

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

CIVIL SIDE No. 189 OF 2007

Rodolph Harry Jean-Louis
Plaintiff

Versus

Marie Jennifer Rosette
Defendant

Charles Lucas for the Plaintiff

Frank Ally for the defendant

JUDGMENT

Egonda-Ntende CJ

1. The plaintiff is the ex husband of the defendant. Prior to the dissolution of the marriage the defendant gave birth to one B on the 25th April 2000. The plaintiff registered the birth of the said child at the Civil Status Office where he acknowledged himself as the father. There are 2 prior issue of the said union.

The marriage of the parties hereto was dissolved by court on 30th July 2002 after an uncontested divorce proceeding. A pre divorce agreement settled all issues related to property, custody, visitation or access rights and maintenance of the children of the couple. The plaintiff paid maintenance for the 3 children including for B until 2005 when the defendant notified him that B was not his child. The plaintiff requested the defendant to notify the family tribunal of this development so that he did not have to continue paying maintenance for B but the defendant did not do so for 6 months until 23rd January 2006 when she signified her consent for the removal of the plaintiff's family name from the name of B.

2. In light of the foregoing the plaintiff petitioned the Supreme Court for a declaration that he was not the father of B in Civil Side No.

261 of 2006 and this was granted.

3. The plaintiff now contends that the defendant misrepresented to him and knowingly misled him into assuming and endorsing the paternity of B. As a result of the said misrepresentation the plaintiff assumed all care, attention, love, parental obligations, maintenance and treated B as his own child. The defendant knowingly engaged the plaintiff to maintain B from April 2000 to August 2006 when she knew that he was not liable. The plaintiff contends that the defendant had sex with another man in the course of their marriage at least 9 months prior to the birth of B. By reason of the said matters the plaintiff contends that defendant's acts and comportment amount to a faute in law for which she must make good to the plaintiff.

The plaintiff contends that he has suffered damage for which he claims as follows:

(a) Misrepresentation of Paternity of B until 2005 including deception, psychological pain and emotional trauma SR 50,000.00;	(b) Social and moral
prejudice, shame and embarrassment--- SR 10,000.00;	(c) Total Expenses in C.S. No.
261 of 2006---- SR 6,645.00;	(d) Refund of maintenance expenses
of B from birth to August 2006 for 76 months--- SR 38,000.00,	
totalling to SR 104,645.00.	

The defendant opposes this action. She admits that she was married to the plaintiff but denies that she misled the plaintiff to believe that he is father of B. She contends that for over 12 months prior to the birth of B she had stopped having any intimate relationship with the plaintiff by reason of his cruelty to her. She further contends that the plaintiff knew that he was not the biological father of B as they were not having any relationship that would have resulted into the plaintiff being the father of B.

The defendant admits the pre divorce agreement but claims that the plaintiff did not pay any maintenance for the children for the period 2002 until 2003 when the defendant commenced an action for maintenance before the family tribunal which was settled by a consent order.

4. In answer to the claim for damages the defendant contends that no costs were awarded in C.S. No. 261 of 2006 and that it was implied that each party would bear its own costs. The defendant contends that the plaintiff maintained B voluntarily knowing that he was not the father. If the plaintiff suffered any social and moral prejudice shame and embarrassment it is contended that he put himself to the same. Between July 2002 and July 2003 the plaintiff never paid maintenance for the children as agreed amounting to SR 18,000.00 which should be set off from any amount that may be due to the plaintiff.
5. The defendant brings a counterclaim against the plaintiff. She contends

that during the course of their marriage the plaintiff ill treated her including physical assault on numerous occasions inflicting injury and prejudice upon her for which she claims damages for pain, suffering, trauma and moral damage amounting to SR 150,000.00. The plaintiff denied the counterclaim contending that it was time barred. Secondly the allegations of ill treatment, cruelty, and assault were not true. Thirdly that the counter claim is frivolous, vexatious and intended only to embarrass the plaintiff.

The parties have conflicting versions of what happened in the last 2 or so years of their union leading to the birth of B. On the one hand the plaintiff testified that he continued to have a sexual relationship with the defendant through the period of the birth of B and after, until the defendant filed for divorce. That situation led him to assume that he was the natural father of B.

On the other hand the defendant testified that she had stopped having any sexual relationship with the plaintiff long before the conception of B and that the plaintiff knew that he could not have been the biological father of B given the absence of any sexual relationship between the parties. She characterised the registration of the birth of B by the plaintiff as the father as a malicious act.

Obviously these 2 versions are irreconcilable. However, even without determining which one is the true version, it appears plain to me, both on the statement of claim and the evidence adduced in this case that the damage the plaintiff seeks to recover cannot be recoverable under Article 1382 of the Civil Code of Seychelles.

As was submitted by Mr. Frank Ally, learned counsel for the defendant, with regard to the claim for the expenses incurred in Civil Side No. 261 of 2006, made under paragraph 12(c) of the plaint, this is an attempt to claim for legal expenses that a party would be entitled too, in terms of party to party costs, if allowed by a court, hearing and determining that particular matter. One cannot bring a fresh proceeding to recover costs in an action where no costs were awarded. If parties were allowed to proceed in this piecemeal fashion there would be no end to litigation. The issue of costs incurred in a particular proceeding must be raised in that particular proceeding. To attempt and raise it later in another proceeding is simply unacceptable. There must be finality to legal proceedings as envisaged under Article 1351 of the Civil Code of Seychelles.

