

GEORGINA NJODZI
versus
LORRAINE MATIONE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 26 & 27 June 2017, 14 & 27 July, and 3 August 2017

Civil Trial

NB Manyuru, for the plaintiff
WT Pasipanodya, for the defendant

MWAYERA J: The plaintiff instituted action proceedings in which she claimed adultery damages for a total of US\$25 000 being, US\$15 000 for contumelia and US\$10 000 for loss of consortium. The defendant disputed the claim. The parties came up with a joint pretrial conference minute in which they identified the following issues for referral to trial.

1. Whether or not the defendant has committed adultery with the plaintiff's husband.
2. Whether or not the plaintiff is entitled to contumelia and consortium.
3. Whether or not the plaintiff is entitled to payment in the amount of US\$25 000 as adultery damages or part thereof.

Although the parties crafted the joint PTC minute to reflect three issues. It is quite apparent what falls for determination here is whether or not the defendant committed adultery with the plaintiff's husband. If she did not the matter ends there. If she did commit adultery the next issue is whether or not the plaintiff entitled to adultery damages as claimed.

The plaintiff was the only witness in the plaintiff's case. She recounted how she got married to her husband one Lawrence Muzvondiwa Njodzi, (hereafter referred to as Mr Njodzi) and solemnized the marriage on 21 February 1996. The duplicate original marriage certificate was tendered as exh 1 by consent. The 22 years old marriage was blessed with three children. The plaintiff narrated that her marriage relationship with her husband was normal with both spouses carrying out reciprocal duty of care, maintenance and obligations. It was apparent from

the plaintiff that both the plaintiff and her husband were senior police officers who encouraged each other to pursue advanced educational qualifications. Both the plaintiff and her husband as police officers were assigned to undertake foreign policing duties in East Timor, South Africa and South Sudan. The plaintiff told the court that while she was away on foreign duty she would leave her bank card with her husband who would access her salary from home. The foreign trips enabled the couple to earn more and they acquired some properties including commercial vehicles. According to the plaintiff the smooth flow of her marriage took a nose dive sometime in 2012 when she no longer enjoyed the love and support of her husband. The plaintiff stated that the relationship deteriorated because of the defendant's involvement with her husband. Finally in 2014 her husband moved out of the matrimonial home to the detriment of expected normal marital relationship. The plaintiff told the court she was hurt by the relationship that was going on between her husband and the defendant and the situation was worsened by the fact that her husband paid lobola for the defendant and defendant performed all traditional rites of a daughter in law to her husband's family. According to the plaintiff all efforts to restore a normal marital relationship with her husband proved futile because of the relationship which the defendant nursed with the plaintiff's husband. At the time of hearing the plaintiff was of the view that there was no hope of resuscitating the marriage since her husband had issued divorce summons. The plaintiff was subjected to excruciating cross-examination but she stood her ground. She maintained that prior to the defendant's intrusion into her marriage she and her husband and family enjoyed a good relationship.

The work related trips were never an issue and conjugal rights and comforts of her spouse were enjoyed without effort or strain. The struggle only came with the birth of the relationship of the defendant and her husband. The plaintiff maintained she was hurt and injured by the disruption of her marriage. She felt her dignity at work was impaired and equally among the relations and the community at large. She was degraded when the defendant assumed the role of a wife to the plaintiff's husband.

This extended even to family events like the funeral of the plaintiff's father in law. Despite the fact that she did not earlier confront the defendant about the adulterous affair the plaintiff was adamant that the defendant was aware Mr Njodzi was married, in any event even after she issued adultery damages claim the defendant did not pull out or desist from the affair.

She continued despite having knowledge that the plaintiff was legally married to Mr Njodzi. The plaintiff further stressed that the adulterous relationship was in the public domain given the defendant's unrelenting stance. The adultery relationship also resulted in the birth of a child and it culminated in divorce proceeding. The plaintiff was firm that she was entitled to the delictual claim as amplified by evidence.

