

CORAH MAHACHI  
versus  
PAMELA FARAI ZIMBA

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 10 April 2017 and 24 May 2017

**Chamber application: default judgment, adultery damages.**

MUSHORE J: This application was placed before me in Chambers as an unopposed application. On 26 October 2016, the applicant had filed a suit against the respondent, claiming the sum of US\$ 25 000-00 for adultery damages. She claims that the respondent has been involved in an adulterous relationship with her husband and that their unlawful union resulted in the birth of a girl child out of wedlock, in March 2017. Although the applicant caused summons to be served on the respondent personally, for reasons best known by the respondent, she did not enter appearance to defend the suit, leading to the present application being made by the applicant. The papers which were placed before me in the present application were compliant with the Rules of the High Court, 1971 [hereinafter referred to as ‘the rules’]. However the applicant had not caused Heads of Argument to be filed in support of the claim. Accordingly, I directed that such Heads be filed, in order for me to determine the merits of the claim on liability, and if liability had been established; the *quantum* of damages to be awarded to the applicant. The Heads were duly filed by the applicant on 4 April 2017.

The application was made in terms of Order 32 r 226 (2) (d) which reads:

- “2. An application shall not be made as a chamber application unless:-  
(d) the defendant has previously had due notice that the order will be sought, and is in default.”

The applicant has also complied with Order 32 r 241 (1) and the application has been placed before me in terms of Order 32 r 242 (1) which does not require service of the application on the respondent. Heads of argument have been filed by the applicant in accordance with r 243 which reads:-

“243. Heads of Argument

A chamber application may be accompanied by Heads of Argument clearly outlining the submissions relied upon and setting out the authorities which justify the application being made without notice and in support of the order sought”

The applicant served summons on the respondent personally. The respondent failed to defend them. Prior to summons being issued applicant gave notice to the applicant by way of personally serving her with a letter of demand (dated 24 June 2016), wherein she requested respondent to desist from continuing an adulterous relationship with her husband, and warning her that if she carried on with the illicit relationship, she would sue her for damages. She attached proof of her marriage by attaching her marriage certificate to her letter of demand. The letter of demand sets out some of facts which led to the applicant filing suit:

“In terms of the instructions we have, you are engaged in an adulterous relationship with our client’s husband, one Taurayi Mungate, with whom it is alleged you are staying together. It is also alleged that you are planning to get married soon and our client even saw you in her house the past two weeks when she visited her husband at the plot. We would like to advise that what you are doing is called adultery and is an actionable civil wrong. Our client and Mr Mungate are legally married and hereto is a copy of their marriage certificate.

.....by this letter we formally advise you and at the same time ordering you to go away and leave our client’s husband within a week of being served with this letter failure of which we will take it without a shadow of a doubt that you are knowingly engaged in the adulterous relationship with our client’s husband.

Your adulterous relationship with our client’s husband is disturbing the sanctity of their marriage and in terms of Zimbabwean policy and values, adultery is wrongful and it is remedied by a claim for damages. It is the law which retains a legal outlet to the aggrieved spouse in that the third party who, with knowledge, intrudes into the marriage institution ought to compensate the injured spouse for the injury occasioned.

.....We will check with you in a week’s time and if you will still be having the adulterous affair with our client’s husband we will institute legal proceedings against you in the High Court and all costs that will be incurred hereby will be borne by you to a higher scale.”

The letter of demand went unacknowledged by the respondent. The applicant then filed suit which was also ignored by the respondent, leading to the present chamber application for a default judgment being filed.

