

**IN THE HIGH COURT OF SOUTH AFRICA**

**(REPUBLIC OF SOUTH AFRICA)**

**PRETORIA**

**CASE NO: 12537/12**

**DATE: 2 OCTOBER 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between;

**R[...] D[...] S[...]**

**PLAINTIFF**

**and**

**C[...] V[...] D[...] W[...]**

**DEFENDANT**

**JUDGMENT**

**MSIMEKI J:**

**INTRODUCTION**

[1] Plaintiff, in this action, claims damages against the defendant who committed adultery with her husband. The claims are based on adultery, loss of comfort, society and services of her husband and alienation of affection. She claims R250-00.00 in respect of each head. She is in total claiming payment of R750-000.00.

[2] The defendant was defended by Pretoria Justice Centre. She pleaded and the matter was set down for hearing on 16 September 2014. The notice of set down was served on Pretoria Justice Centre on 18 July 2013. On 22 April 2014, and by notice of withdrawal, Pretoria Justice Centre withdrew as attorneys of record for the defendant. The plaintiffs attorneys, by registered post, forwarded a notice in terms of Rule 37 (2) (a), Notice of Appoint as Attorneys of Record and plaintiff's Discovery Affidavit on the defendant.

[3] I need to mention that although the defendant's plea is headed: Defendant's plea and counter claim, there is no counter claim.

[4] On 16 September 2014, before the matter was heard, the defendant's name at the roll call was duly called. The defendant was absent. Again the defendant's name was duly called before the trial commenced. The defendant was again absent.

## BRIEF FACTS

[5] On 23 April 1987 the plaintiff and a certain Mr P[...] J[...] D[...] S[...] and the plaintiff married each other in community of property. Their marriage was dissolved by the Court on 15 August 2013. During October 2011, while the marriage between the plaintiff and her ex-husband still subsisted, the defendant engaged in a sexual relationship with the plaintiff's ex-husband. They committed adultery. The plaintiff's ex-husband, in the divorce action, admitted the relationship. The plaintiff found the husband's behaviour inconsistent with a healthy marital relationship. The parties, as alluded to above, divorced. The plaintiff, before the divorce, instituted the current action.

[6] Once it was established that the defendant had failed to attend court, the trial commenced. The plaintiff testified in order to prove her claims. Her evidence confirms her marriage to her ex-husband and their divorce. She testified that theirs was a happy marriage until the defendant came into the picture. A sexual relationship was established between her husband and the defendant. She picked this up and confronted her husband who became very angry. His attitude towards her changed. He became violent and wanted to attack their son who had broken the news to the mother. The ex-husband left their common home and went to live with the defendant after informing the plaintiff that he was going to move into a hotel. The parties received counselling but this was to no avail. The plaintiff and her ex-husband have two children a son and a daughter. These are Fazel and Fagan. The plaintiff testified that the defendant attempted to influence her children. She confronted the defendant who informed her that she and the plaintiff had been madly in love. The defendant used vulgar language in the smses that the plaintiff received from the defendant. The defendant sent a picture of her vagina to the plaintiff's ex-husband via their cell phones. The son brought this to the attention of the mother. This alerted the plaintiff to what was happening between the defendant and the plaintiff's husband. Through whatsapp the defendant informed the plaintiff that she (defendant) would wear the ring once the plaintiff and the ex-husband divorced. She boasted that the plaintiff was off the husband's medical aid. She was extremely vulgar in her messages and I have deemed it unnecessary to repeat them. They are, in any event, part of the discovered documents. The messages, indeed, are bad. The plaintiff's further evidence was that the defendant was fully aware that the plaintiff was happily married to her ex-husband. The plaintiff suffered from cancer and the defendant spoke very bad about the plaintiff's sickness. The defendant and the plaintiff's ex-husband are kissing each other on facebook and the picture forms page 7 of the Index-

Plaintiff's Discovery Bundle. The picture, according to the plaintiff, is the defendant's profile picture. The plaintiff could not take all of this. She felt that her self-esteem, dignity and pride as a loving and caring wife had been attacked and lowered. She got psychological help but remains very badly affected. She cried in the witness stand when she relived and related her story. The plaintiff testified that the defendant, indeed, intended to break her marriage. The defendant, according to the plaintiff, indicated that she loved the plaintiff's ex-husband so much and that she would never leave him.