The plaintiff was subjected to bruising cross examination with unfounded allegations of adultery on her part, but she stood her ground. The court was somewhat taken aback by the line of questioning by the defendant's legal practitioner on the employment status of the plaintiff. Counsel sought to take issue with the plaintiff's nature of employment in this day and age, he questioned the plaintiff's work related foreign trips yet found nothing amiss about the plaintiff's husband undertaking the same work related foreign trips. It is my view, such gender stereotype has no place in a modern civilized and progressive society. In any event, going to work is not a defence or justification for adultery. The defence further sought to under play the loss of comfort and company by turning technical. It was advanced in cross examination of the plaintiff that there was no loss of consortium because Mr Njodzi suffered erectal dysfunction. Further it was argued that if Mr Njodzi was dysfunctional then there was no adultery. The plaintiff stood up to the task and maintained she suffered the delictual wrong occasioned by the adulterous relationship. The argument advanced by the defendant flew in the face of the defendant's case given it is obvious the adulterous relationship of the defendant and Mr Njodzi issued a product in the form of a child. There was clear indication of intimate relationship between the defendant and Mr Njodzi to the detriment of the plaintiff. The plaintiff was further taken to task for not confronting the defendant earlier. The explanation given by the plaintiff, a Superintendent with the Zimbabwe Republic Police, that she did not wish to take the law into her own hands is understandable. She cannot be taken to have condoned the adultery because she issued summons claiming adultery damages but still the defendant continued with the relationship. The plaintiff's version was straight forward and she impressed the court as a credible witness.

The defendant was the only witness in her case. The defendant narrated how she met the plaintiff's husband in 2013 and they exchanged phone numbers. They became friends and the relationship developed into a love affair which culminated in the adulterous couple siring a child in April 2014. The defendant's stance that she believed the plaintiff's husband was a divorcee as

per his say so was exposed during cross-examination. The defendant never visited the unmarried man's residential premises despite knowing he was a police officer. Even if it was to be accepted she initially did not know Mr Njodzi was married when summons for adultery damages were issued and parties attended pretrial conference the defendant's association with the plaintiff's husband did not stop. Even at the time of hearing it was apparent the defendant would frequent Mr Njodzi's residence as she stated he was the father of her child. Her assertion that she was not aware that the plaintiff was married to Mr Njodzi was incredible given the details she narrated of Mr Njodzi's relationship with the plaintiff. The defendant appeared quite in control of the adulterous relationship as buttressed by the visits to Mr Njodzi's communal home and frequent visits to Mr Njodzi because they have a child together. This all occurred after issuance of summons. The defendant, I must comment exhibited a carefree attitude and provocative attitude as opposed to showing contrition. From her stance one could not really tell whether it was because of the pending divorce of applicant that she felt she would emerge the victor or because of her earlier stance when she took up a constitutional application challenging the constitutionality of adultery damages, but obviously the defendant was simply unperturbed. The attitude exhibited was that she did not believe there was anything wrong with adultery. The defendant was clearly unrelenting. Strictly speaking the affair with Mr Njodzi a married man, was from the plaintiff and defendant's evidence not in dispute. The defendant sought to hide behind a finger that she did not know her new found love Mr Njodzi was married. Even if that was to be accepted the undisputed fact is that after issuance of summons the adulterous relationship continued.

The defendant was content with saying Mr Njodzi is the father of her child. The evidence of the defendant confirmed the plaintiff's claim to a great extent. The variance was simply that plaintiff was of the view that she was wronged and thus entitled to damages while the defendant on the other had felt she was justified in having an affair with Mr Njodzi and thus has to be exonerated from any damages claim. The defence was not seriously taken given the manner the defendant testified. She clearly, in an unreliable manner sought to justify the misdemeanor and minimize the plaintiff's claim. In general the defendant in stating that she had no knowledge Mr Lawrence Njodzi was married sought to place the truth beyond the court's reach. In so doing her story was viewed as magnanimously false. In short the defendant's version was not credible.

The defendant was generally viewed by the court as an arrogant and incredible witness. She sought to portray herself as an innocent victim who was seduced by Mr Njodzi. Given the obvious background of no diligent search on the status of Mr Njodzi and the continued adulterous relations after issuance of summons one cannot help but attribute dishonest and wickedness on the part of the defendant as a witness. The defendant knew that Mr Njodzi was married and she remained in the adulterous relation with him.

Upon assessing the totality of the evidence it is clear the plaintiff has established her case for claim of adultery damages under the two grounds *contumelia* and loss of consortium. The only issue the court is to grapple with is as regards the quantum of damages.

