

SOUTH AFRICA / JUDGMENT

Erasmus v Heine (39407/2010) [2013] ZAGPPHC 11 (28 January 2013)

[2013] ZAGPPHC 11

COURT

North Gauteng High Court, Pretoria

BEFORE

L I Vorster

CASE / FILE NUMBER

39407/2010

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IN THE NORTH GAUTENG HIGH COURT,

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO. 39407/2010

DATE: 28/01/2013

In the matter between:

D J E

ERASMUS.....PLAINTIFF

and

G R

HEINE.....DEFENDANT

JUDGMENT

LI VORSTER AJ:

- [1] The plaintiff claims from the defendant damages on the grounds of the defendant having committed adultery with the wife of the plaintiff at the time, and alienation of her affection which ultimately led to the breaking down of that marriage and a decree of divorce granted against him.
- [2] Before I deal with the evidence in this matter it is convenient to deal with a point that is submitted by the defendant in argument. That point is that the plaintiff claiming separate amounts of damages in respect of adultery and alienation of affection amounts to an improper splitting of actions. The submission is that the elements relating to the cause of

action based on alienation of affection are part and parcel of the elements relating to the cause of action relating to adultery, although adultery contains the additional element that there must have been sexual intercourse between the defendant and the plaintiff's wife. I disagree with this contention. Adultery contains an element of contumelia which relates to the humiliation of the plaintiff by the defendant committing adultery with his wife, whilst alienation of affection relates to damages suffered by a plaintiff as a result of the loss of consortium of his wife caused by the unlawful action of the defendant who led her astray. Depending upon the facts of the case, loss of consortium can take place as a result of adultery. However, adultery can also take place only after the wife had been led astray by a defendant in which case a different measure of quantum would apply, depending upon the facts of each case.

- [3] Both the plaintiff, his former wife and the defendant testified that they were Christians and subscribed to the principles of Christianity as a religious faith. The sanctity of marriage and the obligation that it places on both spouses to the marriage to engage in sexual activity with one another only within the framework of the marriage has been recognized in a comprehensive judgment in the case of *Wiese v Moolman* 2009(3) SA 122 (T). I am in complete agreement with that decision. It follows that the marital rights of sexual intercourse and affection and devotion of the married parties are still held in high esteem in law and the rights of action of either spouse to protect those rights and, in the case of violation thereof by third parties, to claim damages as a result of such infringement, are still part of our law and enforceable. In the instant case the sanctity of those rights and obligations is beyond question in view of the Christian faith professed by all the parties to this action.
- [4] The plaintiff was married to his former wife, Suné Erasmus (born Hay) on 30th of April 2005. For the sake of convenience I shall refer to her as "Suné" hereinafter.
- [5] The marriage was dissolved on the 1st of September 2011 after Suné left the common home of the parties on 23rd of March 2010 and had served a summons for divorce on the plaintiff on the 7th of June 2010.
- [6] On 15th of April 2009 Suné began employment with a company by the name of Novagen Pharma. In the course of her employment she met the defendant who was the managing director of an affiliated company called Home Med. Originally Novagen and Home Med operated from the same office building, but later they separated and then operated from adjacent buildings.
- [7] It is the plaintiff's case that he had a happy marriage until the intervention of the defendant which caused Suné inter alia to vacate the common home on 23rd of March 2010 and to revert briefly back to the common home on 27th of March 2010, on which date the plaintiff left the common home. It is common cause that the parties have not cohabitated as husband and wife since then and that the marriage was dissolved as a result of the summons which Suné issued against the plaintiff and which led to the ultimate dissolution of the marriage

during September 2010.

- [8] The defendant denies the claims made by the plaintiff. He testified and also presented the evidence of Suné in support of his denial of the plaintiff's claims. The plaintiff also testified.
- [9] Initially the defendant denied in his plea that he committed adultery with Suné. However, that plea was amended to concede adultery during July 2010. In evidence adultery by the defendant and Suné during August 2010, when the marriage was still not dissolved, but after the summons had been served by Suné on the plaintiff, was also conceded by the defendant and Suné.
- [10] The defence of the defendant is simply that problems in the marriage between the plaintiff and Suné were caused by inconsiderate behaviour on the part of the plaintiff and his lack of understanding and love towards Suné which caused the disintegration of the marriage relationship between them and not the actions of the defendant. It is necessary to examine

and analyze the evidence led before me to come to a conclusion in that regard. I shall do so below.

