

MAKANYARA PERPETUAL MAFUNGA
versus
NATASHA GREEN

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE 26 May 2022, 29 June 2022

Unopposed application: default judgment adultery damages

MUCHAWA J: This matter was placed on the unopposed roll as the respondent who had been duly served with summons had neither entered an appearance to defend nor filed a plea and the time within which to do so had expired with respondent being barred.

Background

The applicant's evidence is that she got married to Evans Kudzayi Gwekwerere under the Marriage Act [*Chapter 5:11*] on 1 November 2020, which marriage still subsists, after having been married traditionally beginning of 2020. The respondent is alleged to have associated with applicant's husband in an adulterous relationship despite knowledge of the existence of the marriage between applicant and her husband. The respondent is alleged to be currently cohabiting with the applicant's husband. Applicant claims to have discovered the adulterous relationship on 21 November 2020.

The applicant's marriage was not blessed with a child but respondent and applicant's husband are said to have a child together.

A letter of demand was addressed to the respondent on 6 October 2021, by applicant's legal practitioners. This was neither responded to nor acknowledged. It is the applicant's further evidence that attempts to engage the respondent have been unsuccessful. It is alleged that the respondent has brazenly violated the sanctity of applicant's marriage and in the process has seriously disrespected and injured the applicant's feelings and dignity particularly as the husband has left applicant and moved in with the respondent. The applicant claims to have lost the love and affection of her husband as well as loss of support, comfort, status and luxury that comes with a stable marriage. The applicant alleges that she is now exposed to sexually transmitted diseases

including HIV and AIDS as the adulterous relationship is ongoing. Furthermore, the applicant alleges that due to this adulterous affair, her marriage relationship with her husband is now strained and she has suffered stress and depression. Her confidence, personal and social dignity is said to have been greatly affected.

The respondent is alleged not to have shown any contrition in this matter. The applicant claims a total of ZWL\$3 500 000.00 (three million five hundred thousand Zimbabwean dollars) as adultery damages which are broken down as follows;

- ZWL\$2 500 000.00 (two million five hundred thousand Zimbabwean dollars only) for *contumelia* in respect of injured feelings, loss of love and affection; and
- ZWL\$1 000 000.00 (one million Zimbabwean dollars only) for loss of comfort, society and services of her spouse (loss of consortium)

Further, the applicant claims interest on the total amount of ZWL\$3 500 000.00 at the prescribed rate from the date of demand, 5 October 2021, to date of full payment plus costs of suit on a legal practitioner and client scale.

The Law

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. 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.

Any claim for damages for mental breakdown arising out of the adultery must be supported by medical evidence.

Loss of consortium is the main element in the estimation of damages. The loss will be less where the respondent has condoned the adultery and the marriage still subsists. It will also be less where to the knowledge of the other spouse the offending spouse has been previously been unfaithful with various women and thus the possibility of the adultery occurring is not unexpected and the distress caused by the adultery is not so severe as it otherwise have been.”

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”

Analysis

The applicant has correctly averred that the respondent was involved in the adultery with her husband, well knowing of the existence of the marriage and that it was a civil marriage.

The applicant’s claim however has a higher amount claimed for *contumelia* rather than loss of consortium yet case law cited above makes it clear that loss of consortium is the main element in the estimation of damages. It may be that since the applicant was civilly married on 1 November 2020 and discovered the adultery some three weeks down the line, her case is one of, more injured feelings than loss of consortium.

In *Katsumbe v Buyanga* 1991 (2) ZLR 256H at p 258-259 ROBISON J highlighted factors relevant to assessment of adultery damages. He remarked:

“Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of the duty of marital fidelity which each spouse owes the other by committing adultery with the one spouse, the court in the absence of mitigatory circumstances, should be seen in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of expedient reasons. The courts should ensure as far as is reasonably possible, that aggrieved spouse who approaches them is not made to feel after the award of damages that the adulterer or adulteress has been the winner and that it would have been better for the aggrieved spouse to have taken the law into his or her own hands. Hopefully we have not reached the stage where we have to be told that adultery is not something to be eschewed and condemned. Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of vital institution of marriage, the courts will only be party to society’s further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra marital sex and which has landed the world in the sexual morass over which the monster, AIDS, now presides in all frightening aspects.”

Turning now to the quantum of damages in this case, I find the following to be features relevant to the damages to be awarded to the plaintiff for the *contumelia* suffered by her, namely;

- The applicant had been in her civil marriage for around three weeks when she discovered the adulterous affair
- She claims that she has suffered stress, loss of confidence, and depression. There is however, no medical report in support of the mental breakdown as required in *Misho v Sithole supra*
- She has suffered an infringement of privacy, dignity and reputation
- The fear of contracting HIV and AIDS is heightened by the birth of a child between applicant's husband and the respondent which goes to show that there is an unprotected sexual relationship.
- The respondent has not apologized nor shown any remorse and instead is now co habiting with applicant's husband
- The court was not favoured with the applicant's social and economic status and that of the respondent and her husband as well as their characters in order to properly assess the level of indignity and infringement of dignity occasioned by the affair.

The claim for loss of consortium has the following relevant features;

- The applicant's husband has moved out of the matrimonial home depriving her of love, companionship, sexual privileges and assistance in good and bad times which a spouse is entitled to expect and consequent mental distress. This happened during the honeymoon phase thus becoming more distressful

In the case of *Dambudzo Oliver Munyebvu v Talent Musvibe supra* TSANGA J observed that it must be borne in mind that the local currency has been devaluating rapidly and what was ZW\$40 000 in 2020 is not the same value to date. I am cognizant of this and will relate to the applicant's claim in United States Dollar terms so as to be able to compare this to awards granted in previous cases. The claim for ZWL\$2 500 000.00 at today's Reserve Bank of Zimbabwe rate of ZWL\$338.4921 per US\$1 translates this claim for *contumelia* to US\$7 385.70. The claim for loss of consortium is set at ZWL\$1 000 000.00 and at today's Reserve Bank of Zimbabwe rate of ZWL\$338.4921 per US\$1 it translates to US\$2 954.29

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 \$20 000-00 awarded a total of US\$5 000-00 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\$5000-00, depending of course on the circumstances of the case.¹

Given the shortcomings pointed to in the evidence, the length of the marriage before the adultery was discovered, case law and the need to take into account fluctuations in the value of money and the need to ensure that the larger claim is that of loss of consortium, I believe a total award in the amount equivalent to US\$3 000.00, is fitting in *casu*. This is broken down as follows;

Contumelia- US\$1 200.00 which is ZWL 406 190.52

Loss of consortium- US\$1 800.00 which is ZWL\$609 285.78

Total is **ZWL\$1 015 449.30**

I therefore make the following order

1. The respondent is ordered to pay the applicant: The sum of **ZWL\$1 015 449.30** which is made up of; ZWL 406 190.52 being damages for *contumelia*; and ZWL\$609 285.78 being damages for loss of consortium; together with interest to be calculated at the prescribed rate from the date of this judgment until payment is made in full.

1.1 Costs of suit.

R Mhandu Attorneys, Applicant's Legal Practitioners

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.