [2013] NAHCMD 267 delivered on (30 September 2013); *van Wyk v van Wyk* (I 3793/2012) [2013] NAHCMD 125 (reasons released on 14 May 2013).

consequence of the adultery. 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.³

(l)

(m) [28] In *Grobbelaar v Havenga*⁴

Harcourt, J said:

(n)

(o) '...this concept of consortium is, as I appreciate it, an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. It was, in my judgment, well described by LORD JUSTICE BIRKETT in Best's case in the Court of Appeal, (1951) 2 K.B. 639 at p. 665, as follows:

(p) 'Companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together, they make up the consortium; but I cannot think that the loss of one element, however grievous it may be, as it undoubtedly is in the present case, can be regarded as the loss of the consortium within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded. Consortium, I think, is one and indivisible. The law gives a remedy for its loss, but for nothing short of that.'⁵

(q) 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. *Contumelia* on the other hand simply relates to the

³Neethling, 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*.

⁴ 1964(3) SA 522 (N) at 525 E.

⁵ Also see the case of *Peter v Minister of Law and Order* 1990(4) SA 6 (ECD) at 9 G-H

infringement of the plaintiff's right to privacy, dignity and reputation.

[29] In the present matter both the defendant and Charmaine admitted that they entered into a romantic relationship prior to the dissolution of the marriage between the plaintiff and Charmaine. In view of this admission I find that the defendant committed adultery with Charmaine when he stayed with her from May 2012 until when the marriage between the plaintiff and Charmaine was dissolved by this Court. The only question for decision is what amount should be awarded by way of damages to the plaintiff.

[31] In the matter of *Chapman v Chapman and Another*⁶ 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* which were accepted by this court⁷. I find it desirable to examine the state of the marriage which existed between the plaintiff and Charmaine, since this is not only relevant to the nature of the consortium which the plaintiff was then enjoying, but also as affecting the probabilities concerning the actions of the actors in this somewhat sordid matrimonial drama. It is also directly relevant to the credibility of the plaintiff, who claimed that his marriage was a reasonably happy one, and Charmaine, who claimed that it was almost exactly the reverse, in truth a cat and dog existence which had tested her endurance almost to breaking point.

[32] I have above summarised the evidence given by the plaintiff and the evidence given on behalf of the defendant and do not intend to repeat it here. The plaintiff's evidence is generally, unsupported by details and I reject it as false. Charmaine says, and she is supported by the evidence of friends, that she was thoroughly unhappy. I accept that evidence. Viewing the totality of the evidence as a whole, I am quite unable to conclude that the defendant has acted, and done so successfully, in enticing away the plaintiff's wife. I would find difficulty in even going so far as to hold that Charmaine left him in consequence of her association with the defendant. I am furthermore unable to find a causal connection between the admitted adultery and any loss of consortium which the plaintiff may have suffered.

⁶ 1977 (4) SA 142 (E).

⁷ See the cases of *Jaspert v Siepker* and *van Wyk v van Wyk* (*supra* footnote No. 2)

Thus, in my view, the plaintiff has failed to discharge the onus upon him to prove in regard to the loss of consortium.

[33] As regards the injury to his dignity and feelings the evidence reveals the plaintiff's cavalier attitude towards marriage generally and marriage with Charmaine in particular, his extra marital affairs with Jacky Manga and the girl called Ricarda, his attempt to mislead the Court by fabricating the November 2011 adultery between Charmaine and the defendant. I am not disposed to accept his assertion that the defendant's adultery with Charmaine caused him humiliation and depression. The admitted adultery provided the plaintiff with a good cause of action which he attempted to exploit in these proceedings, but I am not satisfied that it caused him any distress or *injuria* whatsoever. Under the circumstances he is not entitled to more than nominal damages.

[34] I am not disposed to make any order of costs in favour of the plaintiff. I decline to do so because:

- (a) he intentionally omitted to disclose his extra marital affairs;
- (b) he manufactured evidence in a deliberate attempt to mislead the Court;
- (c) when presenting his evidence he failed to disclose material facts which the Court had to know in order to arrive at a just decision with regard to the quantum of the damages; and
- (d) he failed to prove that he suffered more than nominal damages.

[35] In the result I award the plaintiff an amount of N\$1 as damages for adultery. For the rest, the claim is dismissed, and I exercise my discretion to signify this court's displeasure of the plaintiff's attempts to mislead it and order the plaintiff to pay the defendant's costs.

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SFI Ueitele
Judge

APPEARANCES

PLAINTIFF:

J Diedericks
Of Diedericks Inc

DEFENDANT:

L Shikale –Ambodo
Of Shikale & Associates