

AMON MAPIYE
versus
INNOCENT MUDYIWA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 January 2018 & 12 July 2018

Unopposed Matter

Plaintiff - In person
Defendant – In default

NDEWERE J: The background of the case is that the plaintiff Amon Mapiye got into a customary union with his wife Nomsa Faith Mapiye (Nee Mwazha) in 1999. Their union was initially blessed with two children in May, 2001 and in 15 October, 2005. On 24 April, 2007, the plaintiff and his wife solemnised their marriage in terms of the Marriage Act, [*Chapter 5:11*]. On 3 September, 2008, they were blessed with a 3rd male child. By all standards, the marriage was stable and happy up to 2008, as evidenced by the solemnisation of the customary union on 24 April, 2007, followed by the birth of a son on 3 September, 2008.

Then came a third party in the name of Innocent Mudyiwa, the defendant, to intrude upon this marriage sometime in 2008. The plaintiff was alerted in 2009 by some suggestive text messages which were being exchanged between Innocent, the defendant and his wife which he saw on his wife's mobile phone.

The plaintiff confronted both the defendant and his wife about the text messages. In particular, he alerted the defendant to the fact that Nomsa Faith Mapiye was married to him in a monogamous union. Both the defendant and the plaintiff's wife denied having an adulterous relationship. The plaintiff accepted the denial and let the matter rest.

About four years later, on 23 February, 2013, the plaintiff's wife delivered a fourth male child.

In the first week of October, 2014, the plaintiff issued summons for divorce from his wife in HC 8879/14. He said their marriage had irretrievably broken down. The particulars of the breakdown which he gave were:

- (a) that the defendant no longer loved him and was falsely accusing him of adultery.

- (b) that the defendant had moved out of the matrimonial bedroom for the past one year and eight months, thereby denying him conjugal rights.
- (c) that the defendant had abandoned the family business, donated her 5% shares to her last child, obtained an exit package and was now working at her father's surgery.
- (d) that the defendant had sent her aunt to collect a divorce token from the plaintiff's father as confirmation that she was no longer interested in the marriage.

If the defendant had been out of the matrimonial bedroom for one year and eight months on 2 October, 2014, when the plaintiff signed the divorce summons, it means she moved out twenty months before 2 October. Therefore she moved out of the matrimonial bedroom in 2013, shortly after delivering the last child because twenty months from 2 October, 2014 takes us back to March, 2013. The plaintiff's wife continued to stay at the matrimonial house, but she was effectively on separation from her husband since March, 2013, when she moved out of the matrimonial bedroom, resigned from the family business and donated her shares to the last child. Her message was clear, she no longer wanted anything to do with the plaintiff or his business. Hence the plaintiff responded by issuing summons for divorce.

While the divorce matter was still in progress, in February, 2017, the plaintiff overheard a telephone conversation between his wife and the defendant and from what he heard, it appeared there was an argument between the defendant and his wife over her last child. The defendant was claiming the last born child from the plaintiff's wife, Nomsa Faith, saying the child was his child. The plaintiff confronted his wife Nomsa Faith who confessed about the adultery with the defendant since 2008 and stated that her last child was a product of that adulterous relationship with the defendant. After his wife's confession, the two agreed to go for DNA tests to check the paternity of the child. They went for the tests on 13 February, 2017. The results were that there was a 0% chance of the plaintiff being the father of the last born child. An uncontested divorce order was finally granted on 12 October, 2017, by this court. In the divorce order, the plaintiff was absolved from maintenance and access obligations towards the last child.

