MELANIA CHAKUMHARA (nee MUKWEKWE)
versus
JANET BVITIRA
and
EDDIE CHAKUMHARA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 3 February 2023 & 30 January 2024

Opposed Application- Consolidation of two actions

Mr *L Ziro,* for the applicant
Mr *M D Hungwe* & Mr *J Mapuranga,* for the 1st respondent
Mr *G Chifamba,* for the 2nd respondent

MUSITHU J:

The applicant seeks the consolidation of two matters that are pending before this court. The applicant and the second respondent are husband and wife. The applicant instituted a divorce claim against the second respondent under HC 3978/22. The first respondent is alleged to have committed adultery with the second respondent. She is being sued for adultery damages by the applicant under HC 1502/22. The relief sought is set out in the draft order as follows:

"**IT IS ORDERED THAT: -**

1. The Application for consolidation of the two actions instituted under case number **HC 1502/22 AND HC 3978/22** be and hereby granted.
2. The Applicant be and is hereby directed to consolidate the two court records **HC 1502/22 AND HC 3978/22** so that they proceed under case number **HC 1502/22**.
3. The Applicant shall file her pre-trial papers regards both matters mentioned in paragraph 2 above within seven (7) days of the granting of this order.
4. The 1st and 2nd Respondent shall file their pre-trial papers regards both matters mentioned in paragraph 2 above within **seven (7)** days of having received the Applicant's pre-trial papers mentioned in paragraph 3 above.
5. 1ST AND 2ND Respondents to pay costs of suit on a higher scale jointly or severally, the one paying the other to be absolved."

The application was made in terms of r 34 of the High Court Rules, 2021 (the Rules). The application was opposed by both respondents.

The Applicants' Case

The motive for the consolidation of the matters was that the divorce action under HC 3978/22 was premised on the alleged adulterous between the first and second respondents under HC 1502/22. It was thus convenient and practical not only to the parties, but to the court as well that the two matters be consolidated so that they are heard as one. There was a legal link between the two matters.

The applicant further averred that apart from the fact that the applicant and the first respondent were also cited in both matters, it was also the applicant's intention to rely on the evidence regarding the conduct of the first and second respondents to her advantage in the division of the matrimonial property in terms of s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*]. The same evidence was also relevant in her claim for adultery damages. Legal costs and time would also be saved for all the parties as one joint pre-trial conference would be held. The applicant had already filed her replication in both matters.

First Respondent's Case

In her opposing affidavit, the first respondent denied that there was a proper case for consolidation of the two matters. The matters were not between the same parties and the causes of action were distinct. The matters could not proceed simultaneously since they involved different parties. The second respondent was not a party to the adultery claim. How would the matter be prosecuted when he was not also a party? The proposed course of action would unnecessarily render the matters complex to prosecute.

It was further averred that the causes of action in both cases were distinct. The subject matter was different making it improper for the two claims to be consolidated and proceeded with simultaneously. It was also argued that the averment that the applicant intended to use the same evidence in the two cases to her benefit was ill-conceived and could not be a basis for seeking consolidation. Further, courts consolidated matters to avoid conflicting judgments arising from similar disputes involving the same parties. There was no such risk herein because the claims were distinct.

Second Respondent's Case

The second respondent dismissed the alleged basis for seeking the consolidation of the two actions contending that they were founded on distinct causes of action. In the divorce matter, the applicant sought to divorce the second respondent based on an irretrievable breakdown of the marriage, and the absence of reasonable prospects of a reconciliation. The

second respondent averred that in his response to the divorce suit, he concurred with the applicant that the parties had lost love and affection for each other. There was no dispute about the granting of a decree of divorce. He found no reason why his joinder was necessary in the adultery suit when he was not opposed to the granting of the decree of divorce.

The second respondent also averred that the divorce matter could proceed without further notice to him if he signed an affidavit of waiver and a consent paper as would have been agreed by the parties. The second respondent also pointed to the inconvenience of him attending court in a matter that had no triable issues. He also denied that the fault principle in divorce matters would be a basis for seeking the consolidation of the matters. The import of the conduct of the parties referred to in s 7(4) of the Matrimonial Causes Act, was that it affected the proper and transparent distribution of matrimonial property. He denied that there was evidence of misconduct on his part and the first respondent that had a bearing on the distribution of matrimonial property.

