

CHIPO JHAMBA

AND

ALETA V. MUGWISI

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 26 NOVEMBER 2009 AND 11 FEBRUARY 2010

Mrs Chanayiwa for the plaintiff

Adultery damages

CHEDA J: This is an application for a default judgment for adultery damages.

On the 26th November 2008 plaintiff sued for adultery damages in the sum of US\$50000-00. I granted the application for default but amended the claim to US\$500-00 with an undertaking to give my reasons for the reduction of the said sum later. The following are my reasons.

Plaintiff and her husband entered into a monogamous marriage under the marriages Act [Chapter 5:11] the then [Chapter 37] on the 17th August 1974 and the said marriage still subsists. From 1988 and on diverse occasions plaintiff's husband and defendant illicitly engaged and associated in an adulterous sexual relationship which resulted in the birth of four children, the last one been born in December 1996.

Plaintiff sued defendant for adultery damages which action defendant defended, but, later failed to file a plea and hence an application for default judgment was applied for. Nothing turns on this matter other than the question of *quantum*.

Plaintiff's husband has been committing adultery with defendant for 21 years. Plaintiff according to the papers, did nothing about it until 2009. Plaintiff is indeed legally entitled to damages, but, I doubt if the circumstances surrounding this case justifies the claim made, namely that of US\$50000-00. It is clear that defendant intruded into plaintiff's marriage and for that misdemeanour she should be punished.

There are, however, two issues which I must deal with. Firstly, plaintiff claimed US\$50000-00 for damages without stating what amount is for the injury she has suffered or *contumelia* and which one is for the loss of society and comfort or *consortium*. The correct legal position is that adultery damages are claimable on two entirely separate and distinct grounds; firstly on the ground of the injury or *contumelia* inflicted upon the plaintiff, and secondly on the ground of the loss of comfort, society and services of her husband (*consortium*), see *Viviers v Kilian* 1927 AD 449. It was therefore wrong for plaintiff to lump her claims in one, mixing both damages *contumelia* injury and *consortium*.

Secondly, the *quantum* should be reflective of all the circumstances surrounding the occurrence of the adultery, inclusive of plaintiff's own conduct in the matter. Defendant has been having this illicit relationship with plaintiff's husband for over 20 years, which resulted in four off-springs. Surely, she can not say that she was not aware of his sexual escapades, and at least, she does not shade light on this aspect of her knowledge or otherwise thereof. In the absence of her denial of this knowledge, with all due respect to her, it is reasonable to assume that she must have known of this at some point bearing in mind the length of time of the existence of the adulterous relationship

between her husband and defendant. She, however, chose to ignore it. By her inaction, therefore, she condoned the adultery thereby allowing it to continue. To claim adultery damages for a large sum of money for a relationship which has been in existence for over 20 years later, is in my view, to remove the sting the effect of the adultery usually has on the offended party. In addition thereto, she seems not to have sued for divorce, which is normally is the case in adultery cases. She is, however, entitled to either sue the adulterer alone or and at the same time sue her spouse for divorce. If she had sued her husband for divorce then this would go to show that she has indeed lost *consortium* of her husband and thus her claim for a higher sum would have been justified. In *Biccard v Biccard and Fryer* 1892 SC 473 at 476 where De Villers, C J ably stated:-

“Unless the breach between a husband and his adulterous wife is final, I should not be inclined to award damages to the husband for two reasons. There is not that complete loss of the wife’s society which constitutes the main element in the estimation of damages, and there remains the strong probability that the husband may be trading upon his wife’s dishonour.”

It is the position of our law that loss of *consortium* is a main element in the estimation of damages for adultery, see also *Bruwer v Joubert* 1966 (3) SA 334.

In *Calleta Gwatiringa v Anastasia Matake* HB 119/09 (cyclostyled) I dealt with this issue. I still hold the same view that the fact that plaintiff with full knowledge of the adulterous relationship of defendant with her husband still chooses to keep the marriage but sues for adultery damages, only, her choice should therefore influence the *quantum*.

It is for the above reasons that I reduced the *quantum* from US\$50000-00 to US\$500-00 as I feel that by awarding plaintiff her claim as prayed would amount to allowing her trade on her husband’s dishonour.

The circumstances surrounding this case in my view do not justify the claim made.

It is ordered that:-

- (1) An order for payment in the sum of US\$500-00 (Five hundred United States Dollars) being damages for adultery against defendant be and is hereby granted.
- (2) Defendant pays interest at the prescribed rate on the sum of US\$500 mentioned in (1) above from the date of service of summons to date of full and final payment.
- (3) An order for payment of costs of suit at an attorney and client scale.

Dube-Banda, Nzarayapenga and partners, plaintiff's legal practitioners