- [11] It is convenient to deal with certain facts put before me by way of evidence and which is common cause or not disputed by the parties. That evidence comprise the following: 11.1 A bundle of photographs disclosed and submitted by the plaintiff in evidence which comprise of photographs of the plaintiff and Suné on various occasions and referring to inter alia holidays that were enjoyed by them at Umhlanga, Ballito, Ireland, Cape Province, a marriage in Kwazulu Natal Midlands, family get-together festivals, Clarens (Golden Gate), the celebration of the plaintiff's 30th birthday on 14th of February 2009 and the celebration of the 30th birthday of Suné at a venue called Rhapsody's during October 2009. At that occasion Suné made a speech which was recorded and transcribed and put before Court. The video that was made of that occasion was also presented in evidence and I had the opportunity to look at it. 11.2 A record of e-mails interchanged between Suné and the defendant and also a record of cellphone calls interchanged between them was made available in evidence. The contents of the e-mails were not in dispute and the dates and duration of the cellphone calls between them was also not disputed. It was also common cause that the defendant and Suné spent two nights together in the same bed at different locations. The first time was on the evening of 9th of April 2010 when the defendant invited Suné to spend an evening with him at a health spa. The second time was in June 2010 when Suné invited the defendant to spend a weekend with her in Paternoster and she had booked a cottage with a single room with a double bed therein where they slept together over the said weekend. Both Suné and the defendant denied that they were sexually intimate during either of those two occasions.

- [12] At the outset I must say that the photographs to which I have referred above depict a happy family consisting of both the plaintiff and Suné, their children and their relatives over a lengthy period of time since 2008 up and until at least February 2010. If no more is said, those photographs are prima facie evidence of a happy marriage relationship between the plaintiff and Suné. That prima facie impression was hotly disputed by the defendant in his evidence and in that regard he relied heavily on the evidence of Suné.
- [13] Suné had good employment when she married the plaintiff which enabled her to earn a good salary and even buy a motorcar and some immovable property. The employment with Novagen Pharm was likewise lucrative and enabled her to maintain a good living standard with the plaintiff. The plaintiff, on the other hand, regarded himself as the head of the household and responsible for control of the finances consisting of the joint income of himself and Suné. He worked according to a budget in terms of which the income and expenses were regulated and budgeted for. In the evidence it became clear to me that Suné resented the fact that her income was appropriated by the plaintiff and dealt with in terms of his monthly budget. She felt aggrieved as a result of that. She tried to paint a picture of the plaintiff as a miser and referred to specific instances where the plaintiff

was unwilling to pay when they dined out with friends on social occasions and even when they were on holiday with her family at Umhlanga. Her evidence in that regard was denied by the plaintiff. Moreover, when the credit card statement of the plaintiff was put to her in cross-examination which indicated that on the occasions referred to by her, the plaintiff made substantial payments to the restaurant in question, she was unable to explain the evidence put to her which was clearly contradictory to her evidence on that aspect. She also in her evidence resented the fact that the plaintiff wanted to have sex with her at inopportune times when she was not ready for it and that he did not treat her with the necessary consideration when she was ill, for instance when she and the plaintiff attended a wedding ceremony in the KwaZulu Natal Midlands when she fell ill and had to receive medical treatment ultimately. It is possible that she fell ill during the course of that occasion at some stage. The photographs to which I have referred showed her happily having a ball on the dance floor with the plaintiff. She referred also to another instance during February 2010 when the plaintiff had arranged a weekend for her family, herself and some friends on a farm near Manhaarrand. That was an occasion which overlapped with Valentines day. She had made a Valentines card for the plaintiff. He ultimately threw the card in the dustbin. Much was made in that respect to show the inconsiderate behaviour of the plaintiff towards her. I am not impressed by that conclusion which is sought to be drawn by Suné and the defendant. Throwing away a Valentines card after Valentines day celebrations have been terminated can hardly be said to be inconsiderate behaviour as contended for. During the celebration of the 30th birthday of Suné in October 2009, Suné made a speech which was transcribed and produced to Court. I also had the

