

TATYANA SHAMHU
versus
ANCERCARIA TADERERA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 12 & 26 September 2021 & 25 January, 2023

Civil trial

G. Bwanya for the plaintiff
P. Chimwanda, for the defendant

ZISENGWE J: This is a claim based on the controversial and often emotive delict of adultery. Its controversy stems from the fact that its continued retention on our books has courted support and opposition alike in almost equal measure. Whereas its proponents justify its retention on the basis that it is an important safeguard to the sanctity of marriage and resonates with the nation's culture and mores, its opponents on the other hand argue that the delict is antiquated and is completely out of sync with the current permissive and liberal society and above all discriminatory and therefore no longer serves any useful purpose.

Be that as it may, the plaintiff instituted the current claim against the defendant seeking to recover of the sum of US\$50 000 based on adultery allegedly committed by defendant with her (i.e., plaintiff's) husband. She claims US\$30 000 for *contumelia* and US\$20 000 for loss consortium.

In her declaration she alleged that the adulterous relationship had spanned over a decade having commenced in 2011 and continued virtually uninterrupted to date and that two children have been sired therefrom.

She further indicated that the defendant continued with the relationship despite she (i.e., plaintiff) having confronted and warned her (i.e., defendant) against continuing with the relationship and despite defendant having made an undertaking to terminate it.

She averred that she has suffered immensely as a result of the adulterous relationship as not only has she lapsed into depression but also that her dignity and social standing have plummeted, particularly in light of the eminence of her husband (and therefore her status) in the community.

The defendant entered appearance to defend and while admitting in her plea to having had an intimate relationship with the plaintiff's husband, in the period stretching from 2012 to 2019 nonetheless completely denied being liable for the damages claimed. Her defence appears to be two-fold, firstly she averred that up until 2019 when the plaintiff confronted her, she was unaware that the plaintiff and her husband were married in a monogamous civil marriage and that the moment this was brought to her attention she immediately put the relationship to an end. Secondly, it was her position, that she has since paid the plaintiff the sum of US\$5 000 as compromise for that very wrong.

The issues

The following were the issues that were identified by the parties at the joint Pre-Trial Conference (PTC) as captured in the minute referring the matter to trial.

- (i) whether the adulterous relationship between defendant and plaintiff's husband which started in 2011 ended in 2019 or it still '*subsists*'.
- (ii) whether the defendant paid US\$5 000 as compromise
- (iii) the quantum of damages

Before proceeding to deal with the evidence, there is need to briefly address the question raised by the defendant in her written closing submissions namely that of the relevance and/or constitutionality of the delict of adultery in contemporary Zimbabwean society. According to her the time has come for the courts to declare that delict of adultery no longer serves any useful purpose and is divorced from reality. Several arguments were put forward in support of this

contention. In the main it was argued that adultery is a pervasive phenomenon committed by two consenting adults and that it should not be the business of the law to police social morality. It was further argued that the delict is discriminatory and illogical as it serves to punish not the adulterous spouse but a third party with whom the adultery is committed. Reference was made to several countries in which the delict was abolished. It was further submitted that provisions in the New Marriages Act, Chapter 5:15 which recognises civil partnerships for purposes of sharing of property between partners who may otherwise be in a classical adulterous relationship are a clear indication that things have changed and that adultery no longer as loathsome as it was in years gone by. It was therefore submitted that the court should declare the common law delict of adultery as unconstitutional.

Having filed her submissions first, the plaintiff did not have an opportunity to address this argument in her written closing submissions. This issue was only brought up by the defendant in her closing submissions and did not feature at any time earlier. In my view, however, although today's society is arguably more permissive and more tolerant towards adultery than it was a few decades ago or even a few years ago, there are many factors that tend to support the retention of the delict. To begin with the steady flow of cases involving claims for adultery damages into the courts is clear testament not only that the generality of people in Zimbabwe still abhor adulterous conduct but also that they believe that persons who commit it should be ordered to pay damages for the wrong. The delict has certainly not been abrogated by disuse. Although notions and perceptions around sexual morality in general and marital fidelity in particular have shifted somewhat in recent times as all things are wont to do, the community in general still frowns upon an interloper who knowingly has an improper sexual liaison with a married person. Most people still believe in the levying of civil sanctions against a paramour who knowingly sexually associates with a married person.

