

SOUTH AFRICA / JUDGMENT

Seroot v Pieterse (33377/05)

[2005] ZAGPHC 67 (13 June 2005)

[2005] ZAGPHC 67

COURT

High Courts - Gauteng

BEFORE

JCW van Rooyen

CASE / FILE NUMBER

33377/05

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) Date argued : 8, 15 February 2005 Judgment delivered : 13 June 2005 CASE NO: 33377/2005 In the matter between: THOMAS JOHANNES SEROOT PLAINTIFF and DESMOND PIETERSE DEFENDANT Damages – for loss of consortium – enticement not proved – alienation of affection Van Rooyen AJ[1] The Plaintiff served a summons on the defendant for damages resulting from the defendant's adultery with the wife of the plaintiff which resulted in the enticement of the wife of the Plaintiff to leave the matrimonial home and the issuing of divorce summons by his wife. Defendant had either caused the disintegration of the marriage or contributed to such disintegration. He claims R150 000 for the loss of consortium, the hurting of his feelings, the violation of his dignity and his humiliation in the eyes of the public. At the commencement of the proceedings Ms Delport, for the plaintiff, indicated that she would not persist in the claim for R150 000 and that R15 000, which accorded with the general trend of awards in these matters, would seem more appropriate. [2] Since this matter came before the Court as an application for default judgment on the unopposed roll, evidence had to be led by plaintiff so as to prove the delict plus the damages in terms of Rule 31(2)(b). Proper service had taken place. [3] I initially heard the testimony of the plaintiff and a friend of his, a Mr Isaacs. The couple were married in 1989 and they have two children, aged 16 and 23. Plaintiff described the marriage as one of "caviar and prawns" before the defendant commenced spending weekends with them. They had known the defendant since 1995. After the defendant had been involved in the killing of his brother and experienced trauma as a result of this deed, the Seroots, having compassion with him, invited him to spend weekends with them. He slept in a caravan in the garden, but shared their table with him. As from 1999 plaintiff felt that the relationship between him and his wife was deteriorating. In 2000, after a quarrel on New-Year's Eve she left him for a week. He testified that she had left with the defendant. He obviously inferred this from what had taken place later and was not, at the time, aware that she had been away with the defendant. A month after she returned, his wife told him that she was tired (of him) and was leaving. Before the divorce he saw them in a street under suspicious circumstances; when they saw him they ran away

and he found his wife hiding behind a dog shed. She explained that she was merely on her way to fetch their daughter. After she left the common home she lived with an aunt for a period. Although he initially did not realize what the cause of the problem was, he now knows that the defendant lives with his wife. Before the divorce his daughter broke the news to him. He saw their common bedroom himself. In fact, they had their earlier bedroom suite in that room, since after he sold the house, his wife took the furniture. He also testified that his business was ruined, since he had become depressed and no longer had an interest in running the business. [4] A friend of the family, a Mr Isaacs, testified that the plaintiff was affected seriously by what had happened. His zest for doing business deteriorated and he became a quiet and unhappy person: "He has golden teeth, but nowadays one doesn't see them anymore" he observed, clearly implying that the plaintiff had stopped smiling. He could not testify as to whether the defendant was living with the ex-wife. [5] Since I was not satisfied that there was direct evidence that the defendant had been living with the ex wife of the plaintiff before the divorce, the son was called to testify. He lives with his mother. He confirmed that the defendant was living in the house of the erstwhile spouse of the plaintiff and had lived there ever since. They did not share a room as far as he knew. However, the defendant calls his mother "his wife". He also confirmed that the matter had affected his father and that his father had been in a "morbid spin" after his mother had left him. [6] Ms Delport argued that the mere fact that the matter was not opposed justified the inference that the defendant had been involved in the coaxing away of Mrs Seroot. I do not agree. The mere fact that a defendant does not oppose a matter is insufficient to base such an inference on. There may be other reasons for such a lack of opposition. The question is whether, on a balance of probabilities, I can conclude on the evidence led that the defendant had committed adultery with Mrs Seroot and contributed to the break up of the marriage and the losses averred by the plaintiff. [7] The son testified that the defendant moved into the house of his mother in July 2001. The defendant was, to his knowledge, sleeping in the lounge. A decree of divorce was only granted in May 2004. However, the defendant was referring to his mother as "his wife". He also testified that his mother had warned him that if he came to testify she would not speak to him again; nevertheless he testified and this must count in his favour. Some weight must also be attached to the testimony of Isaacs who said that although he had not seen this himself, the son had told him that the defendant was living with his mother. Of course, the plaintiff also heard from his children that the defendant was living with his wife. His daughter, according to him, was the one who broke the news to him. The suspicious behaviour of the wife and the defendant when plaintiff came across them in a street, also points towards a relationship. I believe that there are sufficient facts before the Court which justify an inference on the probabilities that an intimate relationship developed between the defendant and Mrs Seroot while the marriage still subsisted. [8] In so far as enticement is concerned, the following was stated by Kannemeyer J in *Gower v Killian* 1977(2) SA 393(E) at 395: "It must be shown that the defendant coaxed the plaintiff's wife away from him, that he talked her over and persuaded her to leave him." Milne J (as he then was) said in *Woodwiss v Woodwiss* 1958(3) SA 609 (D) at 617: "It would not be enough for the plaintiff to prove that the first defendant left him after frequent and continued association with the second defendant, or even in consequence of such association, for a wife might leave her husband of her own sweet will in order to make herself more accessible to the other man especially if he had, up

