

CLOUDIO JUME
versus
ELTON SANYAMAHWE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 7, 26, 27 June, 17 July, 25 & 26 September 2023
& 03 January 2024

Civil Trial – Claim for Adultery Damages

Mr *P Mujawo*, for the plaintiff
Mr *B Hodzi*, for the defendant

MUCHAWA J: On 5 August 2022, the plaintiff issued summons against the defendant claiming the total amount of one hundred thousand United States dollars being fifty thousand United States dollars for adultery damages and another fifty thousand United States dollars for loss of consortium and companionship. This was later amended following the defendant's plea to fifty thousand United States dollars for loss of consortium and conjugal rights and fifty thousand United States dollars for *contumelia*. The claim was defended.

The issues referred to trial were as follows:

1. *Whether or not the defendant committed an act of adultery with the plaintiff's wife.*
2. *Whether or not the plaintiff is entitled to the relief sought.*
3. *Whether or not the plaintiff is entitled to costs on a higher scale.*

The Plaintiff's Case

The plaintiff gave evidence and called three other witnesses. Though his counsel undertook to file written closing submissions by the 6th of October, this was not done, and I have proceeded to write this judgment without these and assume that the plaintiff waived his right to submit same.

The testimony of the plaintiff went as follows; he married Thelma Annah Guvakumwe (hereinafter referred to as Thelma), customarily in March 2014 and proceeded to solemnize the

marriage on 24 February 2017 in terms of the then Marriage Act, [*Chapter 5:11*]. This marriage was dissolved on 16 March 2023 and the grounds for this are that Thelma was cohabiting with the defendant and they even had a child together who was born on the 21st or 22nd of February 2022. He avers that his wife had lied that she had secured a job in Chegutu, and he could not locate her, yet she was in the same locality in Warren Park D staying with the defendant where she would be kept hidden. He claims to have been looking for his wife without success until he was summoned by Thelma's aunt to attend in an area called Zviyambe East on 7 December 2021 where Thelma had gone on 6 December 2021. This was to resolve the matter of the problems in their marriage, but this failed as Thelma did not return home despite a promise to do so. She is said to have even refused to remain with their two children aged two years and five years. His attempts to follow up with Thema's relatives via cell phones is said to have resulted in them blocking him.

It was from the grapevine that the plaintiff learnt that his wife was around the neighbourhood and had a child. He then kept a lookout for her and on 29 July 2022, he spotted Thelma on 135th Street carrying a baby and followed her to the defendant's house where he confronted defendant's mother that they were harbouring his wife. He says he then called his father-in-law who was unable to resolve the matter even when they attended before him. It was at this point that the plaintiff searched Thelma's bags and saw the baby's birth record card which reflected the defendant as the father. This was tendered as exhibit 3. Attempts to elicit an explanation from Thelma about the father of the child were met with several explanations including that she had gotten drunk and engaged in sexual intercourse. The child whose names appear as Elsa Sanyamahwe on the birth record card was allegedly born during the subsistence of the marriage.

Plaintiff says that they used to stay together with the defendant who was even introduced as a private tutor for his wife from January 2021, whom he would pay. It is in fact, the defendant's uncle who started off as tutor and defendant took over thereafter. He however thinks that the affair started in 2019. His discovery of the affair was sometime in March or April 2021 when his wife left for ten days to stay in Mufakose. He insists that the defendant therefore knew of the existence of the marriage between him and Thelma. He is said to have been a constant visitor at their house who would even have meals prepared for him. Reference was made to WhatsApp chats between the plaintiff and the defendant wherein the defendant was talking about his attempts to mediate between plaintiff and his wife at one point when she left home and went to stay in Mufakose. Additionally, the conviction of Thelma for bigamy

and perjury before the magistrates court wherein the same basic facts were alleged, supports his claim of the existence of an adulterous affair between defendant and his wife.

