G.P.-S.43575—1969-70—2,000

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In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

BENEDETTO GIORGIO PEILA *Appellant,*

versus

ADRIANA PIERA PEILA (f Peila,b Merli) *Respondent*

Appellant's Attorney *Respondent's Attorney* Horwitz, Cowan
Prokureur vir Appellant Goodrick & Franklin *Prokureur vir Respondent* & Lewis

Appellant's Advocate E Mervis S.C.
Advokaat vir Appellant I. S Weinstock *Respondent's Advocate* N. Phillips S.C.
Advokaat vir Respondent J. Joffe

Set down for hearing on
Op die rol geplaas vir verhoor op 20 - 9 - 1971

1.3.s-6.8.

Coram: Ogilvie Thompson, C.J., Potgieter, Trollip, Rabie J.J.A.

(W.L.D.)

9.14 a.m. - 11.20 a.m.
11.45 a.m. - 1.45 p.m.
2.15 p.m. - 3.00 p.m.

Berlin J.A. - Appeal dismissed with costs.

REGISTRAR, APPEAL COURT,
GRIFFIER, APPÈLHOF,
BLOEMFONTEIN.
1 - 11 1971

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION).

In the matter between:

BENEDETTO GIORGIO PEILA.....APPELLANT.

and

ADRIANA PIERA PEILA.....RESPONDENT.
(formerly PEILA, born MERLI)

CORAM: OGILVIE THOMPSON, C.J., BOTHA, POTGIETER, JANSEN et RABIE, JJ.A.

HEARD: 20th SEPTEMBER, 1971. DELIVERED: 1st November 1971.

J U D G M E N T.

BOTHA, J.A.:

This appeal raises the question of the extent in law of the Court's discretion to grant relief to an adulterous spouse in a matrimonial action. Be-

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cause of an application in relation to costs made on behalf of the appellant, the allegations in the pleadings require to be more fully recited than would otherwise have been necessary.

On the 1st April 1969, the plaintiff (respondent on appeal) issued summons against her husband, the defendant (appellant in the appeal) in which she claimed an order for the restitution of conjugal rights on the ground of the defendant's constructive malicious desertion in May 1967 and, failing which, a decree of divorce and certain ancillary relief. The defendant denied the alleged desertion, and counterclaimed for an order for restitution of conjugal rights on the ground of plaintiff's malicious desertion in May or July 1967, and failing compliance therewith, a decree of divorce, or alternatively, a decree of divorce on the ground of plaintiff's adultery with one Caffaretto in Rome on various occasions during the period October 1968

to.../3

to February 1969, and certain ancillary relief.

In her plea to defendant's claim in reconvention the plaintiff at first denied both the alleged desertion and the alleged adultery, but shortly before the date fixed for the hearing of the action plaintiff gave notice of an application for leave to amend her summons by the inclusion therein of an admission of adultery with Caffaretto in Italy during the period December 1968 to August 1969, and a prayer for condonation of the said adultery, and for leave to amend her plea to defendant's claim in reconvention by the inclusion therein of an admission of the alleged adultery with Caffaretto, and an application for the condonation thereof.

At the earliest possible opportunity, which happened to be on the morning of the trial, the defendant caused to be served upon the plaintiff a notice of exception.../4

tion to plaintiff's prayer "for condonation of her admitted adultery as disclosing no defence" -

> "on the ground that it is not competent to condone adultery and thereby to deprive a plaintiff (herein the plaintiff in reconvention) of his cause of action."

Ludorf, J., who presided at the trial in the Witwatersrand Local Division, allowed plaintiff's amendments, but declined to hear argument on the exception at that stage. He also declined to allow the trial to proceed and the question raised by the exception to be argued as a question of law at the end of the case on the ground that, until the legal issues were resolved, the court would not be in a position to rule on questions relating to the admissibility of evidence. The matter subsequently came before Human, J., who dismissed the exception with costs. Against this order the defendant now appeals to this Court with the leave of the court a quo.