opportunity to listen to the video recording of that occasion. Suné said of the plaintiff that he was her absolute soul mate and that she loved him incredibly much. When the text of the speech was put to her in cross-examination she was constrained to deny the truth of what she had said about

the plaintiff and explained that it was just a front she had put up to create the impression of happiness to the family and friends who attended the occasion. She was constrained to maintain the same stance in relation to all the other photographs handed in by the plaintiff and which depicted her and the plaintiff and their family and friends as in a state of complete happiness and harmony.

[14] It is common cause that Suné consulted a biblical counselor on 18th of August and 14th and 28th of September 2009. The counselor, Dr Vorster Combrink, gave evidence. He confirmed that Suné consulted him on the aforesaid dates. He was unable to divulge further information about the consultations he had, as he had destroyed his notes and documents which could refresh him memory in that regard. In fairness I must accept that Suné experienced some stress or discomfort in her marriage relationship with the plaintiff which caused her to consult Dr Combrink on the aforesaid dates. However, the fact of the matter is that those problems clearly did not terminate the cohabitation of Suné and the plaintiff or cause

the disintegration of their marriage, as, if that had been the case, it is difficult to reconcile a conclusion that the marriage

relationship was practically over with for instance the birthday celebration of Suné during October 2009 and the Manhaarrand

weekend during February 2010.

[15] The defendant became acquainted to Suné in the course of his employment as managing director of Home Med of which Novagen Pharm which employed Suné, was an associated company. He got to know her and in the course of their contact in their respective employment situations they began to like each other. Suné felt aggrieved because the plaintiff, according to her perception, was a miser who denied her access to the money she earned and to which she felt entitled and showed lack of consideration to her according to her perception of the way the plaintiff behaved. The defendant, who was a divorced man, started to like Suné and she started to like him. It is difficult to determine on the evidence exactly when Suné and the defendant developed a liking to each other. It must have been at least since January 2010 and probably as far back as late 2009.

This conclusion is supported by the evidence of the plaintiff that he noticed a change in attitude from Suné towards late 2009 and which continued and escalated into the beginning of 2010. It is also supported by the fact that it is common cause that a meeting took place on the 4th of March 2010 at Irene between the defendant and Suné and during which occasion the defendant said to Suné that he liked her a lot, he is aware that she also likes him and that they should stop having contact with each other until such time as she sorted out her problems in her marriage and made up her mind what she wanted to do. That prudent undertaking did not bear fruit. The undisputed evidence indicates that telephonic and SMS contact increased between them. The plaintiff, having learned that the defendant is involved with Suné then confronted the defendant at his workplace. The defendant denied involvement in the marriage of the plaintiff and stated that he

prayed for the marriage of the plaintiff. As it later appeared, those prayers did not bear fruit. Whilst the SMS and cellphone communications between Suné and the defendant increased after the 4th of March 2010, Suné decided to leave the common home with the plaintiff on 23rd of March 2010 and informed the defendant accordingly. However, before 23rd of March 2010, the defendant, contrary to his undertaking not to contact Suné, sent an e-mail dated the 8th of March 2010 in which he lovingly addressed her as “dear Bella” and referred to a text in the Bible, ostensibly

justifying his departure from his undertaking not to contact Suné. In the meantime, the plaintiff realizing that his marriage relationship is under stress, agreed with Suné to undergo marriage counseling.

[16] The marriage counseling came to no positive result. On the evidence before me that is not surprising. The e-mail and SMS communication between defendant and Suné escalated up to a point where, on 29th of June 2010, they agreed, on the erroneous assumption that the Biblical texts provide support for what they were planning to do, decided to have a child which hopefully would be a daughter to be called Isabella. The defendant and Suné were serious to commit adultery before the decree of divorce in terms of the summons which was served early June 2010 became a finality. That follows from the fact that the defendant and Suné spent a night together on the 9th of April 2010 at a Health Spa and subsequent to that, in June 2010 the same happened at Paternoster. The denial by them that they merely slept together in the same bed and that no intimacy between them took place, is clearly completely improbable and manifestly untrue in the light of their clearly escalating romantic relationship as is evidenced by the e-mails that I have referred to above. Finally, on this point, I find it untenable that they can deny sexual intimacy on those two occasions because it would be against their Christian principles, whereas their actions subsequent to the 4th of March 2010 clearly indicate that they would not hesitate to invoke Biblical texts to justify a violation of the sanctity of

marriage because they happened to have fallen in love with one another.

