IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 1704/15

In the matter between:

SIPHILILE PRINCESS RESTING **PLAINTIFF**

AND

ALI SIFISO RESTING 1ST DEFENDANT

SHARON VENANCIA 2ND DEFENDANT

Neutral Citation: *Siphilile Princess Resting vs. Ali Sifiso Resting & Another (1704/15 [2017] SZHC (82) (05 May 2017)*

Coram: **MLANGENI J.**

Heard: **29.03.2017**

Delivered: **05.05 .2017**

Summary: *Law of delict – Actio injuriarum – claim for damages based on contumelia and loss of comfort and society arising from adultery with Plaintiff's husband.*

Defendant raised an exception on the ground that this cause of action is no longer recognised in this jurisdiction.

Procedural question raised whether excipient was entitled to raise this in the form of an exception or a special plea.

Held: It is now settled that the use of exceptions is wider than the grounds specified in Rule 23 (1) of the High Court rules.

Held, further: exception upheld, no order as to costs.

RULING ON EXCEPTION

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[1] The Plaintiff and the First Defendant got married in Swaziland on the 26th April 2003 by civil rites and in terms of an antenuptial contract. The marriage still subsists.

[2] The First Defendant is alleged by the Plaintiff to have deserted the marital home on the 21st October 2015, with the intention not to

return, and he is further alleged to be now living in adultery with the Second Defendant at a place unknown to the Plaintiff. According to the Plaintiff the First Defendant does not deny the adultery[1].

[3] The Plaintiff has now instituted an action against the First Defendant for divorce and ancillary relief, and against the Second Defendant for damages arising out of *contumelia* and loss of ***"comfort, society and services of the First Defendant[2]"*** as a result of the alleged adulterous relationship between the Defendants.

[4] The First Defendant has pleaded to the Plaintiff's particulars of claim as against him. For her part, the Second Defendant has raised an exception on the basis that the claim for damages arising out of an adulterous relationship is no longer available in this jurisdiction, and therefore there is no cause of action against her. It is apposite to quote the relevant portion of the Second Defendant's exception, and I do so presently –

> ***"The claims are based on alleged adultery and enticement and the action is founded on the actio injuriarum.***
>
> ***An action so derived from the actio injuriarum and based on adultery in which the Plaintiff claims damages for contumelia,***

[1] See Particulars of claim, paragraphs 7.4 at p9 of the Book of Pleadings.
[2] Para 10.6 of the Particulars of Claim, p 12 of the Book of Pleadings.

loss of consortium and enticement is no longer wrongful and does not attract liability. The action is abrogated and is no longer available in Roman Dutch Law."

[5] By arrangement between the parties, the exception was argued before me on the 29th March 2017 and judgment thereon was reserved. This judgment is in respect of the said exception. Prior to the legal arguments on the said date, it was brought to my attention that the Defendants' attorney, Mr. S.V. Mdladla, seeks to amend the First Defendant's plea in a number of ways, as appears on the Notice of amendment dated 28th March 2017. Plaintiff's attorney had no objection to the amendments sought, hence it was granted by consent and the rules of court shall apply thereafter.

[6] Coming back to the subject of this judgment, the Plaintiff's Counsel Advocate D.A. Smith raised a preliminary point of procedure, to the effect that the Second Defendant should have raised her objection to the relief sought against her by way of a special plea rather than an exception. The conventional exception, as we know, is based on Rule 23 (1) of the rules of this court and it applies to pleadings that are either vague and embarrassing or lack averments that are necessary to sustain an action or defence. According to the conventional view, this list is closed. And since the Second Defendant is not arguing that

such relief was never available in this jurisdiction, goes the argument, the right procedure would have been to raise a special plea to the effect that such relief has been abrogated and is no longer available. A special plea does not relate to the merits. It merely seeks to interpose some defence not apparent on the face of the pleadings up to the time when it is raised[3]. A quote from Innes C.J's judgment highlights the difference between an exception and a special plea in the following manner –

> ***"Now a plea in bar is one which, apart from the merits, raises some special defence, not apparent ex facie the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of the cause of action."[4]***

[7] Above I have made reference to what I describe as the traditional or conventional use of an exception. However, in the case of **LUSA INVESTMENTS (PTY) LTD v MINISTRY OF EDUCATION AND TRAINING AND TWO OTHERS[5]** I recently came to the conclusion after reviewing authorities including a recent Supreme Court judgment[6], that there is now a wider usage of exception which allows it to be raised in any situation where the effect would be to bring the litigation to conclusion as between the parties. This, no doubt, is

