REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 6056/2014

In the matte between:

AMANDA VAN STRATEN **PLAINTIFF**

And

NICOLETTE CORNELIA BEKKER **DEFENDANT**

Neutral citation: *Van Straten v Bekker (I 6056-2014) [2016] NAHCMD 243 (25 August 2016)*

CORAM: MASUKU J.,

Heard: 12 August, 21 August, 03 and 25 September 2015

Delivered: 25 August 2016

FLYNOTE: FAMILY LAW- Divorce – action for adultery based on *contumelia* and loss of consortium – whether still sustainable in the modern era.

SUMMARY: The plaintiff a married woman sued the defendant for loss of consortium and *contumelia.* She alleged that after the husband met the defendant, his attitude and

affection towards her changed. He started staying away from home and refused to afford her marital privileges. Furthermore, the defendant on occasion passed snide remarks at her. On one occasion she fell gravely ill but her husband neglected to offer her support. He subsequently asked her to sign a divorce settlement, as he could no longer continue living with her as husband and wife, as the substratum of the marriage on his part, had dissipated.

Held that- the action of *contumelia* and loss of consortium had lost their lustre, as they are no longer in consonance with the constitutional values of privacy, dignity and equality.

Held further that- there were other means available to society for protecting the family other than through the claim based on adultery.

Held further that – Society no longer views the act of adultery with the same degree of disapprobation, as has always been the case.

Held further that – that the role of the guilty spouse in the disintegration of the marriage is often underplayed, giving prominence to the role of the third party, when the guilty spouse may have been the one who initiated the extra-marital affair.

ORDER

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1. The plaintiff's claims for *contumelia* and loss of *consortium* are dismissed.
2. There is no order as to costs.

JUDGMENT

MASUKU J,;

Introduction, history and nature of the dispute

[1] The plaintiff in this matter is a woman who was married to one George Andrew Van Straten in Walvis Bay, within this court's jurisdiction.

[2] The marriage between the two was solemnized on 31 April 2008. The marriage was until 19 January 2015, still subsisting, meaning that at the time of the issuance of the combined summons in this matter i.e. on 16 December 2014, the plaintiff and Mr. Van Straten were still locked within the bonds of matrimony as husband and wife.

[3] The defendant is Nicolette Cornelia Van Bekker, an adult female who resides within this court's jurisdiction also in Walvis Bay.

[4] This action, which is virtually undefended, is a claim instituted by the plaintiff for payment of damages by the defendant, based on allegations that the latter has been and continues to commit adultery with the plaintiff's spouse since July 2014 in Walvis Bay. In her particulars of claim, the plaintiff seeks payment of an amount of N$ 100,000 being N$ 50 000 for *contumelia* and the balance being in respect of a claim for loss of comfort, society and services of her spouse.

[5] I say the claim is undefended for the reason that at the inception of the proceedings, the defendant was represented by Delport-Nederlof legal practitioners who subsequently withdrew as legal practitioners of record for the defendant. Because of the difficulties in locating and serving their client with the notice of withdrawal, this court authorized service of the said notice via substituted service, being the publication of the notice in a newspaper circulating in Namibia, being the Namibian. The notice was published on 27 July 2015. The publication of the notice elicited no response whatsoever from the defendant to proceed with the defence of the claim.

[6] By notice dated 1 July 2015, this court authorized service of the notice of withdrawal by the defendant's legal practitioners and further postponed the matter to 29

July 2015 for a status hearing. The court order stipulated that if the defendant did not appear on that date, her defence may be dismissed and a final judgment may be issued in favour of the plaintiff in terms of the provisions of rule 53 (1) and (2) of this court's rules. Needless to say, the defendant, notwithstanding the publication of the notice and the order of court, did not attend court on the date stipulated. Her name was called out three times but she did not respond. Her defence was thus struck out and it is on that basis that I say the matter is virtually undefended.

[7] Although the matter, as previously pointed out, is undefended, the court *mero motu* requested the plaintiff's legal practitioner to address the court on whether the courts in Namibia should still continue awarding claims such as that prayed for by the plaintiff. This question arose as a result of the winds of change that are currently blowing in some jurisdictions, including our neighbour South Africa, with whom we share a lot in terms of legal heritage. A recent judgment of the Constitutional Court in South Africa, upholding a judgment of the Supreme Court of Appeal of that country, both of which shall be adverted to in due course in this judgment, held that no damages should henceforth be recoverable from a claim such as the one presently serving before this court.

[8] It must be understood that the judgments from South Africa are not binding on this court. They are, however, of high persuasive value and it often benefits our jurisprudence to consider their approach to new legal developments for the sake of deciding whither the interests of justice in our jurisdiction lie. In this regard, we are to be circumspect and not to adopt hook, line and sinker all the legal developments that take place in South Africa for there is a contextual issue always at play and the difference of the peoples and societies in the said countries that should always not sink into oblivion. It is therefore not a case of the adage, 'What is sauce for the goose must be sauce for the gander'.

[9] By the same token, we live in a global village and to totally shut our eyes and ears to the legal developments in other jurisdictions which might develop our

jurisprudence and the cause of justice and to consider ourselves to live in an ivory tower, albeit one without windows, might be retrogressive and suicidal, amounting to a huge disservice to the peoples of this country by its judiciary. A balanced approach to this issue is therefor called for and the courts are eminently placed to do so by holding the scales evenly, and tilting them one direction or the other, depending on the facts and nuances of the case at hand in accordance with the dictates of public policy.

