WASSENAAR v JAMESON 1969 (2) SA 349 (W)

Citation	1969 (2) SA 349 (W)
Court	Witwatersrand Local Division
Judge	Trollip J
Heard	August 27, 1968
Judgment	August 30, 1968
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Delict - Enticement or alienation of wife's affections - What constitutes - Proof necessary - Interdict - Restraining respondent from committing adultery with applicant's wife - Whether such a remedy available - When Court will not grant such remedy.

Headnote : Kopnota

In order for an applicant to establish that a respondent has been guilty of the delict of enticement or alienation of his wife's affections, it does not suffice to prove merely that his wife left him for the respondent; he must prove that the respondent actually induced her to leave him, i.e. actively caused her to leave him.

Assuming that an applicant who has established that a respondent has been guilty of committing the delict of enticement or alienation of his wife's affections is entitled to the remedy of an interdict restraining the respondent from committing adultery with his wife, the Court in the exercise of its discretion would only grant such relief in very special or exceptional circumstances.

Semble: As adultery by a third party constitutes an *injuria* to the innocent spouse, there would appear to be no reason why the remedy of an interdict in appropriate cases should not in principle lie.

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Case Information

Application for an interdict. The facts appear from the reasons for judgment.

S. A. Cilliers, for the applicant.

N. Philips, S.C. (with him *M. Lewis)*, for the respondent.

Cur adv. vult.

Postea (August 30th).

Judgment

TROLLIP, J.: This matter comes before me as an urgent application. The precise

reason why it has to be dealt with as a matter of urgency is not quite clear to me, but, as both sides desire that it be so dealt with, I shall do that. Unfortunately the result is that, with the limited time at my disposal, I have not been able, and will not be able in this judgment, to deal fully with and do justice to the elaborate, interesting and helpful arguments that both counsel have addressed to me.

This was originally an application for an order interdicting the respondent from committing adultery with, meeting, corresponding, visiting, or in any way communicating with the applicant's wife, but, owing to the conflict of fact raised by the affidavits, Mr. *Cilliers*, for the applicant, was unable to ask for the substantive or final relief claimed, but under the prayer for alternative relief he asked for the matter to be referred to evidence under the Rules of Court, or alternatively to trial, and, pending that, for an interim interdict in terms of that prayer in the notice of motion that I have read out.

The respondent, however, contends that the matter can be dealt with on the papers as they stand, and so dealt with the application ought to be dismissed.

The applicant, aged 30 years, and his wife, aged 27 years, have been married for about six years, and have two minor children, aged four and two years. The respondent is a married man, and there are five children born of his marriage.

The applicant's wife and respondent are prominent golfers, and in about February, 1965, they met and became partners at the South African Golf Championship of that year. Through this meeting they eventually formed a more friendly, and more than friendly, association. They fell in love with one another. It was admitted that, during May and June, 1965, they committed adultery with one another on three occasions. This threatened to break up the applicant's marriage, but, on 15th July, 1965, a reconciliation was effected between the applicant and his wife. At the time of this reconciliation the applicant's wife promised not to see or associate with the respondent again, and the respondent in his turn also protested his sincere desire to terminate the affair with the applicant's wife, to return to his wife and children, and he solemnly undertook, according to the applicant, never to communicate with the applicant's wife again.

The applicant and his wife then lived together from July, 1965, to about July, 1968. The applicant says that the reconciliation was complete, and that they lived happily together. Their second child was conceived shortly after the reconciliation, and was born during this period.

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The applicant's wife says that, although she made every effort to make the reconciliation happy, and pretended to the applicant that she was happy, it was indeed the three most unhappy and miserable years of her life, for she was still in love with the respondent. However, she and the respondent did not see one another again, in terms of their respective undertakings, during those three years.

It is common cause that she again met the respondent in June, 1968. How they came to meet is in dispute. She says that the meeting was fortuitous. He alleges that it was by design on the part of the respondent, for he sought her out, but, for that allegation, he relies upon what she allegedly told him, and so it is hearsay in so far as the respondent is concerned. By implication she denies that she so informed him. But be that as it may, it is common cause that the meeting led to a renewal of their former liaison. They do not

deny that towards the end of June, 1968, while the applicant was away in Windhoek, they committed adultery in Johannesburg, and they admit having committed adultery in Durban in about the beginning of August, 1968.

It is common cause that the applicant's wife went to Durban with the respondent on 31st July, 1968. The applicant alleges that, although he forbade her to go to Durban, she was taken there by the respondent by motor car.

The respondent's version is that, shortly prior to 31st July, 1968, the applicant's wife informed him that she intended to leave her husband, and she asked him to take her to Durban so that she would be able to consider her position, i.e. her position *vis-à-vis* the applicant. As already stated, it is admitted that they committed adultery while they were in Durban on this occasion.

She returned from Durban on 6th August, 1968, but she did not return to the applicant. She is now staying with friends in Johannesburg, and she says she has no intention of returning to the applicant. It is clear, therefore, that she has maliciously deserted the applicant. She says she wants to marry the respondent whenever that becomes possible.

