

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. 270/2006

PIETERMARITZBURG

DATE TYPED: 01 SEPTEMBER 2009

In the matter between:

K G

and

A G

AND

J GREADIE

BEFORE

THE HONOURABLE MR JUSTICE HOLLIS A J

HEARD AT PIETERMARITZBURG:

JUDGMENT DELIVERED ON 20 AUGUST 2009

HOLLIS A J The plaintiff" sued the second defendant for general damages amounting to R200 000,00 arising out of firstly contumelia and loss of consortium in consequence of an adulterous relationship between her former husband (hereinafter called "*the first defendant*") and the second defendant, and secondly, arising out of an alleged enticement of the first defendant by the second defendant to leave the plaintiff.

The plaintiff was granted a decree of divorce in September 2008, so the relief in this trial is limited to the relief sought against the second defendant. On-4 October 2006 Mr Justice Hugo granted default judgment against the second defendant for payment of R75 000,00 in consequence of the second defendant having failed to comply with a notice of bar which had been served on her attorneys calling upon her to deliver a plea. Such judgment was later rescinded, hence the necessity for this trial.

During the trial it became common cause that the relationship between the first and second defendants commenced towards the end of December 2001. In April 2002 after a trip which the first and second defendants had surreptitiously taken to Cape Town over the Easter weekend, the second defendant became aware that the first defendant was a married man. Notwithstanding this,, her relationship with the first defendant only came to an end about four months ago. At the present time the second defendant has returned to her husband in an effort to reconcile her marriage!. This relationship which the first and second defendants enjoyed was in flagrant disregard for the feelings of the plaintiff, who at all times was intent on saving her marriage. I was impressed with the plaintiff when she gave her evidence and Miss Jassa;! who appeared on behalf of the second defendant, correctly conceded in argument that the plaintiff had been a good witness.

The plaintiff testified that prior to the commencement of the first and second defendant's relationship she had a good marriage. She enjoyed the support of the first defendant and they were inseparable, even going on shopping trips together to buy groceries. Two young boys had been born of the marriage who. at that, time would have been about six and eight years of age respectively. She¹ testified that the first defendant was the owner of a sports bar in the city. It was here that the first defendant met the second defendant who was a frequent, visitor thereat. The second defendant was a sales representative who sold detergents. Initially the relationship between the first and second defendants was business related, but it soon developed into a personal one, so much so that the second defendant testified that they commenced having sexual intercourse with one another from December 2001 A child was born, of the adulterous relationship between the parties in January 2003. The plaintiff testified that on several occasions the second defendant telephoned her and suggested that she should leave the first defendant as she was in a relationship with him. On one of these occasions in December 2003, the second defendant humiliated the plaintiff by advising her that she had slept on her bed sit the matrimonial home.

The plaintiff hired a private investigator during or about August 2004 to assist her. In consequence thereof, she arrived at the second

defendant's place of work. The second defendant accused her of trespass, said that the first defendant was not there, although the plaintiff on searching the premises found the first defendant hiding in the shower. The second defendant reiterated to the plaintiff that she was in love with the first defendant and had had a child with him. An altercation occurred between the plaintiff and the second defendant, resulting in the plaintiff sustaining injuries in the form of scratches to her nose and face.

On another occasion the plaintiff testified that she was seated in her vehicle with her young children when the second defendant put her head through the passenger window and told her children that they now had a sister. The plaintiff testified that as a result of this incident at least one of her children had been traumatised. Indeed, the plaintiff must have been humiliated herself.

The plaintiffs evidence was corroborated in a limited extent by one Ricky Pillay who testified that he was an employee of the sports bar owned by the first defendant, that the second defendant was a frequent visitor thereat and even brought their love child along on one occasion. He got the impression that the second defendant was chasing the first defendant. It became common cause that after the altercation which occurred between the plaintiff and the second defendant, the second defendant was advised not to return to the sports bar. Notwithstanding this warning, the second defendant did return a few months later.

The first defendant somewhat surprisingly also testified on behalf of the plaintiff, Although some of his evidence corroborated the evidence of the plaintiff insofar as their marriage was a good marriage prior to the commencement of the relationship with the second defendant was concerned, the first defendant was intent on trying to show that it was not he who had done the chasing, but the second defendant was the person who had actively enticed her into the relationship. He was an unimpressive witness and was unable to explain why he had instructed his attorneys in regard to the pleadings in the divorce action on an allegation which was contained in his plea regarding the cause of the breakdown of the marriage which was false. The allegation related to an alleged affair between the plaintiff and the first defendant's brother.

The second defendant also testified and, as one might have expected, her evidence was that it was the first defendant who did the chasing by buying presents for her, sending cards to her and paying her particular attention. The second defendant corroborated much of what the plaintiff testified to in regard to the happening of the incidents but disputed parts of the plaintiff's evidence for instance that the second defendant had telephoned her in an attempt to persuade the plaintiff to leave the first defendant. Although I accept that the second defendant now realises the error of her ways, insofar as her evidence conflicts with the evidence of the plaintiff, I prefer to accept the veracity of the plaintiff's evidence.

