MARTHA MUHWATI

versus

YEUKAI PURITY NYAMA

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE, 30 June 2011

FAMILY LAW COURT

**Unopposed Application**

*S Hofisi*, for the plaintiff

The defendant in default

MAWADZE J: This is an application for default judgment. The claim is for adultery damages in the sum of US$20 000-00.

The brief facts of the matter may be summarised as follows:

The plaintiff (now the applicant) issued summons out of this court on 12 March 2010 seeking adultery damages in the sum of US$20 000-00 against the defendant (now the respondent). The plaintiff’s prayer as captured in the declaration para 9 is as follows:

“Whereof the plaintiff claims for:

1. Loss of contumelia US$5 000-00
2. Loss of consortium US$5 000-00
3. Emotional stress US$3 000-00
4. Embarrassment US$2000-00
5. Breakdown of marriage US$5 000-00
6. Costs of suit” (sic)

The plaintiff’s prayer is couched differently in the affidavit of evidence para 19 as follows:

“19 Wherefore I pray the following:

1. Damages for loss of contumelia US$5 000-00
2. Damages for loss of consortium US$5 000-00
3. Damages for emotional stress and

Embarrassment US$5 000-00

1. Breakdown of marriage and loss

of support US$5 000-00” (sic).

The defendant was served with the summons at her place of residence through her sister in law on 23 March 2010. No appearance to defend was filed. The plaintiff applied for a default judgment after the expiry of the time within which to file appearance to defend. The application was filed on 9 September 2010. The matter was referred to the unopposed roll. On 16 June 2011 I directed Mr *Hofisi* for the plaintiff to file heads of argument in addition to the affidavit of evidence already filed of record justifying the basis for the claim and more importantly the quantum of damages. This was done on 21 June 2011.

The facts of this case as can be gleaned from both the plaintiff’s declaration and affidavit of evidence is as follows:

The plaintiff married Moses Muhwati on either 7 February or 7 March 1987 (the marriage certificate is not clear) in terms of the Marriages Act [*Cap 5*:*11*]. The marriage was blessed with two children Vimbai and Kudzai who are now both majors.

The adulterous relationship between the defendant and the plaintiff’s husband started in 2006. By then the plaintiff had been married for about 19 years. This adulterous relationship has continued unabated to date. It has therefore been in existence for about 6 years. In fact a child, Tinotenda was born out of this relationship in 2008.

It is not clear as to when the plaintiff confronted the defendant and advised her of the marital status of her husband Moses Muhwati. It is the plaintiff’s case that at all material times the defendant engaged in sexual intercourse with her husband, the defendant was aware of Moses Muhwati’s marital status hence the adulterous nature of the relationship. The plaintiff stated that she even approached the defendant’s mother and aunt at the defendant’s residence at number 33 Mwambi Street, Mbare, Harare to register her disapproval of the adulterous relationship between the defendant and her husband. The plaintiff said the defendant had ignored her initial attempt to dissuade the defendant from the relationship. According to the plaintiff the defendant’s mother and aunt assured her that they would prevail upon the defendant and cause her to desist from such a relationship with the plaintiff’s husband. Apparently nothing positive came out of this promise. Instead the adulterous affair between the defendant and the plaintiff’s husband blossomed resulting in the birth of a child in 2008. The plaintiff’s husband has since moved out of the matrimonial home in Bluff Hill Harare and is now co habiting with the defendant and their child. The plaintiff’s marriage which had hitherto been stable and strong for 19 years has been wrecked. She has now lost the love, comfort, society and companionship she used to have with her husband. Most importantly she has lost the conjugal rights. The plaintiff makes it clear that she has now lost all other services she used to get from her husband as her marriage now exists on paper only.

It is the plaintiff’s case that she has now lost all financial support she used to get from her husband. Her husband is a director and shareholder of two companies Demotive (Pvt) Ltd and Demotors (Pvt) Ltd. The companies generated financial resources to support the family. The plaintiff said her husband own a farm in the District of Umtali being subdivision 2 of the remaining extent of Essex measuring 57 hectares where they grow various cash crops realising substantial income. According to the plaintiff she used to receive US$3 500-00 from the income generated from the companies and the farm which she used to buy food for the family and pay school fees for the children. All this is now history as the defendant and her child are now the sole beneficiaries of all the fruits reaped from the business concerns and farming activities. The plaintiff has been banished from the farm.

It is the plaintiff’s contention that her self-esteem has been severely lowered to the point of ultimate humiliation. The plaintiff is a banker and head of operations at Interfin Bank. Her job commands respect but this is no longer the case as her marital tribulations are now an open secret at her work place where she has obviously lost all respect. The plaintiff’s social and religious life has not been spared either. She is a devout Christian belonging to the ZAOGA church where her father in law is a bishop. Her husband and the defendant through their adulterous affair have embarrassed her even at church. She can no longer enjoy her freedom of worship. According to the plaintiff her husband is a shareholder and organising secretary of Gunners Football Club and she used to attend soccer matches and other related social functions as “very important persons” in the company of her husband. Her role in this regard has been taken over by the defendant. She is now even ashamed to be seen at such social gatherings.