It is worth noting that in this case a 22 year old marriage is at the verge of collapsing because the adulterous relationship has reined havoc and divorce summons have been issued. One cannot lose sight of the fact that the plaintiff and her husband are respectable members of the society senior police officers/law enforcement agents. The plaintiff is a superintendent who has suffered and will continue to suffer humiliation because of the adulterous relationship's direct and indirect results. The plaintiff is a mother of 3 and has to face the agony and trauma of explaining to the children. The gap created between the plaintiff and the husband is huge while clearly the defendant is enjoying access to the defendant given her version of frequent visits to the friend and father of her child while the plaintiff has not had access, support, conjugal rights let alone the benefit of knowing the location of her husband. Further in addition to the hurt, pain, suffering and loss of comfort is the glaring evidence of a child born through the adulterous relationship. In *Katsumbe v Buyanga* 1991 (2) ZLR 256 it was stated that a child born of an adulterous relationship is proof of a breach of trust and is particularly dangerous given the backdrop of HIV/AIDS pandemic that cripples the country.

These remarks ring true in this case as the product is a clear indication of unprotected sex. What is sad about this case is the carefree attitude of the defendant, a nurse and midwife and a member of the health profession who ought to know better the dangers associated with unprotected sex. The defendant throughout the proceedings did not show any remorse or signs of regretting what occurred. She did not at any stage apologize to the plaintiff but instead chickly confessed she continues links with her friend the plaintiff's husband. Such a stance calls for an

award of damages once on a high scale. ROBBISON J as he then was in *Katsumbe v Buyanga* (*supra*) case ably held that

“In the absence of mitigatory circumstances the court should take a strong and *principled* stand by awarding high level of damages for adultery otherwise the court will be party to unlicensed promiscuity”

Factors to consider in coming up with appropriate quantum of damages are not exhaustive as stated in many cases decided by this court. See *Raitewi v Venge* HH 152/11, *Mahachi v Zimba* HH 315/17. In *Rateiwa* case *supra* BERE J recounted factors to be considered as including

1. The need to deter would be adulterers from becoming involved in adulterous relationships.
2. The effect of the adultery on an innocent party’s social economic conditions due to the adultery.
3. The duration of the marriage between the aggrieved and her spouse. In addition to these factors. It is settled among other factors the following factors are worth considering
 1. The character of the woman or man involved.
 2. The social economic status of the plaintiff and defendant.
 3. Whether the defendant has shown contrition and apologized.
 4. The need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse. The level of awards in similar cases and the circumstances of the case under scrutiny.

See also *Mapuranga v Mungate*, 1997 (1) ZLR 164 and *Muhwati v Nyama* HH 17/11.

In this case the plaintiff, who still loved her husband has clearly lost a husband, lover, friend, father of her children and workmate because of the defendant’s actions. As if that was not enough the plaintiff suffered the agony of facing an unrelenting defendant who was quick to show she is still heavily connected to the plaintiff’s husband. The defendant in a selfish manner sought to move the court to the notion that there was nothing wrong with adultery given the freedom of association. On another breathe she sought to blame the plaintiff’s nature of employment and work related trips as being the cause of the rift between her and her husband.

The question is how does that not amount to discrimination and inequality on gender basis if the defendant ascribes to liberal thinking of freedom of association then she ought to subscribe to equality on employment opportunity. Clearly the nature of employment is not the misdemeanor complained of. What is at stake is the adultery committed and the consequent damages occasioned. This court will not fold its arms and leave society to drift into immoral decadence under the umbrella of ill perceived rights. The matrimonial bond is clearly protected by the Constitution which sanctions the marriage institution. Any intrusion to the detriment of the marriage institution in circumstances where the intruder has knowledge or ought to have knowledge should not go unchecked. The delictual claim for adultery damages is still very relevant in a progressive democratic society like Zimbabwe which has its social values enshrined in the supreme law of the country the Constitution. The quantum of damages should not be a mockery to the aggrieved party lets the judicial systems falls into disrepute and run the risk of being held in complicity with the adulterous couple.

Where evidence is clear as in this case, that the plaintiff was injured, hurt, insulted and subjected to indignity thus *contumelia* umbrella of damages is justified. Further from 2012 to the time of hearing the plaintiff suffered loss of companionship, affection, love and services thus loss of consortium occasioned. Given the duration of the marriage and the initial cordial relationship of the parties, the disruption brought about by the adultery is of great magnitude and it calls for a fairly high award in damages. This is more so when one considers the unrelenting personality of the defendant.

Accordingly it is ordered that;

1. The defendant shall pay adultery damages in the sum of \$8 000 being
 - (a) \$4 000 for contumelia
 - (b) \$4 000 for loss of consortium together with interest thereon at the prescribed rate calculated from the date of the summons to the date of payment in full.
2. The defendant shall bear the costs.