It must be mentioned that the second defendant associated herself with the first defendant's stance that they had never been away together over the Easter weekend to Cape Town, and lied to the plaintiff's family and her own family on this aspect only relenting and confessing to such trip some months later. An aggravating feature in this matter is that the second defendant continued with the relationship with the first defendant for many years, even though from about 2005 it appears to have been an on and off relationship as by that time the second defendant had moved from Pietermaritzburg. She continued with this relationship notwithstanding a family meeting which was held between the families of all parties, after the first and second defendants had returned from Cape Town, and even after one of the incidents which she had had with the plaintiff when the plaintiff warned her that she would have trouble if she took *"Anand away"*. She chose to ignore the advice which must have been given to her at the family meeting as early as April 2002 and preserved the lie about the weekend in Cape Town for some time thereafter. Even when she left Pietermaritzburg and lived in Johannesburg, she provided accommodation for the first defendant at her sister's home.

Having regard to the evidence, I am satisfied that the plaintiff has discharged the onus of proving on a balance of probabilities not only her cause of action based upon contumelia and loss of consortium but also her cause of action based upon enticement.

The question of how much compensation should be awarded to the plaintiff is always something which is difficult to assess as each case must be determined on its own facts.

When the matter came before Mr Justice Hugo he awarded an amount of R75 000,00 and referred to the fact that what the second defendant had done was a serious infringement of the plaintiffs rights, more particularly, that it had been conducted openly and had involved others. I agree with Mr Justice Hugo. Moreover the adulterous relationship continued over a long period of time. Mr McIntosh on behalf of the plaintiff submitted that an award of R100 000,00 should be made, having regard to the fact that subsequent to the application for rescission the second defendant had openly continued the relationship with the first defendant. In my view, any increase in the amount previously awarded might be considered punitive in nature. I do not believe that the award should be increased and I consider that a fair award of damages taken as a lump sum is an amount of R75 000,00.

In conclusion therefore, I grant an order in the following terms:

1. The second defendant is directed to pay the plaintiff R75 000(00 together with interest thereon at 15,5% per annum from date of service of the summons until date of payment.

APPEARANCES:

FOR THE APPELLANT

Adv. A P McINTOSH

FOR THE RESPONDENT

MISS JASSAT

INTERPRETER

NOT REQUIRED

DRAFT

REPORTABLE/ NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT. PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 270/2006

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BEFORE

THE HONOURABLE MR JUSTICE HOLLIS AJ

HEARD AT PIETERMARITZBURG: JUDGMENT

DELIVERED ON 20 AUGUST 2009

TRANSCRIBER

MRS M WEBSTER

CONTRACTOR

Sneller Recordings (Pty) Ltd • P O Box 1193 • Pietermaritzburg ■ 3200 Tel 033
3425256 ■ Fax 033 3941190

JUDGMENT

20.08.2009

HOLLIS AJ The plaintiff has sued the second defendant for general damages amount to R200 000, firstly, in respect of contumelious arising from an adulterous relationship which existed between her former husband, hereinafter called the first defendant and the second defendant, and secondly, from an alleged enticement of the first defendant by the second defendant to leave the plaintiff.

The plaintiff was granted a decree of divorce in September 2008, so the relief in this trial is limited to what has been stated above. It needs to be mentioned that on 4 October 2006 His Lordship Hugo J, granted judgment against the second defendant for R75 000, in consequence of the second defendant having failed to comply with a notice of bar which had been served on her attorneys. Such judgment was later rescinded, hence the necessity for this trial.

During the trial it became common cause that the relationship between the first and second defendants commenced towards the end of December 2001. By April 2002 after a trip which the plaintiff and the second defendant had surreptitiously taken to Cape Town over the Easter weekend, the second defendant became aware that the defendant was a married man. Notwithstanding this, her relationship with the first defendant only came to an end about four months ago. At the present time the second defendant has returned to her husband in an effort to reconcile her marriage. This relationship which the first and second defendants enjoyed, was in flagrant disregard of the feelings of the plaintiff, who at all times was intent on saving her marriage. I was impressed by the plaintiff when she gave her evidence and Miss Jasat who appeared on behalf of the second defendant, correctly conceded that the plaintiff had been a good witness.