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The crisp question to be decided in this appeal is whether a court trying an action for divorce or for restitution of conjugal rights may, in a proper case, grant relief to a plaintiff notwithstanding the fact that he or she has admittedly been guilty of adultery, and notwithstanding the fact that the defendant relies on such adultery as a bar to plaintiff's action or as a cause of action for divorce against the plaintiff. I should make it clear that the question posed is not intended to refer to the case where the defendant relies on plaintiff's adultery merely to negate the maliciousness of the alleged desertion, and not as a bar to the action for restitution. The Court's undoubted competence to grant relief in such a case to an adulterous spouse where the defence fails, has not been questioned.

In Zelie vs. Zelie, 1944 C.P.D. 209, the Cape Provincial Division, applying the Roman Dutch principle of

compensatio.../6

compensatio (paria delicta mutua pensatione dissolvuntur, Dig. 24.3.39) held, inter alia, that a court was not entitled to grant to a plaintiff, who has committed adultery, a restitution order against a defendant who has only been guilty of malicious desertion, or an order of divorce where the plaintiff is still living in adultery at the time of the trial. This decision was, however, overruled by this Court in Daniels vs. Daniels, MacKay vs. MacKay, 1958 (1) S.A. 513, which was, in effect, an appeal against the judgment in Zelie vs. Zelie, and in which it rejected the strict application, as in that case, of the compensatio principle, and held that -

> "A Court trying an action for divorce or for restitution of conjugal rights has a discretion, in proper cases, to grant relief to a party even though that party has been guilty of adultery."

In so holding this Court in effect affirmed the "practically unchallenged basis" upon which the Courts

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of South Africa had until 1944 proceeded for at least a hundred years, viz., -

> "that a plaintiff in matrimonial proceedings who had been guilty of adultery was liable to be denied relief, but that, according to its view of the circumstances, the Court might exercise a discretion, despite the plaintiff's misconduct, to make an order against the defendant" - per Schreiner, J.A., at page 516.

Some forty to fifty reported cases were cited to the Court in Daniels vs. Daniels (at page 513) in the majority of which during the aforesaid period such a discretion was exercised in favour of an adulterous plaintiff, or recognised as existing even when relief was denied. Most of those cases were considered and discussed in Zelie vs. Zelie and it is not necessary to do so here. All but five or six of the cases so cited were undefended cases. In the defended cases the order for divorce was sought on the ground of the defendant's alleged adultery, but was refused because

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the plaintiff had also been guilty of adultery. In at least four of those cases it was considered that the plaintiff was not entitled to relief by reason of his own proved adultery, and there was no reference to the existence of any discretion. (See e.g. Wiezel vs. Wiezel, (1877) 7 Buch. 92; Jampies vs. Jampies, 10 C.T.R. 439; Swemmer vs. Swemmer, 11 C.T.R. 692, and Abrahamse vs. Abrahamse, 1914 C.P.D. 527). In Newood vs. Newood, 1939 C.P.D. 414, in which the defendant appeared in person, it was recognised however that the court had a discretion to grant relief to an adulterous plaintiff where it was satisfied that -

> "the degree of guilt on the part of the plaintiff and the defendant was not so equal that the plaintiff had by his guilt precluded himself from seeking relief from the Court" - at page 416.

In Harris vs. Harris, 1949 (1) S.A. 254 (A.D.) at page 262, Watermeyer, C.J., in referring to the so-

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called discretion exercised by the courts in England to grant a divorce notwithstanding the adultery of the petitioner, (Blunt vs. Blunt, 1943 A.C. 517), remarked as follows -

> "The English practice of exercising a discretion, which was founded on the provisions of the Matrimonial Causes Act, seems to have been applied on occasions in divorce cases in South Africa without any real consideration of the question where such a discretionary power came from and whether it existed in Roman Dutch Law."

