

SOUTH AFRICA / JUDGMENT

Sebidi v Thobejane (36432/2012)

[2014] ZAGPPHC 57 (21 February 2014)

[2014] ZAGPPHC 57**COURT**

North Gauteng High Court, Pretoria

BEFORE

K E Matojane

CASE / FILE NUMBER

36432/2012

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NO: 36432/2012

DATE: 21 FEBRUARY 2014
In the matter

between: SIMON DIATLENG
SEBIDI.....Plaintiff
And
DR. R K
THOBEJANE.....Defendant

JUDGMENT

MATOJANE, J

[1] The Plaintiff has instituted an action against the Defendant; a medical practitioner who the Plaintiff avers committed adultery with his wife.

[2] The plaintiff claims a sum of R 2,5 million made up as follows:

General damages : R 2 000 000-00

Contumelia : R 500 000-00

PLEADINGS

- [3] It is necessary to quote relevant parts of the particulars of claim and the plea in some detail, because in both cases, the evidence fell short of what was pleaded, and demonstrated that the allegations in the pleadings were speculative and based on assumptions.

PARTICULARS OF CLAIM

- [4] Paragraph 4 of the particulars of claim reads:

“On or about and /or during the period 2011 up until 28th March 2012 the defendant unlawfully, intentionally and wrongfully had an adulterous relationship with the plaintiff’s wife.”

- [5] Paragraph 5 reads:

"During the adulterous relationship between the defendant and the plaintiff’s wife, the plaintiff had on various occasions inside the defendant’s surgery had sexual intercourse with the plaintiff’s wife to which the defendant personally admitted before the plaintiff on the 28th March 2012.”

PLEA

- [6] Defendant in his plea denied ever having had an adulterous relationship with the Plaintiff’s wife and put Plaintiff to the proof thereof. In amplification of his denial, Defendant specifically pleaded that:

“5.2.1 the defendant denies ever having an adulterous relationship with plaintiff’s wife;

5.2.2 the defendant denies ever having sexual intercourse with the plaintiff’s wife at the defendant’s surgery and

5.2.3 the defendant however does acknowledge the plaintiff’s wife being one of the defendant’s patients and having consulted and treated her on previous occasions”

EVIDENCE OF THE PLAINTIFF

- [7] Plaintiff first called Liza Prinsloo, a clinical psychologist to testify on his behalf. She testified that she was requested by Plaintiff’s attorneys to compile a psycho-forensic report on the psychological status of the Plaintiff following a traumatic event. She was furnished with an instruction letter from the attorneys and the combined summons together with the particulars of claim. The Plaintiff attended the evaluation with his wife on the 18 July 2013. Liza Prinsloo testified that Plaintiff informed her that his first marriage broke off after 4 years because his wife had an affair. He married the current wife in 2009. He stated that she started changing approximately a year after their marriage. The change included a reduction in their intimate relationship and she seemed to live above her means. He confronted her and enquired if she had an affair but she did not respond. In 2011 their relationship deteriorated further. He was made aware of his wife’s frequent visits to the doctor’s surgery

and on one occasion he waited for her in the waiting room, her consultation took very long and he had to leave. He informed her of the cell phone message he saw on his wife's phone on the 28 March 2012 and how he confronted the Defendant at his surgery.

- [8] The Plaintiff was asked to complete a questionnaire, the Symptoms Checklist - 90 - R on the presence and severity of psychological symptoms for the past 7 days. The scores on the Somatization and Psychoticism scales were found to be raised in comparison to his other scores and fell two standard deviations above the normative population. Scores on the Obsessive - Compulsive, Depressive, Anxiety, Hostility and Paranoid dimensions were raised one standard deviation from the norm and the Global Severity Index fell two standard deviations above the norm. This according to Liza Prinsloo suggested that significant psychological distress was present. The individual items endorsed indicated the presence of headaches and weaknesses in his limbs as well as a general distrust of others. She testified that the Plaintiff involuntarily ruminates about the events and the impact it has had on his life.
- [9] In her opinion, the Plaintiff and his wife could benefit from couples therapy and to this end 12 sessions of marital therapy are recommended at an approximate rate of R800-00 per session. Plaintiff's wife informed Lisa Prinsloo that she believed they had marital problems, irrespective of her relationship with the Defendant but wanted to remain married and was motivated to work hard on their difficulties.
- [10] Plaintiff testified that Defendant has been his family doctor since 2004 and knows of his marriage to his wife. He referred the court to an invoice of a purchase of a washing machine that he said was given to his wife by the Defendant as a wedding gift. He testified that in the early morning of the 28th March 2012 as they were preparing to go to work, he saw a cell phone message on his wife's phone. The message said, "Cynthia my lover, I hope you slept well and hope that you are happy about what we did". He confronted his wife about the message and she tried without success to grab the phone from him. He took the phone with him to work and saw several other messages from the same number. When he called the number, Defendant's receptionist answered it and confirmed that the number belonged to the Defendant who was then busy consulting patients.
- [11] Accompanied by his wife he went to the Defendant's surgery to confront him. His wife told him not to cause a scene at the surgery. He found patients in the waiting area and managed to slip in before a patient whose turn it was to see the Defendant. He asked Defendant what he was doing with his wife and Defendant said nothing. He went to his car to fetch his wife where she was waiting. He invited Defendant to go through the messages and the latter told him that he could not. Defendant broke down crying saying that he regretted his actions. Defendant told him and his wife to move to another room for privacy and Defendant again apologized and said he will never again phone his wife. The following Sunday he had another meeting at the consulting rooms where the Defendant again apologized.