The applicant says that he wants to save and preserve his marriage, that the respondent is the cause of its threatened break-up, that his wife is merely infatuated with the respondent, that, if the respondent is interdicted from seeing, communicating, and consorting with her, that infatuation will pass over, and that they will then become reconciled and happy again, as happened in the past.

Those objects of course are most laudable, but before I can grant an interim interdict I have to be satisfied that the relevant legal requisites for such an interdict have been fulfilled. Mr. *Cilliers* contended that they had been.

The first enquiry is what delict has the applicant proved that the respondent has committed, and will continue to commit against him, for it is only on that basis that any interim or final interdict can be granted. It is essential, in my view, to embark upon this enquiry at the outset, in order to clarify the real and true issues in this case.

It is common cause that the respondent and the applicant's wife have committed adultery. That is a delict by the respondent against the applicant, and *prima facie* it would appear from the papers that further acts of adultery will probably be committed in future. Mr. *Cilliers*

maintained that applicant had also proved, at any rate *prima facie* at this stage, that the respondent had also enticed the applicant's wife away from him, or, as it is sometimes put, had alienated her affections for the applicant, and would continue to do so in the future. That would of course be a delict *vis-à-vis* the applicant, but has the applicant proved, even *prima facie*, that the respondent has committed such a delict?

According to the authorities, in order to prove such a delict, the applicant has to show not merely that his wife left him for the respondent, but that the respondent actually induced her to leave him, i.e. actively caused her to leave him, or, as was stated in *Van den Berg v Jooste*, 1960 (3) SA 71 (W), that he had co-axed her away from the applicant, that he had talked her over, or that he had persuaded her to leave the applicant, and as a result thereof she had lost her affection for him. That is usually a

very formidable *onus* to discharge.

There is no need to canvass the facts in detail on this aspect. It suffices to say that the applicant alleges several acts of enticement on the part of the respondent, but they are all derived from what his wife is alleged to have told him. That constitutes hearsay evidence against the respondent, who in any event denies them. That, therefore, does not constitute even *prima facie* proof against the respondent. If the matter were referred to evidence or trial, such evidence would not be admissible.

Mr. *Cilliers*, however, stated that the applicant's case on this aspect rests upon circumstantial evidence; but, even assuming the truth of all the applicant's allegations to the effect that their marriage was happy until the respondent appeared on the scene, and that thereafter her affections for him waned and ceased, and she left him, it cannot be inferred therefrom, even *prima facie* in my view, that the respondent was guilty of enticing her away. Such an attachment between a wife and third party usually arises and continues quite spontaneously and voluntarily, without any coaxing, persuading, or wooing on the latter's part. Indeed, in the present case it would appear that, so far from requiring any coaxing, persuading, or wooing from the respondent, the applicant's wife was not only a willing, but an enthusiastic party to the renewed liaison right from its very inception.

The applicant has therefore not proved *prima facie*, and in my view will not be able to prove at the ultimate hearing, that the respondent has been guilty of any enticement or alienation of affections. That aspect therefore falls away. I need not consider, therefore, whether such a delict can beget an interdict such as is claimed in the present case.

I now turn to consider the only remaining aspect which concerns the adultery. Mr. *Philips* has cogently contended that our law does not recognise the remedy of interdict against committing adultery. That such an interdict cannot be obtained against the wife follows from *Ex parte A.B.*, 1910 T.P.D. 1332, which decided that

> 'adultery by one spouse does not constitute a tort in respect of which the other spouse can claim compensation from the guilty spouse'.

As the defending spouse, therefore, does not thereby commit a tort, the innocent spouse could not get an interdict against him or her, but it does not necessarily follow that an interdict cannot be granted against the co-respondent. Mr. *Philips*, apart from advancing reasons that such

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a remedy should not be recognised, has pointed out that no case has been found in the researches of either counsel in which such an interdict has been granted here, in the United Kingdom, or the United States of America. That is indeed a strong indication that such a remedy is not accorded by the law. *Le Roux v Van Wyk*, 1 Menz. 253, quoted by Mr. *Cilliers*, mentioned, almost incidentally as it were, in the course of a damages case, that an interdict had been granted, but that was for harbouring a wife, which is an entirely different matter. Nevertheless, I have some difficulty in seeing why, as adultery by a third party constitutes an *injuria* to the innocent spouse, the remedy of interdict in appropriate cases should not in principle lie, for as Mr. *Cilliers* contended, *ubi ius ibi remedium*. However, I am diffident, with the limited time I have had at my disposal, to rule affirmatively that such a remedy is available, and thereby to add a new cause of proceeding to the already formidable mass of matrimonial litigation that our Courts have to handle. Fortunately I find it unnecessary to decide that question. I shall assume

in the applicant's favour that such a remedy is available to him.