[7] There is indeed evidence which aggravates the defendant's conduct. There is more aggravation than mitigation. The defendant was aware that:

1. the plaintiff and her ex-husband had been happily married;
2. the plaintiff wanted her to desist from her conduct;
3. the plaintiff was humiliated by the adulterous relationship that the defendant and the plaintiff's ex-husband conducted;
4. that her intention was simply to break the plaintiff's heart and her marriage. This eventuated.
5. the plaintiff's husband, as a result of the defendant's conduct, eventually moved out of their communal home after being violent and antagonistic towards the plaintiff and her son.
6. counselling, due to her conduct, would not work and it did not work; and
7. that her conduct would thwart the plaintiff's endeavours to win her ex-husband back.

The defendant was unconcerned about the plaintiff's feelings and the fact that she was suffering from cancer. Instead, she ridiculed all these.

[8] Marriage is sacred. From it flows the obligation to engage in sexual activity with one another only within the framework of the marriage. Our law holds marital rights of sexual intercourse and affection and devotion of the married parties in high esteem. Violation and infringement of these rights entitles one who has suffered damages, as a result, to claim damages. This is what the plaintiff has done in this matter. **See Wiese v Moolman 2009 (3) SA 122 (T); Van Der Westhuizen v Van Der Westhuizen and Another 1996 (2) SA 850 (C) and the unreported case of D J E Erasmus v G R Heine** that Mr Du Toit, for the plaintiff, referred me to.

[9] The plaintiff successfully proved the defendant's wrongful conduct; her intention to destroy the plaintiff's marriage; her intention to humiliate the plaintiff as well as hurting her feelings; the adulterous relationship

which came into being and which caused the abrupt end to the plaintiffs and her ex-husband's marital relationship. The defendant intended to win the plaintiffs ex-husband for her own gratification. She succeeded.

[10] The plaintiff loved her ex-husband. She tried everything possible to win him back but, for the defendant's conduct, she could not. She has clearly suffered and has her remedy in damages. The defendant demonstrated her callous disregard for the plaintiff and her marriage. An award of damages and costs In this matter seems to be appropriate.

### **THE AWARD**

[11] Having found that the plaintiff has suffered damages and that she is entitled thereto, the amount of such damages remains to be determined. Mr Du Toit submitted that the defendant's conduct towards the plaintiff and her marriage was aptly demonstrated by the plaintiff in her evidence. This is true. Mr Du Toit submitted that in 1996, in the Van Der Westhuizen matter, (supra) the court awarded R20-000.00 while in 2013, he further submitted, the court in the unreported case of D J E Erasmus (supra), awarded an amount of R75-000.00 as damages. It was his view that the amount claimed by the plaintiff, in casu, was very high and that the amount of approximately R100-000.00 would be appropriate in the circumstances of the plaintiffs case. The amount, in my view, remains high. I have decided to award a lump sum. The amount of R85-000.00, in my view, would be appropriate.

[12] I make the following order:

- 1. The defendant is ordered to pay the plaintiff R85-000.00 as damages for adultery, loss of comfort, society and services of her husband as well as for alienation of affection.**
- 2. The defendant is ordered to pay the plaintiff's costs of suit**

**M.W. MSIMEKI**

**JUDGE OF THE NORTH**

**GAUTENG HIGH COURT, PRETORIA**

**COUNSEL FOR THE PLAINTIFF: ADV DU TOIT**

**INSTRUCTED BY: T C HITGE INCORPORATED**

**COUNSEL FOR THE DEFENDANT: NO APPEARANCE**

**INSTRUCTED BY:**

**DATE OF HEARING: 6 SEPTEMBER 2014**

**DATE OF JUDGMENT:**