

TIMOTHY CHINYADZA
versus
MELTON PHIRI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 29 and 30 June 2009

Civil Trial

Plaintiff in person
Defendant in person

KUDYA J: On 19 September 2008, the plaintiff issued summons out of this court seeking \$50 million for adultery damages against the defendant. The defendant denied the allegations in his plea filed of record on 17 December 2008. At the pre-trial conference held on 19 May 2009, the amount claimed was amended by consent to US\$5 000-00. The matter was referred to trial on the following issues:

1. Was there an adulterous relationship between the defendant and plaintiff's wife?
2. Did the plaintiff suffer the damages claimed?
3. If, so the quantum thereof.

The plaintiff testified and called the evidence of two other witnesses. The defendant also gave evidence and called the evidence of one further witness. A single documentary exhibit, the marriage certificate of the plaintiff and his wife, was produced in evidence.

It was common cause that the plaintiff was married in terms of civil rites on 6 September 1997. No children were born of the marriage. The plaintiff's wife first worked as an intern with the Zimbabwe Broadcasting Corporation in January 2000 before joining the corporation on a fulltime basis in October 2003 on completion of her studies at the Harare Polytechnic. She worked in the same department with the defendant until he left employment in 2005 to join the Postal and Telecommunications Regulations Authority of Zimbabwe. The plaintiff averred in his evidence that his wife introduced him to the defendant during a football match between Sporting Lions and CAPS United during the 2004-2005 football season.

In his declaration the plaintiff averred that the adulterous relationship occurred between 2004 and July 2007. In his summary of evidence he averred that it commenced in 2000. In evidence the plaintiff stated that he left to work in South Africa in 2007 where his wife joined him later that year. When she came to South Africa, she was emaciated and sickly. She was diagnosed with tuberculosis and put on treatment. She did not respond to treatment. She was tested for and found with the HIV virus. She voluntarily confessed to him that she had contracted the virus from the defendant and detailed the adulterous relationship with him over the course of the eight years beginning from 2000. She described his flat where most of the trysts were performed and revealed that they also had sexual trysts at a lodge in Harare and in a car. She described to him some intimate parts of the defendant's anatomy which he revealed in his testimony. He was tested HIV positive both in Zimbabwe and South Africa.

He was devastated by the change in his health status. He left his employment as a driver in South Africa because he could not mentally come to terms with his new status. He became a danger while behind the wheel as he was troubled by the turn of events. He toyed with the idea of committing suicide. He was satisfied that his wife told him the truth after he phoned the number that appeared in her diary under a woman's name and it was answered by the defendant who also confirmed it was his. As a result of the adulterous liaison, he separated from his wife. His privacy was invaded, his dignity and reputation ruined. He was emotional and cried during his testimony. He felt belittled amongst his kith and kin by the adultery as his wife had been a model wife. He sought damages for the hurt in the sum of US\$ 2 500-00. He lost the comfort, society and services of his wife as a result of the adultery and sought damages for the loss of consortium in an equal amount. He was asked ineffectual questions during cross examination, which left his testimony unscathed.

His wife testified. She gave detailed evidence of her adulterous relationship with the defendant from January 2000 to December 2006. She had sexual intercourse with him at his flat from January 2000 until his marriage. Thereafter they continued to do so at a lodge along Herbert Chitepo Avenue in Harare and in Room 40 at their workplace. She related one incident in which she had sexual intercourse with the defendant in the presence of his wife at his flat; where the two women took turns to sexual entertain the defendant. She also referred to another incident when they did so in a car at a bus stop along the Seke road as he was driving her to her matrimonial home. She stated that she advised him of her marital status from the very beginning when he proposed love to her. He was undeterred by her marital status. She

confirmed that she introduced him to her husband one Sunday afternoon at Rufaro Stadium during the BP Cup final between Motor Action Football Club and CAPS United Football Club. She at all times wore her wedding ring on the appropriate finger on her left hand.

She stated that she was the one who revealed to her husband about the affair in order to expiate the error of her ways. She stated that she gave the defendant's two e-mail addresses and cell number, which was recorded in her diary under a female pseudonym, to the plaintiff.

She was cross-examined by the defendant. He heaved a huge sigh before he commenced cross examination. She did not recall the various dates and times on which the incidences took place as she had not diarized them. In any event she never anticipated that she would at some future date confess her error to her husband. She maintained her evidence in chief and described the sexual anatomy of the defendant in detail.

She gave her evidence well. It was detailed. It was consistent with what she told her husband. The two discrepancies on the description of the defendant's testes and the name of the team which played CAPS United on the date that she introduced her husband to the defendant were insufficient to dent her credibility. Her version as to the existence of a love affair between her and the defendant was confirmed by Memory James, who was her best friend and room mate at the Harare Polytechnic in 2000. I was satisfied from her demeanor and forthrightness that she knew the defendant back then as a boyfriend of the plaintiff's wife. Memory's testimony that the plaintiff's wife wore a wedding ring at the time was confirmed by Mugove Gada, a witness called by the defendant. I believed her story in full.