Common cause facts

[10] I propose, at this nascent stage, to briefly chronicle the facts disclosed by the plaintiff, which as I have said have not been controverted by the defendant in the light of the striking of her defence. To that extent, it is safe to say that the plaintiff's evidence adduced under oath during the hearing is not contested or challenged. I am, in the circumstances fortified in relying on same for the purpose of determining the law applicable to those facts.

[11] The story related by the plaintiff in her witness' statement is to the effect that she and her husband, who sings for a living, had a fairly stable marriage until he started being withdrawn from the plaintiff. These withdrawal symptoms affected the plaintiff who suggested that they see a counsellor which her husband refused to submit to, telling her that he did not love her anymore. She later discovered that her husband had an intimate love affair with the defendant, who was a married woman and the plaintiff, on some occasions, saw the two openly flirting and in manners that were inappropriate and hurtful to her.

[12] It was also her version that her husband began to spend less time with her and when he was at home at night, he would be fiddling with his mobile telephone and stopped being intimate with her. He began to spend more hours away from home at night, citing work pressure as the reason therefor. She began to notice that the defendant was a frequent patron at her husband's music shows and when she had

taken one too many, she would often accuse the plaintiff of being ‘crazy’, which was very hurtful to her.

[13] Around June 2013, her husband sent her an email in which he requested her to sign an attached divorce settlement agreement, which the plaintiff refused to do. Her husband told her that he no longer loved her, he was no longer happy in the marriage and that she no longer fitted into his lifestyle. The plaintiff refused to sign the agreement and tore it up. In March 2014, the plaintiff fell ill after being diagnosed with kidney infection and got no support or help from her husband who gave flimsy excuses for not being able to be with and to support her. He continued with the flirtatious behavior with the defendant and when the plaintiff confronted him about it, he would always accuse her of being too possessive and jealous, refusing him any reasonable measure freedom.

[14] The plaintiff’s husband began making excuses for where he was going only for the plaintiff to find that he was with the defendant. In September 2014, the plaintiff then received a divorce summons from the plaintiff which she was advised not to defend in order to cut down on costs. He later openly admitted to the plaintiff that he had an intimate relationship with the defendant and that when she was sick with kidney problems, he had had sexual intercourse with the defendant on the plaintiff’s marital bed. He proceeded to announce his relationship with the defendant on his face book page and even referred to her on occasion as his wife.

[15] The plaintiff states that this conduct on the part of her husband affected her detrimentally, in terms of her health, privacy, dignity and reputation within the community where she lived. Her story, she states, became well known to the surrounding community and the manner in which they perceived and dealt with her began to change for the worse, suspecting that she had done something to push her husband into the adulterous arms of the defendant, as it were. From September 2014, her husband began to be violent towards her and threatened to break down the house to get his belongings from the house and this necessitated that she obtain a protection order. The

foregoing, chiefly represents the reasons why the plaintiff seeks the damages of *contumelia* and loss of comfort and society of her husband.

The law

Contumelia

[16] I will not move the heavens to come up with some definition of this term, what it entails and its application. It has been defined in case law. In *Van Wyk v Van Wyk,*[1] Schimming-Chase A.J. dealt with the concept of contumelia in the following terms:

> '*Contumelia* on the other hand simply related to the infringement of the plaintiff's right to privacy, dignity and reputation. In Foulds v Smith the court stated that c*ontumelia* is rather a question of fact than a question of law.'

[17] In *Jasper v Siepker,*[2] Ueitele, relying on *Viviers v Kilian,*[3] where 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 the husband. . .'

I should hasten to mention that although the above authority relates to a man having coitus with a married woman and knowing her to be so married, it does not detract from the equation that where the roles are reversed and it is a woman who has a sexual relationship with a married man, knowing him to be so married, that also constitutes *contumelia.* In this regard, the Webster's New College Dictionary[4] defines adultery as 'voluntary sexual intercourse between a married man and a woman not his wife, or between a married woman and a man not her husband'.

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[1] (I 3793/2012) [2013] NAHCMD 125 (14 May 2013.
[2] (I 670/2012) [2013] NAHCMD 267 (30 September 2013.
[3] 1927 AD 449.
[4] 4th ed, (2000) 19.

[18] I am of the view that in the instant case, there can be no doubt that the plaintiff's husband and the defendant did have sexual intercourse during the endurance of their relationship and while the plaintiff's husband was still bound by the bonds of matrimony to the plaintiff. This much, it appears was confessed to by the plaintiff's husband as stated above. Furthermore, it is apparent that the defendant knew that the plaintiff's husband was married to the plaintiff at the time they engaged in that amorous relationship, which at times kept the plaintiff's husband away from the marital home and bed. A case of *contumelia* is accordingly proven on the evidence before court.

[19] Regarding the question of loss of comfort and society, or *consortium,* Van den Heever J stated the following regarding that claim in *Grobbelaar v Havenga*[5]:

'. . . 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 KB 639 at p.665, as follows:

"Companionship, love affection, comfort, mutual services, sexual intercourse – all belong to the married estate. 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 nothing short of that."'

[20] In *Pearce v Kevan*, Selke J, dealt with the claim in the following terms:

'. . . It is the duty of the wife to reside and consort with her husband, and any third person, who intentionally causes her to violate this duty, commits a wrong against the husband for which the latter is entitled to recover damages unless the third person acted from lawful motives, e.g. to protect her husband's ill-treatment, real or genuinely supposed. . .'

[5] 1964 (3) SA 522 (N) at 525 C-E.

As indicated above, this claim is similarly available to a wife whose husband's comfort and society has been alienated.

