PV v AM

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

REVELAS J

2014 MAY 15–17; JUNE 25; DECEMBER 17

CASE No 2700/08

Revelas J:

[1] The plaintiff married his former wife, to whom I shall refer to also as 'IV' herein, during 2000. On 29 May 2009 their marriage was dissolved by a decree of divorce. The plaintiff subsequently instituted the present action for damages against the defendant, on the grounds that the defendant had an adulterous relationship with his wife. The adulatory is alleged to have consisted of separate incidents of oral sex, one of which the plaintiff encountered in his mother's home.

[2] The plaintiff averred that the defendant's conduct resulted in the divorce as a result of which he suffered:

(a) the loss of the love and consortium of his wife as a result of suffered damages in the amount of R100 000;

(b) an iniuria as a result of which the plaintiff has suffered damages, also in the amount of R100 000;

(c) patrimonial loss in the sum of R2 316 600 as a result of the financial support that the plaintiff would have been given from his wife, had it not been for the defendant's conduct;

(d) special damages in the amount of R2000 per month for the period July 2008 to November 2008 being in respect of medical expenses incurred by the plaintiff in seeking assistance to deal with the trauma of having encountered the defendant and his wife in a compromising position (engaged in oral sex);

(e) (or shall suffer) special damages in the amount of R50 000 in respect of legal expenses incurred in the divorce litigation between the plaintiff and his (now) former wife.

[3] The defendant denied all the averments made by the plaintiff, save those pertaining to the particulars of the parties, the jurisdiction of the court and the fact that the plaintiff is his nephew. The defendant did not plead any facts which formed the basis of his defence in terms of Uniform Rule of Court 18(4). During a pre-trial conference, the defendant indicated that he disputed the nature and quantum of the plaintiff's alleged damages.

[4] During the opening address of plaintiff's counsel, the parties agreed to a separation of certain issues. An order was subsequently made in terms of rule 33(4) to the effect that the issues between the parties pertaining to the plaintiff's claim for loss of consortium and iniuria be determined separately from the issues pertaining the quantum of those damages and the alleged patrimonial losses suffered as well as special damages (medical and legal expenses).

[5] During the course of the trial the defendant amended his plea to include the following paragraph:

> '4.4 The defendant in any event specifically denies that a sexual activity in the form of oral sex amounts to adultery for purposes of the plaintiff's action herein.'

The implication of the introduction of this paragraph to the plea was that the trial was concerned firstly, with the question of whether the plaintiff in fact encountered his wife and the defendant engaged in the sexual conduct as pleaded, and if so,

whether the sexual conduct in question constituted adultery. If adultery could be established, the next question to be determined was whether the plaintiff suffered a loss of consortium and an iniuria as a result thereof.

Background

[6] The defendant is the plaintiff's paternal uncle and lives with his wife on a farm in the Eastern Cape. He was in a farming business with the brother-in-law, the plaintiff's stepfather, since 1995. The plaintiff's stepfather died in 2000, (three weeks before his marriage to IV), the defendant became a father figure to him.

[7] Since the age of four years the plaintiff visited the defendant on the farm. The defendant had also taught him to drive a motor vehicle when the plaintiff was only four or five years old.

[8] It was common cause that the plaintiff and IV, who were both practising attorneys in Johannesburg, would make regular visits to the Eastern Cape to enjoy a few days of vacation with the plaintiff's mother, who lived on the farm with the defendant and his wife. Other family members and friends would also be present. There would be entertainment such as game watching, hunting, socializing generally and sometimes attending events in the area, where there sometimes was dancing. In the evenings the family would usually have a braai and sit around chatting and drinking with each other. It is common cause that this was a close-knit family.

The evidence

[9] The events which gave rise to the present proceedings, and, according to the plaintiff, his divorce from his former wife, IV, occurred on one of these farm holidays, on the evening of 5 July 2008. That evening the family had a braai, engaged in conversation as usual and had also consumed alcohol. The defendant's wife had left the farm earlier, with the plaintiff's sister, for Cape Town. As I understood the evidence, the defendant retired to his room first. His bedroom was one room further from the guest room which the plaintiff and IV shared. It was on an

elevated part of the house, and if one went there from the plaintiff's room, one had to climb a few stairs.