[17] In the result of the foregoing I am satisfied that the plaintiff has proved that the defendant with the required intent was responsible for leading astray his former wife, Suné and that the plaintiff is entitled to succeed with its claim. As far as damages are concerned, I intend to award a composite amount in respect of adultery and the loss of the plaintiff of the consortium of his former wife. In that regard I also take into account that the marriage of the plaintiff was under some stress as a result of the resentment of Suné to which I have already referred above. I am, however, not persuaded that such problems as there were could not have been satisfactorily dealt with in the process of marriage counseling had the defendant not interfered as he did. I make the following order: Judgment is granted for the plaintiff in the amount of R75 000,00; The amount of R75 000,00 bears interest at the rate of 15,5% per annum as from date of this order until date of payment; The defendant is ordered to pay the costs of the plaintiff on the applicable High Court scale of tariff of fees and disbursements. L I VORSTER: AJ

LI VORSTER AJ:

- [1] The plaintiff claims from the defendant damages on the grounds of the defendant having committed adultery with the wife of the plaintiff at the time, and alienation of her affection which ultimately led to the breaking down of that marriage and a decree of divorce granted against him.
- [2] Before I deal with the evidence in this matter it is convenient to deal with a point that is submitted by the defendant in argument. That point is that the plaintiff claiming separate amounts of damages in respect of adultery and alienation of affection amounts to an improper splitting of actions. The submission is that the elements relating to the cause of action based on alienation of affection are part and parcel of the elements relating to the cause of action relating to adultery, although adultery contains the additional element that there must have been sexual intercourse between the defendant and the plaintiff's wife. I disagree with this contention. Adultery contains an element of contumelia which relates to the humiliation of the plaintiff by the defendant committing adultery with his wife, whilst alienation of affection relates to damages suffered by a plaintiff as a result of the loss of consortium of his wife caused by the unlawful action of the defendant who led her astray. Depending upon the facts of the case, loss of consortium can take place as a result of adultery. However, adultery can also take place only after the wife had been led astray by a defendant in which case a different measure of quantum would apply, depending upon the facts of each case.
- [3] Both the plaintiff, his former wife and the defendant testified that they were Christians and subscribed to the principles of Christianity as a religious faith. The sanctity of marriage and the obligation that it places on both spouses to the marriage to engage in sexual activity with one another only within the framework of the marriage has been recognized in a comprehensive judgment in the case of *Wiese v Moolman* 2009(3) SA 122 (T). I am in complete agreement with that decision. It follows that the marital rights of sexual intercourse and affection and devotion of the married parties are still held in high esteem in law and the rights of action of either spouse to protect those rights and, in the case of violation thereof by third parties, to claim damages as a result of such infringement, are still part of our law and enforceable. In the instant case the sanctity of those rights and obligations is beyond question in view of the Christian faith professed by all the parties to this action.
- [4] The plaintiff was married to his former wife, Suné Erasmus (born Hay) on 30th of April 2005. For the sake of convenience I shall refer to her as "Suné" hereinafter.
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- [8] The defendant denies the claims made by the plaintiff. He testified and also presented the evidence of Suné in support of his denial of the plaintiff's claims. The plaintiff also testified.
- [9] Initially the defendant denied in his plea that he committed adultery with Suné. However, that plea was amended to concede adultery during July 2010. In evidence adultery by the defendant and Suné during August 2010, when the marriage was still not dissolved, but after the summons had been served by Suné on the plaintiff, was also conceded by the defendant and Suné.
- [10] The defence of the defendant is simply that problems in the marriage between the plaintiff and Suné were caused by inconsiderate behaviour on the part of the plaintiff and his lack of understanding and love towards Suné which caused the disintegration of the marriage relationship between them and not the actions of the defendant. It is necessary to examine

and analyze the evidence led before me to come to a conclusion in that regard. I shall do so below.