The Heads of argument inform that not only did the respondent choose to ignore the summons; she went on to give birth to a girl child in March 2017. The adulterous relationship still subsists. The applicant resides in the marital home in Harare. The respondent and applicant’s husband have been co-habiting at the family farm in Nybabira. This is in a brazen disregard of the offence she is causing the applicant. It is very clear that the applicant has suffered distress, injury and personal insult due to the fact that this adulterous affair has been

conducted openly, boldly and publicly. The respondent has breached the lawfully guarded sanctity of the marriage existent between applicant and her husband and even when she became aware that applicant had sought legal counsel and threatened suit against her and in fact filed suit, she continued co-habiting with applicant's husband. The very plain fact that she has not bothered to respond to the letter of demand or to the suit itself, frankly illustrates that she has no desire to vindicate herself, or even to end the affair. To add insult to injury respondent intends to marry the applicant's husband, which will no doubt lead to the applicant's ouster from the sacred marriage contract which the applicant is supposed to enjoy exclusively with her husband. Although I do not have the benefit of respondent's version of facts because she has chosen not to respond; her disregard to the legal action taken against her leads me to conclude that she simply doesn't care about disrupting the sanctity of a valid and existing marriage, neither does she fear the consequences of her actions. She has continued to inflict distress, humiliation and hurt on the applicant.

It is trite that adultery damages are premised on two aspects: damages for contumelia and damages for loss of consortium. Ref: *Chenesai Raitewi v Tsitsi Shame Venge* HH 152-11 BERE J at p 2 of the cyclostyled judgment.

Contumelia is:

"Equated to the injury, hurt, insult and dignity inflicted upon a plaintiff by the adultery committed by a defendant with his or her spouse"

Loss of consortium is:

"..The loss of companionship, love and affection, comfort and services"

See KUDYA J in *Kudzai Gombakomba v Tsitsi Bhudhiyo* HH 118-2006: *Timothy Chinyadza v Melton Phiri* HH 76-09

In the present matter, the hurt inflicted upon the applicant is plain. Borrowing from the reasoning by MWAYERA J, in *Georgina Njodzi v Lorraine Matione* HH 37-16, in Zimbabwean society the scorn and embarrassment which a wife endures under these types of circumstances exposes the injured innocent party to public humiliation and embarrassment. From the facts in the present matter, the respondent continues to be indifferent to the applicant's quandary. The court frowns upon respondent's behaviour. In aggravation of the injury inflicted on the applicant, I take judicial notice of applicant's personal circumstances with respect to her position to society. The applicant's heads of argument illustrate the severity of applicant's humiliation and loss of comfort succinctly in paragraph 17 which reads as follows:-

“Applicant (who is now aged 70) now has grandchildren, sons and daughters-in-law. The community looks at her as an elderly wise one. All these need to take example from her as regards the sanctity and meaning of marriage. She is an elder at church and has a role mentoring young couples. She, by virtue of this illicit affair, can no longer be an example to her in-laws, sons and daughters, church young couples and the community at large. She is now even afraid of going to church and social gatherings. She has been reduced to zero. The cumulative effect of those factors, on account of the respondent, she has been painfully deprived of the expected conjugal right, matrimonial right and privileges, comfort, society and dignity. She has been subjected to an excruciating wave of humiliation, lowering in self-esteem, she has been frustrated and risks dying as a divorcee.”

It is my considered view that the applicant has suffered contumelia and loss of consortium. Applicant has made out a case for an award for adultery damages.

Quantum

MALABA J (as he then was) listed the areas which a court should use in arriving at the quantum of damages to be awarded to the aggrieved party as being:

- i. The character of the woman or man involved;
- ii. The social and economic status of the plaintiff (and the defendant)
- iii. Whether the defendant has shown contrition and has apologized;
- iv. the need for deterrent measure against the adulterer to protect the innocent spouse against contradicting HIV from the errant spouse; and
- v. The level of awards in similar cases.

I associate myself with BERE J’s remarks when he said (in the *Raitewa* case) that list is not exhaustive with each case being assessed on its own merit.