till then, had some scruples about ‘breaking up a happy home.’”[9] I am not convinced on a balance of probabilities that the defendant coaxed Mrs Seroot away. She might just as well fallen in love with him and coaxed him into a relationship. I am, however, of the view that on the probabilities it has been shown that there was more than a mere friendship between defendant and Mrs Seroot and that an intimate relationship had developed between the two whilst the marriages subsisted. In arriving at this conclusion I was assisted by the following statement of Miller J in *Van Deventer v Van Deventer and Another* 1962 (3) SA 969(N) at 972: “The law is clearly settled that the inference of adultery may and should be drawn if, with due caution, the Court is satisfied that that inference is the correct one on the probabilities, notwithstanding that there are doubts of the sort which are invariably present when the Court, being unable to say that it is satisfied beyond reasonable doubt that the inference drawn by it is the necessary and only one which could be drawn, nevertheless considers that it is the one which is shown on a preponderance of probabilities to be the correct one.” Also compare what Scott JA said in *Hlse-Reutter and Others v Gdde* 2001(4) SA 1336(SCA) at para [14]: “The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. (See *Govan v Skidmore* 1952 (1) SA 732(N) at 734B-D as explained by Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147(A) at 159B-D.) While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged.” [10] The plaintiff averred that his action was based on a loss of consortium, invasion of his dignity and an attack on his reputation in the community. Although consortium, which has been described in *Viviers v Kilian* 1927 AD 449 at 455 as the “comfort, society and services” of a marital partner, has patrimonial facets to it, it is essentially a right of personality. Generally compare *Neethling, Potgieter and Visser* Delikterereg (2001) at 386; *Neethling* Persoonlikheidsreg (1998) 254. and, if not part of dignity, is closely related to it and, in any case, derives from this right which is central to our Constitutional dispensation. In *Khumalo v Holomisa* 2002(5) SA 401(CC) O’Regan J stated the following at para [27]:

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TRANSVAAL

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THOMAS JOHANNES SEROOT

PLAINTIFF

and

DESMOND PIETERSE DEFENDANT

DESMOND PIETERSE

DEFENDANT

Damages – for loss of consortium – enticement not proved – alienation of affection

Van Rooyen AJ

[1] The Plaintiff served a summons on the defendant for damages resulting from the defendant's adultery with the wife of the plaintiff which resulted in the enticement of the wife of the Plaintiff to leave the matrimonial home and the issuing of divorce summons by his wife. Defendant had either caused the disintegration of the marriage or contributed to such disintegration. He claims R150 000 for the loss of consortium, the hurting of his feelings, the violation of his dignity and his humiliation in the eyes of the public. At the commencement of the proceedings Ms Delport, for the plaintiff, indicated that she would not persist in the claim for R150 000 and that R15 000, which accorded with the general trend of awards in these matters, would seem more appropriate. [2] Since this matter came before the Court as an application for default judgment on the unopposed roll, evidence had to be led by plaintiff so as to prove the delict plus the damages in terms of Rule 31(2)(b). Proper service had taken place.