[21] There is no doubt in my mind, having regard to issues pointed out in the preceding paragraphs, that the plaintiff in this case suffered from the loss of comfort and society of her spouse, as a result of the relationship that existed between her husband and the defendant. The plaintiff's husband withdrew his love and affection towards her, offered her no support even when she was gravely ill and even started staying away from the matrimonial home under the ruse that he was busy with work. A case for such a claim is accordingly made out from the evidence before court. There appears to have been no lawful reason for the deprivation of the plaintiff's spouses' consortium in the circumstances. The inference, from the defendant's behavior is irresistible that it was intentional as she wanted to covert and appropriate his love and affection and other incidentals he could offer for her own personal benefit, whilst she was also married at the time.

Case law in Namibia

[22] There are a number of cases in this jurisdiction in which the courts have dealt with the twin claims of *contumelia* and loss of comfort and society. I intend to refer to a few of these cases and consider the issues at play that appear to have persuaded the court to make the orders it did. I will deal with these cases in no particular order.

(a) *Van Wyk v Van Wyk.*[6]

In this case, the plaintiff sued the 2nd defendant for adultery and loss of comfort and society. The plaintiff alleged that the 2nd defendant had had sexual intercourse with her husband knowingly and in total disregard of the matrimonial status and as a result of which she lost the love and affection from her husband. It was proved in evidence that the 2nd defendant went on a provocative spree, amongst other things

[6] (I 3793/2012) [2013] NAHCMD 125 (14 May 2013).

> and sent provocative and hurtful messages to the plaintiff about her relationship with the latter's husband. She sent messages to the effect that the plaintiff was on account of her weight and size a 'full moon' which caused the 1st defendant to be interested in her because she was 'sexy and [had] an ass that drives him crazy'. She also said, to rub salt to injury, 'That which you get, I also get LOL'.

The court found this behavior distasteful and a desecration of the marriage institution, particularly considering that the 2nd defendant had attended the parties' wedding and therefor knowingly had sexual intercourse with the plaintiff's spouse. The court also found that as a result of the 2nd defendant's actions, the plaintiff had lost the comfort and society of her husband and therefore awarded the plaintiff N$ 20 000 in respect of each head of claim.

(b) *Useb v Gawaseb*[7]

In this case, the plaintiff was married and had two children born in wedlock. The plaintiff's wife left her husband and went to live with the defendant. The court found that the defendant and the plaintiff's wife admitted that they started having a sexual relationship before the plaintiff and his wife obtained a divorce. Adultery was thus proved. The court, however, found that the evidence of the plaintiff regarding the loss of comfort and society was contrived and thus unsatisfactory. The plaintiff's wife's evidence that she was being ill-treated by the plaintiff was corroborated by independent witnesses and the court thus found that there was no causal connection between the adultery and the loss of consortium. The plaintiff had thus failed to prove the loss of consortium. The court thus granted the plaintiff nominal damages in the amount of N$ 1.00

[7] (I 1625/2012) [2014] NAHCMD 283 (1 October 2014).

(c) *Jaspert v Siepker*[8]

In this matter, the plaintiff sued the plaintiff for N$ 1 500 000 for damages for adultery and loss of consortium. The court found that the defendant knew that the plaintiff was married but nonetheless proceeded to have a sexual relationship with the plaintiff's wife. The defendant believed that he had had no role in the disintegration of the plaintiff's marriage as his position was that it was over by the time he befriended the plaintiff's wife. The court held that loss of consortium had not been proved but granted damages in the amount of N$ 10 000 for *contumelia.*

(d) *Mathews v Iipinge*[9]

In this case, the plaintiff sued for an award of N$ 30 000 as damages for adultery and *contumelia* as a result of the defendant having committed adultery with the plaintiff's spouse and for loss of consortium. The court found that only one instance of adultery was proven but that condonation of that adultery had taken place. As a result, though the court found that the consortium was, to some extent, repaired after the condonation, it could not be said that the defendant was forgiven for the injury inflicted on the plaintiff and the c*ontumelia* she suffered. The court awarded the plaintiff damages in the amount of N$ 30 000 for this claim.

(e) *Burger v Burger and Another*[10]

In this matter, a suit for N$ 50 000 adultery and N$ 50 000 for loss of consortium was instituted against the 2nd defendant. A concession was made on the plaintiff's behalf that a case of loss of consortium had not been made out against the said defendant as the marriage between the parties had been strained even before the advent of the relationship alleged between the plaintiff's wife and the defendant.

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[8] (I 670/2012) [2013] NAHCMD 267 (30 September 2013).
[9] 2007 (1) NR 110 (HC).
[10] (I 3742/2010) [2012] NAHCMD 15 (10 October 2012).

Regarding the issue of *contumelia*, it had been admitted that a relationship between the two existed but that it was merely platonic and that a sexual angle to it only developed after the marriage broke down. The court had to decide the matter based on circumstantial evidence as to whether *contumelia* had been proven. The court found that *contumelia* was proven as the plaintiff's wife and the defendant had been found together at a function by the plaintiff in a rather compromising position with the defendant's left hand tucked between the plaintiff's wife's legs. The defendant, on being confronted by the plaintiff about this behavior, apologized and promised not to interfere in the relationship. Shortly thereafter, at another function, the parties were again found by the plaintiff in an embrace, kissing each other and once again the defendant's hands between the plaintiff's wife's legs.

The court also considered that there was regular telephonic contact between the defendant and the plaintiff's wife and that she stayed out of the matrimonial home at times, returning in the small hours. At some point, he found her at the defendant's house during the night, the defendant having stated on enquiry by the plaintiff in a telephone conversation that she was not with him. In the circumstances, the court found that the probabilities of the evidence pointed inexorably in the direction that the relationship was more than platonic and that it was in fact a sexual relationship, showing that adultery had been proved. The court awarded the plaintiff an amount of N$ 10 000 as compensation.