The learned Chief Justice did not, however, deny the existence of such a discretion in our law of divorce, and in Daniels vs. Daniels Schreiner, J.A., and Hoexter, J.A., show, in their separate concurring judgments, that the application in the Roman Dutch Law of the compensatio principle, as expounded by such writers as Brouwer, Voet, Cos, Kersteman and others, did not necessarily preclude a court dealing with divorce from weighing up the matrimonial misconduct of one spouse against that of the

other.../10

other (see pages 518, 522 and 528), and that, in any event, having regard to the dwindling scope of the compensation principle in relation to delicts as the law has developed (see page 523), and the fact that adultery has ceased by disuse to be a crime in the modern law, and that all penalties and disabilities which flowed from the crime have also fallen away (see pages 529 - 531), our law of divorce has developed away from a strict application of the compensatio principle and towards a wider discretion in a court dealing with divorce.

Counsel for the appellant, however, contended that this Court in Daniels vs. Daniels did no more than decide that a court trying an action for divorce or for restitution of conjugal rights has a discretion in a proper case to grant relief to a plaintiff even though he has been guilty of adultery, and that this Court did not say and did not purport to say that a court could by the exercise of that discretion deprive

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the defendant, who pleads such adultery as a bar to the plaintiff's action, or who sues for divorce on the ground of such adultery, of his defence or cause of action. Counsel submitted that the real question is whether a court could ever, by the exercise of such a discretion, wipe out the facts on which a party relies for relief.

It seems to me to be wrong to suppose that the existence in a court dealing with divorce of a judicial discretion to weigh up the matrimonial misconduct of one spouse against that of the other could lead to the deprivation of a party's defence or cause of action based upon the other party's adultery. The existence of such a discretion necessarily flows from the rejection of a strict application, as in Zelie vs. Zelie, of the compensatio principle, and is necessarily inconsistent with adultery being an absolute bar to an action for divorce or for restitution of conjugal rights, or with malicious desertion being incapable of being set up as

compensation against an action for divorce on the ground of adultery. (Cf. Harris vs. Harris, (supra) at page 263, and Voet 24.2.7). The existence of such a discretion in a court cannot, however, affect the validity of a party's defence or cause of action based upon adultery. It merely involves the submission to the court of the facts upon which the party relies, in order to enable the court to determine where the blame for the break-up of the marriage lies. (Daniels vs. Daniels at pages 522 and 532). The absence of such a discretion in a court dealing with divorce, and a strict application of the compensatio principle, would, on the contrary, mean that adultery would normally be an absolute bar to an action for divorce or for the restitution of conjugal rights, and would effectively deprive an adulterous plaintiff of his cause of action based on the other party's misconduct, irrespective of the latter's degree of blameworthiness. (Cf. Daniels vs. Daniels at page 532).

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It seems to me, therefore, that the real question is not whether the Court in Daniels vs. Daniels decided that a court dealing with divorce could, by the exercise of its discretion, deprive a party to the action of his defence or cause of action, but whether a strict application, as in Zelie vs. Zelie, of the compensatio principle was rejected by this Court in favour of a discretion to weigh up the matrimonial misconduct of one spouse against that of the other, in relation to all cases of divorce, including cases where the defendant relies upon the plaintiff's admitted or proved adultery as a bar to the action or as a ground for divorce.

Counsel for the appellant contended that, as this Court in Daniels vs. Daniels dealt with two undefended cases for the restitution of conjugal rights on the ground of the defendants' malicious desertion, by plaintiffs who had both been guilty of adultery, the judgments in that case should be construed as being

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confined to such cases, and that they should not be construed as applying also to cases where a defendant relies upon the plaintiff's adultery as a bar to her action or as a cause of action for divorce, in relation to which cases the dicta in Daniels vs. Daniels would in any event be obiter.

Counsel referred us to passages in the judgments of Schreiner, J.A., and Hoexter, J.A., which, it was contended, indicate that the learned Judges of Appeal were dealing with the law applicable to undefended divorce actions only. We were also referred to various decisions in several provincial divisions given since the decision in Daniels vs. Daniels in which those provincial divisions differed as to whether the discretion which, according to the judgments in Daniels vs. Daniels, a court dealing with divorce has to grant relief to a party in a proper case even though that party has been guilty of adultery, should be limited to un-

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opposed divorce proceedings or not. (See Brown vs. Brown, 1964 (2) S.A. 412 (T); Bailie vs. Bailie, 1965 (1) S.A. 337 (T); le Roux vs. le Roux, 1969 (1) S.A. 321 (C); Coetzee vs. Coetzee, 1969 (4) S.A. 466 (O); Van Wyk vs. Van Wyk, 1962 (3) S.A. 976 (D), and Els vs. Els 1964 (3) S.A. 785 (O).