[10] It was not in dispute that when the plaintiff and IV went to their room that evening, IV had a bath and left her bath water for the plaintiff. He climbed into the bath just after her. The plaintiff testified that whenever IV washed her hair on the farm, she would go the bedroom of the defendant and his wife to use the hairdryer which belonged to the defendant's wife. When IV testified about this aspect she explained this arrangement was in place over many years because it was impractical to plug in her own hairdryer in the room she and the plaintiff usually shared in that house.

[11] The plaintiff testified that while he was sitting in the bath, he heard the sound of the hairdryer. He found it strange because IV had not washed her hair that evening. She usually washed her hair in the mornings. He decided to investigate. He climbed out of the bath and ventured up the stairs to the defendant's room where the lights were still on.

[12] What he saw next shocked him deeply. The plaintiff stated that there in the doorway to the defendant's bedroom, he saw the defendant in the doorway, leaning on the door frame with his one hand and in his other hand he held his genitals, while IV was engaging him in oral sex (or fellatio). Upon seeing him (the plaintiff), the defendant moved away quickly as if nothing happened.

[13] The plaintiff said he immediately grabbed IV by the arm and pulled her out of the room. He then stormed to his mother's bedroom with IV, woke his mother up and told her what happened. The three of them (the plaintiff, his mother and IV) then went to the defendant's room. Upon entering, they found the defendant lying on the bed reading the Bible. When the defendant was confronted with the incident, according to the plaintiff, his response was that he did not know what the plaintiff

was talking about and suggested that he was perhaps mistaken as to what he thought he had observed.

[14] The plaintiff testified that IV went to sit beside the defendant and asked him (sarcastically) whether he, in the present circumstances, would be prepared to provide her with transport for her return to Johannesburg. When the defendant denied any knowledge of what she was referring to, IV slapped him through his face. She testified she acted out of sheer shock in doing so.

[15] The plaintiff stated that IV also confessed to him that this incident was not the first of its kind that occurred between her and the defendant. It is common cause that the plaintiff and IV left the farm the following day. Once in Johannesburg, IV moved out of the common home and some months thereafter, she instituted divorce proceedings against the plaintiff. Both parties are presently remarried to other persons.

[16] IV, who testified under subpoena, corroborated the aforesaid version of the plaintiff about the events of 5 July 2008 in all material respects. IV also testified that the incident of 5 July was not the first incident of this nature she had shared with the defendant. According to her, she got involved with the defendant because when she was at a low point in her life when the defendant started phoning her in Johannesburg and eventually, an adulterous relationship had developed between them. IV said the defendant had manipulated her into the relationship and the sexual relations between them consisted only of oral sex (fellatio) on a few occasions. She testified that felt ashamed about the incident and left him because she could no longer face the plaintiff as a result thereof.

[17] The defendant denied everything in his testimony. In particular he denied that IV never came into his room that night. He alleged that there would be no reason for her to do so because his wife had taken the hairdryer with her to Cape Town. The defendant’s version of events was that he had gone hunting with friends that day and

that in the evening (of 5 July 2008), he was very tired. He had consumed alcohol that evening, and IV had also given him a sleeping pill, saying that it would help him have to sleep well. He then took the pill and went to his room where he first had a bath. This was denied by IV.

[18] The next thing he knew, the defendant said, there were people (mense) around him speaking very loudly. At this point he was in his bed and according to him, he was unable to remember anything of the period between him taking a bath and waking up in his bed surrounded by people. He admitted that his sister, the plaintiff and IV were there. The defendant denied that he was reading the Bible when they came into his room and also that IV had slapped him. He said on several occasions during his testimony that he could not remember what happened (Ek weet nie daarvan nie). He attributed this to the combined effect of the alcohol (drankies) and the sleeping pill which IV allegedly had given to him. This is what he told his wife when he had to explain to her about the abrupt departure of the plaintiff and IV from the farm and the allegations made by the plaintiff with regard to the incident in question. He denied any affair with IV.

[19] The defendant's challenge to the allegations made by the plaintiff was that the plaintiff was only after a fifty percent ownership of the defendant's close corporation. The defendant also portrayed IV in his testimony as a woman who was overly affectionate (hangerig en vatterig) and who freely doled out sleeping pills to all and sundry. The defendant also called Mrs B, the wife of a friend, to support his allegations.