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11.2 A record of e-mails interchanged between Suné and the defendant and also a record of cellphone calls interchanged between them was made available in evidence. The contents of the e-mails were not in dispute and the dates and duration of the cellphone calls between them was

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[12] At the outset I must say that the photographs to which I have referred above depict a happy family consisting of both the plaintiff and Suné, their children and their relatives over a lengthy period of time since 2008 up and until at least February 2010. If no more is said, those photographs are prima facie evidence of a happy marriage relationship between the plaintiff and Suné. That prima facie impression was hotly disputed by the defendant in his evidence and in that regard he relied heavily on the evidence of Suné.

[13] Suné had good employment when she married the plaintiff which enabled her to earn a good salary and even buy a motorcar and some immovable property. The employment with Novagen Pharm was likewise lucrative and enabled her to maintain a good living standard with the plaintiff. The plaintiff, on the other hand, regarded himself as the head of the household and responsible for control of the finances consisting of the joint income of himself and Suné. He worked according to a budget in terms of which the income and expenses were regulated and budgeted for. In the evidence it became clear to me that Suné resented the fact that her income was appropriated by the plaintiff and dealt with in terms of his monthly budget. She felt aggrieved as a result of that. She tried to paint a picture of the plaintiff as a miser and referred to specific instances where the plaintiff

was unwilling to pay when they dined out with friends on social occasions and even when they were on holiday with her family at Umhlanga. Her evidence in that regard was denied by the plaintiff. Moreover, when the credit card statement of the plaintiff was put to her in cross-examination which indicated that on the occasions referred to by her, the plaintiff made substantial payments to the restaurant in question, she was unable to explain the evidence put to her which was clearly contradictory to her evidence on that aspect. She also in her evidence resented the fact that the plaintiff wanted to have sex with her at inopportune times when she was not ready for it and that he did not treat her with the necessary consideration when she was ill, for instance when she and the plaintiff attended a wedding ceremony in the Kwazulu Natal Midlands when she fell ill and had to receive medical treatment ultimately. It is possible that she fell ill during the course of that occasion at some stage. The photographs to which I have referred showed her happily having a ball on the dance floor with the plaintiff. She referred also to another instance during February 2010 when the plaintiff had arranged a weekend for her family, herself and some friends on a farm near Manhaarrand. That was an occasion which overlapped with Valentines day. She had made a Valentines card for the plaintiff. He ultimately threw the card in the dustbin. Much was made in that respect to show the inconsiderate behaviour of the plaintiff towards her. I am not impressed by that conclusion which is sought to be drawn by Suné

and the defendant. Throwing away a Valentines card after Valentines day celebrations have been terminated can hardly be said to be inconsiderate behaviour as contended for. During the celebration of the 30th birthday of Suné in October 2009, Suné made a speech which was transcribed and produced to Court. I also had the

opportunity to listen to the video recording of that occasion. Suné said of the plaintiff that he was her absolute soul mate and that she loved him incredibly much. When the text of the speech was put to her in cross-examination she was constrained to deny the truth of what she had said about the plaintiff and explained that it was just a front she had put up to create the impression of happiness to the family and friends who attended the occasion. She was constrained to maintain the same stance in relation to all the other photographs handed in by the plaintiff and which depicted her and the plaintiff and their family and friends as in a state of complete happiness and harmony.

[14] It is common cause that Suné consulted a biblical counselor on 18th of August and 14th and 28th of September 2009. The counselor, Dr Vorster Combrink, gave evidence. He confirmed that Suné consulted him on the aforesaid dates. He was unable to divulge further information about the consultations he had, as he had destroyed his notes and documents which could refresh him memory in that regard. In fairness I must accept that Suné experienced some stress or discomfort in her marriage relationship with the plaintiff which caused her to consult Dr Combrink on the aforesaid dates. However, the fact of the matter is that those problems clearly did not terminate the cohabitation of Suné and the plaintiff or cause

the disintegration of their marriage, as, if that had been the case, it is difficult to reconcile a conclusion that the marriage

relationship was practically over with for instance the birthday celebration of Suné during October 2009 and the Manhaarrand

weekend during February 2010.