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[3] I initially heard the testimony of the plaintiff and a friend of his, a Mr Isaacs. The couple were married in 1989 and they have two children, aged 16 and 23. Plaintiff described the marriage as one of “caviar and prawns” before the defendant commenced spending weekends with them. They had known the defendant since 1995. After the defendant had been involved in the killing of his brother and experienced trauma as a result of this deed, the Seroots, having compassion with him, invited him to spend weekends with them. He slept in a caravan in the garden, but shared their table with him. As from 1999 plaintiff felt that the relationship between him and his wife was deteriorating. In 2000, after a quarrel on New-Year’s Eve she left him for a week. He testified that she had left with the defendant. He obviously inferred this from what had taken place later and was not, at the time, aware that she had been away with the defendant. A month after she returned, his wife told him that she was tired (of him) and was leaving. Before the divorce he saw them in a street under suspicious circumstances; when they saw him they ran away and he found his wife hiding behind a dog shed. She explained that she was merely on her way to fetch their daughter. After she left the common home she lived with an aunt for a period. Although he initially did not realize what the cause of the problem was, he now knows that the defendant lives with his wife. Before the divorce his daughter broke the news to him. He saw their common bedroom himself. In fact, they had their earlier bedroom suite in that room, since after he sold the house, his wife took the furniture. He also testified that his business was ruined, since he had become depressed and no longer had an interest in running the business.

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of the erstwhile spouse of the plaintiff and had lived there ever since. They did not share a room as far as he knew. However, the defendant calls his mother "his wife". He also confirmed that the matter had affected his father and that his father had been in a "morbid spin" after his mother had left him. [6] Ms Delport argued that the mere fact that the matter was not opposed justified the inference that the defendant had been involved in the coaxing away of Mrs Seroot. I do not agree. The mere fact that a defendant does not oppose a matter is insufficient to base such an inference on. There may be other reasons for such a lack of opposition. The question is whether, on a balance of probabilities, I can conclude on the evidence led that the defendant had committed adultery with Mrs Seroot and contributed to the break up of the marriage and the losses averred by the plaintiff.

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[9] I am not convinced on a balance of probabilities that the defendant coaxed Mrs Seroot away. She might just as well fallen in love with him and coaxed him into a relationship. I am, however, of the view that on the probabilities it has been shown that there was more than a mere friendship between defendant and Mrs Seroot and that an intimate relationship had developed between the two whilst the marriage subsisted. In arriving at this conclusion I was assisted by the following statement of Miller J in Van Deventer v Van Deventer and Another 1962 (3) SA 969(N) at 972:

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Also compare what Scott JA said in *Hlse-Reutter and Others v Gdde* 2001(4) SA 1336(SCA) at para [14]:

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Govan v Skidmore

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“The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.”

In *Van der Westhuizen v Van der Westhuizen and Another* 1996(2) SA 850(C) King J (as he then was) stated at 852B-C:

Van der Westhuizen v Van der Westhuizen and Another

1996(2) SA

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852B-C:

Now it may be that society views with less disapprobation than in the past the commission of adultery, 'the act of violating the bed of a married person' (Johnson's Dictionary). There are, one must recognise, degrees of reprehensibility, ranging, one supposes, from the isolated, chance encounter to the sustained, continuing invasion of the sanctity of the marriage relationship. In casu there is nothing which mitigates the second defendant's misconduct. There is much which counts in aggravation thereof; these latter factors may be briefly enumerated: (a) the second defendant was at all times aware of the fact that the plaintiff and the first defendant were married; (b) it would furthermore have been apparent to the second defendant, who saw both of them daily, that their marriage was happy and successful; (c) the flaunting of the adulterous relationship was a cause of great humiliation to the plaintiff; (d) that relationship continued unabated despite requests by the plaintiff that the participants desist; (e) as a result of the relationship, the plaintiff lost her job and her husband became antagonistic and violent towards her; (f) the second defendant actually moved into the common home after plaintiff had found the position to be intolerable and moved out; (g) the second defendant acted throughout with complete insensitivity towards the plaintiff and with unconcern for her injured feelings. In short one can hardly imagine a more callous disregard for the marriage relationship or a more blatant intrusion into a previously happy and fulfilled marriage..

Plaintiff's only recourse is to law; in this way she has sought to assuage the pain she has suffered and the indignity she has been subjected to. The plaintiff said in evidence that it was not 'the financial side altogether. I just felt I had to take some steps against what I had suffered.' The plaintiff has undoubtedly suffered. She has experienced the disintegration of her marriage, the hostility of her husband and the hurt and humiliation of a woman whose marriage has been violated in the most grievous manner. Marriage remains the cornerstone, the basic structure of our society. The law recognises this and the Court must apply the law. I regard this as a disgraceful case of conscious and deliberate desecration of the marriage relationship, necessitating an award of damages."