[20] According to Mrs B, IV always flirted with other men, showed no affection to her husband and complained about her poor marriage to the plaintiff. She also testified that IV regularly used all kinds of pills. Her evidence was disputed by IV. Neither the defendant nor Mrs B were impressive witnesses. In my view Mrs B's evidence that IV allegedly conveyed to her that she had an unhappy marriage, is

improbable. In her attempt to destroy IV's character as a woman of loose morals (for the obvious benefit of the defendant), Mrs B only discredited herself.

[21] The only basis upon which the defendant's version of events can be accepted, is if he was able to establish that the plaintiff and IV conspired to lie about the incident of 8 July 2008, for financial reasons. The defendant failed to establish such a conspiracy of lies. The defendant was a poor witness and his version of events was probably false. Even though on some aspects pertaining to their divorce, the plaintiff and IV contradicted each other on relatively minor aspects, their version was more probable. Both IV and the plaintiff are attorneys and it is highly unlikely that they would have manufacture such an elaborate lie as part of their divorce proceedings, risking embarrassment and scandal, just to get their hands on a share of the defendant's close corporation or one of the farms.

[22] In the divorce proceedings between them, the oral sex incident between IV and the plaintiff (the defendant in the divorce) was common cause. It is also highly unlikely that the plaintiff would have woken up his mother and taken her to the defendant's room when he confronted her brother with this very unpleasant development, if nothing at all had happened that night. The defendant's attempt at establishing a defence of total oblivion of all that went on around him can also be rejected out of hand.

[23] IV denied that she ever gave the defendant sleeping pills. On the defendant's version he fell into his state of unconsciousness in the bath. If it happened as he described, one has to question why he did not wake up in the bath when he, as could be expected, would have come close to drowning. On the evidence presented by both parties, the plaintiff's version is to be preferred.

Discussion

[24] The next question to be decided is whether the sexual conduct under consideration constituted adultery or not, and secondly, whether such adultery

caused the plaintiff to suffer a loss of consortium and an iniuria. The defendant's contention is that the act in question is not sexual intercourse, and therefore, that when a married person engages in voluntary oral sex, with a person other than with his or her spouse, that would not constitute adultery. The contention calls for an examination of what sexual intercourse actually means.

[25] Counsel for the defendant relied on the definition of sexual intercourse as found in the *Bloomsbury's Concise English Dictionary*, which is 'an act carried out for production or pleasure involving penetration, especially one in which a man inserts his erect penis into a woman's vagina'.

[26] In my view such a technical and narrow approach can only lead to absurdity and unfairness. Firstly, it offends the equality prescripts of s 9 of the Constitution in that parties to a same sex marriage would not have the same rights with regard to adultery, as parties to a heterosexual marriage.

[27] The limitations presented by this strict definition of sexual intercourse as relied upon by the defendant, has been recognised and corrected in the criminal law in rape and sexual assault cases. In s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the definition of sexual penetration has been extended to include 'any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person'.

[28] The plaintiff's counsel, Mr *Ellis*, referred me to two cases decided in the United States where this question was dealt with. The first was *RGM v DEM*, a decision of the Supreme Court of South Carolina.[1] In this matter, the appellant who had committed adultery, contended in divorce proceedings that she was entitled to alimony since 'homosexual conduct' was not included in the definition of adultery

[1] 410 SE 2d 564.

under s 20.3.10 and s 20.3.130 of the South Carolina Code, in terms of which 'a spouse found guilty of adultery' was barred from receiving an alimony award. The court dealt as follows with the issue:

> 'The exclusion argued by appellant is novel to our court, but other jurisdictions have addressed the issue. The Florida District Court of Appeal noted:
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> > "We have seen that evidence of adultery may be considered in an alimony award . . . yet we know of no prior case applying this to a homosexual relationship. Notwithstanding, we find no substantial distinction, because both involve extramarital sex and therefore marital misconduct."
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> *Patin v Patin* 371 So (2d) 682 at 683 (Fla Dist Ct App 1979). In *Patin* the trial court made no finding as to the wife's relationship with her female friend, and the appellate court remanded the case for such a finding. Other courts have also held that homosexual extramarital relationships constitute adultery. See *MVR v TMR* 454 NYS (2d) 779, 115 Misc (2nd) 674 (1982); *Owens v Owens* 247 Ga 139, 274 SE (2d) 484 (1981).
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> We view appellant's definition of adultery as unduly narrow and overly dependent upon the term sexual intercourse. Appellant does not deny that she engaged in an extramarital sexual relationship. Instead, she argues that a narrow interpretation of sections 20-3-10 and 20-3-130 would not include homosexual activity. We find persuasive the reasoning of the *Patin* Court that explicit extramarital sexual activity constitutes adultery regardless of whether it is of a homosexual or heterosexual character. Accordingly, we conclude that homosexual activity between persons, at least one of whom is married to someone other than the sexual partner, constitutes adultery'.

[29] The other decision referred to by the plaintiff was a decision of the Court of Appeal of Louisiana, in *Menge v Menge*[2]. In this case, Mrs Menge admitted in

[2] 491 So 2d 700 (1986).

divorce proceedings to certain sexual acts (which included oral sex) with a man other than her husband, but contended that it did not constitute 'sexual intercourse' and therefore she did not commit adultery. The court dealt with this issue as follows:

> 'In *Simon v Duet* 177 La 337, 148 So 250 (1993), the Supreme Court approached a "definition" of adultery when it stated:
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> > "It must be alleged that the offending party was guilty of adultery, or was guilty of having sexual connection or intercourse, which means the same thing."
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> *Black's Law Dictionary*, 5th Edition (1979) defines adultery as "voluntary sexual intercourse of a married person with a person other than the offender's husband or wife".
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> *Webster's New Collegiate Dictionary*, A & C Merriam Co, Copyright 1981, defines sexual intercourse as:
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> > "(1) heterosexual intercourse involving penetration of the vagina by the penis: coitus; (2) intercourse involving genital contact between individuals other than penetration of the vagina by the penis".
>
> Mrs Menge, then, seeks to limit the definition of adultery to coitus. We do not interpret the applicable law so narrowly. Louisiana law and jurisprudence does not define adultery per se, the closest definition of which we are aware being the aforementioned *Simon* case. However, our law recognizes another species of adultery, which is homosexual adultery, see *Adams v Adams*, 357 So 2d 881 (La App 1st Cir 1978) and *Alphonso v Alphonso* 422 So 2d 210 (La App Cir 1982). Homosexual adultery, by its very definition, does not include coitus. We find that the acts to which Mrs Menge admitted, specifically the commission of "oral sex", constitutes adultery within the meaning of Civil Code Article 139'.

[30] The aforesaid approach makes sense and I respectfully associate myself therewith. In the circumstances, it can be decisively concluded that the conduct under consideration constitutes adultery. I now turn to the question of whether any

loss of consortium and an iniuria was suffered by the plaintiff as a result of his wife's adultery with the plaintiff.

[31] In claims for adultery, the cause of action against a third party is the actio iniuriarum The practice is often, for a plaintiff to allege in his or her pleadings that the adultery caused him or her to suffer contumelia (insult and scorn) and caused a loss of consortium provided by the marriage relationship.[3] In *Wiese v Moolman*[4] (from which I borrow freely in this judgment) it was pointed out that adultery is regarded rather as an iniuria because, in terms of our law, it is an injury to the reputation, dignity and emotional welfare of the innocent party.

[32] The loss of consortium is the loss of the comfort, society and services of the guilty party[5] and it was explained it as follows by Du Plessis J[6] in *Wiese*:

> 'Die term consortium is een van daardie wye, ondefinieerbare begrippe wat nogtans 'n goed verstaanbare betekenis dra. Dit behels onder meer die samesyn, die kameraadskap, die wedersydse vertroue, liefde en ondersteuning wat vir die eggenote uit die huwelik voortspruit. Die presiese aard en inhoud van consortium verskil van huwelik tot huwelik: elke man soen sy vrou op sy eie manier. Uit hoofde van die huwelik het elke eggenoot 'n persoonlikheidsreg op die consortium. Ons reg aanvaar dat owerspel as algemene stelling daardie consortium versteur en so op die reg daarop inbreuk maak. Die onskuldige eggenoot kan ook vermoënsverlies vorder wat hy/sy as gevolg van die verlies aan consortium ly. Neethling (op 258) wys daarop dat sulke skade eintlik met die actio legis Aquiliae gevorder moet word, maar vir doeleindes van hierdie uitspraak konsentreer ek op die persoonlikheidsregte wat in gedrang is.'.