On the other hand I may note that in the evidence for the plaintiff in this case no evidence was brought to show that this sum had been incurred anyway by the plaintiff. When he was questioned about this point, the plaintiff said he did not recall the amount that he had spent on the case. There was no evidence as to what the expense might have been for. In effect even if it had been recoverable it remained unproven.

With regard to the claims under paragraph 12 (a) and (b) of the plaint which are characterised as misrepresentation of paternity of B until 2005, including deception, psychological pain, emotional trauma, social and moral prejudice, shame, and embarrassment. These particulars relate to the learning of the act of adultery committed by the defendant and resulting into the birth of B.

6. In his examination in chief the plaintiff was asked by his counsel the following question:

'You are now averring to the court that as a result of your ex wife acts and comportment she committed a

faute in law for which must make good. In your plaint you are claiming R50,000.00 for what you called misrepresentation of paternity including psychological pain and emotional trauma that you suffered. Can you describe to the court how you felt? How you endured that pain and trauma?’

7. The plaintiff responded as follows:

‘When my wife was pregnant I took full responsibility bearing in mind that she was faithful to me. Upon she giving birth I was present in the labour room. I gave full care and love as a father and at the end a straight forward call was made by her representative that I was not the father of the child.’

8. He continued to say he was shocked and he cried. It is clear to me that the pain, trauma, etc is the result of the realisation that his wife was not faithful to him. It is the act of adultery that gave rise to this damage. In its wisdom, the legislature has, vide Section 26 of the Matrimonial Causes Act, barred any claim for damages in respect of the adultery of a party to a marriage. The claim for damages under paragraph 12 (a) and (b) of the plaint cannot succeed, in my view, in light of the statutory bar to damages for adultery.

Section 26 states in full,

‘Notwithstanding any other written law, the adultery of a party to a marriage shall not give rise to a claim for damages.’

9. I note that the position that I have taken on this issue is consistent with an earlier decision of this court in France Denis v Andrea Oredy, Civil Side 333 of 1992(unreported) by Perera, J (as he then was) in which he concluded that ,

‘... the provisions of Section 26 that “the adultery of a party to a marriage shall not give rise to a claim for damages” is applicable to any claim either under the Matrimonial Causes Act of 1992 or to a delictual action under the Civil Code.’

10. The last head of damage that the plaintiff has claimed is for

‘Refund of maintenance expenses of B from birth (April 2000 until August 2006 at SR 500 monthly for 76 months totalling to SR 38,000.00.’

11. These expenses can be separated in 2 parts. Prior to the divorce and post divorce payments. The post divorce payments were agreed to by the parties and crystallised into a court order. The payments prior to the divorce proceedings are being claimed at the rate SR 500.00 per month. The plaintiff has not adduced any evidence to show that he paid this amount monthly to the defendant. It appears to be claimed presumptively, perhaps on the basis that this is the sum that he agreed to pay post divorce.

It is possible that the plaintiff did incur expenses on B after his birth. No proof of such expenses, however, has been produced before this court, unlike the case with post divorce expenses for which receipts and vouchers have been produced. The plaintiff is categorical with regard to when payments for maintenance began. It states in paragraph 6 that 'Payment of the maintenance began in July 2003..'. I am satisfied therefore that the plaintiff has not adduced any evidence to show what expenses he incurred on B prior to the divorce proceedings. He cannot therefore recover under this sub head.

On the other hand it should be noted that during this period (pre-divorce) the plaintiff was presumed to be the father of B by law. The plaintiff was under a duty to maintain B when these payments were made. That obligation was not retrospectively annulled by subsequent proceedings disavowing paternity. I find no basis upon which the plaintiff can succeed to recover these expenses.

With regard to the post divorce expenses, receipts and banking slips were tendered in evidence. These payments have been proven. These expenses were incurred as a result of a court order in Civil Side No.253 of 2003, albeit by consent of the parties. The court order made in the Family Tribunal was not only signed by the parties but it was signed by the members of the tribunal and the secretary of the tribunal.

I do not think that they can be recovered unless the order for their payment is set aside or varied. I would have thought that to recover payments made under that order, it would be necessary to bring proceedings to set aside or vary such order or judgment, for instance on the ground of fraud, or under Article 1116 of the Civil Code rather than commencing proceedings under Article 1382 of the Civil Code, asserting 'a faute in law'. Such proceedings ought to be in the court which had made the earlier consent order or judgment.

This position is consistent with the position taken by this court in N. Pardiwalla v J.J.J. Pardiwalla, Dv. No. 65 of 1992 (unreported) in which Perera, J., (as he then was) held that a court had no power to vary a consent judgement or order made previously except on an action brought for that purpose on the ground of fraud or mistake.

For those reasons the head of damage under paragraph 12(d) cannot succeed. As all claims have failed, this suit is dismissed with costs.

Turning to the counter claim by the defendant, Mr. Charles Lucas, learned counsel for the plaintiff submitted that it was filed out of time in light of the provisions of Article 2271 of the Civil Code. The matters complained of in the counter claim were stated in the testimony of the defendant to have occurred in 1987 and 1989. A period of more than 5 years has passed without an action being brought in respect of the said matters. Clearly Mr. Lucas is right. The counter claim is out of time. It is dismissed with costs.

Signed, dated and delivered at Victoria this 22nd day of January 2010

FMS Egonda-Ntende
Chief Justice