In *Bester v Calitz* 1982(3) SA 864(O) at 867A-B Kotze AJ described the intention of an award of damages in such a case as a "salwing vir die gemoedskrenking".

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[11]The defendant did not take the trouble to defend the action so that the Court could also hear his version. I was, accordingly, dependent on the testimony by the plaintiff, his friend and his son. As indicated above, I have decided on the probabilities that an intimate relationship did exist between the defendant and the wife of the plaintiff during the subsistence of their marriage. This relationship was clearly also the cause of the disintegration of the marriage. The defendant knew that the plaintiff was married to his love partner and nevertheless did not desist from the relationship. The evidence shows that this conduct has seriously affected the life of the plaintiff and has at least contributed to the alienation of the affection of his wife for him: he has suffered the indignity of losing his wife to an intimate relationship with the defendant, he suffered the loss of her consortium and also believed that he was insulted in the eyes of the community. I do not believe that the last ground is justifiable. The mere fact that a man is left by his wife does not mean that the reasonable public would think less of him. Central to the present plaintiff's suffering lies the attack on his feelings, as a facet of dignity and the loss of consortium, which is also, partly, a facet of dignity. He has lost his zest for life and work and has become morbid at times; a life of “caviar and prawns” has turned into a dull, pointless life as a result of the alienation of affection contributed to by the defendant. Of course, a defendant's liability is not limitless and not all suffering is legally relevant. The test is an objective one as to when an invasion has occurred and only such damages which reasonably resulted from the conduct of the defendant would be compensated. In *Sokhulu v New Africa Publications Ltd and Others* 2001(4) SA 1357(W) Goldstein J said the following in regard to the impairment of dignity:

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Goldstein J said the following in regard to the impairment of dignity:

“The right to an unimpaired dignity is protected by the actio iniuriarum. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt. Minister of Police v Mbilini 1983(3) SA 705(A) at 715G-716A. In Brenner v Botha 1956(3) SA 257(T) Boshoff AJ (as he then was) said at 261 in fin-262:

actio iniuriarum

Minister of Police v Mbilini

Brenner v Botha

in fin-

‘ In cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair the plaintiff’s dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.’

There cannot be an impairment of dignitas without unlawfulness and the question whether this requirement is satisfied or not is an objective one answered by having regard to the prevailing norms of society. De Lange v Costa 1989(2) SA 857(A) at 862B-G.”

dignitas

De Lange v Costa

In spite of what I perceive to be much greater tolerance in modern society of divorce and a greater understanding that marriage relationships are not cast in stone, given the strains of everyday life, I remain convinced that the alienation of the affection which a man or a woman has for his or her partner in marriage or another recognized partnership equal to marriage, amounts to an unlawful violation of the dignity of the humiliated partner. If this alienation takes place *in animo iniuriando* it entitles the hurt partner to damages. Large amounts are seldom awarded for such indignity. This is probably related to the fact that the essence of such an action is to afford the plaintiff some form of compensation, even if the compensation in actual fact mainly lies in the recognition by a Court that he or she was cheated and humiliated.

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[12] I am of the opinion that R15000 would afford the plaintiff some balm to his wounds. The mere fact that the Court has decided in his favour, should also contribute to the redress owing to him. This is an appropriate case for an award of costs on the High Court scale.

[12] I am of the opinion that R1

5

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balm to his wounds.

The mere fact that the Court has decided in his favour, should also contribute to the redress owing

to him. This is an appropriate case for an award of costs on the High Court scale.

It is ordered: (a)

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(a)

That the Defendant pay the plaintiff R15000 as damages with 15,5 % interest p.a. to run from 1 September 2005 up to date of payment, which must be before 1 January 2006. (b) That the defendant pay the plaintiff's costs of suit at the High Court scale.

That the Defendant pay the plaintiff R1

000 as damages

with 15,5 % interest p.a. to run from 1 September 2005 up to date of payment, which must be before 1 January 2006.

(b)

That the defendant pay the plaintiff's costs of suit at the High Court scale.

JCW van Rooyen.....Acting Judge of the High Court 13 June 2005 For the Plaintiff : adv Isma Delpont

JCW van Rooyen.....Acting Judge of the High Court 13 June 2005 For the Plaintiff :
adv Isma Delpont

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