SEYCHELLES / JUDGMENT

Rose v Valentin (CS 288/1998) [1999] SCSC 8 (29 September 1999)

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COURT	CASE / FILE NUMBER
Supreme Court	CS 288/1998

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Rose v Valentin

(1999) SLR 99 Antony DERJACQUES for the plaintiff France BONTE for the defendant Ruling delivered on 29 September 1999 by: PERERA J: This is a delictual action wherein the plaintiff claims damages from the defendant on the ground that he allegedly committed adultery with his wife, or alternatively that he commenced an adulterous relationship which caused an estrangement with his wife and children. The ruling arises from a plea in limine litis raised by counsel for the defendant that the action is bad in law and that it cannot be sustained. The law prevailing before the Matrimonial Causes Act 1992 (Cap 14) came into operation was different. A party to a marriage who obtained a decree of divorce on the ground of adultery could claim damages in the same suit against the third party adulterer cited as a co-respondent. In addition, a delictual action under the provisions of the Civil Code was available to the innocent spouse against such third party adulterer, although no action for divorce was filed by him. In the case of Tamboo v Monthy (1989) SLR 150, Abban J (as he then was) upheld the decision of the Magistrates' Court awarding R7000 as damages claimed in a delictual action. He stated thus – The claim for damages for adultery, as in the present case, can be therefore maintained irrespective of the Matrimonial Causes Act (Cap 72). I must emphasise that a claim for damages for adultery does not always stand or fall with a petition for divorce even if joined with it. Abban J reiterated this position in the appeal of Julita Joseph v Marie Gregoretti Moustache (unreported) Civil Appeal 26/1990 which was an appeal from my judgement in the Magistrates' Court in my capacity as Senior Magistrate then. Abban J upholding the award of R7000 as damages stated – The submission that the action could not be maintained was also a misconception. A claim for damages for adultery has always been recognised at the suit of a spouse and such a claim does not need to be brought under the Matrimonial Causes Act (Cap 72). It is a distinct cause of action. Furthermore, the action could also be maintained under article 1382 of the Civil Code. The respondent had a cause of action which could be founded in delict; and this was precisely what she did. It was fault to entice your friend's husband from her, give him shelter and cause him to neglect your friend and

in consequence of which your friend was compelled to undergo untold hardship and distress. The appellant by her imprudent conduct caused damage to the respondent and her behaviour fell squarely within the provisions of articles 1382 and 1383(1) of the Civil Code. The Matrimonial Causes Act (Cap 72) which had been enacted in 1948 came up for revision by a committee appointed by the late Dr Earle Seaton, the then Chief Justice of Seychelles. The recommendations of that committee are now embodied in the Matrimonial Causes Act 1992 (Cap 124). However the prohibition of an action for damages arising from the adultery of a party to the marriage as contained in section 26 of the Matrimonial Causes Act (Cap 124) was not one of the recommendations of that committee. In the case of Bernadette Racombo v Jancy Marianne (unreported) Civil Appeal 2/1994 the question as to whether the prohibition contained in section 26 extended to a delictual remedy under the general law contained in article 1382 of the Civil Code came up for consideration. It was contended that that section applied only to claims made on a petition for divorce and that adultery as a faute under the Civil Code survived. It was further contended that the state, by virtue of article 32(l) of the Constitution had undertaken inter alia "to promote the legal, economic and social protection of the family" and hence section 26 of the Matrimonial Causes Act should not be interpreted in a manner permitting a third party to wreck a marriage by committing adultery with one of the parties to the marriage, without being liable to be sued for damages. I held that article 32(2) of the Constitution contains a derogation to the right created in article 32(1) when it provides that such right "may be subject to such restrictions as may be prescribed by law and necessary in a democratic society.....” and that unless and until section 26 is declared by the Constitutional Court to be inconsistent with article 32(1), it should be regarded as a "law" which restricts that right. In the case of Daisy Micock v. Marie Andre Albert (unreported) Civil Appeal 14/1993 where again the constitutional point was canvassed in relation to section 26 Bwana J, though obiter, characterised section 26 as "a bad law which does not reflect public policy, the expectations of this country and the provisions of article 32(1) of the Constitution". He however agreed that it was not the province of a court of law to question the morality of a statute, and hence set aside an award of damages made in the Magistrates' Court. The case of Donald Regis Celestine v Abel Charles (unreported) CS 192/94 provides a novel interpretation of section 26 in relation to article 1382 of the Civil Code. In that case the husband sued the person who allegedly had "an extramarital affair" with his wife, for loss and damage caused to him consequent to depression, anxiety and stress suffered. Although he avoided the word "adultery" in the plaint, it was in evidence in that case that in an action for divorce he obtained a decree on the ground of adultery of his wife. Amerasinghe J took the view that as the dictionary meaning to the word "affair" was, inter alia, a sexual relationship between two people who are not married to each other, that word did not "include anything as serious as adultery as it is beyond doubt that sexual relations between parties within the definition of an "affair" could exist without adultery". With respect, I would consider that as a perverse interpretation of the word "adultery", and as an evasion of the prohibition contained in section 26. What was considered as delictual was not the physical act of adultery, but the injury, loss or damage it causes to innocent

party by way of mental and moral suffering and loss of consortium. Hence, the position prior to the enactment of the Matrimonial Causes Act 1992 (Cap

