

GEORGINA NJODZI
versus
LORRAINE MATIONE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 September 2015 & 14 January 2016

Trial cause

L B Munyuru, for the plaintiff
W T Pasipanodya, for the defendant

MWAYERA J: This matter concerns the status of adultery damages in Zimbabwe in the 21st century. The main issue is whether or not the common law delictual claim for adultery damages is constitutional or unconstitutional.

The plaintiff is married to Lawrence Muzvondiwa in terms of the Marriages Act [*Chapter 5:11*]. From about 2012, it is alleged that the defendant engaged in adulterous relations with the plaintiff's husband. The adulterous relationship culminated in siring a child for the adulterous couple. The plaintiff, irked by this adulterous relationship, issued summons claiming adultery damages for a total of \$25 000 broken down as follows;

- (a) *Contumelia*: \$15 000
- (b) Loss of consortium: \$10 000

The parties referred the matter for trial on the contentious issues. At the hearing of the trial the defendant made an application on the constitutionality, or otherwise of the plaintiff's claim. It is this constitutional application that I am now seized with and seek to dispose of.

The thrust of the defendant's argument as presented in heads of argument and orally can be briefly summed up as follows. The applicant (defendant) argued that it is improper to sue the defendant to the exclusion of the plaintiff's spouse yet he is the main architect of the relationship. This is viewed by the applicant as discriminatory and therefore contrary to the constitutional provisions of equality before the law.

Secondly, the applicant argued that the claim amounted to infringement into privacy of the applicant's sexual life thus violating not only the right to privacy, but also the right to freedom of association. The applicant argued that the claim by the plaintiff has no legal standing as it is archaic and unconstitutional.

The respondent (plaintiff) on the other hand presented argument in Heads of Arguments and orally to the effect that the claim was well founded in terms of common law and was also supported by the Constitution. The Constitution being the supreme law of the country recognises the marriage institution. Thus adultery, as argued by the respondent is a threat to the very existence of the marriage institution which the Constitution of Zimbabwe seeks to protect. As such, the claim for adultery damages by the plaintiff was properly before the court.

I must mention at the outset that the applicant placed heavy reliance on foreign judgements to persuade the court to align to the notion that adultery damages are not only archaic but unconstitutional. I will, in due course, revert to some of the cases referred to as persuasive authority.

At this juncture, it is important to look at the delictual claim of adultery and the mischief that the law seeks to protect by the remedies available. It is settled that adultery is an injury occasioned to the innocent spouse because of the adulterous relationship. The spouse can recover damages for loss of a spouse's consortium as well as any patrimonial loss suffered and also personal injury or contumelia suffered by the innocent spouse, inclusive of loss of comfort, society and services.

In the case of *Timothy Chinyadza v Melton Phiri* HH 76-09 Kudya J at p 4 of the cyclostyled judgement defined *contumelia* as follows: "*Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by adultery committed by a defendant with his or her spouse". One does not require a magnifying glass to scrutinize and come up with a conclusion that *contumelia*, that is injury, hurt, insult and indignity occurs, to an innocent spouse where the other commits adultery. The injury is so obvious that there would be no justification in not seeking legal redress for the wrongful hurt occasioned. The Supreme Court of South Africa decision in the case of *RH and DE (C594/2013) [2014] ZA SCA 133* confirmed that the award for *contumelia* was rightly made even though there was a finding that the adultery was committed at a time when the marriage had already irretrievably broken down. What is worth noting is that once there is evidence of injury, hurt, insult and indignity having been occasioned on an innocent party because of the adulterous relationship, then the

innocent spouse is entitled to damages for *contumelia*. Once *contumelia* is established then the next issue would be whether or not there is loss of consortium, that is loss of comfort and society. The basis of such a claim being the defilement and corruption of the innocent spouse's matrimonial bed. It is my considered view that adultery damages, whether classified as falling under *contumelia* or on the other hand, consortium, are delictual damages arising from a delictual wrong occasioned to an innocent married party. To this extent the distinction is fallacious.