Secondly, not enough information was placed before me by way of empirical studies to support the notion that the delict is an unnecessary albatross around our collective neck, so to speak, more research and consultations need to be undertaken on adultery as a delict (better still, a form of a referendum) before its fate decided.

As for the argument based on civil partnerships under the new Marriages Act, Chapter 5:15, in my view the retention of the monogamous civil marriage alongside several other marriage

formations justifies the concomitant retention of the delict of adultery as it relates to persons who are married under such a regime. The “civil partnership” principle introduced in the Act, was meant to address an entirely different social mischief and certainly not to put an end to the delict of adultery. The delict in my view serves two main purposes, firstly as a deterrent against would-be transgressors and secondly as some form of solace or compensation for the innocent spouse thereby affected. I believe that society is better served its retention than by its abolition. Its abolition would aid rather than retard moral decay as those that may be inclined to engage in it will not be deterred safe in the knowledge that no legal repercussion will befall them for their potentially ruinous conduct

Ultimately therefore, I find that the defendant failed to make sufficiently compelling argument to have the common law delict of adultery as unconstitutional.

The evidence

Reverting now to the evidence led during the trial. The plaintiff and the defendant were the sole witnesses for their respective cases. From the evidence as a whole the following facts are common cause. The plaintiff is a Ukrainian national and is married to a Zimbabwean, the latter who is a prominent medical doctor and provincial medical director for Masvingo province. They are married in terms of the Marriage Act, [Chapter 5:11], which is a monogamous civil marriage which marriage is blessed with two children. Prior to the flare up caused by the alleged adultery claims the defendant enjoyed a close relationship with the plaintiff’s family.

More pertinently for current purposes, it is common cause that from around 2011, the defendant and plaintiff’s husband commenced to have a secretive romantic liaison which the plaintiff only discovered in 2019. Significant is the fact two children were born as a result of that relationship. Finally, it is common cause that pursuant to a meeting held between the parties in 2019 in the wake of the plaintiff’s discovery of the relationship, the defendant paid to the plaintiff, (albeit in instalments), the sum of US\$5000. Whether the said amount constituted an out of court settlement or compromise for the delict in issue as contended by the defendant or it was in settlement of completely different reason as maintained by the plaintiff is bitterly contested.

The following is a synopsis of the evidence by each of the parties: -

Plaintiff’s evidence

The plaintiff testified that in 2019 she unearthed the adulterous relationship which had been raging on behind her back when she noted some suspicious transactions reflected on her husband's secret bank statement. She discovered that several debit entries made thereto were either in favour of the defendant or in connection with the defendant. It was then that she confronted the defendant who apologized for the affair claiming that she was initially an unwilling participant in that affair before the two of them "fell in love".

According to the plaintiff a meeting was then convened in May 2019 in a bid to resolve the matter and map the way forward. Ultimately, according to her, the parties agreed that the defendant would pay her the sum of US\$5 000 representing all monies expended on her by her husband. She itemised these expenses in her evidence and they included the purchase of a motor vehicle for the defendant and import duty thereto, university fees paid for the defendant, costs for repairs to that motor vehicle and insurance premiums therefor among several other expenses. Needless to say, she would categorically deny assertions put to her during cross examination that the said amount was compromise recompense for the adultery that defendant had committed with plaintiff's husband.

It was her evidence that it was agreed as between the parties not only that the illicit affair would be promptly terminated but also that the defendant and plaintiff's husband would cease all forms of communication behind the plaintiff's back.

But alas, according to plaintiff, that was not to be, as she once again stumbled upon communication in the form of text messages on the ubiquitous *WhatsApp* platform, which according to her demonstrated that not only were the defendant and her husband still communicating clandestinely but also undoubtedly informed her that their illicit relationship was alive and well.

According to the plaintiff, the timing of the exchanges between the paramours, (which was almost always around midnight), the tone and language used, (which was warm. Cordial and romantic) and the furtive and abrupt termination of the exchanges between the two each time she stepped into the room where her husband was and the spirited attempts to ensure that she never got hold of their communication were part of the proof indicative of thriving relationship between the defendant and her husband.