The plaintiff avers that he suffered emotionally as he was left with two minor children whom he had to look after yet their mother was next door in an adulterous relationship where she was now known as “mai Mukundi”. Even though he employed maids, he says that he could not ask them to clean up the younger child when she messed herself up. He says too that he no longer enjoyed his conjugal rights as his wife was no longer available and had last had sexual intercourse in January 2021. The child Elsa born in February 2022 cannot be his, therefore. Speaking to his humiliation, the plaintiff says that the defendant whom he would meet in the neighbourhood, would insult him using vulgar words and taunt him that his wife had left him due to his small manhood and had found satisfaction in him. The defendant was said not to be remorseful at all but would rather boast that the plaintiff would not get a single cent from him. Further, the plaintiff says that he was living in fear of contracting sexually transmitted diseases because of his errant spouse. Two newspapers were produced as exhibits 8A and 8B, to show that the issue of the criminal matter of bigamy was extensively covered in publications.

When exhibits 9A to 9G were produced, which are pictures showing the plaintiff in compromising positions with various women, he said that he was out on leisure and that is what all married men do.

It was only in cross examination that the plaintiff said that their marriage certificate and wedding photos were on the wall and the defendant who was a frequent visitor should have known of the existence of the marriage.

The plaintiff denied having paid any “gupuro” or divorce token and when asked whether the marriage broke down because of the alleged adultery or his abusive nature towards his wife, he said that it was the adultery.

The second witness for the plaintiff was Gaudencia Midzi, his daughter and stepdaughter to Thelma. She was 21 years old when Thelma was married. She claims to have known the defendant as her stepmother’s tutor. She was unsure about the circumstances surrounding the birth of the child Elsa including who her father is. She said this would be best known by the woman carrying the pregnancy. She could not comment on the plaintiff’s state at the time of the alleged adultery as she said she was not available. Asked about the wedding photos on the wall, she said that she saw them in 2021. She then said she did not stay at this place for long and upon being quizzed retraced her statement and said 2021 was the last time she saw the photos. She had been told that Thelma was staying next door. According to her,

when Thelma left home in or about November to December 2021, she was already pregnant and gave birth to Elsa in May 2022.

She believes that her siblings were psychologically affected due to neglect by their mother, Thelma.

Kennedy Kanyemba Fidelis was the plaintiff's third witness. He is a friend of the plaintiff since childhood. He claims to have known the defendant as Thelma's tutor. According to him, the marriage of the plaintiff and Thelma was well known in their neighbourhood, Warren Park D. He knows that the defendant would go to the plaintiff's house as a tutor and should have seen the marriage certificate which was displayed on the walls and the children of the marriage. During the criminal trial of Thelma for bigamy and perjury, she was said to have been accompanied by the defendant, her baby, and defendant's relatives. He said he was aware that Thelma and her baby are now staying at the defendant's house. He said that the plaintiff lost weight due to the adultery scandal. His knowledge of the details in the plaintiff's family was attributed to the fact that as a friend he would visit their house up to five times a week. When questioned under cross examination, the witness conceded that he had only heard about where Thelma went and had not seen her himself. He refrained from commenting on whether his own friend, the plaintiff was faithful to his wife during the marriage. He claimed to have been a mediator when Thelma was suspected of the affair.

The plaintiff's last witness was Nicho Chingodza, his maternal uncle. He too said that the marriage certificate of the plaintiff and Thelma was displayed on the walls. He knows defendant as a young brother as they grew up in the same neighbourhood and had learnt that he was teaching mathematics to Thelma. He insisted that the defendant should have known of the existence of the marriage as he would visit plaintiff's home and be paid for the tutoring. He however avoided commenting on the plaintiff's right to companionship and loss of conjugal rights and possible emotional damage and humiliation arising from the affair. His view is that everyone in Warren Park D knows about the plaintiff's marriage to Thelma. When quizzed about whether "gupuro" or the divorce token was paid and when Thelma went missing, he then explained that he is a flight engineer who does not spend a lot of time in Zimbabwe. His explanations about the act of adultery and the defendant teaching Thelma, were largely hearsay. He however said he saw the defendant entering the plaintiff's yard twice.

The Defence Case

The defendant was the first witness in his case. He clarified that his correct surname is Sanyamahwe and not Samanyahwe. His defence went like this: He is not married and has no children. He knows the plaintiff from 2021 from seeing him around in the neighbourhood. He was never Thelma's teacher and never visited their home but would pass through the road. It was in fact, his uncle, Kudzanai Wilson Dziruni who was tutoring Thelma, and this is how he came to know Thelma as she would attend at Kudzanai's home for lessons.

