GETRUDE MUPAZVIRIWO
versus
BLESSED KUBETA

HIGH COURT OF ZIMBABWE
MAKONI & MAWADZE JJ
HARARE, 27 JUNE & 25 JULY 2013

F. M. Katsande, for the appellant
Ms P. Kashiri, for the respondent

Civil Appeal

MAWADZE J: This is an appeal against the entire judgment of the Bindura magistrates court delivered on 28 March 2012.

The appellant appeals against the entire judgment in which the court a quo granted an absolution from the instance.

The respondent also filed a cross appeal in which he seeks to have the appeal dismissed on the basis that the court *a quo* did not have the jurisdiction to deal with the matter.

The appellant's grounds of appeal against the entire judgment are couched as follows;-

"1. The Learned magistrate misconceived the prerequisites of breach of promise which are;-

"(a) that the defendant made a promise to marry the plaintiff.

(b) that the plaintiff accepted the promise to marry and communicated his/her acceptance to the defendant and

(c) that the defendant breached the promise to marry without just cause."

Mazarire v Magoronga 1992 (1) ZLR 282 (SC) at 255 F-G.

1. Contrary to the established principle of law on the subject the Learned magistrate found that the promise to marry had to be published and or

witnessed by third parties. In that extent the learned magistrate went remiss, misdirected himself and erred in law.

2. The learned magistrate erred and misdirected himself in law when he found that a claim of *contumelia* is vitiated by the plaintiff's consent to licentious behaviour with the defendant who jilted her.
3. The learned magistrate ought to have found that the plaintiff's participation in the defendant's advances was a result of the latter's wiles and solitations which is what aggravated his moral blameworthiness when he unjustifiably repudiated the amorous relationship and promise to marry.
4. The learned magistrate ought to have found that the deception and glib talk is the basis upon which the claim for *contumelia* was premised and not the consent to the lewd practice.

Wherefore the appellant prays that the judgment by the learned Provincial magistrate be set aside on appeal and the following substituted therefore;

" The will be judgment for the plaintiff in terms of the summons.

5. The respondent shall bear the costs of this appeal."

On the other hand, the respondent's grounds of the cross appeal are as follows;-

"Grounds of Appeal

1. The learned magistrate erred by entertaining a matter in which the claim exceeded the monetary jurisdiction of the court.

   Wherefore the respondent prays that;-

   (a) The court a quo's decision to dismiss the point *in limine* raised by the respondent be and is hereby set aside.
   (b) The plaintiff's claim is hereby dismissed.
   (c) The plaintiff shall pay the costs of this appeal."

In his submission to the court Mr *Katsande* for the appellant took the point that the cross appeal was filed out of time in terms of the rules of the magistrates court and therefore should be regarded as a nullity.

The notice of appeal was issued out at both the High court and Bindura magistrate's court on 29 March 2012. The cross appeal was filed on 23 April 2012. The

question which arises therefore is whether the cross appeal was filed in accordance with the rules.

Order 31 Rule 2 of the magistrates court (civil) Rules 1980 provides as follows;-

" 2 Method of noting appeal or cross appeal

(1) ……..

(a) ……..

(b) …….

(2) …….

(a)……

(b) ……

(i) …….

(ii) ……

(3) A cross appeal shall be noted by the delivery of the notice within seven days after the delivery of the notice of appeal."

Mr *Katsande* for the appellant submitted that the notice of appeal was issued out on 29 March 2012 and served on the respondent on 2 April 2012. The respondent only filed the cross of appeal on 23 April 2012 well after the prescribed seven days. The provisions of O31R 2(3) are mandatory. The notice of the cross appeal by the respondent fails to meet the requirements of the magistrates court rules and is therefore a nullity.

Although the respondent's cross appeal is a nullity this court is still seized with the material issue as to whether the court a quo had jurisdiction to entertain the appellant's claim.

The appellant's claim as per the prayer in the particulars of claim is couched as follows;

" Wherefore the plaintiff prays for judgment as follows;-

(a) US$2000 damages for breach of promise to marry

(b) US$1000 for *contumelia*

(c) Costs of suit."

At the time the claim was brought before the court *a quo* by the appellant the monetary jurisdiction of the magistrates court was fixed at US$2000. Mr *Katsande*'s

submissions were for to the effect that the claim by the appellant was well within the monetary jurisdiction of the court *a quo* as appellant is entitled at law to claim damages for breach of promise to marry separately from damages for *contumelia*. The logic of this argument would be that a claim for breach of promise to marry is a separate cause of action from one for *contumelia* when one deals with the same action for breach of promise to marry. This is incorrect. The action for breach of promise to marry is a composite one combining both the contractual and delictual elements. See *Guggenheim v Rosenbaurn* (2) 1961 (4) SA 21(W.) In practice these two elements must be clearly separated in the pleadings and in the assessment of damages. However this does not mean that these are two separate causes of action. The cause action remains breach of promise to marry. In the same vein while delictual damages maybe aggravated by contumelious or injurious conduct by or on the behalf of the defendant, such *contumelia* does not constitute a separate cause of action. While it is correct for the appellant to specify the nature of damages claimed and the quantum thereof such a cause of action should remain within the jurisdiction of the magistrate court. In *casu* the court *a quo* could only have competently dealt with a claim for a breach of promise to marry inclusive of both contractual and delictual damages which is within its monetary jurisdiction of US$2000.