Furthermore, she referred to several seemingly discreet pieces of evidence suggestive of the continuation of the relationship. These include photographs retrieved from defendant's mobile phone depicting the defendant, her husband and their (i.e., her husband and defendant's) children apparently enjoying a "family day" in park in the city centre of Masvingo, the fact that her husband had purchased a residential stand which he had proceeded to develop before going on to execute a deed of donation in defendant's brother's name and which house the defendant was currently residing as part of what she viewed as irrefutable proof indicative of the continuation of the illicit affair.

Ultimately therefore she insisted that the claim for damages in the sum of SU\$50 000 was justified in light of the profound trauma, humiliation that she has had to endure on account of the adulterous relationship. She claimed that her marriage has been ruined and reduced to no more than a shell and that she and her husband have ceased all intimacy and do not share a common bedroom.

She testified that she has had to endure indignity and ignominy of the public knowledge of the affair in the relatively small community of the town of Masvingo which hitherto held her marriage on high esteem. She further testified that as a result of the stress induced by the affair, she has lapsed into depression which depression was medically diagnosed and for which she is currently under medical management.

She also stated that she feels profoundly betrayed by the defendant whom she not only regarded as a family friend but also whom she assisted in many different ways. She indicated that for a considerable period of time the defendant was her and her husband's employee at their local surgery.

According to her, to add insult to injury, whereas the defendant enjoyed her husband's financial benevolence, on account of the illicit affair, she has not been the recipient of similar treatment. She elaborated by indicating that whereas her husband had gifted the defendant with a motor vehicle, she at the material time did not have any and similarly unlike the defendant who had the good fortune of having a house built for her (albeit disguised as a gift to her brother) she enjoyed no such benefit.

The defendant's evidence

The defendant stuck to her guns and disputed the claim. According to her when her relationship with the plaintiff's husband commenced, she was completely unaware of the type of marriage plaintiff and her husband had contracted. Her belief that the two were not in a civil monogamous marriage being fortified by the fact that neither of them spotted marriage bands.

Most significant, however, was her evidence that she immediately put an end to the relationship when plaintiff confronted her in 2019 explaining to her that they were married in terms of the then Marriage Act, [*Chapter 5:11*]. In the same breath she testified that being in the wrong she agreed to pay the sum of US\$5 000 as compromise for the adultery, an obligation she discharged in instalments.

As for the evidence supposedly indicative of the continuation of the affair post its discovery in 2019, she branded same is insufficient to prove the adultery. She urged the court to find the evidence of the photographs showing her, plaintiff's husband and their two children as innocuous as nothing precluded the four of them socialising for the sake of the children.

As for the house donated to her brother, she expressed ignorance as to how that came about as she was not privy to the circumstances of the donation. She however confirmed that she presently resides in that house as caretaker thereof at the behest of her brother.

During cross examination the defendant was taken to task on several facets of her evidence. Counsel referred to parties of her account which were at odds with what was pleaded on her behalf. Notably in this regard she was asked to explain why in her evidence in chief she insisted that the adulterous affair came to an end in 2019 yet in her summary of evidence she had mentioned that it was terminated in 2011. Similarly, she was asked to explain why she had misrepresented in her written summary of evidence that the plaintiff's husband was not the father of her two children only to make an about turn in court and testify to the contrary. She attributed the former to a mere typographical error but was at pains to explain away the latter.

The question of liability

Adultery is defined as the voluntary sexual intercourse between a married person and someone other than his or her spouse. It constitutes an injuria against the innocent spouse who may claim for personality infringement and loss of consortium against the third party.

The crisp question that falls for determination here is whether there is sufficient evidence demonstrating the continuation of the adulterous relationship between defendant and plaintiff's husband post 2019. It would appear that from both the pleadings and the evidence that the plaintiff does not wish to pursue damages for the acts of adultery committed prior to the 2019 confrontation between the parties. What is critical therefore is whether the relationship proceeded beyond that stage.