The defendant denied any knowledge of the existence of a marriage between the plaintiff and Thelma. He stated that he did not have any sexual intercourse with Thelma knowingly as he was drunk and woke up naked the following day. He thinks he was drugged and raped by Thelma. They had met up at a bar and ended up in bed together under the influence of alcohol. Prior to this, the defendant averred that in or about May or June 2021, Thelma who was coming for lessons at her uncle's place had confided in him that she needed assistance as she had been given "gupuro" by her husband and needed a place to stay. As the compassionate person that he is, he got a place for her in Warren Park 1 and helped with rent. The alleged rape is said to have happened in or about September or October 2023. This is when he went to the bar, met up with Thelma who thanked him for the assistance. He says he then passed out and does not remember anything. In his evidence he said when he woke up, he was in a room and under cross examination this changed to a car.

In explaining how his name ended up being entered in the section of father of Elsa Sanyamahwe, the defendant said he was just a good Samaritan who was taking food to Thelma who was admitted at Mbuya Nehanda maternity hospital and to access her, due to the hospital policy that only husbands can visit, his name was entered. In another breath, he said that the birth record is not authentic and is only a card. When questioned about his basis for helping Thelma, he said it was because she had been chased from home by her husband and he considered her as a sister who needed help. On being asked about how the need for help was communicated, he said that he got a message on the phone. The defendant said that in 2019 he was in South Africa on the Presidential programme and was nowhere near Thelma.

The second witness in the defence case was Thelma. She confirmed her marriage to the plaintiff and its solemnization. She however tried to explain that she was unduly influenced to agree to registration of the civil marriage as her parents were not aware of this. There is a 23-year gap between them. The plaintiff was painted as a fraudster who had been masquerading as a legal practitioner who worked at the High Court until he was arrested in a matter involving

the Katsande family. The idea to register the marriage was supposedly borne out of the challenges plaintiff was facing on the work front. She however said the marriage was not fake.

Reference was made to the transcribed record of audio conversations between the plaintiff and Thelma's sister. Such record is alleged to show that the plaintiff no longer loved Thelma. She said that as a result the plaintiff would bring women home and if she questioned him, she would be beaten up. In the audios the plaintiff was saying that he had no interest in Thelma. Further she stated that in or about March or April 2021, plaintiff gave her "gupuro" in the presence of her sister Marciline Ncube. Thereafter she says that the plaintiff would abuse her, and she would wake up to sometimes see him sleeping with the maid. The audio record was also saying that plaintiff would go for up to two months without sexual intercourse with Thelma and he would sleep with other women. This was said to be corroborated by the pictures already tendered as exhibits 9A to 9G. She further said there were some pornographic video and pictures which she had withheld as they were not fit for the court to view. All these were allegedly taken during the subsistence of the marriage. She said they last consummated the marriage in January 2021. The plaintiff who supposedly got his fill of his sexual appetite elsewhere was said to come home and play pornographic videos and force her to lick his genitals amongst other things she abhorred.

Her narration is that the marriage irretrievably broke down in 2020 when Thelma discovered the several women the plaintiff was involved with. When she demanded that they go for HIV testing, this is when the plaintiff is alleged to have called her sister and given her "gupuro" whilst asserting that he could not be overridden in his own home.

Thelma denied that the defendant was her tutor and said it was in fact Kudzanai, the uncle who was teaching her internal auditing and statistics. She confirmed the defendant's version that they indeed slept together after meeting in the bar. After the "gupuro" she says she was emotionally disturbed and would go out to pubs to drink and sleep with different men. This is when she met the defendant and took advantage of him as she knew him from his uncle's place. She averred that the defendant did not initiate the sexual act and by then she was renting in Warren Park 1 after being sent out of the matrimonial home by the plaintiff.

According to Thelma, the bigamy report against her and this claim are both in a bid to fix her as plaintiff is aware that she ended up giving birth to a child during the subsistence of the marriage. About the donation of rental money, Thelma said she had asked for help from the defendant and his uncle when she went for lessons, and they questioned why she needed help

when she had a husband to which she said she had no husband as she did not want to divulge her marital problems which information, she had not even told her parents.