[23] The long and short of it, is that court's in this jurisdiction have and appear to continue to grant damages in appropriates case where it has been found that adultery has taken place and where loss and comfort and society is proved as a result of the adultery.

<u>The winds of change</u>

[24] Adultery has, for a long time, been viewed rather critically and treated as a serious issue in many societies. To this extent, it has been treated as a criminal offence in some and a civil wrong in others. The approach to adultery has been largely informed

by religious and cultural notions of the inviolability of marriage. The civil action of *contumelia* is thus touted to be geared to protect marriages and family values through the award of damages against a paramour who is adjudged to have violated and desecrated marriage and the marital bed as it were. In some societies, in the 17th century, adultery attracted the death penalty and later, the flogging of women.

[25] In recent years, the attitude towards the inviolability of marriage appears to have thawed somewhat as adultery as a matrimonial offence or civil wrong seems no longer to serve its purpose i.e. of preventing break-ups in marriage by adulterous elopers or debarring would-be adulterers. As a result, there has been a call from sexual libertarians, feminists and right activists for individual sexual privacy, freedom of association, gender equality, non-discrimination and the abrogation of adultery as a civil wrong due to the effects it has on a woman.[11] The refrain in that connection is that the prurient view of sexual intercourse outside marriage by a free moral agent or a consenting adult is no longer a tenable position in a modern age.

[26] During the reform of English divorce law for instance, it was held that:

> 'The commission of a matrimonial offence follows the breakdown of marriage and is not the cause of it. In a happy marriage the parties rarely commit adultery; even if they do divorce proceedings are unlikely to follow unless the marriage has already broken up.'

As a result, the punishing of marital infidelity has often been seen as some kind of State interference in what is a purely private realm of human conduct.

[27] Burbury C.J.[12] says the following in this regard:

> 'Our modern law is a product of our modern society; it has in no sense caused more broken marriages, it is symptomatic of the changed outlook in society upon the institution of

[11] Nehal A. Patel, The State's Perpetual Protection of Adultery: Examining Koes-Tler V. Pollard and Wisconsin's Faded Adultery Torts (2003) Wis.l. Rev.1013 2.
[12] Some Extra-Judicial Reflection Upon two year's judicial experience of the Commonwealth Matrimonial Causes Act 1959 (1953) 36 *Aust. Law Journal 283,284.*

marriage – a society in which many no longer subscribe to the Christian concept of marriage. . . Modern divorce legislation must be taken to be the democratic expression of the will of the majority of the community. To abolish divorce or make it easy would not be to repair broken marriages. We may regret the decline in spiritual, moral and social values which has occasioned the modern legislation. But . . . the law must be adjusted to social conditions as they exist. . .'

[28] I now intend to carry out a brief survey in other jurisdictions in order to find out how this issue has been handled and whether the views relating to adultery as an actionable civil wrong still hold true.

Nigeria

[29] In Nigeria, the law still takes a very strict view of adultery. The legal system there is pluralist in nature and consists of English, customary and Islamic laws which regard adultery as a matrimonial wrong and a ground for divorce. The Matrimonial Causes Act[13] in s. 114 (1) (c) deals with 'damages in respect of adultery'. A party may, in a divorce petition based on adultery join the other party as a respondent and claim damages for the adultery.[14] Damages are not, however, awarded if the adultery has been condoned, whether subsequently revived or not or if a decree of divorce based on the adultery is not granted,[15] or the adultery was committed more than three years before the date of the petition.[16]

[30] Issues taken into account in assessing the damages were set out in the Nigerian case of *Mohammed v Mohammed*[17] include the actual value of the adulterous spouse to the petitioner i.e. both pecuniary and consortium; injury to the claimant's feelings and the blows to his or her honour; the co-respondent's means and conduct; the conduct of the spouses themselves, especially the adulterous spouse and whose harshness or cruelty might have undermined the non-adulterous spouse and the co-respondent's

[13] 1970.
[14] S. 32 (1) of the Matrimonial Causes Act.
[15] S. 31 (2) *Ibid.*
[16] S.31 (3) *Ibid.*
[17] (1952) 14 WACA 199.

knowledge that the adulterous party is married. In *Adeyinka v Ohuruogu,*[18] the Supreme Court of Nigeria stated that the said damages are 'to compensate for . . . loss of consortium . . and outrage of. . . honour and family caused by adultery and not to punish the adulterer,'

Zimbabwe

[31] The law in Zimbabwe is akin to the law that presently obtains in this jurisdiction as discussed above.[19] In this regard, there has been some degree of consternation from some feminists who incline to the view that the some judges appear to take a lackadaisical approach to adultery cases, considering the fact that it affects Zimbabwean women more than men. In this regard, they take the view that 'the law has treated the issue of adultery with less seriousness than it deserves'.[20]

The United States of America

[32] Shirley Glass[21] opines that the United States is experiencing a 'crisis of unfaithfulness'. In this regard, she noted that some courts had defined adultery as not involving moral turpitude and thus not inherently prejudicial. Social science surveys depict that at least 20 to 50% of American adults admit to committing adultery, whereas some studies place the adultery rate at 70%.[22] The U.S. Supreme Court has held that the State has an interest in protecting the institution of marriage, while, at the same time bearing the duty to uphold the freedom of association as a fundamental right protected by the U.S. Constitution. As a result, from the 1980s, most states in the U.S. had de-recognised adultery- based torts like alienation of affection and criminal conversation.[23]

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[18] (1966) 1 All N.L.R. 210 at 212-213.
[19] Takadiini v Maimba 1996 (1) Z.L.R. 737.
[20] Sylvia Chirawu, 'Till Death Do Us Part: Marriage, HIV/Aids And the Law in Zimbabwe (2006) 13 *Cardozo J.L. & Gender* 29.
[21] Shierly Glass & Jean Coppock Staheli. Not Just Friends: Rebuilding Trust and Recovering Your Sanity After Infidelity 329-330 (2004).
[22] Shirley Glass (*op cit*).
[23] Nehal A. Patel, 'The State's Perpetual Protection of Adultery: Examining Koes-Tler V. Pollard And Wisconsin's Faded Adultery Torts (2003) *Wis. L. Rev.* 1013 2.