[3] Herbstein and Van Winsen, ***'The Civil Practice of The Supreme Court of South Africa'***, 4th Ed, p 470.
[4] **BROWN v VLOK**, 1925 AD 56 at p 58.
[5] 1943/16 [2017] SZHC 37
[6] **SWAZILAND GOVERNMENT v MFANUZILE VUSI HLOPHE**, 20/2016 [2016] SZSC 38

demonstration that the Common Law grows in order to deal with new socio-economic demands, including the need to conclude matters expeditiously, but I also cautioned that courts should guard against a situation where all special pleas and objections are swallowed up in exceptions because with that, some exciting aspects of our adversorial litigation would be lost, forever[7]

[8] On the basis of the aforegoing analysis I come to the conclusion that the Second Defendant is allowed to raise the issue in the manner that she has done, through an exception. I am further fortified in this position by the case of **WIESE v MOOLMAN**[8] in which a similar issue was dealt with on the basis of an exception, despite the fact that in the South African jurisdiction the remedy had been well-recognised since as far back as 1927.[9] It now remains for me to consider whether the exception is sustained in the circumstances or not.

[9] The action for damages against a third party arising from adultery with the Plaintiff's spouse has its origins in English Law. It was a criminal offence known as *'criminal conversation'*. Deeply rooted in patriarchy, the notion that the woman was a chattel belonging to her husband,

[7] At paragraph 11 of the judgment.
[8] 2009 (3) SA 122
[9] See **VIVIERS v KILLIAN 1927 AD 449**

and the husband was aggrieved by an act of adultery with his wife. Predictably, it only protected the interests of the husband, not the wife who, in this context was considered to have no rights. Criminal conversation was abolished by legislation in 1970. I have already mentioned above that in South Africa it was first recognised back in 1927, but was in the Cape Colony much earlier than that. At the heart of this remedy was the word ***'Contumelia'***, which connotes insult, humiliation and scorn.[10] The Plaintiff husband was said to be humiliated and insulted by the enticement of his spouse away from him, resulting in loss of affection and consortium of the spouse. The wrongful conduct, therefore, was in the acts of enticement and inducement of the spouse away from the marriage relationship. Gradually, it became accepted that the wife must also have the right of action. In a liaison involving two consenting adults, who are emotionally attracted to one another, it was always bound to be a toll order to prove that one enticed the other.[11] It is a fact, though, that this type of claim has been the subject of much litigation in South African jurisdiction and elsewhere[12]. And in South Africa the claim has been upheld as recently as 2009 in the case of **WIESE v MOOLMAN**, *supra.* Given the legal history of this country, especially since the year 1905 when The General Administration Act was promulgated, with the effect that the

[10] Collins English Dictionary.
[11] **WASSMAAR v JAMESON 1962** (2) SA 349, per Trollip J. at p 352.
[12] A comprehensive comparative analysis of the law regionally and overseas is to be found in the South African Constitutional Court judgment of **DE v RH** [2015] ZACC 18

Roman Dutch Common Law was made part of our law[13], it has been accepted that judgments based upon the Common Law in South Africa are highly persuasive in this jurisdiction. Due, possibly, to physical proximity as well as common socio-economic dynamics, it is also true that our legislative innovation largely follows South African models in most aspects of our laws. The result of this is that in any sphere of law, in the absence of legal authority to the contrary, judgments of South African courts are generally followed in this jurisdiction.

[10] Counsel on both sides agree that on the subject there is no traceable judgment in this jurisdiction. In venturing into this uncharted area of the law I have been greatly assisted by the able submissions of Counsel on both sides. To embark upon a comparative analysis of the position in various jurisdictions in the world would, for me, be re-inventing the wheel in view of the judgments that have been brought to my attention in respect of the eventful litigation in **DE v RH**, in the Supreme Court of Appeal[14] as well as the Constitutional Court[15] of South Africa. Nonetheless, I figure that it would be worthwhile to undertake a brief consideration of some of the salient arguments in support of and against this type of delictual claim.

[13] See Section 3 of Act No. 11/1905
[14] 2014 (6) SA 436 SCA
[15] [2015] ZACC

[11] In the good old days marriage was regarded as the nucleus of the family, sacrosanct and inviolable. This was particularly so in the case of civil rites marriages between two persons only – of opposite sexes. Divorce was a rare phenomenon and was generally frowned upon. When it occurred it was readily attributable to interference by third parties, through adultery. There was a perceived need to punish the third party for intruding in the private relationship. The erring spouse was thought to have been enticed away from the innocent one, resulting in humiliation and insult (*contumelia*) as well as loss of comfort and society. These ***'injuries'*** were believed to be compensable in monetary terms, never mind the difficulty of quantification. For purposes of this judgment I do not need to go into the fine distinction between the *actio injuriarum* based on adultery (the humiliation and insult) and the action for enticement where, in the latter case, the Plaintiff would have to prove that the defendant persuaded the erring spouse to leave[16] the innocent one.