Thelma denied that she had a child with Elton Sanyamahwe. She said she has no birth record for the child yet and the baby card as this was confiscated by the plaintiff. She said that her own child is called Mukundi and not Elsa. In terms of timing, she accepted that she was intimate with the defendant in or about September or October 2021 and her child was born in February 2022 as a premature baby at about 6 months. She however insisted that the child could not have been that of the defendant.

With support from the audio transcript, Thelma denied that she abandoned her children as the plaintiff says therein that he chased her. She further said that the plaintiff has the habit of refusing all women custody of their children when he separates with them. She said there were three ex-wives before her who all went through the same. This was alleged to have even happened with Gaudencia, the plaintiff's witness who was collected at six months of age from her mother and placed in the custody of plaintiff's mother.

Thelma denied ever having gone to work in Chegutu or having passed such information to the plaintiff at any stage.

Whether or not the defendant committed an act of adultery with the plaintiff's wife

The law on adultery damages is clearly set out in the case of *Misho v Sithole* 1992 (2) ZLR 291 (SC) wherein it was held as follows:

“An adulterer is only liable for adultery damages if she knew at the time of sexual intercourse that her sexual partner was married.”

From the evidence of the parties, it is common cause that Thelma was still legally married to the plaintiff, in or about September 2021 when she was intimate with the defendant. The marriage form they wedded under, [Chapter 5:11] was monogamous in nature. The questions about the circumstances of the plaintiff at the time of solemnization of marriage in relation to a pending criminal accusation against him are irrelevant as also the fact that Thelma's parents may have been unaware of registration of the marriages. She was a major and did not need the consent of her parents to enter this marriage.

The question of whether the alleged affair started in 2019 or 2021 is neither here nor there as both dates fall within the subsistence of the marriage.

The deciding factor is whether the defendant, well knowing about the existence of the marriage between the plaintiff and Thelma, proceeded to engage in a sexual relationship with her.

The defendant and his witness told an incredulous story. The evidence relating to the proximity of the defendant's home to that of the plaintiff and that he passed by his house every day, speaks to knowledge of the existence of the marriage. She was even a student of his uncle who would visit his/his uncle's home thus putting them in close proximity. This is backed by WhatsApp messages between the plaintiff and defendant in which the defendant says that he had even tried to mediate between the plaintiff and defendant at one point when Thelma ran away from home for Mufakose in April 2021. The story of the sexual encounter between the parties having been initiated by Thelma after allegedly drugging then raping the defendant does not add up. Why would the defendant then become Thelma's good Samaritan attending at the maternity home and buying medication and food. How did he end up paying her rentals earlier when she left home. It was then that the defendant's tongue slipped, and he referred to Thelma having been chucked out of home by her husband. The retracing he tried then to do was not helpful. Whilst the defendant and Thelma tried to dismiss the relevance of the birth card for Thelma's child as of no evidentiary value, the defendant himself offered an explanation as to how his name was entered as father of the child. He said he was just playing good Samaritan and needed to get access to Thelma.

The dates of the alleged rape and the date of birth of the child at the premature age of six months points to the likelihood of the defendant being the father thereof.

The fact that Thelma emphasized in evidence that she was given "gupuro" and there is an affidavit in which she refers to the plaintiff as her ex- husband paints the picture that due to possible ignorance, she assumed that the giving of the divorce token signalled the end of her marriage to the plaintiff, and she had moved on. She even says in that exhibit 5 that the plaintiff had been threatening to kill her and her current husband and family. In the summons, the defendant's address is given as 4663-136 Street, Warren Park D, Harare. In Exhibit 5 Thelma, in a sworn statement wherein she talks about her current husband, gives her address as 4663, 136th Street Warren Park D Harare, as on 3 August 2022. The child's birth card also gives the same address. It appears that the defendant is clutching at straws as the evidence at hand shows that he was aware of the existence of the marriage between the plaintiff and Thelma when he engaged in an adulterous relationship with her in or about September 2021. This relationship could very well have started earlier.

It is my finding that the defendant engaged in an adulterous relationship with the plaintiff's wife.

Whether the plaintiff is entitled to the relief sought.