It is important to understand the basis of such a delictual claim in the context of a marriage institution. A marriage is defined as a *sugeneris* contract entered into by two willing parties (see *Ncube, Family Law in Zimbabwe* 1987]. The sanctity of this anomalous contract is what an adultery damages claim seeks to protect. The claim should not be viewed in isolation but from the view point of its purpose, being to protect the sanctity of marriage. If it is for this purpose then the argument that it is improper to sue one party to the adulterous relationship does not hold water. This is because given the nature of a marriage, it would amount to suing one self. Whereas in suing the third party, the claimant will be seeking a personal remedy for hurt, injury, iniquity of company and comfort occasioned by the third party's association with the married party. The historic background to adultery claims should not be ignored upon considering whether or not the delict no longer has space in our legal system. I am alive to the position taken by the Supreme Court of South Africa in the case of *RH v DE (supra)*, wherein in relation to the award for consortium, it held that the award was not justified, and further concluded that its continued existence was no longer justified.

The court in *RH v DE* considered the question for determination to be what are the consequences of adultery and thus only sought to highlight the quantum of damages. The court considered the South African constitutional values and also sought to rely on other foreign judgements. It then held that the award for *contumelia* had been rightly made but that the award for consortium was not justified. It held further that the delict's continued existence in the South African context was no longer justified.

The circumstances of that case are that adultery was committed after irretrievable breakdown had occurred. Also the court relied on decisions from other jurisdictions like *Rose v Valentine* [1999] SCSC 8; 1999 SLR 99 the Supreme Court of Seychelles, quoting *Cosgrow v Cosgrow*, SCA 12/1992 (New Zealand) that,

“The evolution of law within commonwealth jurisdiction over the last decade or so demonstrates that there is no longer any turpitude attached to adultery”.

The South African Supreme Court was persuaded by that position and also sought to evaluate the socio-economic and legal framework for the South African jurisdiction. As correctly observed in *HV Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 CC

“In considering the position in other jurisdictions sight should not be lost of whether similar legal questions would have arisen and the context in which they would have arisen so as to come up with an informed decision of the applicability or otherwise of the decision”.

The central question is, in the Zimbabwean context are these foreign decisions applicable?

In other words one has to consider whether the reasoning adopted in South Africa, Seychelles, Canada and New Zealand is possible and applicable in light of the Zimbabwean Constitution’s normative framework and our social context. From case law, it is settled in our jurisdiction that in coming up with adultery damages the following factors have to be considered;

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.
5. The level of award in similar cases.

See *Khumalo v Mandishona* 1996 (1) ZLR 434; *Nyakudya v Washaya* 2000 (1) ZLR 65 C; *Chenesai Rateiwa v Tsistsi Venge* HB 152/11.

Of course the circumstances of each case come under scrutiny as the court makes the decision. The reason behind adultery damages being the protection of the sanctity of the marriage institution. In *Katsimbe v Buyanga* 1999 (1) ZLR 256 H at 258-259 Robinson J affirmed the purpose of adultery damages as the protection of the marriage institution when he remarked as follows:

“Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of duty of marital fidelity which each spouse owes the other by committing adultery with 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 as opposed to treating him or her with kid gloves for a variety of expedient reasons.”

Precedents in the Zimbabwean jurisdiction reveals that adultery damages are underpinned on the preservation of the sanctity of marriage. The Matrimonial Causes Act

[Chapter 5:13] provide sanction issues of divorce and distribution or apportionment of property. Divorce is granted in circumstances where it would have been shown that the marriage has irretrievably broken down. Adultery is still a recognised ground of divorce and as such it is still part of our law.

Section 5 (1) and 2 (b) of the Matrimonial Causes Act reads as follows:

“(1) An appropriate court may grant a decree of divorce on the grounds of irretrievable break down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of restoration of a normal marriage relationship between them.