The defendant baldly denied any knowledge of the marital status of the plaintiff's wife. His denials sounded hollow for a man who worked with the plaintiff's wife for seven years. He was adamant that he never saw the wedding ring on her. He was her supervisor and took part in interviewing her for the job she landed after her training. His denials painted him as an untruthful witness. In my view, he denied any knowledge of her marital status in a bid to distance himself from the love affair he pursued with her. He falsely denied that he was living positively with the HIV virus in his pleadings and when he cross examined the plaintiff and his wife. He was an untruthful witness. I did not believe his version of events where it differed with that of the plaintiff's wife.

I am satisfied from the evidence that was led that the defendant committed adultery over a seven year period with the plaintiff's wife. In the process he infected her with the HIV

virus and she in turn infected the plaintiff. I answer the first issue that was referred to trial in the affirmative.

The two issues that follow the first one concern the quantum of damages that the plaintiff suffered as a result of the adulterous relationship between his wife and the defendant. He claimed the sum of \$US2 500.00 for *contumelia* and a further US\$2 500.00 for the loss of consortium. In both *Nyandoro v Tizirai* HH 12 /06 and *Gombakomba v Bhudhiyo* HH 118/06 I adopted the definition of contumelia set out in *Doyle v Salgo (1)* 1957 R & N 840 at 844A, *Katsumbe v Buyanga 1991(2)* ZLR 256(H) at 258C and *Takadini v Maimba 1996 (2)* ZLR 737 (S) at 738F. *Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery committed by a defendant with his or her spouse.

In *Khumalo v Mandishona 1996 (1)* ZLR 434 (H) MALABA J, as he then was, set out the five factors that a court considers in arriving at an estimate of the damages due to a plaintiff for *contumelia*. These are:

- a. the character of the spouse involved
- b. the social and economic status of the plaintiff and the defendant
- c. whether the defendant has shown contrition
- 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.

In the present case, the defendant instigated the love affair with the plaintiff's spouse. He knew that she was married. The wife was a religious woman who fell from grace at the hands of the defendant. At the commencement of the affair her desire to pass her course drove her to ingratiate herself to the defendant. After she passed she used the relationship to obtain a job with the defendant's employer and thereafter to remain in good books with him. She continued with the affair after he left employment. It seems to me that her conduct revealed her as a weak woman of low morals. Her character would be mitigatory to the defendant.

As regards the social and economic status of the two protagonists, the plaintiff had been married for three years when the adulterous union commenced. He was firstly a teacher, then became an insurance agent and a self employed businessman before he immigrated to South Africa where he worked as a driver. The defendant was an electronic engineer who was a superior to the plaintiff's wife. At first he was a bachelor who then married a classmate of the plaintiff's wife. From the evidence of Memory, it was apparent that the defendant had

better financial resources than the plaintiff. He rose through the ranks to become chief engineer and manager in his department during the currency of his love affair with the plaintiff's wife. He used his social and economic muscle to keep the plaintiff's wife enthralled by him. He infected her with HIV, which she passed on to the plaintiff. These are aggravating features against the defendant.

The defendant despite the clear evidence against him maintained his headstrong denial of the wrong he did. He has not apologized or shown contrition for his conduct. This aggravated the damages against him.

The fourth factor concerns the protection of the institution of marriage. The marital relationship has been curtailed by the transmission of HIV to the plaintiff by the defendant through the plaintiff's wife. The plaintiff is understandably troubled and worried by his fate. He lost his job in South Africa. He is apprehensive about his future prospects in life and is haunted by the specter of stigma that he will face. The conduct of the defendant was brazen. He continued to indulge in unprotected sexual intercourse with the plaintiff's wife with the knowledge of his health condition. I find this aggravates the damages.

Lastly, comparable cases that are available were pegged at a time when Zimbabwe dollars were in vogue before the advent of the prevailing multi-currency economic regime. In *Nyandoro's* case, *supra*, at p. 23 of the cyclostyled judgment I set out the prevailing cross rates between the Zimbabwe dollar and the US dollar in 1996, 2000 and 2006 as being 9: 1; 38: 1 and 100 000 :1, respectively. In *Nyandoro's* case the damages I awarded in local currency for contumelia were equivalent at the time to USD1 000. The facts in the present case are more serious than those in that case.

In the exercise of my discretion, after weighing the above mentioned factors, I estimate the damages for *contumelia* in the sum of USD 1 500.00.

It is clear from the facts of this case that the defendant has lost consortium as a result of the adulterous relationship between his wife and the defendant. He separated with his wife on 6 April 2008 after a ten year marriage. He lost the sexual intimacy, trust, friendship and companionship he used to have with his wife. He lost all the other services that a husband receives from his wife in marriage. The marriage was stable for the plaintiff. The marriage has broken down. It is recognised that in those circumstances the damages would be higher. In *Nyakudya v Washaya* 2000 (1) ZLR 653 (H) the plaintiff was awarded \$13 000 for loss of consortium, then equivalent to approximately USD 340. The aggravating features in the

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present case are higher than in that case. I would estimate damages for loss of consortium in the present case to be US\$500.

Accordingly, it is ordered that the defendant shall pay the plaintiff the sum of US\$ 2 000.00 as damages for adultery; and costs of suit.