124) was that adultery was a ground for divorce, and was actionable as a delict both under the former Matrimonial Causes Act or under article 1382 of the Civil Code. The reason for the enactment of section 26, as set out in the Matrimonial Causes Bill 1991, is as follows- Clause 26 seeks to do away with a claim for damages by the petitioner against a co-respondent in a case of divorce based on adultery. Section 26, as enacted however is as follows - Notwithstanding any other written law, the adultery of a party to a marriage shall not give rise to a claim for damages. Interpreting this section in the light of the object disclosed in the Bill, could it be said that the right of a party to a marriage to bring a delictual action under article 1382 of the Civil Code on the ground of adultery survived? In the Racombo case (supra) I expressed the view that the phrase "the adultery of a party to the marriage" in section 26 should be interpreted in its generic sense to include all effects or consequences to the marriage or to the innocent spouse. G C Thornton on Legislative Drafting (11th edition) at page 88, explaining the use of the "notwithstanding" clause in enactments, states that "where one provision is inconsistent with another provision in the same law or some other law, the draftman ought to make it clear which provision is to prevail" ..... but if for any reason the inconsistent provision cannot be specified, the use of the phrase "notwithstanding any law to the contrary" is acceptable. In section 26, the phrase "not withstanding any other written law" has the same connotation. Hence section 26 prevails over all other written laws which provide an action for damages arising from the adultery of a party to a marriage. Maxwell on Interpretation of Statutes (12th edition) at page 137, under the heading "construction to prevent evasion" states - .... The office of the judge is to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined. In the instant case, the plaintiff bases his cause of action on adultery, and alternatively on the adulterous relationship the defendant allegedly had with his wife resulting in estrangement with his family, and the consequent loss and damage caused to him. These two alternatives cannot be separated. As the Roman Dutch Jurist Johannes Voet states of adultery in (Bk 48. Se: 5. Sub-Section7)- Its vileness is manifest from the fact that, while almost all other delicts are confined within the limits of their own baseness, adultery entails a troop of evils. The Court cannot entertain any claim for damages under any "written law" where the claim arises from the adultery of a party to a marriage although it may be presented in an indirect or circuitous manner to defeat the object of section 26. Hence the usage of terms like "marital affair" as in the Celestine case (supra) or "making love" as in Francis Hoareau. v. Emmanuel Joubert (unreported) CS 74/1993 are masquerades for the conceptual term "adultery" and are therefore not actionable in delict. It may be contended that section 26 of the Matrimonial Causes Act puts a premium on immorality. But as Bhagwati J stated in the Indian case of RK Garg v The Union (1981) RSC 2138 - ..... Immorality by itself is not a ground of

constitutional challenge, and it obviously cannot be, because morality is essentially subjective in value, except in so far as it may be reflected in any provision of the Constitution, or may be crystallised into some well accepted norm of special behaviour. If, as is being contended, section 26 should be interpreted in a way that the undertaking given in article 31(1) to promote the legal, economic and social protection of the family becomes meaningful, the remedy would lie with the legislature to amend that section or for the Constitutional Court to consider whether section 26 is inconsistent with the article 31(1) of the Constitution. The basic difference between the Matrimonial Causes Act 1992 (Cap 124) and the earlier law is the removal of the "fault" principle. In this respect Venchard JA in the case of Cosgrow v Cosgrow SCA 12/1992 stated thus – The evolution of the law within commonwealth jurisdictions over the last decade or so demonstrates that there is no longer any turpitude attached to adultery. Thus in New Zealand, the no fault concept has been introduced for the severance of the marital link. In South Africa, as far back as 1944 Blackwell J in the case of Rosenbaum v Margolis

(1944) WLD 147 at 158 stated thus - There is something, in my opinion, to be said for the view that an action for damages against an adulterous third party is out of harmony with the modern concepts of marriage and should be abolished. In Seychelles these modern concepts were adopted in the Matrimonial Causes Act in

1992. The Matrimonial Causes Act, being the special legislation governing matrimonial matters and matters arising therefrom, prevails over all other written laws in respect of those matters. Accordingly the plea that the action is bad in law and that it cannot be sustained is upheld. As this ruling substantially disposes of the whole cause of action, the action is dismissed with costs. Record: Civil Side No 288 of 1998

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