[33] There is, accordingly, 'an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex'. Issues that informed the approach included the need to emphasise personal choice; to keep the courts out of the bedroom; decrimininalise sex acts; to remove the use of the law to legislate morality. That notwithstanding, U.S law still recognizes the adultery-based tort of 'intentional infliction of emotional distress' (IIED), as any intentional, reckless or negligent conduct of a person that is outrageous or exceeds all bounds of tolerance or decency and causes another person severe emotional distress.

England

[34] From a traditional perspective, English law considered adultery to be an act with serious consequences.[24] For that reason, husbands could sue in trespass for deprivation of the wife's services. The Matrimonial Causes Act,[25] provided that a party to a marriage could obtain a decree of divorce on proving that the spouse had committed a matrimonial offence. The only offence that entitled a husband to obtain the decree was adultery by his wife. For a wife, on the other hand, it was not enough for her to prove adultery against her husband, there was an onus on her to prove that the husband was guilty of incestuous adultery, meaning adultery and another offence on top, e.g. rape, bigamy, sodomy, bestiality, cruelty or desertion for more than two years would then suffice.

Uganda

[35] Uganda, for a long time also operated in terms of the Ugandan Divorce Act, which took its ancestry form the Matrimonial Causes Act of 1857 of England. In 2004, the Constitutional Court of Uganda declared certain portions of it unconstitutional and therefore null and void.[26] It was accordingly easier for a husband to divorce his wife

[24] Wayne Morrison (ed.) *William Blackstone Commentaries on the Laws of England* (2001) 109.
[25] Of 1857.
[26] Manisuli Ssenyonjo, Towards Non-Discrimination Against Women and *De Jure* Equality in Uganda: The Role of Uganda's Constitutional Court *A.J.I.C.L.* 2008 16 (1) 1-34 at 2.

based on adultery than the converse, in which case an additional misdemeanour was required.[27] Under the ss 5, 21, 22 of the Divorce Act, a husband was required to name a co-respondent to his petition so that he could compensated in terms of damages and costs 'for trespassing to his goods'!. Such a cause as however not available to a wife petitioner.

[36] The Penal Code Act, under s. 154 classified adultery as an offence against morality and imposed double standards of sexual norms in that it afforded sexual freedom for men than women reflecting the patriarchal nature of the society. In *Uganda Association of Women Lawyers and 5 Others v The Attorney-General*[28] it was declared that the Divorce Act was discriminatory on the basis of sex and therefore contravened the provisions of Art. 21 (1) and (2) which provide for equality. Tellingly, the court did not find that adultery was no longer a matrimonial wrong or a ground for divorce under the Divorce Act.

South Africa

[37] Coming closer home, in South Africa, the Constitutional Court, in *DE v RH,*[29] upheld a judgment of the Supreme Court of Appeal[30] in which the latter court overturned a judgment of the North Gauteng High Court granting damages arising from adultery between Mr. RH and Ms. H in *actio injuriarum* for loss of consortium and *contumelia.* The Constitutional Court came to the conclusion that '. . . in the light of the changing *mores* of our society, the delictual action based on adultery . . . has become outdated and can no longer be sustained. . .'

[38] In its analysis, the court held that the issue of liability for adultery was predicated on moral turpitude or wrongfulness of the adulterous act. It found that the ever softening attitude of society to adultery called for its nullification. Core, in the decision-making process in this regard were the following factors:

[27] Manisuli Ssenyolo (*supra*) 1-34 at 3.
[28] Unreported judgment of 10 March 2004 (Constitutional Court of Uganda).
[29] (CCT 182/14) [2015] ZACC 18.
[30] HR v DE [2014] ZASCA 133; 2014 (6) SA (SCA).

(a) The development of constitutional norms, including the right to security of person; the right to privacy and freedom of association. These were to be observed regardless of the reprehensible nature of adultery;

(b) The need to weigh the potential infringement of the dignity of the plaintiff against the infringement of the fundamental right of the adulterous spouse and the third party 'in the light of current trends and attitudes towards adultery both nationally and internationally;

(c) The changing mores and attitudes towards adultery;

(d) The need to prevent State intervention in intimate or personal choices;

(e) That the law can protect marriages by removing legal obstacles that impede its enjoyment but may not prop up a failed marriage.

Whither Namibia?

[39] The question that needs to be determined at this stage, is the approach that this country should adopt in the light of the various approaches to adultery in other jurisdictions. As indicated earlier, Namibian courts have always granted such claims and this has been based on the traditional approach to the issues at play, without in particular, considering the trends in internationally and regionally, particularly in consideration of our Bill of Rights.

[40] The first issue to consider is the judgment of this court in *Voigts v Voigts*[31], where Damaseb J.P. decried the state of our divorce laws as being out of touch with the modern approach which is no longer based on the fault principle, but that irretrievable breakdown of marriage has become the operative criterion. Although this was on the basic issue of divorce *simpliciter*, it is a pointer that it may well be time to consider whether we should allow the state of the law relating to adultery in the anachronistic state in which it is presently.

[31] (I 1704/2009) [2013] NAHCMD 176 (24 June 2013).