It is common cause that there is no direct evidence of sexual intercourse having occurred between defendant and plaintiff's husband and the plaintiff's evidence hinges almost entirely on circumstantial evidence. The surreptitious and furtive nocturnal communication on the instant messaging social medial platform *WhatsApp* constituting one of the central pillars of her assertion of the existence of such a relationship, the photographs depicting the plaintiff's husband, the defendant and their children being the other.

It is a well-known fact that given the secretive nature of an adulterous relationship, evidence of the same is seldom direct. The parties to an adulterous relationship almost invariably strive to keep their relationship a secret and their sexual trysts more so. Therefore, direct proof of sexual intercourse between the paramours is not always required and an inference of such conduct may be drawn from their conduct. Adultery might be inferred where the evidence showed that the parties desired one another, had the opportunity of gratifying their desire and showed willingness to do so. (*Kleinwort v Kleinwort*, 1927 AD 123; *Goodrich v Goodrich*, 1946 AD 390; *Van Deventer v Van Deventer and Another*, 1962 (3) SA 969 (N) at p. 971; *Smit v Arthur* 1976 (3) SA 378.)

In *Khumalo v Mandishona* 1996 (1) ZLR 434 (H), MALABA J. as he then was had occasion to address the proof required in an action for adultery. He said the following. He referred to the dictum in *Truter v Truter and Anor* NPD 250 at 253 – 253 where SELKE J. said the following;

“It is therefore advisable now to consider in greater detail what was said in the Kleinwort case. The learned CHIEF JUSTICE there classifies the adultery cases under two general heads so far as proof of adultery is concerned. First, there is the class in which there exists direct evidence of misconduct. This is relatively a simple type of case, in that respect that the court is concerned merely with the question of the credibility of the evidence tendered,

and the proof of adultery is not dependent upon inference in the sense we are now considering. This class of case is comparatively rare as has been remarked more than once. Then there is the class of case in which the court is asked not merely to decide upon the credibility of the evidence but also find by inference from the facts and circumstances established that adultery has occurred. The evidence thus relied on may related to one or more specific occasion or it may be less definite in the scope and relate generally to association, a conduct extending over a period of time. This is usually much more difficult of the two classes of case”.

The present case undoubtedly falls into the latter category. The plaintiff relies not so much on specific identified acts of adultery but rather with the general association or liaison between her husband and the defendant. She insists that their association and conduct, particularly when viewed against the backdrop of their uncontroverted adulterous relationship which begot two children as such as to lead to inference of its continuation.

In *Smit v Arthur* (*supra*) the Court of appeal in setting aside an order absolving the respondent from the instance on the basis that insufficient evidence had been placed before the court to draw an inference of adultery said the following:

“It is clearly correct that no single episode or incident deposed to in evidence could, considered in isolation, properly give rise to an inference of adultery... But the proper resolution of the issues in this case must be sought not by appraising each incident simply on its own circumscribed facts, but by a careful survey of the whole of the history of the relationship of the parties and of their behavior at all relevant times. All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom. While the triad of desire, opportunity and willingness will often be sufficient to justify the inference of adultery, it does not follow that each of those elements must be independently proved; depending upon the circumstances, proof of the first two of those elements might justify an inference that the third, too, was present.”

Sight must of course not be lost of the facts that adultery as with any other civil suit needs only to be proved on a preponderance of probabilities. See *Gates v Gates*, 1939 A.D, at p. 155; *Ley v Ley's Executors and Others*, 1951 (3) SA at p. 192; *Van Lutterveld v Engels*, 1959 (2) SA at

p. 702C and that adultery can be established in the same manner as any other fact in a civil case by means of inference from circumstances. See *Kleinwort v Kleinwort*, 1927 AD at p. A 124

In drawing inferences in civil proceedings, the inference sought to be drawn as in criminal proceedings must also be consistent with all the proved facts. However, according to Schwikkard and Van Der Merwe in their book “Principles of Evidence, 4th ed at page 579”, such inference needs to be the only reasonable inference as it is sufficient that it is the most probable inference. The learned authors refer to the case of *A Onderlinger Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) where it was held that a plaintiff who relies on circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences. This is because proof in civil proceedings is on a balance of probabilities and not on the much higher threshold required in criminal proceedings which is beyond reasonable doubt.