Following his wife's confession of adultery with the defendant, the plaintiff issued summons against the defendant for adultery damages on 22 February, 2017, which is the case I am seized with. The defendant filed an appearance to defend on 28 February, 2017. The defendant did not file any plea and on 4 April, 2017, the plaintiff filed a notice to plead and intention to bar and gave the defendant five days to deliver his plea or get barred. No plea was

filed and on 4 May, 2017, the defendant was barred. The plaintiff applied for default judgment and this being a damages claim, the matter was referred to the unopposed roll. The plaintiff filed Heads of Argument in support of his claim. He also filed an affidavit of evidence. The matter was initially set down for 6 September 2017. On 31 August, 2017, the plaintiff's lawyers wrote to the Registrar of the High Court indicating that the parties were making efforts to settle the matter out of court. No settlement ensued thereafter so the matter was eventually set down as unopposed for 10 January, 2018. When the case was called the plaintiff appeared in person although up to the filing of his Heads of Argument he was represented. I indicated that I needed time to go through the plaintiff's Heads of Argument and check previously decided cases before coming to a decision on the appropriate amount of damages to be awarded. I have since gone through the plaintiff's Heads of Argument and done further research on the approach taken on the issue of adultery damages in previously decided cases.

As correctly pointed out by Tredgold CJ in *Doyle v Salgo* 1957 R & N 840 (FSC) at 841 B-C or 1958 (1) SA 36 (FSC) at 37 B in an undefended case involving a claim for adultery damages which was quoted with approval by ROBINSON J on p 257 of *Katsumbe v Buyanga* 1991 (2) ZLR 256,

“the fact that an action for damages is undefended does not relieve the judge from the obligation of scrutinising the evidence closely”.

To begin with, let me start by saying that I agree with the sentiments expressed in *Katsumbe v Buyanga* 1991 (2) ZLR 256 (HC) on p 258 that:

“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 courts in the absence of mitigating circumstances, should be seen, in their award of damages, to come down hard on the adulterer or adulteress ... The courts should ensure, as far as is reasonably possible, that an aggrieved spouse who approaches them is not made to feel, after their 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.”

Indeed in our jurisdiction, we have had several cases where aggrieved spouses took the law into their own hands and injured or killed the adulterer or the spouse. It is therefore needful for the courts to give meaningful damages when approached, to discourage aggrieved spouses from taking the law into their own hands.

The plaintiff issued summons claiming \$30 000-00 for loss of consortium and \$30 000-00 for *contumelia* plus interest at the prescribed rate from the date of the summons and costs of suit on an attorney and client scale.

The plaintiff's claims are supported by our law on adultery damages. In *Khumalo v Mandishona* 1996 (1) ZLR 434 (H), on p 442, it was stated thus:

“*Contumelia* incorporates the injury, insult and indignity suffered by the plaintiff whilst loss of consortium relates to the loss of comfort, society and service of the wife as a result of the adultery committed by the defendant.”

I will start by dealing with the plaintiff's claim for *contumelia*.

In 2009, the plaintiff came across suggestive text messages between his wife and the defendant. He confronted both of them and confirmed to the defendant that his wife was married to him and owed him fidelity. Both his wife and the defendant denied the adulterous relationship. However, the confrontation by the plaintiff did not make them stop the adultery. They continued the adulterous relationship for five years, leading to the birth of a child.

The continuation of the adultery after warning from the plaintiff for the long period of five years aggravated the injury and insult to the plaintiff when he later found them out. The birth of the child is also aggravatory. More aggravatory is the fact that defendant did not come out clean and apologise after the birth of the child. In collusion with plaintiff's wife, he passed on his child as plaintiff's child, well knowing that to be false. As a result of this fraud, plaintiff took care of defendant's pregnancy and child from the period of conception till the child was four years old spending several thousands of dollars on the child's care. Had he not overheard the defendant's argument with his wife by chance, the fraud on him by the defendant and his wife would have continued. This fraud aggravates the injury and insult.

However, adultery damages are not about compensating the plaintiff for looking after the defendant's child. The plaintiff is at liberty to institute compensation proceedings against the defendant if he so wishes. So my award shall concern itself with the adultery itself.

After his wife's confession, DNA tests had to be done to confirm paternity. The fact that the child was confirmed to have 0% chance of being plaintiff's child worsened the plaintiff's injury. Indeed, I cannot think of a worse case of adultery than the present one. Consequently, a high award of damages for *contumelia* is called for in the present case.