[15] The defendant became acquainted to Suné in the course of his employment as managing director of Home Med of which Novagen Pharm which employed Suné, was an associated company. He got to know her and in the course of their contact in their respective employment situations they began to like each other. Suné felt aggrieved because the plaintiff, according to her perception, was a miser who denied her access to the money she earned and to which she felt entitled and showed lack of consideration to her according to her perception of the way the plaintiff behaved. The defendant, who was a divorced man, started to like Suné and she started to like him. It is difficult to determine on the evidence exactly when Suné and the defendant developed a liking to each other. It must have been at least since January 2010 and probably as far back as late 2009.

This conclusion is supported by the evidence of the plaintiff that he noticed a change in attitude from Suné towards late 2009 and which continued and escalated into the beginning of 2010. It is also supported by the fact that it is common cause that a meeting took place on the 4th of March 2010 at Irene between the defendant and Suné and during which occasion the defendant said to Suné that he liked her a lot, he is aware that she also likes him and that they should stop having contact with each other until such time as she sorted out her problems in her marriage and made up her mind what she wanted to do. That prudent undertaking did not bear fruit. The undisputed evidence indicates that telephonic and SMS contact increased between them. The plaintiff, having learned that the defendant is involved with Suné then confronted the defendant at his workplace. The defendant denied involvement in the marriage of the plaintiff and stated that he prayed for the marriage of the plaintiff. As it later appeared, those prayers did not bear fruit. Whilst the SMS and cellphone communications between Suné and the defendant increased after the 4th of March 2010, Suné decided to leave the common home with the plaintiff on 23rd of March 2010 and informed the defendant accordingly. However, before 23rd of March 2010, the defendant, contrary to his undertaking not to contact Suné, sent an e-mail dated the 8th of March 2010 in which he lovingly addressed her as “dear Bella” and referred to a text in the Bible, ostensibly

justifying his departure from his undertaking not to contact Suné. In the meantime, the plaintiff realizing that his marriage relationship is under stress, agreed with Suné to undergo marriage counseling.

[16] The marriage counseling came to no positive result. On the evidence before me that is not surprising. The e-mail and SMS communication between defendant and Suné escalated up to a point where, on 29th of June 2010, they agreed, on the erroneous assumption that the Biblical texts provide support for what they were planning to do, decided to have a child which hopefully would be a daughter to be called Isabella. The defendant and Suné were serious to commit adultery before the decree of divorce in terms of the summons which was served early June 2010 became a finality. That follows from the fact that the defendant and Suné spent a night together on the 9th of April 2010 at a Health Spa and subsequent to that, in June 2010 the same happened at Paternoster. The denial by them that they merely slept together in the same bed and that no intimacy between them took place, is clearly completely improbable and manifestly untrue in the light of their clearly escalating romantic relationship as is evidenced by the e-mails that I have referred to above. Finally, on this point, I find it untenable that they can deny sexual intimacy on those two occasions because it would be against their Christian principles, whereas their actions subsequent to the 4th of March 2010 clearly indicate that they would not hesitate to invoke Biblical texts to justify a violation of the sanctity of

marriage because they happened to have fallen in love with one another.

[17] In the result of the foregoing I am satisfied that the plaintiff has proved that the defendant with the required intent was responsible for leading astray his former wife, Suné and that the plaintiff is entitled to succeed with its claim. As far as damages are concerned, I intend

to award a composite amount in respect of adultery and the loss of the plaintiff of the consortium of his former wife. In that regard I also take into account that the marriage of the plaintiff was under some stress as a result of the resentment of Suné to which I have already referred above. I am, however, not persuaded that such problems as there were could not have been satisfactorily dealt with in the process of marriage counseling had the defendant not interfered as he did. I make the following order:

Judgment is granted for the plaintiff in the amount of R75 000,00;

The amount of R75 000,00 bears interest at the rate of 15,5% per annum as from date of this order until date of payment;

The defendant is ordered to pay the costs of the plaintiff on the applicable High Court scale of tariff of fees and disbursements.

L I VORSTER: AJ

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Prepared on 12 October 2026 · Esheria