It is important to understand the basis of such a delictual claim in the context of a marriage institution. A marriage is defined as a *sui generis* contract entered into by two willing parties (see *Ncube, Family Law in Zimbabwe* 1987]. The sanctity of this anomalous contract is what an adultery damages claim seeks to protect. The claim should not be viewed in isolation but from the viewpoint of its purpose, being to protect the sanctity of marriage. (Per MWAYERA J as she then was in *Njodzi v Matione* HH 37/16.

The case of *Misho v Sithole* supra held as follows:

“An adulterer is only liable for adultery damages if she knew at the time of sexual intercourse that her sexual partner was married. A claimant is entitled to claim damages under two heads namely:

1. Loss of consortium. This claim could include loss of love, companionship, sexual privileges and assistance in good and bad times which a spouse is entitled to expect and consequent mental distress.
2. *Contumelia*. This claim is for infringement of privacy, dignity and reputation.”

The plaintiff went out of the way to portray a picture of a hapless victim in this whole drama, even sobbing at appropriate points. The totality of the evidence however shows that he was a philandering man who was married to a woman 24 years his junior who was one in a row of up to three others whom he had divorced or separated from. He even boasted that married men do go out for a good time with many other women, and it is ok. It only becomes a problem when the women do likewise.

In transcribed evidence of an audio between the plaintiff and Thelma’s sister, the plaintiff states the following key facts:

- That he never looked for Thelma when she left as he does not love her nor care for her and as a result never went back to her home after paying lobola.
- That he chased Thelma like a dog and set her up after giving her “gupuro”. Before that, they would spend up to two months without sexual intercourse and Thelma would see him sleeping with other people on pornographic videos which he would show her. This was a sign that he did not care for her at all.
- Before chasing Thelma, he had removed her things from the bedroom and threw them out and told her that if she stuck around, he would murder her.

- He said he had proof of 10, 15 or 20 women who were crying to come and stay with him and Thelma is nothing to him.
- If she is honest, Thelma will tell you that we ended being loving in 2011. The rest was just so and so

The lack of care on the plaintiff's part is backed up by his failure to report his wife missing to the police or her relatives when she allegedly disappeared. Even his witnesses could not back this up. Thelma's version of there having been some discontent in the marriage due to the plaintiff's affairs is supported by the WhatsApp messages between plaintiff and defendant, the pictures presented as exhibits 9A to 9G showing the plaintiff in flagrant display with various women in compromising positions.

In his evidence, the plaintiff appears to have harped on about the defendant having been a tutor to his wife, the affair having started in 2019 and that pictures of the marriage certificate and wedding photos were hanging in his house, just to build up the case that the defendant was aware of the existence of the marriage between him and Thelma from 2019. This evidence was however unsupported. It is unclear why the plaintiff only seemed to build up the issue of photos as he went along in cross examination yet did not say so in his evidence in chief. Even his daughter was inconsistent saying she saw the photos in 2021 and then retracing this under cross examination to say it was the last date she saw them. Her evidence was largely hearsay and she conceded that she did not stay with her father for a long time. Equally, the friend Kennedy was inconsistent by trying to give the impression that he was an annoyingly frequent visitor who would visit up to 5 times a week to then saying he had moved out of the same locality, then mixing the place of residence from Warren Park D to Warren Park 1. His evidence on what photos he saw is doubtful. The rest of his evidence was hearsay. The same goes for the evidence from the alleged uncle, Nicho who ended up saying that he does not spend a lot of time in Zimbabwe due to work commitments and largely relied on information passed on to him.

I note however that the defendant was not challenged on the fact that he was in South Africa in 2019 on a Presidential programme and was nowhere near Thelma. The plaintiff's evidence zeroes in on the period in 2021 as also confirmed by the defendant's case.

The circumstances of this case are that adultery was committed after irretrievable breakdown had occurred and the customary payment of "gupuro" had occurred in or about April 2021. Could the plaintiff successfully claim any damages for loss of consortium considering that this claim includes loss of love, companionship, sexual privileges and

assistance in good and bad times which a spouse is entitled to expect and consequent mental distress. I think not. There was no love lost between the parties based on the plaintiff's own confession that he had no more love for Thelma but many other women whom he was in liaison with and had thrown her out of the bedroom. He said he had been last in love with her in 2011. His alleged mental or emotional distress was not backed up by any medical report. Even his witnesses could not confirm this. His major distress was tending to the children in the absence of their mother. Gaudencia Midzi says she was away and can not comment on the plaintiff's mental and emotional state. The law is clear that any claim for damages for mental breakdown arising out of the adultery must be supported by medical evidence. See *Misho v Sithole supra*. There is none herein.