It would be unprofitable to deal with those cases in detail. In most of them the court was unable to find any justification in the judgments in Daniels vs. Daniels for a limitation of the discretion to undefended divorce actions. It is, I think, also unnecessary to deal with the passages in the judgments in Daniels vs. Daniels to which counsel has referred us in support of his contention. Counsel for the respondent also referred us to passages in the judgments which, it was contended, indicate that the dicta of the learned Judges of Appeal were not intended to be confined to the law applicable in undefended divorce actions.

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The most significant is the following passage at page 524 in the judgment of Schreiner, J.A., which was concurred in by all the Judges who sat in the appeal viz. -

> "This Court should, in my view, lay down without any equivocation that the court trying an action for divorce or for restitution of conjugal rights has a discretion, in proper cases, to grant relief to a party even though that party has been guilty of adultery."

I cannot imagine that Schreiner, J.A., would have emphasised the "without any equivocation" if his remarks were intended to be confined to undefended cases. However, it does not seem to me to be helpful to determine, from isolated passages in the judgments in Daniels vs. Daniels, whether or not the dicta of the learned Judges of Appeal were intended to be confined to the law applicable in undefended divorce cases. What is important is to determine the real ratio for the conclusion arrived at by the Court that -

> "A court trying an action for divorce or for restitution of conjugal rights has a discretion, in proper cases, to grant relief to a party even though that party has been guilty of adultery."

As already indicated this Court in Daniels vs. Daniels rejected for our law of divorce the strict application of the compensatio principle as laid down in Zelie vs. Zelie, in favour of a judicial discretion in a court dealing with divorce of weighing up the matrimonial misconduct of one spouse against that of the other in order to determine whose conduct was the more blameworthy or was the real cause of the break-up of the marriage. The existence of such a discretion is, as already indicated, inconsistent with adultery being an absolute bar to an action for divorce or for restitution of conjugal rights, or with malicious desertion being incapable of being set off or weighed up against the alleged adultery of the other spouse. A little reflection will show that to restrict the ratio in the

judgments of Daniels vs. Daniels to divorce cases, other than those in which the defendant relies upon the adultery of the plaintiff as a bar to the action for divorce or restitution of conjugal rights, or as a cause of action for divorce, would be completely illogical and unacceptable. Of particular importance in this regard is the following passage in the judgment of Schreiner, J.A., at page 525 -

> "The Courts will continue in the future as they have done in the past to work out, as they decide the varied cases that come before them, the broad lines on which the discretion must be exercised. So doing they will no doubt give due effect to that consideration, of general character but of primary importance, to which Viscount Simon, L.C. referred in Blunt vs. Blunt, 1943 A.C. 517 at page 525, namely -
>
> > 'The interest of the community at large, to be judged, by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down'. "

At page 532 Hoexter, J.A., also refers to the con-

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sideration of "questions of public policy" in actions for divorce. The implication inherent in the argument on behalf of the appellant that questions of public policy are of importance only in undefended actions for divorce, must be rejected.

The ratio of the judgments in Daniels vs. Daniels was necessary for the decision in that case, and nothing that was said in those judgments can rightly be regarded as obiter. That reasoning is, in the light of the considerations I have mentioned, clearly applicable to all actions for divorce. The fact that the Court in Daniels vs. Daniels happened to deal with unopposed actions is quite irrelevant. I cannot conceive on what possible grounds it could be successfully contended that the legal principles applicable in a divorce action must depend upon whether that action is unopposed or whether it is an action in which reliance is placed upon the plaintiff's adultery as a bar to the action

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for divorce or for restitution of conjugal rights, or as a cause of action for divorce.