The second respondent denied having conducted himself in any manner to hinder the proper distribution of the parties' matrimonial property in the divorce matter. It would be legally costly and an inconvenience for him to be dragged into a matter that had no bearing on the distribution of matrimonial property, custody of the minor children, maintenance of the children and access rights to the children.

The Submissions

Mr *Ziro* for the applicant submitted that the overriding consideration in an application of this nature was the issue of convenience. All the parties herein had some interest in the divorce matter, and the common denominator was the marriage certificate. The other issue of interest was that of maintenance consequent to a decree of divorce. The existence of a minor child born out of the adulterous relationship would have an impact on the maintenance of the children born in wedlock.

The misconduct of a party was also a factor to be considered in the award of costs in favour of or against a party. Counsel for the applicant cited several authorities in advancing the point that a claim for damages is usually conjoined with a claim for divorce.[1] Counsel also pointed out that the respondents herein were using the same law firm in the matter in which they are both defendants.

[1] *Mugari v Mugari & Ors* HH 697/21, *Mungofa v Sande & Another* HH 29/08, *Mhora v Mhora* SC 89/20 and CCZ 5/22

In response, Mr *Mapuranga* for the first respondent submitted that the rationale for consolidation of matters as enunciated in case law authority was simply to avoid conflicting judgments. The court was referred to the case of *Africom Holdings (Pvt) Ltd & Anor* v *Ndlovu & Ors*[2], where that principle was articulated. According to counsel, for an application for consolidation to succeed, one had to establish that the cases involved: the same parties; the issues to be decided upon were related or common and that the cases were pending in one court.

Counsel argued that the applicant had failed to pass the first hurdle since the two cases did not involve all the parties. The only matter in which all the parties were cited was the divorce matter. The second respondent was not a party in the adultery claim. Mr *Mapuranga* also argued that the applicant failed to pass the second hurdle. The issues to be decided upon were not the same. The divorce claim was premised on the irretrievable breakdown of the marriage relationship. Once it was established that the marriage had irretrievably broken down, then the court had to consider the legal principles pertaining to the sharing of property, custody of the children and their maintenance.

In contrast, the claim for adultery damages involved a consideration of two aspects, that is, the claims for *contumelia* and loss of consortium. According to counsel, the claim for *contumelia* was for the injury, hurt, insult and dignity inflicted upon the aggrieved party by the guilty party.[3] The claim for consortium was for loss of companionship, love and affection, comfort and services.[4] The claims were therefore governed by distinct principles of law and the issues could not be said to be common. The evidence needed in the disposal of the respective claims was also not the same.

Mr *Mapuranga* also argued that there was no risk of there being conflicting judgments to necessitate a consolidation of the matters. There was no triable issue in the adultery claim that could raise *res judicata* or issue estoppel with the divorce action. The cause of action, the questions of fact and law in the two matters were distinct. If the applicant was successful in the damages claim, then she would be awarded a judgment sounding in money which would not assist her divorce claim. Conversely, if she lost the damages claim, she would suffer no prejudice in the divorce action.

Counsel for the first respondent also dismissed the attempted reliance on the *Mugari* case *(supra)* arguing that the circumstances of that case were distinct from the present matter.

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[2] HH 357/18
[3] *Raitewi v Venge* HH 152/11
[4] *Gombakomba v Bhudhiyo* HH 118/06

Counsel submitted that in that matter the court considered the question of consolidation on a balance of convenience. The applicant had demonstrated that she was based in Geneva and the consolidation of the matters was convenient to avoid her having to fly twice to attend court. In any case that judgment was not binding on this court, as this court was at large to depart from the precedent set in that matter.

Mr *Chifamba* for the second respondent associated himself with submissions made on behalf of the first respondent. The second respondent was not contesting the divorce matter. There were no triable issues in the divorce matter. The divorce matter would be settled in the absence of triable issues. Counsel cited the case of *Ncube* v *Ncube*[5] in arguing the point that divorces were now based on the no fault principle, and for that reason, the conduct of the parties played no role in the distribution of matrimonial property. The applicant's case was therefore motivated by a wrong principle of the law altogether.

