

Faithfulness, adultery and the law (2003)

Faithfulness can be defined as an intimate relationship between two persons, whereby those two persons are committed to one another and do not engage in sexual relationships with anybody else. In Namibia, faithfulness is in theory part and parcel of marriage, both in terms of religion (“Thou shalt not commit adultery” is one of the Ten Commandments – Exodus 20:14) and law (probably because of the influence of religion on law over the years). However, faithfulness can also exist outside the marriage web, between boyfriends and girlfriends or within homosexual relationships. It is then a choice made by the two people engaging in the relationship rather than a matter for legal intervention.

Within the web of the marriage, if one person is not faithful (often referred to as one person is cheating – having boyfriends and girlfriends), this is called adultery. Adultery is not a crime in Namibia. (However, I did hear a tale from a high-ranking police officer about a man who came to a Namibian police station to lay a charge against the man he found in bed with his wife. Upon learning that there is no crime of adultery, he said that he wanted to lay a charge of malicious damage to property!! This was of course not allowed, but it does show how some people think about women in relationships.)

Adultery not being a crime, you cannot send someone to jail because he/she cheated on you. However, adultery is a ground for divorce in a civil marriage. Divorce is an official dissolution of the marriage. However, adultery as a ground for divorce is seldom relied upon in Namibia, because of the need to provide evidence of the adultery. It is not always necessary to name the third party (so long as other adequate evidence of the adultery is provided) – but if the third party is named, then he or she must be served with the divorce papers. For example that if you find your husband with another woman and you want to use this as a reason to get a divorce, you may have to name the other woman in court and serve the divorce papers on her as well as on your husband. Facts about the adultery must be put before the court, such as details about the dates and places where the affair took place. So, even where there has been adultery, the ground for divorce is usually what we call constructive desertion. It means that the person having the extramarital relationship has made it impossible for the other spouse to remain in the relationship. (Constructive desertion does not necessarily mean leaving the house – it can mean making it impossible for the other spouse to remain, because of the one spouse’s alcohol abuse or violence or adultery.)

When people divorce, they have to divide their property. Adultery might be used in a divorce case to motivate ‘forfeiture of benefits’, which means depriving the guilty spouse (the one cheating) of a share in the financial benefits derived from the marriage. In divorce cases based on adultery or constructive desertion, the “innocent” spouse may request a court order that the “guilty” spouse must lose any financial benefit from the marriage. To understand how this works, you must consider the fact that most marriages in Namibia work have a property

arrangement called “in community of property”. This means that all the belongings and the debts of the husband and the wife are put together into what is called a “joint estate”. They each own half of everything in the joint estate. “Forfeiture of benefits” is based on the idea that no spouse should profit from a marriage that he or she has destroyed. If the marriage breaks down because of adultery, the innocent spouse would ask the court not to divide the property half and half in the usual way, but to deprive the guilty spouse of his or her share in the increase in the value of the joint assets.

A request for forfeiture of benefits must be made before the court issues the order of divorce -- it cannot be made after the divorce is granted.

Another limitation is that an order for forfeiture of benefits is possible only where the innocent spouse has contributed more to the joint estate than the guilty spouse. For this reason, “forfeiture of benefits” is seldom of use in practice to wives, who often have lower-paying jobs or take greater responsibility for child care. Courts are entitled to take into account the services of a spouse in managing the joint household and caring for the children in their calculation of the spouses’ respective contributions, but even so it is hard for many wives’ contributions to amount to more than the salary of the husband.

The “innocent spouse” cannot bring any legal action other than a divorce proceeding against the “guilty spouse”. However, it is possible to bring a civil action for damages against the third party -- the third party being the person the “guilty spouse” is having an affair with -- regardless of whether the adultery leads to divorce. Damages are claimed for loss of “consortium”, a broad concept which includes love, companionship, sexual intimacy and general assistance. (In the eyes of the law, both spouses in a marriage are entitled to “consortium” from each other.) So, if your husband cheats on you, you can bring a court case for damages against the other woman and if your wife cheats on you, you can bring a court case for damages against the other man.

Some jurisdictions, such as the UK and some states in the USA, have abolished the right to bring civil cases for damages resulting from adultery. It is however still possible in Namibia (and in South Africa), but these kinds of cases are not common.

What about customary marriage? Here there is also gender bias with respect to adultery. In many Namibian communities, it is grounds for divorce if a wife is unfaithful to her husband, but not the other way around.

In case of unfaithfulness outside of marriage, things are much more difficult. If you have a sexual relationship with someone but you are not married to this person, you have no legal duty to be faithful to this person. Therefore, if your boyfriend or girlfriend cheats on you, you do not have any legal remedy. This is especially important for young people, who often engage in relationships without

getting married. You have to know those facts and if you happen to learn that your partner is not faithful, I advise you to walk away and find a more trustworthy partner.

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