Even the manner in which the plaintiff came to know about the adultery was very traumatic. Imagine the plaintiff having a four year old son whom he was nurturing as his own, then he suddenly overhears an argument between his wife and another man who was claiming to be the father. Then he finds out that the man is the same one he confronted five years previously but he denied having an adulterous affair. The plaintiff must have experienced intense shock from that discovery. In fact it is commendable that the plaintiff remained in

control of his senses and did not take the law into his hands when he overheard his wife's discussion and when she confessed to him. The plaintiff's claim for \$30 000.00 damages for *contumelia* is therefore understandable in the circumstances.

The next issue is for the court to determine the appropriate quantum.

In *Nyakudya v Washaya* 2000 (1) ZLR 653, the factors to be considered in determining the amount of damages to be awarded against a third party for adultery were summarised as follows;

- “(a) the character of the woman (or man) involved,
- (b) the social and economic status of the plaintiff (and the defendant)
- (c) whether the defendant has shown contrition and has apologized
- (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.

In addition to the above, the court should also take into account whether the plaintiff has suffered lack of consortium as well as *contumelia*, or just the latter, and the decrease in the value of money.”

As aforesaid, a high award is called for in the circumstances of this case; an award which will recognize the serious injuria inflicted upon the plaintiff.

In *Smith v Arthur* 1976 (3) SA 378, the court said in looking at awards made in the past, there is need to consider the decreased value of money. This principle was reiterated in *Nyakudya v Washaya supra*, at page 658 where the learned judge had this to say;

“the court cannot disregard the horrendous decline in the value and purchasing power of the Zimbabwe dollar over the last two years.”

In *Chinamasa v Jongwe Printing and Publishing Co (Pvt) Ltd & another* 1994 (1) ZLR 133 (H) at 170 a defamation case, the learned judge stated the following;

“... The fall in the value of money is a fact which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics which may lead to an unreasonable result.”

The above principle applies to adultery damages as well.

On the AIDS factor, as correctly pointed out by MALABA J (as he then was) in *Khumalo v Mandishona* 1996 (1) ZLR 434, the factor of AIDS needs to be considered in the assessment of damages for *contumelia*....”. damages are awarded for the factor of AIDS as a deterrent measure to protect the innocent spouse from the risk of contracting the virus from the errant partner.”

On the issue of the unrepentant defendant, it was held in *Chapman v Chapman and Anor* 1977 (4) SA (NC) 142 at p 144 that if the co-respondent is grossly impudent and unrepentant, that will aggravate the damages. In the present case, we have a defendant who was warned in 2009 by the plaintiff, but he carried on. In fact, he was boastful about his adulterous escapades, spreading the news of his adulterous relationship with plaintiff's wife to some members of plaintiff's community. That aggravates the amount of damages.

In the *Khumalo v Mandishona* case, supra, at page 446, the court said;

“where the defendant shows contrition and tenders an apology to the plaintiff for the injury inflicted, the apology constitutes a balm for the plaintiff's injured soul. The plaintiff's feelings are however, not assuaged by an impertinent seducer who does not show any contrition and forces him to go to court and relive the traumatic experience when giving evidence to prove adultery.”

The above quotation summarises the facts of the current case. The defendant was never apologetic. He continued the adultery for four years after being warned by the plaintiff. Even after being found out, he did not seriously attempt to settle the case out of court. The plaintiff had to come to court with his claim and endure the bad publicity that comes with public court hearings. This situation aggravates the *contumelia*.

On the character of the woman involved, we do not have much by way of evidence since the claim was not defended. All we know is that until 2008 when defendant intruded into the marriage, the plaintiff and his wife, had a stable and peaceful relationship. On the character of the plaintiff we are told he was an emerging business man. We have nothing on the character of the defendant since he chose not to defend.

As correctly pointed out in *Chinamasa v Jongwe Printing Publishing Co. (Pvt) Ltd & Anor supra* the fall in the value of money is a factor which should be taken into account. Despite dollarization, it is a fact that the purchasing power of money has declined over the years. It has been declining since 2009 when Zimbabwe adopted multicurrency. Prices of goods and services have continuously gone up unabated. A higher award than in the previously decided cases is therefore called for in view of the declining value of money.