In the present matter there is more than ample scope for the drawing of such an inference, here is why. The furtive and clandestine nocturnal communication between defendant and plaintiff’s wife are a dead given away. If such communication was innocent and innocuous as the defendant would want everyone to believe, why would the two only communicate in the dead of the night when the plaintiff was lost to sleep? Why would the communication be abruptly terminated the moment plaintiff stepped into the room? The frequency, tone and nature of the *WhatsApp* messages were such as to lead to an inference of the continuation of the adulterous relationship.

The plaintiff was an impressive witness. She gave her evidence clearly and did not seek to embellish her account. She did not strike me as someone who sought to punish the defendant for something she did not do. In any case she had already forgiven the defendant for past transgressions and had let bygones be bygones. She cannot therefore be accused of acting with malice against the defendant in instituting the present claim. Similarly, she cannot for the above reasons be said to be mistaken for drawing the inferences she drew from the evidence at her disposal. The defendant’s account on the other hand was riddled with improbabilities and inconsistencies. She was also a poor witness on the stand. For example, she sought to ascribe the plaintiff’s anguish and slide into depression to causes other than her husband’s infidelity. She went

so far as suggesting that the plaintiff's depression was attributable to the war in Ukraine where she hails from, or to the fact that she has no house to which to retreat to escape an unhappy marriage.

The defendant sought to suggest that she immediately terminated her relationship with plaintiff's husband upon being made aware of the latter's correct marital status, indicating as she did that that she realised that she was the one being used. Implicit on this evidence, therefore, is the suggestion that she was aggrieved and offended by the entire set up in which she had to put up to play second fiddle as the plaintiff's husband's mistress. Her conduct in the wake of this discovery, however, runs contrary to that of a person so aggrieved. She would continue to meet and lounge with the plaintiff's husband in circumstances suggestive of a very warm and cordial relationship with the plaintiff's husband. The photographs of the picnic in the park speak to such conviviality. The defendant and the plaintiff's husband evinced a clear desire to continue with the relationship it being one of the triad of factors for an inference of adultery to be drawn. The fact that the two would meet albeit on the pretext of doing so for the benefit of the children meant that they had the opportunity to engage in adultery as envisaged in the triad of factors.

Equally compelling is the fact that the defendant has continued to reside in a house registered in the plaintiff's husband's name. One can understand the plaintiff's argument that the deed of donation executed by her husband in defendant's brother was meant to disguise the fact that the house was meant for the benefit of the defendant. The defendant's professed ignorance of the events culminating in the deed of donation is feigned. It would be stretching the bounds of credibility to suggest that the plaintiff's husband with whom she was in a relationship would purchase a stand, develop it, and donate it to her brother and for the latter to ask her to reside therein is all a coincidence!

These factors should not be viewed in isolation but against the backdrop of their confessed previous lengthy romantic liaison. All in all, therefore I believe there is justification in drawing the inference that the relationship between defendant and plaintiff's husband continued beyond 2019.

Having made the above finding the question therefore of whether the US\$5 000 paid to plaintiff by defendant was for adultery damages or for moneys expended on the defendant by plaintiff's husband becomes peripheral. That is because even if it constituted damages for adultery committed up to 2019 as contended by defendant, that would not in the least absolve her from

liability for damages for adultery that took place post 2019. In other words that amount was for past transgressions and cannot be taken as a licence for future adultery.

Further in this regard I find, the plaintiff's evidence that the amount paid to her represented the recovery of sums of money expended to defendant and defendant's relatives by her (i.e., plaintiff's) husband quite convincing. She produced a bank statement on which such sums were highlighted. She indicated that she excluded the amounts apparently expended on the children. It cannot be a coincidence that the total of the sums expended on the plaintiff and her relatives as highlighted on the bank statement would also be the same amount the plaintiff demanded as damages. The probabilities favour the plaintiff's version.

