

GODFREY TAFU
versus
D. DENYA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 5 AND 21 APRIL 2004

Civil Trial

Mr *Gijima*, for the plaintiff
Mr *Mazonde*, for the respondent

BHUNU J: This is an application for absolution from the instance at the close of the plaintiff's case. The facts giving rise to the legal dispute between the parties are to some extent common cause.

What is not in dispute is that the plaintiff's ex wife Patricia Tafa was employed at Merchant Bank of Central Africa as the defendant's private secretary. The defendant was employed as the financial director at the material time.

During the period extending from the 4th of August 2002 to the 6th of August 2002 the defendant had occasion to attend a directors meeting in South Africa. It is common cause that during the same period the plaintiff's ex wife Patricia was also in South Africa. The purpose for which she was in South Africa is in dispute.

It is however not in dispute that before travelling to South Africa she lied to the plaintiff her then husband that she was going to attend a Secretary's conference.

After her departure and upon investigations the plaintiff discovered that Patricia had in fact lied to him that she was going on a business trip to South Africa. Upon discovering that the defendant was in South Africa at the same time, booked at a hotel about one kilometer from where Patricia was booked he became suspicious.

As a result of his suspicion he phoned Patricia who compounded his suspicion by lying to the plaintiff that she was in the company of a colleague

who to the plaintiffs knowledge had not travelled to South Africa at all. She was still at work in Zimbabwe.

On those facts the plaintiff concluded that the defendant and Patricia must have indulged in sexual intercourse while in South Africa.

Apart from mere speculation and conjecture there was no shred of evidence tending to show that while in South Africa the defendant met Patricia and had sexual intercourse as alleged by the plaintiff.

Faced with that hardship and the prospect of losing credibility the plaintiff under cross-examination made an about turn and began to allege that when he confronted Patricia on the phone while she was still in South Africa she confessed having committed adultery with the defendant. Patricia subsequently made several confessions threatening to kill herself upon her return to Zimbabwe.

In an attempt to bolster his case the plaintiff called Patricia to confirm his assertion that sexual intercourse indeed took place between herself and the defendant while she was still married to the plaintiff.

Patricia however contradicted the plaintiff's evidence in every material respect. She denied ever having had sexual intercourse with the defendant as alleged by the plaintiff or at all.

She admitted having been in South Africa at the material time but gave an innocent explanation for her presence in South Africa at the time. She explained without any contradiction that she had gone to South Africa for the purpose of cashing her travellers cheques being a refund from a flopped deal to buy a car from Japan. The deal flopped due to the plaintiff's meddling. He was demanding that the money be paid to him through Trust Bank where he worked.

Patricia lied to the plaintiff that she was going to South Africa to attend a secretary's conference whereas in truth and in fact she was going to cash her travellers cheques. She lied because if she had told the truth she feared the plaintiff would have demanded the money.

In his evidence-in-chief the plaintiff had alleged that as proof of a sexual relationship between the defendant and Patricia the defendant had facilitated

her obtaining foreign currency in contravention of the Exchange Control Regulations.

In support of his assertion the plaintiff called 3 bank officials from the Merchant Bank of Central Africa, Mr Asbury the general manager, Doctor Hatendi the then managing director and Mrs Morris the senior manager at the back office.

It is needless to say that far from confirming the plaintiff's story these three high ranking officials contradicted his evidence in every material respect. They all denied that the defendant had facilitated the unlawful allocation of foreign currency to Patricia to fund her trip to South Africa. Bank records established that Patricia had lawfully withdrawn funds from her foreign currency account which were free from any Exchange Control Regulations.

The long and short of it all is that the plaintiff's allegations are frivolous and vexations based purely on mere conjecture and speculation.

His conduct in omitting to rely on the alleged confession of adultery by his wife in his summons and declaration, pleadings, at the Pre-trial conference and in his evidence-in-chief leads to the irresistible conclusion that an attempt to rely on such evidence under cross-examination is an attempt to close the stables after the proverbial horses have bolted. It is highly unlikely and not in the least probable that had his ex wife confessed the adultery the plaintiff who was ably represented could have failed to rely on such confession at the first opportunity.

Having regard to all the material facts and evidence before me I find as a fact proved that there is no evidence upon which a reasonable court acting reasonably might make a reasonable mistake and give judgement in favour of the plaintiff.

As regards costs it is clear to me that the plaintiff's marriage to Patricia was under stress and unstable. He cannot be faulted for being suspicious when Patricia lied to him to travel to South Africa at a time when her boss was also in South Africa close to where she was lodging. In order to clear his conscience and suspicions I think he was entitled to have his day in court.

That being the case there is no bases for penalising him with an order of costs on the higher scale.

In the final analysis it is accordingly ordered that the application for absolution from the instance be and is hereby granted with costs.

Mbidzo Muchadehama and Makoni, the plaintiff's legal practitioners
Atherstone and Cook, the defendant's legal practitioners