(2) Subject to subsection (i) and without prejudice to any other facts or circumstances which may show the irretrievable break-down of a marriage, an appropriate court may have regard to the fact that

(a)

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

Since adultery is considered as a ground for divorce then it would be a contradiction to consider the delictual claim for adultery damages as irrelevant. The Maintenance Act [Chapter 5:09] also seeks to taint adultery. Section 10 on adultery reads:

“Where a spouse is proved to have committed adultery before or after making an order and such adultery has not been condoned, the maintenance court may refuse to make an order for maintenance in favour of such spouse or may discharge an order for maintenance made in favour of such spouse.”

Thus clearly for all intents and purposes the legislature as it currently stands condemns adultery.

As will later be shown when we look closely at the relevant constitutional provisions adultery damages are still relevant in our societal and legal context.

Worth noting is the fact that superior courts, inclusive of the High Court, have inherent jurisdiction to protect and regulate their own process and develop common law in so far as the interests of justice are maintained. See s 176 of the Constitution.

In the case of *Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143 Gubbay ACJ as he then stated that,

“..... law in a developing country cannot afford to remain static.....it must adapt itself to fluid economic and social norms as and values and to altering views of justice.”

In making that pronouncement did not seek to usurp the legislature’s function of making the law. Rather, he buttressed the need to develop the common law taking into account the societal interests which are the interests of justice. This observation I make is made clear when one considers the facts of the *Zimnat Insurance Co Ltd v Chawanda supra*.

The court in that case had to answer the question whether a wife married under an unregistered customary union has a right of support and thus a right to compensation for loss of support. The court had to do away with discrimination between a customary law marriage and a civil marriage. The court had to protect the interests of widows who are married under customary law by developing customary law to allow widows of customary law marriages to have a claim against third parties for the wrongful death of their spouse. My understanding of the reasoning in the *Zimnat Insurance Co Ltd v Chawanda* is that the court, in the interests of justice, can develop common law but that this does not amount to usurping the legislature's function of making law. The same sentiments were echoed by Kentridge AJ (as he then was) in *Duplessis and Others v Deklerk and Another* [1966] ZACC 10, 1996 (3) SA 850 quoting *R v Salituro* (1992) 8 C.R.R. 2nd 173 when he remarked that:

“Judges can and should adapt the common law to reflect the changing, social moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. None the less there are significant constraints on the power of the judiciary to change the law ... in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform ... The judiciary should confine itself to these incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.” underlining my emphasis

Clearly courts have a duty to develop the common law whenever it is warranted and in conformity with the interests of justice. Having made the observation that adultery is still part of our law from precedents, and legislative provisions, it is important to turn to the constitutional provisions which show that adultery claims are very much in sync with the present day social and legal reality in Zimbabwe. Public policy is now infused with constitutional values and norms. It is **apparent public policy often represents the legal convictions of the community. It reflects those values that are held dearly by a society.** To that extent therefore in deciding whether a delictual claim of adultery damages is constitutional or otherwise, while appreciating and respecting foreign jurisdictions' decisions, the decision should be contextualised to reflect the legal convictions and societal values. Section 2 (1) of the Constitution of Zimbabwe is relevant and speaks volumes in respect of societal values. It reads:

“This constitution is the supreme law of Zimbabwe and any law, practice, custom or contract inconsistent with it is invalid to the extent of the inconsistency. The obligation imposed by this constitution are binding on every person. Natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

Section 3 of the same Constitution, which is the supreme law of the country, outlines the values and principles on which the constitution is founded. A reading of the whole section clearly reveals that the constitution recognizes and accepts that the Zimbabwean moral fabric is engraved in the country's culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution. The institution of marriage is entrenched deeply in the country's culture, tradition and religion and its protection has been in unambiguous language propagated by the courts. See *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64. In both cases the courts frowned on the wrongfulness of adultery in so far as it is a threat to the marriage institution. Malaba J (as he then was) in the *Mungate* case held:

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

Given the people driven Constitution process which took place in Zimbabwe that observation by Malaba J (as he then was) still holds true as confirmed by protection of the marriage institution in the Constitution of Zimbabwe Amendment (No 20) Act 2013. Section 78 thereof recognizes the marriage institution. This gives a public complexion to the marriage institution. The nation of Zimbabwe has a duty to protect the marriage institution and obviously third parties encroaching into a marriage are also be part of the nation.