In his brief response, Mr *Ziro* insisted that s 7(4) of the Matrimonial Causes Act was relevant to the current proceedings. Counsel further submitted that the principle in the *Ncube* case cited on behalf of the second respondent was vacated in the *Mhora* judgement and it was therefore not applicable to the present matter.

The Analysis

The consolidation of matters is provided for in r 34 of the High Court Rules, 2021 (the Rules). Rule 34 provides as follows:

> "***34. Consolidation of actions***
> Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon—
> (a) the said actions shall proceed as one action;
> (b) the provisions of rule 32(25) shall with the necessary changes apply with regard to the action so consolidated; and
> (c) the court may make any order which it considers fit with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions."

From a reading of the above law, the court is reposed with discretion to order the consolidation of matters where doing so is expedient and in the interests of justice. That latitude is consistent with powers given to this court to regulate its own processes in terms of s 176 of the Constitution. In *Africom Holdings (Pvt) Ltd* v *Moyo & 4 Others*[6], DUBE J (as she was then) dealt with the issue of consolidation of matters as follows:

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[5] 1993 (1) ZLR 39 (S)
[6] HH 357/ 18 at pages 3-4

> "The primary objective of consolidating matters is to void delays in hearing matters and duplication of trials. The overriding factor in an application for consolidation is that of convenience. The court may consolidate matters where it has been shown that the cases sought to be consolidated involve:
> a) the same parties,
> b) where the issues to be decided are related or common
> c) the cases are pending in one court
> d) or where the parties have causes that can be joined in a single action.
> Rule 92 gives the court wide discretionary powers in dealing with consolidation of actions. In *New Zealand Insurance Co Ltd* v *Stone* 1963 (3) SA 63 at p 69 A-C, the court applied r 11 of the South African Uniform Court Rules which is identical to our r 92 and said the following of consolidation of matters,
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> > "…the court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the court will not order consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context …. is meant substantial prejudice sufficient to cause the court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the onus is upon the party applying to court for consolidation to satisfy the court upon these points''

The primary consideration is about the balance of convenience and the unlikeliness of prejudice to either party. All the parties herein are also parties to the divorce suit in HC 3978/22. It is only in the claim for adultery damages that the second respondent herein is not a party to. The circumstances of this case are not very different from those of *Mugari* v *Mugari & 2 Others*, which was cited by the applicant's counsel. In that case, the applicant who was the defendant in the divorce matter instituted a separate action claiming adultery damages against a third party. The applicant defended the divorce suit which was still pending at the time she instituted the application for the consolidation of the two matters.

In granting the application for consolidation of the two matters, the court held as follows:

> "In *casu* the two actions are pending in the same court. The parties are not necessarily the same. It is only the applicant who is common to both actions. She is the defendant in the divorce matter though she states she has put forward the reason for breakdown of her marriage as the adulterous affair between first and second respondents in her counterclaim. The issues to be decided are somehow related in that the divorce centers on a subsisting marriage and the adultery damages claim stems from the consequences of the marriage.
> In terms of the evidence, what would be common to both actions are the particulars of the adultery in order to prove general damages in respect of loss of consortium and infliction of *contumelia*. That evidence would be important for the applicant's claim in respect of sharing of matrimonial property, by operation of section 7 (4) of the Matrimonial Causes Act [*Chapter 5: 13*]"[7]

[7] At pages 3-4 of the judgment

Counsel for the first respondent argued that the *Mugari* case was distinguishable from the present matter because in that case the court considered the balance of convenience and that it would be convenient to consolidate the matters since the applicant was based outside the country. From my reading of the judgment, the fact that the applicant was resident outside the country, was one of the factors that the court considered in granting the application. It was not the sole consideration. I find no conceivable reason to depart from the *dictum* in the *Mugari* case.

Further, from a reading of r 34 the principle behind the consolidation of matters is not just about the need to avoid conflicting judgments as submitted on behalf of the respondents. It is about convenience, and not just to the parties, but to the administration of justice. Related matters that involve the same parties and issues common to the causes of action must be dealt with at the same time instead of spreading them between different judges of the same court.

