

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

CASE NO: 8422/2006

DATE 21/6/07

D. Marais
SIGNATURE

In the matter between:

DEOLALL, MAHENDRA

Excipient

and

DEOLALL, FRAMASHNEE (born BODHIE)

Respondent

J U D G M E N T

MARAIS, J:

This is a divorce action in which the defendant has counterclaimed against the plaintiff. The exception is to Claim B, alternative to the claim for division of the joint estate, and reads:

"CLAIM B

6. The Plaintiff and Defendant entered into the marriage relationship referred to in paragraph 4 of the Plaintiff's Particulars of Claim, on the express alternatively implied, further alternatively tacit agreement that they will be capable of enjoying normal sexual relations.
7. The Plaintiff is not capable of engaging in normal sexual relations.
8. The Plaintiff has accordingly breached the contract of marriage concluded between the parties.
9. As a result of the Plaintiff's said breach the Defendant has suffered damages in the sum of R130 000.00, calculated as follows:
 - 9.1 wasted expenses incurred in respect of the wedding ceremony and all ancillary expenses incurred in respect thereof which include but is not limited to the hiring of venue and catering: R 30 000.00
 - 9.2 loss of financial benefits of the marriage R100 000.00
10.
 - 10.1 It was within the contemplation of the parties at the conclusion of the agreement that the Defendant would resign from her post as a Desktop Publisher one month prior to the marriage date.
 - 10.2 Pursuant thereto the Defendant did resign from her post on 30 September 2005;
 - 10.3 As a result of the Plaintiff's breach of contract the Defendant lost her income for the period 1 October 2005 up to and including 31 January 2006 in the amount of R26 500.00.
11. The Defendant furthermore suffered damages in the amount of R50 000.00 by reason of the Defendant's contumacious breach of contract whereby Plaintiff's personal dignity and reputation were impaired."

The excipient maintains that in view of the special nature of the "contract" of marriage the ordinary remedies for breach of contract are not available for a breach of such "contract" particularly in the context of an order dissolving the marriage.

Although the parties argued the matter on the basis that marriage is a contract it has so little of the character of a normal contract that I later express my doubts whether it is correct or helpful to so characterise marriage. As will appear, in this regard I am in the august company of Wessels J.

The defendant, on the other hand maintains that the normal remedies for breach of contract are available in the context of the marriage contract.

LAWSA 2nd edition Vol 16 para 12 has the following to say:

"Marriage is an agreement in that it is based on the consensus of the parties, but it is certainly not an ordinary contract in the sense of an agreement creating obligations. As has been pointed out by several writers, while it is true that marriage does give rise to obligations, such as the reciprocal duty of support, the primary goal of marriage is not the creation of obligations. Many of the normal principles of the law of contract do not apply to marriage. ... Moreover many of the consequences of marriage cannot be expressed purely in terms of legal rights and duties."

The Divorce Act provides that various orders are competent on granting a decree of divorce. Those relating to the interests of dependants and minor children are not presently relevant.

Section 7 provides for the principles to be applied in dividing assets and in granting maintenance between the parties. Section 9 provides for a forfeiture of the patrimonial benefits of the marriage in certain circumstances. The Act deals with the consequences of a breakdown of the marriage relationship and of matrimonial misconduct by one or both of the parties. It therefore seems to me significant that the Act nowhere provides for a normal contractual remedy to be available to either spouse for a breach of the relationship created by the formal entering into of a marriage. In my view counsel for the excipient correctly argued that the Divorce Act grants no power to the court hearing the divorce action to make an award for damages consequent upon the divorce as a result of a breach of the "contract" of marriage, notwithstanding the fact that the Act deals extensively with the results of fault as a cause of the break-up of the marriage.

The South African Law of Husband and Wife 5th edition at 145 states:

"The marriage relationship embraces duties of a non-material as well as of a material kind. The non-material duties find their legal expression in the concept of consortium, which includes the love, companionship, sexual privileges and assistance in good and evil days which spouses are entitled to expect from each other."

On the same page the authors go on to state:

"The actions for damages for adultery and enticement, assuming they still form part of our law, protect the consortium against intentional assault by a third person. In both actions damages can be claimed for loss of consortium as well as pecuniary loss."

However, the action for damages for adultery is not available as against the straying spouse; it is only available against a third party. It seems to me to demonstrate the special nature of the "contract" of marriage which is that, save for specifically recognised exceptions (generally embodied in the Divorce Act), no other actions arising out of breaches of duty of a non-material nature which exist as between spouses are permissible.

In *Ex Parte ABS* 1910 TS 1332 at 1338-9 Wessels J held that a husband could not sue his wife for damages for adultery and held that:

"marriage is not an obligatio, and it does not fall under the category of contractual obligations."

I have already expressed by doubt as to whether it is correct or even helpful to characterise marriage as a "contract"; it is a relationship consensually entered into by the parties recognised and regulated by the State. In *Ex Parte ABS* (*supra*) Wessels J cited with approval the following passage from the judgment of Brett J in *Mordaunt v Moncreiffe* which reads:

"Marriage is not, as is often popularly stated, a contract. If it were it could, according to every principle of the laws of contracts, be rescinded by mutual consent, but it cannot. There is a contract before marriage, which is a contract to marry, but marriage is the fulfilment of the contract, which is then satisfied and ended, and there is no further contract."

I am therefore not convinced that it is helpful to regard marriage as a contract but of such a peculiar nature that it is not susceptible to the normal rules of contract. That seems to me somewhat of an oxymoron.

A line of cases since the decision of Wessels J in *Ex Parte ABS* has confirmed that the wronged spouse has no action against his unfaithful spouse in respect of adultery, whatever the effect of such adultery may have on the consortium between the parties. The fact that in this instance the wronged spouse cannot sue his marriage partner for a fundamental breach of the obligations assumed on marriage demonstrates the principle that the ordinary contractual remedies are not available for a breach of the duties assumed when a marriage is entered into, whether such duties be of a contractual nature or not.

In the result I make the following order:

1. The exception that defendant's Claim B in the counterclaim discloses no cause of action is upheld with costs.
2. Defendant's Claim B is struck out of the counterclaim.

D. Marais

D MARAIS
JUDGE OF THE HIGH COURT

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DATE OF HEARING 15 May 2007

DATE OF JUDGMENT 21.06.2007