[12] Clearly, the position outlined just above mirrored the *boni mores* of the times. Between then and now much has changed in terms of attitudes and behavior. Marriage has lost a certain amount of inviolability[17], and the advent of constitutions which pronounce on freedom of association

[16] **WASSMAAR v JAMESON,** *supra*, at p 352B
[17] See Madlang J. in the Constitutional Court judgment in **DE v RH** at p 27.

has occassioned a shift away from the notion of apportioning fault. It is now accepted that the primary responsibility to sustain a marriage rests with the spouses, and that if they abandon this responsibility not much can be achieved through punishing third parties in the form of a civil suit[18]. Marriage is regarded as a voluntary act of consenting adults, and if one of them changes their mind due to substantial reasons it is no longer regarded as a social tragedy. In most countries in the world adultery has always been a ground of divorce which was available to the innocent party, and in the Common Law jurisdictions forfeiture of benefits may provide the punitive element against the wayward spouse.

[13] It has gradually dawned that it takes two to tango, even in marriage, hence it is not always fair to put the blame for the collapse of marriage exclusively on one of the parties. In a country such as Swaziland, where there are only two grounds of divorce – adultery and desertion – it has become increasingly clear that many spouses find themselves trapped in marriages that are unsustainable, leading to an escalation of domestic violence and other forms of abuse. Many countries, in response, have introduced wider grounds of divorce, the most famous of which is the so-called ***"irretrievable breakdown of marriage"***[19]

[18] See the concurring judgment of Mogoeng Mogoeng C.J. in the judgment of **DE v RH**, supra, at p 29.
[19] See Section 3 of the South African ***'Divorce Act No. 70/1979.'***

wherein once life together becomes objectively intolerable an aggrieved spouse can seek the way out. In an era where tolerance has diminished substantially, due perhaps to increasing divergence in habits and inclinations, the notion of irretrievable breakdown offers a flexible exit door for spouses who want out of marriage. It is also true that an increasing percentage of the newer generation no longer regards marriage as a must, while some do it for convenience. These developments come with a change in morality, and the question unavoidably arises whether or not there is any useful purpose anymore in sanctioning a third party who happens to be in a voluntary relationship with a married person. Indeed, in some of the situations that arise the liaison with a third party is a symptom of problems within the marriage relationship. This particular aspect was a major issue of evidence in the High Court hearing of the South African case of **DE v RH**, *supra*.

[14] The main perceived purpose of the remedy was the protection of the marriage relationship against intruders. If this purpose was ever achieved, it is relevant to ask whether it is still achieved in an environment where attitudes towards adultery have significantly softened, and where it has become clearer that the primary responsibility to sustain a marriage relationship lies with the spouses.

Also, the deterrent effect of the remedy that was once touted is falsified by the reality that most adulterous relationships are spontaneous; where they are planned it is on the assumption that they will remain a secret of the parties.

[15] The eloquent words of Brand J.A.[20] lay a solid foundation for an approach to this important subject. I quote at paragraph 17 of the judgment of the Supreme Court of Appeal in **DE v RH**:-

> ***"The context in which the question arises is the recognition by our courts that while the major engine for law reform lies with the legislature, the courts are nonetheless obliged on occasions to develop the common law in an incremental way. These occasions are dictated, firstly, by s 39 (2) of the Constitution, which imposes the duty on the courts to develop the common law so as to promote the spirit, purport and objectives of the Bill of Rights. Secondly, by the acceptance that the courts can and should adapt the common law to reflect the changing social, moral and economic fabric of society; and that we cannot perpetuate legal rules that have lost their social substratum -----".***

[16] One attribute of the civilized world is the constant change in the moral perception of certain things that were once viewed as repugnant. Consider, for instance, the change in language from ***"prostitutes"*** to

[20] At pate 29 of the judgment. See also the Namibian case of JAMES SIBONGO v LISTER LUTOMBI AND ANO, Civil Case No. SA 77/2014 at p 8 of the Judgment of Smuts J.A.

"sex workers", a clear pointer towards more tolerance and understanding that these hapless people are making a living. It is in the light of this stark reality that I must ask myself whether this remedy has a place in modern day Swaziland. While a good portion of the civilized world moves away from this, is there a rational and sound justification for this country to remain behind? While the family, and by extension marriages, remains the main social foundation of our communities and societies, it is apparent that the role of the state[21], and our courts, should not go beyond providing the legal framework and environment for those who are inclined to honour it. Our courts should have no place in enforcing the obligations that ordinarily fall upon the parties to the marriage to respect their vows. This way of seeking redress, it has been observed, is usually motivated by anger and vengeance rather than pursuit of genuine closure, and its damaging effect upon the children of the marriage can hardly be justified through monetary compensation whose quantification is likely to be based on subjective rather than objective considerations.