A lot was also said about the need to relate to the conduct of the parties in terms of s 7(4) of the Matrimonial Causes Act. Counsel for the applicant argued that the conduct of the parties in the adultery suit was relevant to the question of the distribution of the matrimonial property in the divorce matter. That is not the correct position of the law. The conduct of the parties referred to in s 7(4) of the Matrimonial Causes Act, is not the one that has a bearing on the breakdown of the marriage. The fault principle is no longer part of the law. In granting a decree of divorce, the court is no longer concerned about imputing blame on any party as being the cause of the breakdown in the marriage. The correct position of the law was set out in *Mhora* v *Mhora*[8] where the court held as follows:

> "The appellant mistook this conduct to be that which leads to the breakdown of the marriage. A contextual reading of s 7 (4) makes it clear that this is not the conduct envisaged in the Act but that which has a bearing on the distribution of property. I am of the view that the conduct envisaged in s 7 (4) of the Act is that which seeks to hinder or frustrate a proper consideration of what consequential orders can be made upon divorce. The repercussions of such conduct are aptly illustrated in the *Shenje* case, *supra*, at 163A – C where GILLESPIE J had this to say:
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> > "The task of assessing a fair division of property can be difficult enough when appropriate evidence is led of the wealth, assets and means of the parties. It is potentially much more difficult when a party seeks to conceal his circumstances. The various suggested approaches to a division ("a one-third rule" or a "his, hers, theirs" approach) are rendered useless where one does not have any clear idea of what is available for distribution." (my emphasis)

So, the conduct envisaged under s 7(4) of the Matrimonial Causes Act is that which has a bearing on the sharing of the matrimonial property, and not so much about which party was

[8] SC 89/20 at p 18

to blame for the breakdown of the marriage. Be that as it may, the respondents did not point to any conceivable prejudice that they would suffer if these two matters are consolidated.

It must be noted that the court seized with the consolidated matters is at large as regards the procedure it will adopt in dealing with the matters. Rule 34 (c) is instructive. In terms of that provision, the court *"may make any order which it considers fit with regard to the further procedure…."*. The court may in its discretion decide to hear evidence on the divorce matter first and then the claim for adultery damages next. It is convenient having the same judge seized with the divorce, handle the adultery claim as well since all the parties have an interest in both matters.

All the three parties herein are involved in the divorce matter. Two of the parties are involved in the claim for adultery damages. It was submitted on behalf of the second respondent that he was not opposed to the granting of a decree of divorce, thus obviating the need to consolidate the matters. I still do not see how a consolidation of the matters would prejudice the respondents even if the divorce is uncontested. The court will simply record the terms of the divorce settlement and proceed to deal with the adultery claim. In the absence of any plausible prejudice being occasioned to any of the parties, it is my view that it would be convenient to have these matters consolidated so that they are disposed of by the same court.

COSTS

The general rule is that costs follow the event. Counsel for the applicant sought costs on the attorney and client scale in the event of the court finding in the applicant's favour. Indeed, the weight of case law authority that were brought to the attention of the respondents clearly showed that it was prudent to have these matters consolidated. However, in the exercise of my discretion, I determine that an order of costs on the attorney and client scale is not called for herein.

DISPOSITION

Resultantly it is ordered that:

1. The application for consolidation of the two actions instituted under case number HC 1502/22 and HC 3978/22 is hereby granted.
2. The applicant be and is hereby directed to consolidate the two court records HC 1502/22 and HC 3978/22 so that they proceed under case number HC 1502/22.
3. The applicant shall file her pre-trial conference papers with regards to both matters mentioned in para 2 above within seven (7) days of the granting of this order.

4. The first and second respondents shall file their pre-trial papers with regards to both matters referred to in para 2 above within seven (7) days of having received the applicant's pre-trial conference papers referred to in para 3 above.
5. The first and second respondents shall pay the applicant's costs of suit on the ordinary scale jointly or severally, the one paying the other to be absolved.

Takaindisa Law Chambers, legal practitioners for the applicant
Kadzere Hungwe and Mandevere, legal practitioners for the first respondent
Mugomeza and Mazhindu, legal practitioners for the second respondent