This takes me to the purpose of adultery damages, being protection of the marriage institution. My reading of the case *DE v RH (supra)* reveals, to a great extent the court proceeded on the premise that the import of the delict is to restore a marriage or to prop it up. In my view, and with all due respect this is not the consideration. This marks a point of departure. The point which must be made is that the import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which our constitution is underpinned. Adultery damages are to compensate the innocent party to a marriage for their loss of consortium and *contumelia*. When an award for damages for adultery is made, the innocent party is not precluded from suing for divorce or condoning the wrong by the other spouse and forging ahead with the marriage. It is accepted marriage and family are social institutions of vital importance. They have more than personal significance, as shown by the constitutional protection of the morally underpinned relationship. The constitution would not seek to protect the marriage institution if the duty for the sustenance of the institution was wholly for the parties, at least

in the Zimbabwean context, given the importance placed by society on the marriage institution. The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when from the perspective of its invasion of the marriage institution. The marriage institution is protected by the society and the nation in the Constitution. In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values. The invasion of a marriage by a third party in the Zimbabwean context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage. The dignity and right to privacy of all citizens is not absolute as the constitution, in s 86 is instructive on limitation of fundamental Human Rights and Freedom. Section 86 (1) and (2) is instructive. It reads:

- “ 1. The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons. (underlining my emphasis)
2. The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors including (a) the nature of right or freedom concerned (b) the purpose of the limitation, in particular whether it is necessary in the interest of ... public morality ... or the general public interest.”

It is made abundantly clear that rights, as given by the Constitution have to be responsibly enjoyed. Everyone has the duty to respect the fundamental human rights and freedoms as entrenched in the constitution. In *casu*, the defendant has rights to dignity, privacy and equality before the law, which are the same rights the plaintiff has. What remains is the balancing act on whether there is an intrusion on the other's rights which would require the delictual sanction. To argue that dealing with an adultery damages claim trial, would infringe on privacy of the defendant as issues of intimacy would be delved into, amounts to barring prosecution of all matters of a sexual nature. One needs not go further by giving examples of cases of rape which necessarily involve divulging of intimate details of how the sexual violation would have occurred. Even divorce matters, parties seek to prove irretrievable breakdown by divulging lack of sexual intimacy for specified periods. Adultery entails intrusion into an innocent spouse's intimate relationship without the innocent's

spouse's consent. Certainly that does not mean the intruding party's rights supersede the rights of the innocent spouse. The investigation into the alleged adultery is to assess if indeed the intrusion is genuine, and if so, to assess the quantum of damages so as to compensate the wronged innocent spouse. There is nothing unconstitutional, in my view in carrying out the investigative part, more so when one considers the purpose of adultery damages. The potential infringement of dignity and privacy should not be viewed in isolation of the rights of the innocent spouse in a marriage. Section 56 of the constitution is to the effect that all persons are equal before the law and have equal protection and benefit of the law. My reading of that section does not reveal that wrongful conduct is sanctioned by the law. The constitution clearly affords protection to all regardless of their social status. It is not only a fallacy, but also unrealistic to impute that a claim for adultery damages by an innocent spouse discriminates on the basis of marital status. This is for the obvious reason that adultery damages claims are not only targeted against unmarried persons. The claim is against a third party, married, or not married who is alleged to have intruded into the marriage institution at the expense of the innocent spouse. The action for adultery damages is as a matter of fact not limited to unmarried third parties only.