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[3] Harms *Amler's Precendents of Pleadings* (7 ed) at 22; and *Viviers v Kilian* 1927 AD 449 at 455.

[4] 2009 (3) SA 122 (T) at 126A–B.

[5] *Amler* supra n 3 at 22

[6] At 126B–D.

[33] Du Plessis J summarised the aforesaid, and explained further, that adultery runs directly counter to the undertaking given both spouses to each other and to the outside world, to have sexual relations (or intercourse) only within the confines of their marriage. The learned judge also emphasized that in our law adultery is regarded as an infringement of a range of personal rights which emanate from the marriage[7]. He also cautioned[8], that it was necessary as a matter of legal policy, to protect the exclusivity of sexual relationships to which parties have committed themselves because, the learned judge explained, firstly, adultery is not lawful and the courts should not send out a message that it is. Secondly, adultery causes extreme emotions for which the law, by way of the actio iniuriarum, must provide an escape valve. If the law fails to do so, there exists a danger that such emotions might be expressed by unlawful means. Marriage is an institution which by its nature and content, includes the rights and obligations to exclusive sexual relationships.

[34] The plaintiff and IV both insisted that what the plaintiff saw that night destroyed their marriage. Both denied that their marriage was on the rocks for other reasons, unrelated to the defendant, when that proposition was put to them in cross-examination.

[35] In the divorce litigation between the plaintiff and his former wife, the plaintiff (the defendant in those proceedings) filed a counterclaim. The first and main ground he pleaded as having lead to the breakdown, was the incident of the oral sex between his wife and uncle. On all the evidence presented, that was the catalyst of the divorce.

[36] The plaintiff and IV may not have had a perfect marriage, as evidenced from their divorce pleadings (the matter was settled), but there were no divorce proceedings looming before this incident. It was not disputed that IV cared for the plaintiff, cooked all his meals and washed his clothes, despite the fact that both of

[7] At 126E–F.

[8] At 127I–128B.

them had demanding careers There was no indication that they were not a normal couple with reciprocal duties of care and and a commitment to sexual exclusivity towards each other. The plaintiff, in my view, established that he lost the comfort, society and services of his wife through her adultery with the defendant.

[37] The plaintiff's discovery with of the adultery, was a shocking experience for him, as it would be to any married person. What the plaintiff observed in his mother's house, also amounted to a betrayal and humiliation by a man who was his mother's brother and whom he regarded a father figure. The incestuous element of the adultery could only have worsened matters. This incident could only have had a negative impact on the self-respect, dignity and reputation of the plaintiff. Clearly, the defendant suffered an iniuria when he witnessed the defendant and his wife in this compromising position and also when he went through the aftermath thereof.

[38] In the circumstances, the plaintiff has established that as a result of the defendant's conduct, he suffered a loss of consortium and iniuria and is accordingly entitled to such damages as he may prove he suffered. This aspect remained in dispute and the quantum of damages was to be determined separately.

[39] It would. in hindsight, have been more practical if the quantum of the aforesaid damages to be awarded, were to be determined in this hearing, rather than in a separate hearing together with the questions of patrimonial loss and special damages. If the parties so wish, and are in agreement, they may forward short written submissions in respect of what an appropriate award for damages would be and I could write a separate judgment on those damages.

[40] This suggestion is made in the context where the evidence was heard in 2012 and postponed sine die by agreement, then set down and removed from the roll in 2013, and set down for argument only the following year. Perhaps some time can be saved by dealing with the quantum of damages in relation to the loss of consortium

and iniuria in the manner suggested since no further evidence would be required as would be in the determination of the other heads of damages.

[41] In the result the following order is made.

1. The plaintiff succeeds on the merits.
2. The matter is postponed sine die for the determination of the quantum of the damages suffered by the plaintiff as a result his loss of consortium and iniuria.
3. The question of plaintiff's patrimonial losses and special damages are also postponed *sine die*.
4. The defendant is to pay the plaintiff's costs of suit, having.

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