- [12] Following the confrontation in the Defendant's surgery, his wife informed him that Defendant continued to phone her expressing concern for her marriage. I must pause to mention that during the consultation with Liza Prinsloo, Plaintiff's wife refuted the allegation by Plaintiff that Defendant remained in contact with her even at the time of assessment.
- [13] Plaintiff testified that Defendant subsequently sent him cell phone message inviting him to a meeting at a local Casino despite serving him with an interdict prohibiting him from speaking with him. Transcripts of the messages were discovered and formed part of the record. The Defendant sent the first message on the 11 September 2012 to the Plaintiff and reads:

"Good morning, would you be available for a dinner meeting for 18H00 at the Carousel on Friday the 13th. I will compensate with R400.00 petrol expense. Thanks"

In reply, Plaintiff message reads:

"The meeting is welcomed; however it will be wise of us to sort ourselves out before our attorneys since we have had unpleasant differences in our approach to the issue of importance. You are the one to steer the initiative. I will be waiting as always."

- [14] Under cross-examination, Plaintiff testified that he did not see his wife having sex with Defendant but was told by his wife that they slept together. It was put to him that Defendant denies having an adulterous relationship with his wife and further that Defendant denies having admitted to having a relationship with his wife on the 28 March 2012. Counsel failed to deny the further allegations made by the Plaintiff and further failed to put the Defendants version to the Plaintiff.

HEARSAY EVIDENCE

- [15] During Plaintiff's evidence in chief, his counsel brought an application for the admissibility of the hearsay evidence of Plaintiff's wife. The application was refused and I indicated that I would furnish my reasons as part of the judgment. These are my reasons.
- [16] Section 3 of the Law of Evidence Amendment Act of 1988 prohibits, in the absence of agreement, the admission of hearsay evidence unless the interests of justice require it. The section reads:

"3 Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to-
 - (i) the nature of the proceedings
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph
- (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
- (4) For the purposes of this section-

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

[17] Section 3(1)(c)(i) confers a judicial discretion on the court to take specific account of the nature of the proceedings. This refers to the

distinction between civil and criminal proceedings. In civil proceedings the Plaintiff must prove its case on the balance of probabilities unlike in criminal cases where the onus is onerous and the admission of hearsay evidence may unfairly ease the burden on the state to prove its case beyond reasonable doubt.

[18] Section 3(1)(c)(ii) refers to the nature of the evidence. The Plaintiff's wife has an interest in the matter; that she attended the evaluation

by Liza Prinsloo with Plaintiff shows that she wants to save her marriage and make it work; it is inconceivable that her evidence if not tested under cross examination will be objective.

[19] Sections 3(1)(c)(iii) - the purpose for which the evidence is tendered is clearly to prove that Defendant, despite his denials, has had sexual intercourse with the Plaintiff's wife at his surgery on various occasions without the reliability of her evidence being tested under cross examination. The probative value of the hearsay evidence section (1)(c)(iv) - The intended hearsay evidence cannot be independently corroborated, if such evidence is admitted then the judgment will be based on her "say so" as to what happened without with no guarantee of reliability of the evidence. The cell phone messages that have been discovered do not make mention of any love relationship between the Defendant and Plaintiff's wife. The first message that Plaintiff alleges he read on his wife's

phone was never discovered. In any event, the message merely asks whether Plaintiff slept well after what she and Defendant allegedly

did. It is speculative to insinuate from the message that they had sex the previous day at Defendant's surgery as alleged in the particulars of claim. The hearsay evidence, in my view, will have very little probative value and will carry no weight at all if admitted.