In support of his argument that the discretion referred to in Daniels vs. Daniels cannot exist or be exercised in a case in which a defendant relies upon the plaintiff's adultery as a bar to an action for divorce or for restitution of conjugal rights, or as a cause of action for divorce, counsel referred us to the following dictum of Watermeyer, C.J., in Harris vs. Harris, (supra), at page 265, namely, that, under the common law -

> "it is no defence to a husband's claim for divorce on the ground of adultery for the wife to say that she has been driven from home by the cruelty of her husband and left indigent and has therefore committed adultery or that her misconduct arose 'ex contumace atque maligna mariti abstinentia,' (Voet 24.2.7)."

I cannot agree that the above passage lends support to counsel's contention. It is, of course, true that under the common law malicious desertion could

not to be raised as a bar to an action for divorce on the ground of the other party's adultery. Adultery is, subject to certain exceptions, always unlawful and a ground for divorce, but there is nothing in our law, as it has developed and as it is now enunciated in Daniels vs. Daniels, which precludes a court from weighing up the adultery of one spouse against the alleged matrimonial misconduct of the other. It should in this connection be noted, as pointed out by Schreiner, J.A., at page 521 of his judgment in Daniels vs. Daniels, that Brouwer (De Jure Connubiorum 2.18.12) rightly or wrongly, regarded malicious desertion as a worse matrimonial offence than adultery, and that Van Den Heever, J.A., in Allen vs. Allen, 1951 (3) S.A. 320 (A.D.) at p. 327 remarked that in Holland -

> "some authorities attributed to malicious desertion a greater disruptive effect than to adultery, holding that whereas adultery merely gave cause for divorce, malicious desertion itself put an end to the marriage."

Similar.../22

Similar considerations apply in relation to counsel's argument that a court cannot by "condoning" the adultery of one spouse deprive the other spouse of a defence or of a cause of action based on such adultery. Though it is no doubt a convenient phrase to use, in speaking of the court's discretion in matrimonial proceedings, that it may "condone" a party's adultery - the word "condonation" is also used in Rule 18 (8) of the Rules of Court - it is clear that a court does not, in the exercise of its discretion, "condone" - in any of the recognised senses of that word - a party's adultery. The adultery remains as a fact and it remains unlawful. Whatever the court does, it does not overlook or treat as non-existent the adultery of the other spouse, and it does not extinguish a defence or cause of action based on such adultery. The court merely weighs up the matrimonial misconduct of the one spouse against that of the other and decides whose conduct was

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the more blameworthy or caused the break-up of the marriage. It may then grant relief to a party even though that party has been guilty of adultery. But whether a court would do so, would necessarily depend upon the peculiar facts of each case as determined at the trial. I would, in this connection like to repeat and adopt what Hoexter, J.A., said at page 532 in Daniels vs. Daniels, namely -

> "I would like to emphasise that nothing I have said is intended to convey that our Courts do not regard adultery as an act of the greatest moral turpitude and one which endangers the existence of the most important unit of our social life, the family."

Inasmuch as the present are exception proceedings I come to the conclusion that, for the reasons indicated, defendant's exception was rightly dismissed, and that the appeal cannot succeed.

Counsel for the appellant finally contended that if the appeal should fail, this Court should make a special order as to costs against the respondent, in

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view of the fact that it was due to her conduct that the exception to her prayer for condonation of her admitted adultery as disclosing no defence, was only served and filed on the morning of the trial. That, in my view, constitutes insufficient ground for depriving her of her costs of appeal. It may be that, as a result of the late filing of her application to amend her summons and plea in the manner set out, the costs of the day's hearing before Ludorf, J., were wasted. If that be so, the trial court would, no doubt, take care of the situation by making an appropriate order as to costs.

The appeal is dismissed with costs.

D.H. Botha

BOTHA, J.A.

OGILVIE THOMPSON, C.J. }
POTGIETER, J.A. } CONCURRED.
JANSEN, J.A. }
RABIE, J.A. }