The plaintiff testified that prior to the commencement of the first and second defendant's relationship with one another, she had a good marriage. She enjoyed the support of the first defendant and they were inseparable, even going on shopping trips together to buy groceries. Furthermore, they had two young boys who at that time would have been about six and eight years of age respectively. She also testified that the first defendant was the owner of a sports bar in the city. It was here that the first defendant met the second defendant who was a frequent visitor thereat. The second defendant was a sales representative who sold detergents. Initially the relationship may have been business related, but it soon developed into a personal one, so much

so that the second defendant testified that they started having intercourse with one another from December 2001. A child was born of the adulterous relationship between the parties in January 2003. The plaintiff testified that on several occasions the second defendant telephoned her and suggested that she should leave the first defendant as she was in a relationship with him. On one of these occasions in December 2003, the second defendant humiliated the plaintiff by advising her that she had slept on her bed at the matrimonial home.

The plaintiff hired a private investigator during or about August 2004 to assist her. In consequence thereof, she arrived at the second defendant's place of work. The second defendant accused her of trespass, said that the first defendant was not there, although the plaintiff on searching the premises found the first defendant hiding in the shower. The second defendant reiterated to the plaintiff that she was in love with the first defendant and had had a child with him. An altercation occurred between the plaintiff and the second defendant, resulting in the plaintiff sustaining injuries in the form of scratches to her nose and face.

On another occasion the plaintiff testified that she was seated in her vehicle with her young children when the second defendant put her head through the passenger window and told her children that they now had a sister. The plaintiff testified that as a result of this incident, at least one of her children had been traumatised. Indeed, the plaintiff must have been humiliated herself.

The plaintiffs evidence was corroborated in a limited extent by one Ricky Pillay who testified that he was an employee of the sports bar, that the second defendant was a frequent visitor thereat, and even brought their love child along on one occasion. He got the impression that the second defendant was chasing the first defendant. It became common cause that after the altercation which had occurred between the plaintiff and the second defendant, that the second defendant was advised not to return to the sports bar. Notwithstanding this warning, the second defendant did return a few months later.

The first defendant somewhat surprisingly, also testified on behalf of the plaintiff. Although some of this evidence certainly corroborated the evidence of the plaintiff insofar as their marriage being a good marriage prior to the commencement of the relationship with the second defendant, the first defendant was intent on trying to prove that it was not he who had done the chasing, but the second defendant was the person who had actively enticed him into the relationship. To me he was an

unimpressive witness and was unable to explain why he had instructed his attorneys in the pleadings in the divorce action on certain allegations which were contained in the plea as to what was the real cause of the breakdown of the marriage.

The second defendant also testified and, as one might have expected, her evidence was that it was the first defendant who did the chasing by ...{inaudible - audio fades totally) The second defendant confirmed much of what the plaintiff testified to in regard to the happening of the incidents, but of course disputed those parts of the plaintiffs evidence in regard to the plaintiffs testimony that the second defendant had called her to leave the first defendant. Although I accept that the second defendant now realises the error of her ways, insofar as her evidence conflicts with the version of the plaintiff, I prefer to accept the veracity of the plaintiff's evidence.

It must also be mentioned that the second defendant went along with the first defendant's viewpoint, that they had never been away together on the Easter weekend trip to Cape Town, and lied to the plaintiffs family and her own family, on this aspect and only relented and confessed to such trip many months later. An aggravating feature in this matter is that the second defendant continued in the relationship with the first defendant for many years, even though from about 2005 it appears to have been an on and off relationship as she had moved away from Pietermaritzburg. She continued with this relationship notwithstanding a family meeting which was held between the families of all parties, after the first and second defendants had returned from Cape Town, but even after one of the exchanges which she had with the plaintiff when the plaintiff warned her that she would have trouble if she took 'Anand away'. She chose to ignore the advice which must have been given to her at the family meeting as early as April 2002, and continued to lie about the weekend in Cape Town for some time thereafter. Even when she left Pietermaritzburg and lived in Johannesburg, she provided accommodation for the first defendant at a relative's home.

Having regard to the totality of the evidence, I am satisfied that the plaintiff has discharged the **onus** of proving not only her cause of action based upon contumelious, but also her cause of action based upon enticement. The question of how much compensation should be awarded to the plaintiff is always something which is difficult to be accurate upon.

When the matter came before His Lordship Hugo J, he awarded an amount of R75 000 and referred to the fact that what the second defendant had done was a

serious infringement to the plaintiffs rights, more particularly, that it had been conducted openly and had involved others. Mr McIntosh on behalf of the plaintiff submitted that an award in excess of R75 000 should be made, bearing in mind that subsequent to the application for rescission of the judgment, the second defendant had openly continued the relationship with the first defendant. In my view, an increase on the amount awarded by His Lordship Hugo J might be considered punitive in nature. I do not believe that the award should be increased, and I consider that a fair award of damages is in an amount of R75 000.

In conclusion therefore, I grant an order in the following terms:

1. The second defendant is directed to pay the plaintiff R75 000, together with interest thereon at 15,5% per annum from date of

APPEARANCES:

FOR THE APPELLANT

ADV A P McINTOSH

FOR THE RESPONDENT

MR S JASAT

INTERPRETER

NOT REQUIRED