In *Smith v Arthur* 1976 (3) SA 378 at 387, MILLER A.J.A said;

“Because in my view the courts have tended to pay only lip service to their condemnation of adultery, their awards of damages have been relatively low,.....”

Given the aggravating factors outlined above; I do not intend to pay lip service to the condemnation of the adultery in the present case. I shall give an award which reflect the aggravated injury suffered by the plaintiff.

Loss of Consortium

Consortium has been defined as the totality of a number of rights, duties and advantages accruing to spouses of a marriage.

In *Best v Samuel Fox Co. Ltd* [1951] 2 KB 639 at p 663, the Lord Justice described consortium as follows:

“Companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state. Taken together they make up the consortium.”

In *Place v Searle* [1932] 2 KB 497 at 512; it was held that a husband has a right to the consortium of his wife and the wife to the consortium of her husband.

In *Pearce v Kevan* 1954 (3) SA 910 (N), the learned judge said,

“It is the duty of a wife to reside and consort with her husband and any third person who intentionally causes her to violate this duty commits a wrong against the husband for which the latter is entitled to recover damages.”

The above principle would equally apply if the husband was the adulterer because the duty, as indicated in *Place v Searle* is to both parties.

However, before a claim for loss of consortium can succeed, there should be proof of actual loss of consortium. In other words there must be proof that the wife stopped consorting with the husband as a result of the adultery.

In the present case, the wife remained at home from 2008, to February 2013 when she delivered the baby conceived out of her adulterous union so there is no evidence of loss of consortium from 2008 to February 2013 when the last child was born. Soon after delivery, within less than a month from the date of delivery according to plaintiff's declaration in the divorce action, the plaintiff's wife moved out of the matrimonial bedroom. She resigned from the family business, claimed an exit package and donated her share to the newly born child. She told her aunt to seek a divorce token from plaintiff's father. So clearly, from about March 2013, the plaintiff lost his wife's consortium. Looking at the list in *Best v Samuel Fox Co. Ltd*, *supra* the plaintiff lost companionship, love, affection, comfort, mutual services and sexual intercourse. This loss is linked to his wife's adultery with the defendant because her actions occurred soon after delivery of the defendant's baby. Probably, the birth of the child confirmed the irreversible situation which her adultery with the defendant had caused and she could not continue to live a lie as she had done for the previous five years.

So plaintiff's claim for loss of consortium has merit.

The next question is what is the appropriate quantum of this type of damages in the circumstances of the present case?

To start with, I do not subscribe to the idea expressed in *Muller v Vink* 1972 (1) PH B2 which was referred to in *Khumalo v Mandishona supra*, that the recognition of women as free agents rather than chattels means that damages for loss of consortium should be on the lower side. This is because consortium has nothing to do with gender. It applies to both male and female spouses. Consortium is about the reciprocal rights, duties and obligations of spouses to each other. This means that damages for loss of consortium are about supporting and strengthening the institution of marriage; they are not about gender.

In this regard, I will do no more than quote ROBINSON J in *Katsumbe v Buyanga*, 1991 ZLR 256 at 258 when he stated the following;

“... unless they are prepared to take a strong principled stand in this regard in support of the 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 its frightening aspects.”

In addition, we have a constitution which protects the institution of the family.

Section 25 of the Constitution of Zimbabwe Amendment (No. 20) of 2013 provides as follows:

“The State and all institutions and agencies of government at every level must protect and foster the institution of the family....”

The judiciary is one such State institution which is called upon by our constitution to “protect and foster the institution of the family.” It goes without saying that the marital state is the beginning of the family institution. Section 78, of the Constitution, on marriage rights states that every adult person has the right to found a family, thus confirming that marriage is the foundation of the family institution which state institutions are being called upon to protect and foster. So the courts must be seen to be protecting the family institution by protecting marriages.