Unfortunately, the text of the two documents which embody the agreement was not very helpful as neither of them capture the basis thereof. They only reflect the defendant's acknowledgement of indebtedness to the plaintiff in the said amount and the former's undertaking to extinguish her indebtedness in instalments. Although it would appear that the first document dated 3 December 2020 was authored with the assistance of personnel at the Legal Aid Directorate, no witnesses subscribed to the agreement and no witnesses were called by either party.

The burden to prove the defence of compromise rested squarely on the defendant. The passage from the case of *Pillay v Krishna and Another* 1946 AD 946 at 951 -2 is instructive. The following was said.

“If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with: where the person against whom the claim is made is not content with a mere denial of that claim but sets up a special defence, then he is regarded quoad that, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it..... But there is a third rule, which voet states as follows. He who asserts, proves and not he who denies, since a denial of a fact cannot naturally beprovided it is a fact that is denied and that the denial is absolute ... The onus is on the person who alleges something and not on his opponent who merely denies it.

In the present matter, the defendant raised the special defence of compromise, but was unable to prove the same. To conclude this segment therefore, I find that it was not shown on a balance of probabilities that the amount of US\$5000 agreed upon as between the parties and paid by the defendant to the plaintiff represented compromise for the adultery committed by the defendant with plaintiff's wife. Furthermore, that even if it did, it did not absolve the defendant of the liability of further acts of adultery committed post that agreement.

This then brings me to the third and final segment of the enquiry, namely the quantum of damages payable. Adultery damages are generally claimable under two separate heads, namely *contumelia* and loss of consortium. *Contumelia* encompasses the injury, insult and indignity suffered by the plaintiff as a result of the adultery and loss of consortium relates to the loss of comfort society and service of the wife of husband and as the case may be as a result of the adultery committed by the defendant (see *Khumalo v Mandishona* (supra); *Viviers v Killian* 1927 AD 449; *Nyakudya v Washaya* 2000 (1) ZLR 653 (H) and *Takadini v Maimba* 1996 (2) ZLR 737 (S)).

In *Nyakudya v Washaya* 2000 (1) ZLR 653 (H) the court referred to the factors listed in *Khumalo v Mandishona* (supra) in considering the appropriate quantum of damages in a claim for adultery. These are;

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

Contumelia

In this regard the plaintiff cast a sorrowful and pitiful sight on the witness stand as she recounted the humiliation, pain and indignity she has had to endure on account of the adulterous relationship. She indicated that given the small size of the Masvingo community and the prominence of her husband who happens to hold a top government post in the health sector, her humiliation has been severe. She testified that as a consequence she has lapsed into depression necessitating medical intervention. This, according to her, has been exacerbated by the fact that she is already a cancer patient. She produced documents in respect of the depression diagnosis.

That the plaintiff holds a position of considerable esteem in the community of Masvingo can hardly be disputed. She testified as much and the defendant did precious little to gainsay the same.

Regrettably the defendant from her evidence and demeanour in court did not demonstrate much by way of contrition nor has she apologised for the latter acts of adultery. Equally, not

enough evidence was led on her socio-economic status but one clearly observes that her position is a stark contrast to that of the plaintiff.

The defendant's resolve to continue with the relationship with plaintiff's husband despite having been initially caught in 2019 in my view aggravates the quantum awardable.

Loss of consortium

Under this head the plaintiff claimed the sum of USD\$20 000. She testified that her marriage has all but collapsed as she and her husband have virtually become strangers. They now use separate bedrooms implying that they have lost all semblance of intimacy. They have been reduced to mere civility towards each other as all they do now is to exchange greetings before retreating to their separate bedrooms.

The amounts awarded in comparable cases range from USD\$5000 to USD\$20 000 depending on the particular set of circumstances of that case and having regard to all the circumstances of this case, I am of the view that the appropriate award of damages for adultery is as follows: -

- (a) **USD\$5 000** in respect of *contumelia*; and
- (b) **USD\$8 000** in respect of loss of consortium

Accordingly, the plaintiff's claim succeeds and the defendant is hereby ordered to pay plaintiff;

- (a) USD\$13 000 or its equivalent in value in Zimbabwe dollars at the official interbank rate calculated on the date of payments with interest thereon at the prescribed rate from the date of issuance of summons to date of full payment.
- (b) Costs of suit.