[41] In expressing his exasperation at the present state of affairs, although in a different context, as mentioned above, but one not totally irrelevant to the present issue, the learned Judge President expressed himself in the following powerful terms:

> 'The divorce law of Namibia is archaic and demonstrably in need of reform. The government of the day has inexplicably failed to initiate the much-needed reform. Under our current divorce law, when it comes to considering dissolution of a marriage, it matters not that the spouses do not love each other or that the marriage has irretrievably broken down. A court may only grant divorce upon proof that a spouse committed a matrimonial offence.'

[42] I am of the view that the proper manner in which the question has to be approached is to consider the issue of adultery from the alleged premise of protecting the sanctity of marriage. This will be viewed against an array of other factors such as the modern morals of the society towards adultery; the current trends in Namibia towards the monogamous marriage; the fundamental rights of parties to privacy; the right to freedom of association of both parties, including the interloper and more importantly, the values espoused in the Namibian Constitution.

[43] One fact that sticks out like a sore thumb, with most of the cases, is that the action is almost invariably there to assuage the wounded pride of a man, whose 'property' has been invaded by a stranger, gate crashing into marriage bed as it were. That the action was primarily geared to protect men can be seen from *Viviers v Kilian* (*supra*),[32] For the most part, even from the array of cases that I have referred to, the plaintiffs have predominantly been men who are aggrieved that their spouses have been 'violated' by other men. It appears to have been coined to protect men primarily and correspondingly relegates the woman to a person who cannot exercise a right to remain in a marriage even if does not seem to be working. To this extent, the issue of equality enshrined in our Constitution becomes relevant.

[44] In *Burger v Burger* (*supra*), Miller A.J. stated the following at para [26] of the cyclostyled judgment in the assessment of damages:

[32] At p. 430.

‘I will also take into account the fact that modern society has become more tolerant towards incidences of adultery and that must reflect on the amount of damages I must award.’

This, in my view, is an acknowledgement that even in this jurisdiction, regardless of the fact that our marriage laws remain to some extent archaic, the attitude of society regarding adultery is softening as noted by the court. In this regard, although Mr. Justice Miller did not refuse to grant damages altogether, he pertinently found it fit to factor in the thawing attitudes of society towards adultery into account and to award a quantum that reflects the modern day approach to the issue of adultery.

[45] In this regard, I must also add my voice and state that the perniciousness of the act of adultery has, in the course of time become more tolerable than it previously was and this, in my view, is a factor that must be taken into account even in this jurisdiction, in deciding whether the damages for adultery should continue to be awarded by the courts in this day and age. Has the action not lost its lustre?

[46] As early as the *Viviers* judgment in 1927, Solomon C.J. had already noted the possibly debilitating consequences of such actions and stated the following:[33]

‘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 realize that they cannot commit adultery with married women with impunity.’

This is an indication that from that time, the propriety of continuing with this action was a cause for concern, regardless of how strongly adultery was viewed at that time. The court was nonetheless equally conscious that it should not be seen to encourage the launching of such actions and this brings us to consider whether this is an action to be continued in this day and age.

[33] At p.457.

[47] Furthermore, in 1944, in *Rosenbaum v Margolis,*[34] the court, in an era where issues of human rights may not have been high on the judicial agenda, if at all, had the following to say about adultery, in perpetuation in part of what Solomon CJ had said in the excerpt quoted above:

> 'There is something . . . to be said for the view that an action for damages against an adulterous third party is out of harmony with modern concepts of marriage and should be abolished.'

It has unfortunately taken so very long for the courts to take the proper cue from the views of the luminaries who spoke in emphatic fashion so many decades ago about the need to reconsider whether adultery as an action ought to continue being recognized and enforced as a matrimonial wrong.

[48] I am of the view that although well recognizing and accepting, as stipulated in the Constitution of Namibia that, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State',[35] it is a sad fact of life that marriages do break down for a variety of reasons. In some instances, if not in most, once a party to the marriage engages in adulterous conduct, it is normally a pointer that the marriage is navigating on tempestuous seas. In such cases, the guilty party is not inveigled or coerced into the other party's bed but does so willingly and with full knowledge that his or status is at odds and does not permit the pernicious conduct he or she is engaged in.

[49] The remedy, in my view, does not lie in enforcing court orders of damages on persons no longer willing or able to stick to their marital vows. The society, with the help of the State should invest considerably in innovative ways and make appropriate interventions to assist couples whose marriages are struggling for whatever reason. In point of fact, pre-marital counselling may be even more helpful to persons intent on getting married by preparing them for what they are going to face in marriage rather

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[34] 1944 WLD 147.
[35] Art. 14 (3).

than trying to assist when the problems that were previously unseen have set in. Furthermore, continuous assistance should be made available to parties facing hurdles in their marriages.

[50] The setting up of marital counselling and other support systems are, in my view the way that should be adopted by the State in part in order to protect the family as stated in the Constitution. The award of damages, even if it may in a sense assuage the wounded feelings of the cheated spouse, does not, correspondingly serve to restore a marriage that is on the rocks evidenced by the one party engaging in an adulterous affair. Awarding damages may actually be tantamount to treating the symptom rather than the disease. The court cannot be a shepherd cracking a whip to nudge errant spouses back into the rails of marriage when they are no longer willing for whatever reason.

[51] As the act of adultery comes about from a conscious decision of the party desecrating the marital bed with open eyes as it were, whatever it is that the law can do by issuing orders, including interdicts and awarding damages in a bid to try to protect the marriage will be an exercise in futility. No amount of damages, even at a punitive scale, may, in my view, serve as a deterrent when a party is no longer interested, for whatever reasons, to stay committed to the oath taken when the marriage covenant was entered into.