It is my considered opinion that in the light of the facts of this matter, the claim for USD 50 000 for loss of consortium must fail.

I turn now to consider whether the plaintiff is entitled to any damages for *contumelia* which is a claim for infringement of privacy, dignity and reputation. The plaintiff's evidence shows that the parties resided in the same neighbourhood and were familiar to each other. He stated how the publication of the case of perjury and bigamy in several newspapers like the Herald and H Metro in which the facts of the adultery and the birth of a child between his wife and defendant were widely covered and she was convicted. This was said to have greatly humiliated him and he was affected health wise. The defendant is alleged to have been boasting that plaintiff's wife had left him because of his small manhood and defendant was better able to satisfy her. He was alleged not to be remorseful. Kennedy Kanyemba Fidelis gave evidence that during the criminal trial, the defendant would come in the company of Thelma together with the child in issue and his relatives. It was also the plaintiff's case that Thelma moved into the next street not too far from his and was staying with the defendant's family thereat. I already made mention of an affidavit sworn to by Thelma, exhibit 5 when she was seeking a protection order on 3 August 2022 when she gave her residential address as 4663, 136th Street, Warren Park D, Harare. That happens to be the same address of the defendant where summons was served on him.

I take the position taken by MWAYERA J, as she then was, in *Njodzi v Matione supra* wherein she opined as follows:

“One does not require a magnifying glass to scrutinize and come up with a conclusion that *contumelia*, that is injury, hurt, insult and indignity occurs to an innocent spouse where the other commits adultery. The injury is so obvious that there would be no justification in not seeking legal redress for the wrongful hurt occasioned. The Supreme Court of South Africa decision in the case of RH and DE (C 594/2013)

[2014] ZA SCA 133 confirmed that the award for *contumelia* was rightly made even though there was a finding that the adultery was committed at a time when the marriage had already irretrievably broken down. What is worth noting is that once there is evidence of injury, hurt, insult and indignity having been occasioned on an innocent party because of the adulterous relationship, then the innocent spouse is entitled to damages for *contumelia*.”

The plaintiff was clearly hurt, humiliated and had his privacy invaded by the adulterous actions of the defendant. The next question is on the quantum of such damages.

TSANGA J, in the case of *Dambudzo Oliver Munyebvu v Talent Musvibe* HH 292-22 sets out how to go about quantifying the damages.

“As to the quantum for loss of consortium and *contumelia* the factors taken into account as outlined in the case of *Misho v Sithole* above include:-

- (a) the character of the woman involved;
- (b) the social and economic status of the plaintiff;
- (c) whether the defendant has shown contrition and has apologised;
- (d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and
- (e) the level of awards in similar cases”

The damages I award should be reflective of all the circumstances surrounding the occurrence of the adultery, inclusive of plaintiff’s own conduct in the matter. Here is a plaintiff who is twenty-four years older than his wife, is three times divorced and is a self-confessed philanderer who claims to have set up his wife and starved her of love, companionship, sexual privileges and assistance in good and bad times which a spouse is entitled to expect. Should he cash in on a self-created situation? Granted, for a man of his ego he must have been extremely humiliated to have a very young man engage in an adulterous affair and even sire a child with his wife in the very same neighbourhood. He must get some damages. The question exercising my mind is the quantum of damages.

Nothing much is said in the pleadings about the plaintiff’s social and economic standing. He is just referred to as the husband to Thelma. His damages entitlement cannot be increased on this account.

The defendant has not apologised nor shown contrition and keeps on insisting that there was no adultery committed and weaving an incredible defence of having been drugged and raped by Thelma whom he then allegedly took care of whilst she was in hospital based on his good heart and who turned up staying at his house with a hospital card bearing his name as father of the child.