From the above discussions it is apparent that the defendant has not managed to prove that the claim for the adultery damages offends against the Zimbabwean Constitution. What is clear is that other jurisdictions have in part or fully done away with the delict or tort of adultery. Whereas it is important to take note and appreciate what is going on in other jurisdictions, it is of paramount importance to apply the principle in the context of our nation as a constitutional democracy. Public policy, as reflected, in our Constitution, depicts our values as a nation. The protection of the family and marriage institutions is encapsulated in the constitution. It is my considered view that society which was involved in the constitution making process still views adultery negatively. The divorce law in Zimbabwe is based on the irretrievable breakdown principle. Adultery is one of the considerations under s 6 of the Matrimonial Causes Act. Whereas the innocent party cannot sue their spouse for adultery for the obvious reason they (underlying the marriage relationship) also have an option to divorce or condone and move on, the fundamental question is what should happen to the third party who would have intruded? It is the law which ought to retain a legal outlet to the aggrieved spouse. The Zimbabwean Constitution and subservient law still permit redress by claims for adultery damages. The damages are meant to compensate for the occasioned *contumelia* and loss of consortium. Adultery is still a consideration in our law for divorce and as such given

our constitutional provisions on the rights, freedoms, protection of the marriage and family institution one cannot just in the abstract, from foreign jurisdictions with different societal values, declare an otherwise legitimate claim illegitimate.

The remarks and sentiments by Hon Robinson J in *Katsumbe v Buyanga supra* still hold true today. I subscribe to the same sentiments where he remarked

“Hopefully, we have not reached the stage where we have to be told adultery is not something to be eschewed and condemned. Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the court will only be party to society’s further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against premarital and extra marital sex and which has landed the world in the sexual moral over which monsters, AIDS, now presides in all its frightening aspects”.

See also the case of *Elizabeth Tanyanyiwa v Lindiwe Huchu* HH 668-14.

I wish to add my voice that it must be remembered that marriage and family remains the basic structure of our society, the preservation of which squarely lies on the couple and the nation as per our Constitution. The third party who, with knowledge, intrudes into the marriage institution, ought to compensate the innocent spouse for the injury occasioned. It goes without saying, adultery is almost always debilitating for the victimised spouse who suffers indignity and hurt because of the adultery. The importance of the marriage and family social institutions cannot be underplayed, moreso given that the relationship is not only significant to the individuals concerned but also for the public at large.

In my view marriage is a human institution which is regulated by law and protected by the constitution which, in turn creates genuine legal duties.

See also the case of *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000(3) SA 936 (OC); 2000(8) BCLR 837 (CC).

The court therein alluded to the importance of marriage and family institution, and O’Regan J had this to say;

“Marriage and family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties..... Such relationships are of profound, significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.....” My emphasis.

It can clearly be deduced therefore, that a marriage institution, has both the private and public complexion, hence the need for its protection.

Any deliberate intrusion into the marriage institution is an attack on the dignity of an innocent spouse which ought to be sanctioned by the law. In my considered view the *bonis mores* or legal convictions of our society have not changed so much that adultery could objectively be regarded as reasonable and thus it remains unlawful. The legal and public policy in Zimbabwe, are still reflective of adultery as wrongful. This is more so given our legislative and constitutional provisions which are inclined towards protection of the marriage and family institution.

The marriage institution is founded upon morals and the constitution which is the supreme law of the country protects that very morally underpinned relationship. Intrusion in the marriage institution by adultery therefore remains wrongful and there is nothing unconstitutional about an adultery damages claim.

Accordingly it is ordered that:

1. The application to have adultery damages claim declared unconstitutional is dismissed with costs.
2. The plaintiff's claim for adultery damages is properly before the court.

Mvingi & Mugadza, plaintiff's legal practitioners
Messrs Manase & Manase, defendant's legal practitioners