It is clear that the Court has a discretion to grant or refuse an interdict, for it is an extraordinary remedy. That discretion is wider in the case of an interim than in a final interdict. It seems to me that, if available, an interdict against a third party committing adultery with the claimant's spouse should only be granted in very special or exceptional circumstances, for these reasons: (1) it is obviously an unusual or novel remedy, for so far it is unheard of; (2) it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses; (compare *Ex parte A.B., supra* at pp. 30 and 39); (3) it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses; (4) it attempts to regulate conduct between the third party and the claimant's spouse, which springs from human emotions and passion. This differentiates it from other, ordinary relationships; (5) its enforcement gives rise to practical difficulties. These were mentioned in argument, and they need not be amplified here; (6) if adultery is subsequently committed, the claimant is not without remedy, for he has the remedies of divorce and damages.

The above were all reasons advanced by Mr. *Philips* in his able argument about why the law should not recognise, and does not recognise, a remedy by way of interdict. On the assumption I have made the law does recognise such a remedy, but those reasons that I have set out above would undoubtedly induce the Court to be slow to grant that remedy.

In the present case there are no special or exceptional circumstances that would warrant this Court, or the Court ultimately hearing the matter, granting such an interdict. There are only two circumstances that are relevant, and were relied upon.

Firstly, the applicant submits that an interdict would probably save his marriage and restore his wife's *consortium* to him. But the facts are

completely against that. They show that the marriage has probably broken up irretrievably.

The applicant's wife says in her affidavit in para (3):

> 'In desperation, and because of my child, I agreed in 1965 to a reconciliation, and I genuinely and sincerely attempted from 1965 to 1968 to forget the respondent, with whom I was then in love, and am still in love. In this endeavour I was completely unsuccessful, and the three years to which I have referred have been the most miserable and unhappy of my life. I love my children dearly, and I would not wish to do anything which would in any way hurt them or cause them grief, but I know that if I continued to live with the applicant, our relationship will deteriorate even further, and we will be even more unhappy than in the past.'

Then para. (4):

> 'I am determined not to live with the applicant again under any circumstances, and while I earnestly hope and desire that the respondent will not be interdicted and restrained from seeing me, I will not under any circumstances return to the applicant, or live with him as man and wife.'

Para. (5):

'During the attempted reconciliation between 1965 and 1968 between myself and the applicant, I did everything in my power to keep from the applicant the fact that I was brokenhearted and desperately unhappy. I genuinely then hoped that our marriage could be patched up, but this was not the case, and had I not met the respondent fortuitously in June, 1968, and renewed my former association with him, I would nevertheless soon have become no longer able to tolerate married life with the applicant.'

Para. (6):

'I believe that, if it ever becomes possible for me to marry the respondent, we shall be happy in one another's company, and I earnestly desire to marry him.'

Now, that shows in my view that according to the applicant's wife the marriage is now firmly on the rocks. Mr. *Cilliers* argued that the Court hearing evidence *viva voce* might not believe the applicant's wife, and might conclude that there is hope of another reconciliation, and thus grant the interdict, but I must assume that the above evidence that I have read out is the evidence that the applicant's wife will give at the trial. On such evidence the Court could only conclude that the parties' marriage has irretrievably broken up. Mr. *Cilliers* argued that in 1965 the parties did become reconciled, and the same could happen again, but I think that that incident is against the applicant. What the applicant's wife says in effect is that she genuinely attempted a reconciliation during that period, but that it failed, and that strengthens her in her attitude never to attempt it again. That being so there is no purpose in granting the interdict in trying to save the marriage, because the marriage is irretrievably lost.

The second circumstance relied upon by Mr. *Cilliers* is that the applicant should not be subjected to the insult or humiliation of the respondent's continuing to commit adultery with his wife. That argument is not without substance, but its force is considerably weakened by the fact that, firstly, as already mentioned, his marriage has already broken up irretrievably, and his wife has left him. So that if they now commit adultery the insult or humiliation must of necessity be considerably lessened, especially as it has not been shown that the respondent enticed the applicant's wife away from him. Secondly, that much of that insult and humiliation is caused by his wife herself, who, as I have already said, is and would probably continue to be, judging by her affidavit, an enthusiastic party to the commission of any further adultery. Thirdly,

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the applicant would be able to recover damages for such further adultery from the respondent.

There is no suggestion in the papers that the respondent could not afford to pay those damages. In that regard Mr. *Cilliers* submitted that it would be wrong to relegate the applicant merely to his right to claim damages, thereby enabling the respondent virtually to purchase the right to commit adultery with the applicant's wife at the expense of insulting or humiliating the applicant.

In view of the fact that the applicant's marriage has now irretrievably broken up, and that he has irretrievably lost his wife's *consortium*, I do not think it is wrong to relegate him to his claim for damages.

It was also mentioned in the papers that the applicant had suffered patrimonial loss from the defection of his wife. In so far as that has resulted from his wife's leaving him, as the respondent has not been shown to be responsible for enticing her away, he would not be liable therefor, but, if he is, the applicant has his remedy for damages against

the respondent, and that is not a ground, therefore, for granting him an interdict.

I have therefore come to the conclusion that on the papers the applicant would not be entitled to a final interdict, and is therefore not entitled to have the matter referred to evidence or trial, and is not entitled to any interim interdict. The application is therefore dismissed with costs.

Applicant's Attorneys: *Israel, During & Kossuth*. Respondent's Attorneys: *Bowen, Sessel & Goudvis.*