The law on what constitutes breach of promise to marry is clear. See *Mazarire v Magoronga* 1992 (1) ZLR 282 at 255E-H. The essential elements for a breach of promise to marry can be summarised as follows;-

(i) that the defendant made a promise to marry the plaintiff

(ii) that the plaintiff accepted the promise and communicated his or her acceptance of promise to the defendant and

(iii) that the defendant had broken his or her promise without just cause.

It is correct that the learned magistrate, with all due respect, misdirected himself on the law of breach of promise to marry. It is illustrative to refer to the relevant part of the learned magistrate's judgment in which he said;

> " The law on breach of promise to marry is clear. For a breach of promise to marry claim to be customed one would be called upon to establish the existence of a promise made through an engagement party which would be

witnessed by a number of people in the exchange of some love tokens before other relatives. Now in this particular case such did not happen. What we has is word of mouth maybe between the parties such promise was never witnessed." (sic).

While it might be very useful corroborating evidence for the plaintiff to show that there was an engagement witnessed by a number of people and that love tokens were exchanged between the parties in order to prove that a promise to marry was made by the defendant such issues are not essential elements of the breach of promise to marry. To that extent it is therefore clear that the learned magistrate misdirected himself and erred in law.

Having made that finding the question still to be answered is whether on the evidence on record the learned magistrate was correct to grant an absolution from the instance. Put differently, the question is whether the appellant in the court *a quo* made a case of breach of promise to marry. At this stage it is useful to deal with the brief facts of the matter.

The appellant and the respondent are teachers at Nzvimbo Primary school. The respondent joined the appellant in 2003 at this school. The appellant's love life has not been put to issue. She is much older to the respondent (respondent put the age difference at 10 years). The appellant's first husband died. At Nzvimbo Primary school she was "married" to a fellow teacher Tawanda Gumbo whom she was staying with when the respondent joined them. The appellant and Tawanda Gumbo had one child born out of their "marriage." It has not been disputed that the appellant gave the respondent a very warm welcome when he joined the appellant and her husband at Nzvimbo Primary school. In fact she gave him a basket full of green maize mealie cobs. The respondent became a close friend to the appellant's "husband" Tawanda Gumbo. The respondent says both the appellant and her "husband" would frequently visit him at his house at the same school. From the evidence on record Tawanda Gumbo deserted the appellant and eloped with a house maid who was working for the appellant and Tawanda Gumbo. Tawanda Gumbo apparently transferred from Nzvimbo Primary school where the

respondent and the appellant remained. This is where the dispute between the parties start.

It is common cause that after the appellant had been deserted by her "husband" Tawanda Gumbo she remained close to the respondent. Both the appellant and the respondent said that the respondent helped the appellant who was taking lessons in accounts and the appellant would visit the respondent's house and vice-versa for this purpose.

The appellant's version of events is that it was during that period in 2009 when the respondent proposed love to her. The appellant said the courtship started after her "husband" had left and the respondent was assisting her with lessons in accounts. In her evidence she said she was reluctant to accept the love proposal but after a month she gave in as the respondent persisted. She said the respondent persisted saying she wanted to marry her. In her particulars of claim the appellant said after accepting the love proposal then love relationship blossomed and that the local community became aware of the two love birds who would be seen together on divers occasions and at different places. This is the time the appellant said the respondent promised to marry her as they discussed and planned their future.

In her replication the appellant said the affair between them was very passionate and they became intimate. Under cross examination she however said they did not have sexual intercourse but that they caressed each other while naked and that she performed oral sex by sucking respondent's penis. In her evidence in chief the appellant said her friends Rumbidzai Mashumba, Bertha Muchirikuenda and Musa Mwedzi were aware of the love relationship.

According to the appellant it was sometime in 2010 that she realised that the respondent was drifting away, becoming emotionally detached and indifferent. In her particulars of claim the appellant said when she noticed this she wrote a letter (through her legal practitioners) to the respondent in order to ascertain the fate of their relationship and that the respondent verbally informed her he no longer wanted to marry her. In her replication the appellant said when the respondent showed signs of withdrawing from the affair she sought the intervention of church elders but the respondent evaded them. She

said the respondent started to flirt with other women and she caught him in a compromising position with another woman. This caused her to advice her legal practitioners to write to the respondent who did not dignify this with any response. In her evidence in chief she said the respondent refused to be introduced to her uncles or relatives.