[52] Another issue that in my view should not escape scrutiny is that the assumption or presumption operating normally is that the third party is the one who is responsible for wrecking the marriage, and worthy of being censured therefor by an award of damages for desecrating the marital bed as it were. That is not always the case. There may be instances where the spouse is the one who sticks his or her neck out from the bonds of matrimony and entices a third party to partake of the fruits of what should remain to be enjoyed within the bounds of the marriage. Once the marriage breaks down, the court is moved to punish the third party who may have been deliberately enticed by the guilty spouse, leaving the said spouse blameless and possibly benefitting

from the damages order that the court may award against the third party. This spouse does not reap what he or she has sown, which is against the normal rules of nature.

[53] This may also have some unintended consequences, namely the action in question being a gold mine for unscrupulous couples who may be facing perilous financial circumstances. They may decide to entice unwary parties to enter into an adulterous relationship with their spouse and then later turn to sue them, knowing that the courts generally award damages to the non-adulterous spouse. To this extent, the availability of this action may become a weapon of extortion in the hands of unscrupulous parties wishing to make one more dollar without working for it.

[54] Furthermore, it appears to me that adults have a right to choose whom they associate with, conscious, of course, of the implications of the associations in question. If they decide to associate themselves with other people in a manner that violates their marriage vows, the choice they make should, in my view be respected, however hurtful and injurious it may be to the feelings of others connected to them. And this is so despite the reprehensions of adultery. No amount of censure at the personal, family, cultural or State level may change what is otherwise considered by others to be reprobate behavior, if they have set their minds at doing so.

[55] Furthermore, I am of the considered view that although marriages are instituted and given recognition and force by the law, it is odious for the courts or the processes of the law to be used to peer into and attempt to regulate matters in the secret chambers of a married couple. In this regard, the Constitution protects and outlaws interference with the privacy of the home.[36] Courts should steer away from intervening in matters that are intimate in nature and which to some extent amount to personal choices. It is accordingly my considered view that when the court descends into the deep recesses of the bed-chamber of a couple and issues orders in what should be a private domain not only amounts to interference, it may also have the potential to harm the dignity of the

[36] Art. 13 (1).

persons involved in the debacle, including the children who are for the most part innocent passengers in the vehicle headed for doom.

[56] That is not all. This may have the potential to do grievous damage to the institution of marriage and by extension, the family. Where these matters of the immoral behavior of the parents are laid bare for public scrutiny, as often is the case, this may render the prospects of restoration rather extreme. Furthermore, it may deeply hurt and negatively affect the children of the marriage, contrary to the constitutional provision that calls for the protection of the family. As a result, children, who are innocent and who have had no role to play in the embarrassing and hurtful scenes playing themselves out may be the greatest sufferers.

[57] In cases such as the *Van Wyk* matter (*supra*), there is no reason, in my view, why, if the third party insults or defames the spouse of the person whose marriage he or she has interfered in, the ordinary law of delict should not be invoked if all the elements of the action alleged are proved. I am of the view that whatever insults are hurled at the plaintiff should be capable of redress by the law in other manners rather than using the marriage setting to settle those delictual claims by awarding damages.

[58] I accordingly incline to and endorse the view expressed by the Supreme Court of Appeal in *RH v DE*:[37]

> '. . . that in the light of the changing mores of our society, the delictual action based on adultery . . . has become outdated and can no longer be sustained; that the time for its abolition has come.'

[59] I also agree with the sentiments expressed by the unanimous judgment of the Constitutional Court of South Africa in *DE v RH* (*supra*):[38]

> 'I am led to the conclusion that the act of adultery by a third party lacks the wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium; it is not reasonable to

[37] *Supra* at para [40].
[38] At para 63 of the judgment.

attach delictual liability to it. That is what public policy dictates. At this day and age it just seems mistaken to assess marital fidelity in terms of money.'

[60] In the circumstances, and having regard to the foregoing, I am of the view, notwithstanding how subjectively and maybe objectively impaired the plaintiff's feelings and dignity may have been by the actions of the defendant in the instant case, I am of the view that for the reasons advanced above, it would be inconsistent with modern trends of thinking to continue to hold on to the outmoded claim of damages for adultery. This is more the case considering the other competing and maybe more forceful solicitudes expressed by the Legislature in this country's Constitution.

[61] The courts should and actually bear the responsibility to carry and light the torch even in the dark alleys informed by custom, entrenched sexist ethos and sensibilities, which are steeped in the patriarchal perceptions and practices of the past. In this regard, the duty to shine the constitutional light in areas that may have been canopied and pervaded by what may now be outmoded and unconstitutional ethos remains critical. This should particularly be the case where these actions and practices run counter to the values and ideals espoused in the Constitution of this great Republic.

[62] Reverting to this case at hand, it is clear that the plaintiff's husband tried his utmost best to convey the situation from the deep recesses of his heart that he could no longer have a meaningful marriage relationship with the plaintiff but she would simply not accept this change of position and status. What would have resulted from an enforced marital union may have been a loveless, oppressive and possibly violent relationship, which would not serve either of the parties, their families or the society at large. The end result of such relationships is normally what is often referred to as passion killings, which leave the relatives on either end of the spectrum hurt, disillusioned and broken and the children to some extent orphaned.

[63] In the circumstances, although this may be a bitter pill to swallow for some, the time has come for this Republic to become practical and proactive on this subject. The

claim of adultery can no longer be justifiably sustained or maintained as a proper cause of action before our courts. This is so notwithstanding the personal affront, recrimination and hurt it may leave with the injured party to the marriage.

