

MACLEAN MASIMBA NYANDORO  
and  
GODFREY TIZIRAI

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE, 28 and 29 September, 25,26 and 27 October 2005 and 8 February 2006

**Civil trial**

Mr *L Uriri*, for the plaintiff  
Mr *G C Chikumbirike*, for the defendant

KUDYA J: The plaintiff, Nyandoro, issued summons out of this court against the defendant on 13 May 2004 claiming \$350 million in damages for *contumelia* and the loss of comfort, society and services following the defendant's adultery with his wife; interest from the date of summons until payment in full and costs of suit.

In his declaration the plaintiff alleged that “on divers occasions between May 2003 and March 2004 and at places, particulars of which are not known to the plaintiff and in breach of the trust the plaintiff deposed in him and in flagrant abuse of his office as the plaintiff’s spouses' superior the defendant and the plaintiff’s spouse have committed adultery, which adultery the plaintiff's spouse has admitted.”

The defendant pleaded to the declaration without seeking further particulars from the plaintiff on where the acts of adultery took place in the light of the averment that plaintiff's wife had admitted to the adultery, but was content to deny committing adultery with her.

THE ISSUES

At the pre-trial conference held on 21 October 2004 the parties agreed to the following:

- 1.1 Whether the defendant committed adultery with the plaintiff's wife between May 2003 and December 2003.
- 1.2 If so, whether plaintiff suffered loss as claimed or in any lesser amount.



## THE PLAINTIFF'S CASE

In a bid to prove these two issues, on a balance of probabilities, the plaintiff called the evidence of two witnesses and voluntarily produced 1 documentary exhibit.

In his testimony he established, and confirmed by the production of the Marriage Certificate Exhibit "1" that he married Georgina Ngiwoneni Baleng born on 6 July 1970, the spouse, in church in Harare on 17 April, 1999 under the Marriages Act [*Chapter 5:11.*] The two had previously solemnised a [*Chapter 238*] the precursor of *Chapter 5:07*] union in 1991. Two children were born of the union on 7 March 1991 and 22 October 1999 respectively.

The plaintiff stated that the defendant was his friend and a distant relative. He has known the defendant since 1986. He was aware that save for the time that the defendant was assigned to work elsewhere by defendant's employers, he has always been a Kwekwe resident. After the out of Kwekwe assignment the defendant returned to Kwekwe as the Human Resources Manager of ZIMASCO.

He testified that the defendant was his drinking mate, who instigated and encouraged him to become a member of the Kwekwe Golf Club. The defendant advised the plaintiff which banks gave a higher yield and so were worth to invest in. He is a businessman and would seek the defendant's influence and advice on contracts flighted by his employer. When the plaintiff's mother was afflicted by stomach pains, it was the defendant who recommended that she be taken to a Gweru based doctor and the defendant would thereafter phone him inquiring as to the progress in her recovery.

The plaintiff is of the same totem as the defendant's wife. The defendant fondly referred to the plaintiff as "brother-in-law" (tsano) in Shona. The defendant's wife often visited the plaintiff's residence, and she at one stage was the class teacher of one of his children. The plaintiff's spouse worked in the same company as the defendant. The plaintiff was elated when she was transferred from the Engineering Department to the Human Resources department where she became the defendant's secretary. He felt that she was in safe hands. The defendant as a friend and relative knew that the two were husband and wife.



THE DISCOVERY

He testified that his wife's mobile cellphone line was 011 418 098 while that of the defendant was 011 211 713.

On 7 March 2004 at around 9a.m. he found his spouse's cellphone on a table in the lounge. He perchance found himself playing with her cellphone. Under messages he scrolled one which referred to the sender having a braai and being in shorts waiting for her and another one asked why she had told the sender that Maki (the plaintiff) was at the Golden Mile yet he was at the Golf Club. The spouse's phone contained what he termed "serious unhealthy messages." He adopted the table in paragraph 1,7 of his Summary of Evidence as a true depiction of the messages that he saw. I reproduce it below:

RECEIVED From defendant	SENT To defendant by spouse
<p>Good morning dear. Hope you had a good nite's sleep. I was not angry, only disappointed. I am okay now.</p> <p>Received: 09:54:50 on 7/03/04</p>	<p>He is on his way to the mile please I do not want to cross your path.</p> <p>Sent:20:22: 23 on 06/03/04</p>
<p>The gin and tonic is chilled and ready, I even got viceroy and for myself the meat is smelling nice and I am in shorts whats missing to complete the occasion is you.</p> <p>Received: 20:18:34: Sent on 06/03/04</p>	<p>My sister is around she arrived at three &amp; Kumbi is also around will be at the mile and just say hie my brother will be there as well from U.K.</p> <p>Sent: 19:15:51 on 6/03/04</p>
<p>If your sister and brother are here how come we had Maki with us at the club;</p> <p>Sent 19:55:43 on 06/03/04</p>	<p>I also pray that you are on your own.</p> <p>Sent: 01:05::45 on 15/02/04</p>
<p>Haunyari kuve unavailable so early in the day. Been trying to reach you.</p> <p>Received 17:14:43 on 05/03/04</p>	<p>Happy Valentine day hope u had a good day this is five past one and I decided to send this msg.</p> <p>Sent: 01:04:16 on 15/-2/04</p>
<p>Its up to you love. I don't know what you do but you are unreliable. Please talk to me or forget the whole thing.</p>	<p>Not Good enough. You forgot my birthday last year again.</p> <p>Sent: 15:49:52 on 13/02/04</p>