According to the appellant the respondent breached the promise to marry her and this was unjustified. She said she felt hurt, ridiculed and humiliated after being jilted. The appellant said she had taken the relationship seriously and had agreed to transfer from the school with the respondent after which filed her application but the respondent did not. The appellant said the respondent's conduct was contumelious as he deceived her, wasted her time, embarrassing her and prejudicing her as she turned down other suitors. Her school work was adversely affected and her friends were aware of all that especially Rumbidzai Mashumba.

The respondent on the other hand denied ever proposing love to the appellant. He denied that he fell in love with the appellant, let alone that the parties ever got intimate in any manner. While the respondent said he remained friendly to the appellant helping her in accounts lessons and discussing social issues he insisted this never culminated in a love relationship. The respondent said the appellant took him to task on why he did not alert her of the secret affair between the appellant's "husband" Tawanda Gumbo and the maid and would question him why he was still single. The respondent said maybe the appellant expected him as an eligible bachelor to make advances to her but he did not because she was 10 years older than him and had been married twice. Nothing meaningful was adduced from the respondent through cross examination by the appellant's legal practitioner.

The critical question to be answered is as follows; Did the respondent make a promise to marry the appellant from the evidence briefly discussed.

The evidence on record does not show at all that the appellant in the court *a quo* managed to prove on a balance of probability that she was in love with the respondent let alone that a promise to marry her was made. This conclusion is inevitable for a number reasons.

Other than the appellant's word that she fell in love with the defendant which is strongly disputed by the defendant, there is no other evidence to show that such a love relationship existed between the two. While the appellant's love life may not be a bar to her having a relationship with the respondent, the circumstances of the case make it highly unlikely that the respondent fell in love with her. The respondent was a friend to her "husband", a fact which should have been known at this school which is a very small community. The respondent who is a bachelor knew that the appellant had been married twice, had a child and was much older to him. While the appellant in her evidence gave the impression that this love relationship was an open book for everyone in the locality including her friends which she mentioned by name, none of those witnesses were called. The need to do so was very clear in view of the respondent's stance. In fact the respondent challenged the appellant to name a single fellow teacher at the school who was aware of the alleged love relationship. The appellant was unable to take up this challenge!

The appellant's own evidence is uninspiring and does not seen to suggest that the respondent made a promise to marry her. A few examples of her evidence in brief is illustrative.

The following exchange took place between the appellant and her legal practitioner on pp27 to 28 of the record.

" Q. Did courtship continue?

A. Yes

Q. What other developments took place?

A. He made continuous visits to me making indications that he was interested in me. I posed a question to him whether he was interested in marrying me or he was not.

Q. What was his response?

A. He indicated he intended to marry me and not play with me

Q. Was this at the beginning, middle or end of courtship?

A. It was in the middle of the courtship.

Q. What then happened?

A. It then happened that I approached my Pastor then and highlighted it to him and the Pastor eventually approached the defendant and had a talk with him.

Q. And what was the result?

A. After that the Pastor came and told me that the defendant had indicated that he still loved me although he was not yet prepared to marry me but was going to do so when he ever get ready.

Q. Did he ever get ready?

A. I never saw the readiness."

According to the appellant the respondent advised the pastor that he was not ready to marry her. This is the response which caused the appellant's legal practitioner to write a letter of demand to the respondent.

In her evidence (See pp29 of the record) the appellant said the respondent told her that he was unwilling to be introduced to the appellant's uncles or relatives for fear that such a move would be misconstrued for a serious relationship. It is surprising that the appellant who is not a young, naive and execitable girl would then take such a relationship seriously even assuming it existed.

Under cross examination by the respondent the appellant conceded to the following;-

(i) that she never had sexual intercourse with the defendant.

(ii) that neither the appellant nor the respondent introduced the other to their respective relatives.

(iii) that they did not enter into any engagement.

(iv) that the appellant is unable to mention any teacher at Nzvimbo school who was aware of their love relationship.

(v) that she never went to any place with the respondent or attended any occasion together.

All these factors taken culmilatively tend to show that there was no love relationship between the parties. It would be really bizarre to find otherwise.

The letter written by the appellant's legal practitioners to the respondent is not proof that a love relationship existed between the parties, let alone that the respondent made a promise to marry the appellant. All the letter contains is what the appellant herself told her legal practitioner. The letter is therefore is of no probative value to the point in issue.

All in all the appellant's case is a hopeless one. The court *a quo* would have acted properly even if the appellant's claim had been dismissed. However the court *a quo* granted an absolution from the instance. There is no misdirection in that regard. The appellant did not make a case at all for the claim made. The appeal lacks merit and cannot succeed. The appellant should bear the burden of the costs.

Accordingly for the above reasons the following order is granted;-

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs.

F.M. Katsande & Partners, appellant's legal practitioners
Tondhlanga & Associates, respondent's legal practitioners