

BASIL MAKURURU
versus
DERICK VORI

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 18 February 2016 and 3 March 2016

Unopposed Application

A Muzvaba, for the plaintiff

MWAYERA J: The applicant instituted action proceedings against the defendant claiming adultery damages being \$4 000-00 for *contumelia* and \$7 000 for *consortium*. The defendant did not enter an appearance to defendant and the *dies inducie* having expired the applicant filed the current unopposed application.

The background to the matter as outlined by the applicant is that the defendant engaged in an adulterous relationship with his wife Sharon Margaret Makururu well knowing that the latter was married to the applicant in terms of the Marriage Act [*Chapter 5:11*]. The defendant and the applicant's wife would arrange to meet for intimate escapades during the time that the applicant would be working out of Harare. The intimate relationship just like arrangements for the meetings would be communicated via social media called "whatsapp". The applicant had to quit his Chairmanship of a Legal Aid Trust where his wife worked because at one point he was introduced by his wife's workmate to the defendant as her relative. The applicant pointed out that the explicit and graphic sexual messages between the defendant and his wife traumatized him extensively. This culminated in him issuing out summons for divorce and separating from his wife who has since moved to her parent's home. The applicant in his founding affidavit narrated that his marriage to his wife and mother of his minor child was stable only to be disturbed by the adulterous relationship.

The defendant did not defend the claim for adultery damages. The inference is that adultery was committed occasioning *contumelia* that is injury, hurt insult and indignity. Further the adultery caused loss of the spouse's consortium that is loss of comfort and society. The pain, injury and suffering occasioned on an innocent spouse because of the

adulterous relationship should not be understated. The loss and injury and humiliation cannot be measured in money since an award cannot in any way be equated to the value of a happy marriage eroded by an adulterous relationship. In the case of *Khumalo v Mandishona* 1996 (3) ZLR 737 the court stated that:

“It is of course, always a daunting task for a court to try and place monetary value on the pain and suffering inflicted on the plaintiff by adultery. What is important is that the innocent spouse has to be compensated for the injury, pain and discomfort occasioned”. I subscribe to the sentiments of the court in *Fuller v Fuller* 1949 (3) SA 852 which sentiments have been echoed now and again in similar cases of adultery”.

The judge there stated

“It is clear that the plaintiff has suffered intensely from the conduct of his wife and the defendant. Of course no amount of money can compensate the plaintiff for the mental distress which he suffered. He will understand my judgment does not mean that in my opinion the sum which I shall award to him can be regarded as making up for what he has suffered.”

The award of necessity has to be made and the court has to rely on other decided cases and also consider the circumstances of the case. It is not possible to convert with any exactitude the damages suffered through contumelia and loss of consortium but in assessing the appropriate quantum of damages the general trend is that in the absence of mitigating factors and where the adulterous relationship has led to divorce a higher award of damages should fallow. In the case of *Sikhuphakile Mpofo v Irene Munyore* HB 63/05 at p 6 of the cyclostyled judgment Bere J held that:

“The defendant appears in my view to have displayed lot of arrogance and her actions as explained by the plaintiff calculated to demean and inflict pain on the part of the plaintiff. The conduct by the defendant inevitably requires to be censored by this court. It is clear the plaintiff was indeed subjected to grave and humiliating iniquity”.

In this case the applicant was mocked and insulted at the hands of the defendant when his wife’s workmate at the Legal Aid Clinic where the applicant was a Chairman. The applicant was introduced to the defendant as a relative of the wife’s workmate. The applicant had to bear the pain of reading messages of intimacy of his wife and the defendant. The defendant and applicant’s wife even discussed on phone texts the applicant’s wife menstrual cycle. The defendant has been shown to have intruded sexually upon the applicant’s marriage and has contributed to the breach of duty of marital fidelity which spouses owe each other by committing adultery with the applicant’s wife. Such conduct ought to be visited with an award of adultery damages. In the case of *Katsumbe v Buyanga* 1991 (2) ZLR 256 H at 258-259. Robinson J in awarding adultery damages remarked:

“The court 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 spouses to have taken the law into their own hands.”

It is important in assessing the appropriate quantum of damages for one to underscore the reason behind adultery damages which is the protection of the sanctity of the marriage institution. The Zimbabwean courts have in their pronouncement frowned at the wrongfulness of adultery in so far as it is a threat to the marriage institution. *Mapuranga v Mungate* 1997 (1) ZLR 164 Malaba J (as he then was) held

“Adultery is still prohibited by public opinion as an act of sexual incontinence”

See also *Katsumbe v Buyanga supra* where Robinson J spoke strongly against adultery as an intrusion into the marriage institution. Adultery is still a recognised ground of divorce in the Matrimonial Causes Act. Section 5 (2) (b) reads

“Subject to subsection (1) and without prejudice to any other facts or circumstances which may show the irretrievable breakdown of a marriage, an appropriate court may have regard to the fact that

(b) the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship.”

The Constitution of Zimbabwe Amendment (No 20) Act 2013 s 78 thereof recognises the marriage institution and thus further shows any intrusion, with knowledge into the marriage institution by a third party is wrong and unlawful. It ought to be visited with an award of damages so as to compensate the innocent spouse. In the present case the defendant made effort to intrude on the applicant’s spouse when the applicant would be out working for his family, showing he had knowledge of the marriage. In an insensitive manner he discussed the intimate escapes on social media thereby inflicting pain, humiliation and indignity to the applicant.

In coming up with an award from damages I am guided by the fairly settled factors as ably pronounced by the courts. *Khumalo v Mandishona* 1996 (1) ZLR 434, *Nyakudya v Washaya* 2000 (1) ZLR 65, *Chenesai Rutawa v Tsistsi Venge* HB 152/11 and *Muhwati v Nyama* HH 17-11.

The following factors have to be considered in coming up with an award.

1. The social and economic status of the plaintiff and the defendant.
2. The character of the spouse involved.
3. Whether or not the defendant has shown contrition

4. The need for deterring measures against the adulterer to protect the innocent spouse against contracting HIV from errant spouse.
5. The level of award in similar cases.

The applicant a lawyer by profession must have suffered on discovery of the fact that his wife was committing adultery with a music artist. The adulterous relationship has led to institution of divorce proceedings to the detriment of the once happy marriage. In addition to the injury, the applicant has suffered loss of consortium. Due regard has been had to all circumstances of this case and an award for damages for *contumelia* and loss of consortium has to be made as a way of compensating the innocent spouse. It is also my considered view that given the increase in crimes of passion brought about by the evil associated with adultery for deterrence purposes, meaningful awards which do not appear to mock the aggrieved innocent spouse are called for.

Accordingly it is ordered that:

1. The defendant shall pay a total of \$6 000; (being \$4 000 for *contumelia* and \$2 000 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 pay the costs of suit.

Musoni Masasire Law Chambers, applicant's legal practitioners