[64] There are, in my considered view, other meaningful, effective and more efficient means and ways of propagating, nurturing and protecting the institution of marriage and by extension, the family than clinging to a claim that runs counter to constitutional principles and which is more importantly, out of touch with modern trends and realities. The law must remain relevant and a useful tool in social engineering. Once it loses its lustre, like salt that has lost its tastiness, it must be thrown out in the streets and be trodden under foot by women and men. That is, in my view, the lot of the delictual claim of adultery and its incidentals of loss of *consortium* and *contumelia*.

[65] As I close, I find it appropriate, in order to demonstrate the levels of unfairness and lopsidedness of such claims, to quote from a judgment in Botswana in *Mofokeng v Mpolokang,*[39] where the court expressed itself in the following terms regarding the absence of the man who was the cause of the matter serving in court in the first place:

> 'One interesting feature to this case, which may apply to other such cases, is that the person who initiated this catastrophe is not in court to see the fruits of his labour. He is sitting in the serenity of his office or of the matrimonial home, far removed from the tensions and stresses of the courtroom atmosphere as he was not cited nor called as a witness. All things being equal, he is likely to benefit, even if marginally, from the fruits of the plaintiff's judgment. This is a paradox.'

A paradox it indeed is. In this case as well, here a battle of the women is raging and the man at the centre of the debacle sits ensconced in an air-conditioned room, maybe playing the game of solitaire as the women in his life sweat and slug it out in court.

<u>The Supreme Court judgment</u>

[39] 2007 (3) BLR 23 (HC).

[66] Just before the judgment was handed down by this court, the Supreme Court of Namibia, delivered its judgment in *James Sibongo v Lister Lutombi Chaka and Another.*[40] From that judgment, it would seem that the Supreme Court was made aware of this judgment and would have preferred to allow this court to first make its pronouncement on the issues that arise for determination herein. The Supreme Court, however inclined to the view that there was nothing inherently wrong in it dealing with the question notwithstanding the fact that this court had not had the opportunity to deal with the question of the sustainability of the question in the *Sibongo* matter.

[67] I am heartened to observe that the Supreme Court, for substantially similar reasons, came to the same conclusion that the claim of adultery can no longer form part of our law. I do not need to expatiate on the Supreme Court judgment, save to identify the main findings of the said Court. It only remains to state that the Supreme Court placed, for the large part, heavy reliance on the cases of the Supreme Court of Appeal of South Africa and the Constitutional Court for its ultimate position.

[68] At para [39] Smuts J.A., who wrote for the judgment for the majority of the court said the following:

> 'As I have said, this court has likewise made it clear that public policy and the legal convictions of the community are informed by our constitutional values and norms. An examination of the origin of the action and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy. That examination also demonstrates that the action has also lost its social and moral substratum and is no longer sustainable.'

[69] At para [45], the court asked a rhetorical question in the following terms:

> 'But does the action protect marriages from adultery? For the reasons articulated by both the SCA and the Constitutional Court, I do not consider that the action can protect marriage as it does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating.'

[40] Case No. SA77/2014 delivered on 19 August 2016

It proceeded to quote quite generously from the SCA judgment in support of the above conclusion.

[70] Finally, and in putting the last nail to the coffin of the action, the Supreme Court said the following at para [55]:

> 'But ultimately, it is in respect of the determination of wrongfulness – with reference to the legal convictions of the community informed by our constitutional values and norms – that it is no longer reasonable to impose delictual liability for a claim founded on adultery. Whilst the changing societal norms are represented by a softening attitude towards adultery, the action is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. Its patriarchal origin perpetuated in the form of the damages to be awarded are furthermore not compatible with our constitutional values of equality in marriage and human dignity.'

[71] In the valedictory paragraph, the Supreme Court said the following:

> 'The conclusion I reach is that the act of adultery by a third party lacks wrongfulness for the purposes of a delictual claim of *contumelia* and loss of consortium. Public policy dictates it is no longer reasonable to attach delictual liability to it. The action is thus no longer sustainable.'

Observation

[72] I should, however mention that a misinterpretation of the content and effects of the judgment may understandably take place. It must be made clear that the court has not, by saying adultery is not actionable against a third party, it has thereby allowed or legalized adultery nor decriminalized it as some may have it. The courts have merely stated that the action is not sustainable in the modern day and age but they have not encouraged nor given a licence to the commission of adultery to the detriment of the institution of marriage. It is up to the parties in marriage to ensure that they comply with their undertakings as married persons.

[73] Lastly, I need to acknowledge the scholarship and assiduity of Ms. Lubbe for the remarkable work and assistance she rendered to the court. That the plaintiff's claim has been dismissed is no reflection whatsoever on the lack of effort or endeavor on her part.

She was the epitome of what courts have, over the years come to expect of an officer of the court.

[74] Lastly, I do need to apologise to the plaintiff in particular, for the delay in handing down the judgment. This has been due to a very tight roll, including conducting trials from the turn of the year and dealing in the process with many and for most of the time, complicated interlocutory judgments within stringent time limits. It must also not sink into oblivion that this was a watershed case that demanded very close and careful consideration as it had the potential to change significantly, the landscape in matters of adultery in this jurisdiction. The matter was thus approached with a degree of trepidation, considering also that the defendant ended up not being represented. It would have been easier for the court to deal with the matter if the equality of arms had been observed, by the defendant being represented through to the end of the matter.

[75] In the premises, and now with the imprimatur, as it were, of the highest court in the land, I issue the following order:

1. The plaintiff's claims for *contumelia* and loss of *consortium* are dismissed.
2. There is no order as to costs.

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TS Masuku

Judge

APPEARANCE:

PLAINTIFF:	D Lubbe
	Instructed by Du Pisani Legal Practitioners