[20] The Plaintiff has not given any reason why his wife cannot testify (section (1)(c)(v)): The court will not speculative as to the reasons why plaintiff elected not to call her as a witness. There is not doubt that the admission of the hearsay evidence will prejudice the Defendant as he will not have the opportunity to challenge the evidence despite his denial in his plea that he never committed adultery as alleged and most importantly, the court will be denied the opportunity of weighing her credibility and reliability of her evidence in deciding whether the interest of justice require its admission. I am accordingly not persuaded that the interest of justice require the admission of the hearsay evidence of the Plaintiff's wife.

EVIDENCE OF THE DEFENDANT

[21] Defendant testified that he has been practising as a medical doctor for about 19 years. He denies having had an adulterous relationship with Plaintiff's wife who was his patient. He further denies that he admitted to Plaintiff on the 28 March 2012 that he committed adultery with Plaintiff's wife. He stated that Plaintiff wants to extort money from him because Plaintiff has been constantly sending him phone messages demanding R500 000.00 from him and later reducing it to R300 000.00. When Plaintiff phoned to tell him that he was coming to see him at the surgery he told Plaintiff that he would regret it as he had embarrassed him before. He later decided to send Plaintiff a cell phone message arranging to meet with him and explain to him that his suspicions are baseless. Initially Plaintiff was amenable to a meeting and told Defendant that he did not have money for petrol. Defendant offered him R400.00 as compensation. The meeting never took place as Plaintiff recanted

and said they should meet in the presence of their lawyers.

- [22] During cross-examination he was shown an invoice of a washing machine that he allegedly bought for Plaintiff's wife as a wedding gift, he denied knowledge of same. He denied having admitted to having an adulterous relationship with Plaintiff's wife. It was put to Defendant that his counsel never disputed Plaintiff's evidence that Defendant sent a message to Plaintiff's wife asking her about what they did the previous day. Defendant denied having sent such a message to the Plaintiff's wife. He further denied obtaining a restraining order against Plaintiff. It was suggested to him that his evidence that Plaintiff wanted to extort money from him was a recent fabrication, as it was never put to the Plaintiff when he testified. He was adamant that he gave his lawyers his whole version and cannot explain why they never confronted the plaintiff with his version.

DISCUSSION

- [23] The evidence of the Plaintiff did not support the allegations in the particulars of claim, namely that Defendant had an adulterous relationship with Plaintiff's wife for a period of a year until 28 March 2012 and thereafter. No evidence was led to show that Defendant has had on various occasions' sexual intercourse with Plaintiff's wife in his surgery.
- [24] Defendant was not an altogether satisfactory witness. He initially denied that Plaintiff was his patient and that he did not know that plaintiff was married. He sought to create an impression that he knew Plaintiff's wife only by her maiden surname but recanted when confronted with notes he made in the clinical records. He also initially said the notes in the clinical records relating to Plaintiff were made by his locum but quickly admitted that the handwriting was his.
- [25] The only evidence on the part of the Plaintiff, which suggests that Defendant committed adultery, is the opportunistic answer of the Plaintiff under cross-examination, to the question by defendant's counsel whether any person had seen Defendant committing adultery, he answered that his wife told him that she had sex with Defendant. This was hearsay evidence that I had ruled inadmissible. The Defendant's evidence was more consistent with his pleadings, but he clearly could not explain why his counsel never confronted the Plaintiff with his version.
- [26] It was submitted on behalf of the Plaintiff that as Defendant's counsel never denied that Defendant cried and admitted adultery to Plaintiff, his version should be accepted as true. It is clear that Defendant's counsel brought no professional skill, judgment or knowledge to the advantage of his client. He failed to take basic steps to represent his client properly.
- [27] While I have an understanding for the position of the Plaintiff in this case, sympathy cannot supplement a lack of evidence. I am of the view that the evidence falls short of what the Plaintiff is required to prove for the purposes of the present action, when I weigh the competing probabilities, I am not satisfied that the Plaintiff has discharged the onus to prove his case on the balance of probabilities.

ORDER:

Absolution from the instance is granted, each party to pay its own costs.

K E MATOJANE

JUDGE OF THE HIGH COURT

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