[17] In a quest to establish fault the litigants, including the third party, are subjected to unbridled probing into their privacy, and in the end the defendant may be exonerated from liability, but by then the damage to

[21] See s 27 (3) of The Constitution, which states that the family ***"is the natural and fundamental unit of society and is entitled to protection by the state"***

their dignity occasioned by the public nature of such hearings may no longer be reversible or compensible. Clearly, any possible gains by the Plaintiff are far outweighed by the emotional and social scars[22] that such litigation unavoidably leaves in its wake.

[18] But the major anomaly of this remedy is that it is available against the third party only, and not against the adulterous spouse who is clearly a co-perpetrator[23]. This anomaly is said to be part of the reason why this relief was rejected outright in German Law.

[19] Within the narrow compass of exceptions I must be conscious to avoid an extensive discourse that might be otherwise necessary in the event of a full trial involving evidence. While this issue is, in my view, well within the ambit of the Common Law, I find that I cannot resist a passing reference to the Chapter III rights entrenched in our constitution, for the constitution is, afterall, the grundnorm of our legal system, and the validity of the common law must be measured against it. Of immediate relevance are the freedom of association[24] and the protection of dignity[25] of the individual. It is the constitutional right of the individual to chose who to relate with, and if a party to marriage

[22] See Brand J.A. at paragraph 39 of the DE v RH judgment in the Supreme Court of Appeal of South Africa.
[23] Per Brand J.A. in DE v RH, SCA, para 29.
[24] Per s 14 (1) (d)
[25] Per s 18 (1)

chooses to be involved with a third party the regrettable reality is that his choice has to be respected by all, and his legal obligations should not go beyond the other party to the marriage who, in turn, has redress in the form of divorce. Because of the freedom of association it is unacceptable to put a third party through the ordeal of litigation when the relationship is undeniably voluntary.

[20] The Supreme Court of Appeal in South Africa came to the conclusion in **DE v RH**[26] that the *actio injuriarum* based on adultery is no longer wrongful in the sense of attracting liability, and is no longer part of the common law of South Africa. This is in respect of the claim for contumelia and the claim for loss of consortium. In the Republic of Namibia this issue arose for consideration in the recent appeal case of **JAMES SIBONGO v LISTER LUTOMBI CHAKA AND ANOTHER**[27], having been raised by the court *mero motu*, as was the case in the S.C.A. case of **DE v RH**. In that country one argument that was made was that in the absence of a constitutional provision specifically authorizing the courts to develop the common law such as to promote the spirit and purport of the Bill of Rights in the constitution, the courts should not hold that the common law remedy was no longer available.

[26] At para 41 (a)
[27] Case No. SA 77/2014

The unequivocal response of the court, quoting from the Canadian Supreme Court[28], is in the following terms –

> ***"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared ----- In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform ----- The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[29]"***

[21] At paragraph 28 of the judgment, the court noted that although there is ***"no express enjoinder to the courts"*** in that country to develop the common law, the courts have a duty to do so ***"whenever that is warranted------"***. Indeed, this was a major motivation in the unanimous judgment of the S.C.A. in the landmark case of **DE v RH**.

[22] The court further observed that the remedy is incompatible with constitutional values of equality ***"of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association[30]"***, and came to the conclusion that it is no longer good law.

[28] R v SALITURO (1992) CRR 173; [1991] 3 SCR 654
[29] At p 10 of the Judgment, per Smuts J.A.
[30] At p 22.

[23] The position that has been adopted in the judgments that I have referred to above is of much persuasion to me. Not only is it based on sound reasons but it is in line with developments in various parts of the world in this regard, including England, Australia, Canada and others.[31] I find no reason why this country must embrace an archaic and anachronistic remedy that is out – of – touch with our modern values and norms. In this position I am also fortified by the unanimous judgments in the cases that I have relied upon in this region, where the way of life is very much like ours in Swaziland.

[24] In the circumstances I uphold the exception. In respect of legal costs I accept that at the time of instituting the action the Plaintiff would not have foreseen this particular conclusion, and I am therefore persuaded to make no order for costs in respect of the exception.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR THE APPLICANT: **ADV. D.A. SMITH**

FOR THE RESPONDENTS: **MR. S.V. MDLADLA**

[31] Others include Seychelles, Scotland and various African countries, with the known exceptions of Zimbabwe and Botswana.