In the present matter I would add that I will take into account other criteria to those listed above:

- a. The need to deter would be adulterers from becoming involved in adulterous relationships; and
- b. The effect on the innocent party’s socio-economic conditions due to the adultery; and
- c. The duration of the marriage between the aggrieved and her spouse;

The applicant describes the respondent as being after her husband’s wealth. She uses the euphemism ‘gold-digger’ in describing her. It would appear that the applicant has a strong reason for coming to that conclusion bearing in mind that the respondent has taken up residence at the family farm and refuses to remove her therefrom. The respondent is living off the applicant’s husband. The respondent is depleting family income without contributing anything except hurt and pain. The respondent has created a gulf between applicant and her

husband. The applicant describes respondent as being disrespectful and that she lacks contrition and is deriving enjoyment at the applicant's pain and frustration.

The applicant is elderly and has been married to her husband for forty-eight years which makes for an aggravating circumstance in that her humiliation in the public eye is exacerbated. Her marriage has all but been destroyed. At 70 years of age it would be impossible for applicant to start afresh. She has been rejected at a very advanced age.

There can be no doubt that this case calls for an award which would also serve as an example that the courts frown upon such conduct.

Adultery damages awards are arrived at taking into the facts of each case. The applicant has claimed US\$25 000-00 split into US15 000-00 for contumelia and US10 000-00 for loss of consortium. I am of the view that the contumelia and loss of consortium are as serious as each other given the on-going deriding of the applicants life as it should have been; but for the illicit affair. The respondent needs to recognise that her conduct in continuing with this illicit relationship; remaining at the matrimonial farm; ignoring litigation carries a price within itself.

As recently as 2016 in the *Njodzi* case the plaintiff claimed the exact same amount as in the present matter. However because the Njodzi case the matter turned on the constitutionality of adultery damages, the issue of quantum of damages was not required to be determined.

In the *Raitewa* case, in 2011, the applicant claimed a total of US\$20 000-00 (US10 000-00 for each head) and the award given was a total of US\$6 000-00 (US 4 500-00 for contumelia and US\$1 500-00 for loss of consortium)

In *Chipo Jhamba v Aleta Mungwisi* HB 01/10 the court awarded US 500-00 from a claim of US\$50 000-00.

In 2010 in *John Gore v Simon Chiware* HH 274-14 the court awarded the plaintiff a total of US\$1 200-00 from US\$20 000-00 which had been initially been claimed.

In 2011 in *Martha Muhwati v Yeukai Purity Nyama* HH-137/11, the court granted an award of US\$5 000-00 in total having noted that adultery damages awards ranged between US800-00 and US\$5 000-00.

*In casu*, and in taking into consideration the duration of the applicant's marriage and her standing in society and the extent to which the illicit affair is impacting her and her extended family, it is my considered view that in order to redeem her circumstances and

position in society, the award must bear some recognition to the seriousness with which the respondent's conduct has had on the extended family structure and applicant's standing at church and a counsellor of young couples. Applicant is so dejected that she is afraid to be seen about in public. I am also acutely sensitised by the lack of regard to these proceedings which the respondent has displayed and as a result I intend to inform the respondent at her disregard of the applicant's feelings and disdain for court proceedings by the damages award which I intend to grant.

### Costs

The applicant has prayed for an award of costs on a legal practitioner and client scale. Such awards are the exception and not the norm. I quite understand the frustration that the applicant feels by respondent's recalcitrance by her having ignored the applicant's, but I am not placed in a position to consider with fairness whether a special order of costs ought to be granted in the present matter, given that the *audi alterem partem* rule has not been observed, I daresay that this is through no fault of the applicant. However such an order requires both sides to be heard before it can be considered in order to give the parties an opportunity to argue for/or against such an order.

See: *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (SC).

In the result I will award applicant ordinary costs.

I therefore make the following order

The respondent is ordered to pay the applicant:

1. The sum of US\$8000-00 which is made up as being; US\$4,000-00 being damages for contumelia; and US\$ 4,000-00 being damages for loss of consortium; together with interest to be calculated at the prescribed rate from the date of this judgment until payment is made in full.
2. Costs of suit.

*Chiturumani Law Chambers*, applicant's legal practitioners