I am not sure about the innocence of the plaintiff given his own escapades and the extent to which he might benefit from a deterrent measure against the defendant for protection from the errant spouse against contracting HIV.

What remains is for me to be guided by levels of awards in similar matters. In the case of *Martha Muhwati v Yeukai Purity Nyama* MAWADZE J after consideration of factors relevant in arriving at an estimate of damages due in an adultery claim initially pegged at \$20 000 awarded a total of US\$5 000 as damages for adultery together with interest. The judge in that case considered the levels of awards in similar cases together with the other relevant factors and observed that the level of damages for *contumelia* and loss of consortium range between US\$800-00 – US\$5000, depending of course on the circumstances of the case.¹

Mapiye v Mudyiwa HH 399-18 is a case in which the court awarded damages of US\$10 000 for adultery. In so doing the court cited the following cases as forming the basis of its award:

“... *Monica Muerudza v Ropafadzo C Magora* HC 6334/13 the court awarded US\$8 500 for both *contumelia* and loss of consortium. In *Makururu v Vori* HH 174-16 US\$4 000 was awarded for *contumelia* and US\$2 000 for loss of *consortium*.”

In the case of *Muhwati v Nyama* HH 137/11 MAWADZE J observed, All the cases cited in the heads of argument indicate that the level of awards made both for damages for *contumelia* and loss of consortium do not amount to US\$10 000. These include *Mtungwazi v Sibanda* HB 61/90, *Nyandoro v Tizirai* HH 12-06, *Timothy Chinyadza v Melton Phiri* HH 76/09, *Chipo Dera v Cynthia Kambeza* HH 175-10. The award in respect of damages for *contumelia* range from US\$800to US\$5 000. I am satisfied that an estimate of US\$2 500 is adequate to compensate the plaintiff for *contumelia*.

I wish to take the same approach. In the circumstances of the facts of this matter, I am satisfied that an award of USD 5 000 is adequate to compensate the plaintiff for *contumelia*.

Whether the plaintiff is entitled to costs on a higher scale.

No submissions were made by the plaintiff justifying an award of costs on a higher scale. There were no closing submissions filed by the plaintiff. Costs on a higher scale should only be awarded in exceptional circumstances.

According to the leading authority as to attorney and client costs in South African law, *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607 where his LORDSHIP TINDAL JA stated:

¹ He cited among others cases like *Khumalo v Mandishona* 1996 (1) ZLR 434, *H Mtungwazi v Sibanda* HB 61/90, *Nyandoro v Tizirai* HH 12/06, *Timothy Chinyadza v Melton Phiri* HH 76/09 and *Chipo Dera v Cynthia Vambeza* HH 175/10.

“The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts incase considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation .”

AC Cilliers in *The Law of Costs* 2nd ed p 66, classified the grounds upon which would the court be justified in awarding the cost as between attorney and client:

- (a) Vexatious and frivolous proceedings
- (b) Dishonesty of fraud of litigant
- (c) Reckless or malicious proceedings
- (d) Litigant’s deplorable attitude towards the court
- (e) Other circumstances

In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them. Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alteration. In awarding costs at a higher scale, the courts should therefore exercise greater vigilance.

Though I have found for the appellant on the question of damages for *contumelia*, I dismissed the claim for loss of consortium as unmerited. In this case the defendant’s defence can not be said to be vexatious and frivolous. It cannot be said that he was not *bona fide* in mounting his defence pointing to reckless or malicious proceedings. Though parts of his defence were clearly dishonest, other parts were sustained leading to dismissal of the claim for loss of consortium. The defendant did not show a deplorable attitude towards the court. This is not one of the exceptional cases in which costs on a higher scale should be awarded.

Accordingly, I order as follows:

1. The claim for USD 50 000 or the equivalent Zimbabwe dollars at the prevailing bank rate for loss of consortium, be and is hereby dismissed for lack of merit.

2. The plaintiff is awarded USD 5 000 (five thousand United States dollars) or the equivalent Zimbabwe dollars at the prevailing bank rate as damages for *contumelia*.
3. The defendant is to pay costs of suit on an ordinary scale.

Macharaga Law Chambers, plaintiff's legal practitioners

Mundieta & Wagoneka-Mandizvidza Law Chambers, defendant's legal practitioners