Our Constitution upholds marriages, as indicated in s 78. Consequently, in assessing the quantum of damages for loss of consortium, it has been held that where the adultery leads to the breakup of the marriage, the damages are aggravated. In the present case, a divorce order was issued on 12 October, 2017, by this court. This means the plaintiff lost his wife’s consortium for four years, from February, 2013 to 12 October, 2017. Although the plaintiff was not aware of his wife’s adultery when he issued summons, it is clear from para 7 of his

divorce declaration that loss of consortium is what made him seek divorce. His reasons as given in para 7 were;

- a) That defendant no longer loves the plaintiff and falsely accuses him of having an extra marital affair with her cousin. Going by the list in *Best v Samuel supra*, ground (a) for divorce above confirmed the loss of love, affection and companionship.
- b) That defendant has moved out of the matrimonial bedroom for the past one year and eight months, thereby denying the plaintiff his conjugal rights; Ground (b) confirmed the loss of sexual intercourse and comfort
- c) That the defendant has abandoned the family business to which she was a minority shareholder and donated 5% shares to the last child, took an exit package and was working at her father's surgery; Ground (c) confirmed the loss of mutual services.
- d) That defendant sent her aunt to plaintiff's father to collect a token of divorce as a sign that she is no longer interested in the marriage. Ground (d); confirmed the loss of love, companionship and affection.

So the loss of consortium in the present case is what led to the breakup of the marriage; thus aggravating the loss of consortium damages which are payable.

In *Pearce v Kevan* 1954 (3) SA 910 (N), the court stated the following;

"It is obvious that there must be a causative connection between the conduct of the third person and the dereliction by the wife of the duties she owes her husband....."

In the present case, there is a causative connection between defendant's adultery and the loss of consortium to plaintiff. Nomsa Faith Mapiye denied conjugal rights to her husband for one year and eight months because she was committing adultery with the defendant Innocent Mudyiwa. She stopped having sexual intercourse with him because she was having it with Innocent. Innocent betrayed the meaning of his name and was not innocent in this case. He enticed plaintiff's wife away from the marriage. He would go to plaintiff's house as if he wanted to buy water which the couple sold in their business. Despite being confronted by the plaintiff in 2009, he did not stop the adultery. He persisted in enticing this married woman away from the duties and obligations of her marriage till he succeeded in breaking up the marriage.

As stated in *Pearce v Kevan supra*;

"... the law as I endeavoured to state it potentially embraces the conduct of a man who, whatever his immediate objects may be, perseveres in behaving towards another man's wife

in a way which he realises is having the effect of alienating her affection from her husband and which ultimately produces that result and brings about an estrangement.”

Indeed, in the present case, the defendant, Innocent Mudyiwa “persevered” in this adulterous behaviour for a good five years, till the marriage broke. This aggravates the damages payable.

Given the further decline in the purchasing power of money in recent years;

I find no reason to give an award of damages for adultery which are lower than in any of the previously decided cases. I will however, rely on the quantum awarded from 2009 in view of dollarization.

In *Chenesai Rateiwa v Tsitsi Venge* HB 152/11, US\$4 500 was awarded for *contumelia* and \$1 500 for loss of consortium.

In *Monica Muerudza v Ropafadzo C Magora* HC 6334/13, US\$8 500-00 was granted for both *contumelia* and loss of consortium. In *Muhwati v Nyama* 2011 (1) ZLR 634 US\$5 000-00 was granted for both *contumelia* and loss of consortium.

In *Judith Tikiwa v Makomborero Adiyolah Charlie* HH 488/14, \$3 000 was awarded for loss of consortium and \$3 500-00 for *contumelia*.

In *Makururu v Vori* HH 174/16 - \$4 000-00 was awarded for *contumelia* \$2 000-00 for loss of consortium.

It is therefore ordered as follows:

- a) The defendant shall pay the plaintiff \$6 000-00 damages for *contumelia*.
- b) The defendant shall pay the plaintiff \$4 000-00 damages for loss of consortium
- c) The defendant shall pay interest at the prescribed rate from the date of the summons to the date of final payment.
- d) The defendant shall pay costs on an attorney and client scale.

Zvinavakobvu Law Chambers, plaintiff’s legal practitioners