I am satisfied that the plaintiff in both her affidavit of evidence and heads of argument has addressed the issues pertaining to the basis for the claim and the quantum of adultery damages. I am however not persuaded that the plaintiff is entitled to adultery damages in the sum of US$20 000-00.

As already stated there is some confusion and or lack of clarity in the plaintiff’s prayer both in the declaration and the affidavit of evidence. The heads of argument filed by the plaintiff are very detailed and useful. I am indebted to Mr *Hofisi* in that regard. Be that as it may, the plaintiff could not still justify the claim of damages in the sum of US$20 000-00 even from the cases referred to.

I am satisfied that the plaintiff’s marriage has been virtually destroyed. She had lost her husband of 24 years to the defendant. Her dignity and self-esteem has been lowered in the eyes of her peers, workmates, fellow church members and the public at large. The plaintiff’s children though majors have lost a father and all the financial support. I am in no doubt that the defendant’s conduct has caused immense emotional stress and embarrassment to the plaintiff. It is however not an easy task to quantify all these findings into financial terms.

A claim for adultery damages is generally premised on two aspects, which are, damages for contumelia and damages for loss of consortium. See *Khumalo* v *Mandishona* 1996 (1) ZLR 434. There is no basis therefore for the plaintiff to split her claim into other aspects like “emotional stress, embarrassment, breakdown of marriage” which all fall under the armbit of contumelia and loss of consortium. By adopting this approach alone the plaintiff’s claim is reduced to US$10 00-00 from US$20 000-00.

In the case of *Timothy Chinyadza* v *Melton Phiri* HH 76-09 KUDYA J at p 4 of the cycostyled judgment defined contumelia as follows:

“Contumelia is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery commuted by a defendant with his or her spouse”.

The learned judge made reference to a number of cases which includes *Doyle* v *Salgo* (1) 1957, R & N 840 of 844 A, *Katsume* v *Buyanga* 1991 (2) ZLR 256 (H) at 258 C, *Takadini* v *Maimba* 1996 (2) ZLR 737 (S) at 735 F, *Nyandoro* v *Tizirai* HH 12-06 and *Gombakomba* v  *Bhudhuyo* HH 118-06.

In *Khumalo* v *Mandishona* 1996 (1) ZLR 434 (H) MALABA J as he then was outlined factors the court should take into account in arriving at an estimate of the damages due to the plaintiff for contumelia. Let me proceed to list them and highlight their relevance in the present case.

1. The character of the spouse involved: From the facts of the matter it would appear that both the plaintiff and her husband were devout Christians and they had lived in happy matrimony for 19 years before the defendant intruded into their marital relationship.
2. The social and economic status of the plaintiff and defendant: The defendant chose not to defend this claim and the court is inhibited in assessing any other factors which may be mitigatory and or in her favour. I have already referred to the plaintiff’s social and economic status and how all this have been ruined.
3. Whether the defendant has shown contrition: There is nothing to show that the defendant is contrite. In fact the defendant in her wisdom decided to disregard the court proceedings. The inference one may draw is that the defendant is oblivious to the consequences of her conduct and would careless in that regard. Such an attitude should be considered by the court and properly assessed as an aggravating factor.
4. The need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse. There is always the inherent danger that the plaintiff is exposed to the risk of contracting the HIV virus as a result of her husband’s promiscuous conduct of engaging in extra marital sex with the defendant. The courts play a vital role in preserving the institution of marriage and should punish accordingly those who find pleasure in promiscuity.
5. The level of awards in similar cases: All the cases cited in the heads of argument indicate that the level of awards made both for damages for contumelia and loss of consortium do not amount to US10 000-00. These include *Mtungwazi* v *Sibanda* HB 61/90, *Nyandoro* v *Tizirai* HH 12-06, *Timothy Chinyadza* v *Melton Phiri* HH 76/09, *Chipo Dera* v *Cynthia Kambeza* HH 175-10. The award in respect of damages for contumelia range from US800-00 to US$5 000-00. I am satisfied that an estimate of US$2 500-00 is adequate to compensate the plaintiff for contumelia.

Consortium relates to loss of comfort, society and service of wife or husband as a result of the adultery committed by the defendant. See *Timothy Chinyadza* v *Melton Phiri supra*. I have already referred to the plaintiff’s evidence in that regard. Mr *Hofisi* in the heads of arguments did not refer to specific awards made by this court in relation to damages for loss of consortium. In *Timothy Chinyadza* v *Melton Phiri supra* an award of US$500-00 was made for loss of consortium. In the case of *Chipo Dera* v *Cythia Kambeza* HH 175-10 the court granted damages in the sum of US$400 for loss of consortium. In *casu* the defendant chose not to defend the claim and the plaintiff’s averments are not controverted. In the exercise of my discretion after weighing all the factors as outlined in the plaintiff’s evidence I estimate damage for loss of consortium to be US$2 500-00.

In the result it is ordered that the defendant shall pay the plaintiff the sum of US$5000-00 as damages for adultery with interest thereon at the prescribed rate from the date of judgment to the date of full payment and costs of suit.

*V Nyemba & Associates*, plaintiff’s legal practitioners