Received 20:22:11 on 21/02/04	
Are you there? Whats happening? I am at home and waiting for you. Received: 20:016:01 on 21/02/04	Getting back to work. Sent: 09:44:34 on 12/02/04
Okay, I am not going anywhere. I will be at golf here in KK and will be free around 7 p.m. Call you then. Received: 9:21:20 on 21/02/04	Yes this is one big invitation all that I have is yours to fuck & suck I am chuffed and feel like a fuck from you now. Sent: 09:43:53 on 12/02/04
I see you are avoiding talking to me. Does this mean I won't see u tonite? Ndizvo zvaunoita kana uchida kutamba yako. I know that now. Received 13:14:28 on 20/02/04	Phone had no battery

He immediately went to his spouse's sister with whom he discussed these messages. He then confronted his spouse and asked her about them. She cried but refused to disclose who had sent the messages to her. He scrolled his own cellphone and realised that the number in his spouse's mobile belonged to the defendant. He accused her of going out with the defendant and she said the defendant was the problem. He sent her to the defendant with a message. She went and delivered the message. On her return he questioned her about the message she dispatched to the defendant on 12-02-2004 at 09-43-53 which she described as "having oral sex on the phone" with the defendant who was alleged to have been in Harare at the time.

On 8 March 2004 he went to the defendant's office and confronted him. The aura of fear surrounding the defendant was obvious to him from the sweating and puffy appearance that greeted him. It seemed to the plaintiff that the defendant feared he might be killed. He questioned him as to why he was doing this to his wife and he alleged that the defendant responded that it just happened. The plaintiff left and went to a close church mate. He also contacted his spouse's uncle. These two then met at the Golden Mile motel in his absence.

He further stated that his wife took him to the places she used to go with the defendant and showed him everything including the cars used. His spouse was only transferred from the defendant's department in August 2005, more than a year after the discovery.

## THE HURT

He stated that the discovery of his wife's infidelity and confession to the adulterous union with the defendant was hurtful. His wife was 35 years old while defendant was old enough at 60 to be her father. He strongly believed in retrospect, that the defendant had encouraged him to join the Kwekwe Golf Club to facilitate the defendant's agenda to be with his wife. The defendant at times left the plaintiff drinking beer in the club. These thoughts tortured his feelings.

The plaintiff reflected on the youthful nature of his children. The older one was in Grade 7 in 2005. They still required both their parents for them to grow up as model citizens. He compared them with those of the defendant, of whom the youngest child was attending university in South Africa.

Further, the fact that he was his wife's superior at work convinced him that the defendant's actions were an abuse of office.

He alleged that the discovery had a deleterious effect on his health and his work life. He suffers from sugar diabetes and hypertension. He alleged that he consulted a doctor on 9 March 2004 and went for further reviews on 10 and 11 March 2004 because his high blood pressure had shot up. No discovery was done by the plaintiff and as a result though he had averred as much in his declaration, he could not produce his medical cards in the face of the defendant's objections.

He alleged that his business operations were also affected as he stopped searching for business from ZIMASCO (Private) Limited as he believed he would not succeed as he had brought the present allegations against one of its managers.

He stated that Kwekwe is a small town where those in the middle class frequent the same recreational facilities like hotels and clubs. He moved in the same social circles as the defendant. The two often met and this aggravated his hurt feelings. The size of the city compounded his embarrassment at being viewed as the husband whose wife was committing adultery with her boss, behind his back, yet the two families were closely connected. He now perceives himself as a small man and believes others see him in the same way. He stopped going to the Golf Club, Golden Mile Motel, and Wimpy Kwekwe as he did not wish to bump into the defendant. He referred to an incident where he met the defendant at the Golf Club after the Pre-Trial Conference when the defendant outstretched his hand to

greet him. He almost took the law into his own hands after arming himself with a one litre soft drink bottle with which he wanted to strike the defendant. Fortunately, for both of them, the defendant sensed danger and retreated. Even as he testified he made out that he had no appetite to look at the defendant whom he regarded as a ruthless person who had stabbed him in the back and was therefore an enemy. The plaintiff felt in court relieved that he was now having an opportunity to express his repressed feelings about the infidelity.

### THE CLAIM

He gave an insight into why he sought \$350 million. In his declaration he sought \$250 million for *contumelia* and \$100 million for the disruption of the comfort, society and services of his spouse. Before the alleged adultery he lived well with his spouse and he believed they were the best couple in Kwekwe. In his oral testimony he justified the claim on seven grounds:-

1. That he lost a lot of business, including for coming to court to testify, as he lost man hours on this matter which he would have profitably spent fending for his family. He did not produce any documentary evidence of his purported loss nor did he state in dollars and cents the quantum of that loss.
2. That he no longer had regular nights.
3. That each time he was intimate with his wife after the discovery his mind wonders to the adultery she had with the defendant.
4. That the liaison between the defendant and his spouse undermines his roll as a father figure in his own home.
5. That the trust and friendship he had with his wife was undermined by the abuse.
6. That as a manager the defendant tried to destroy what God had put together and abused his position. He felt that his life was placed at risk in these days of HIV/Aids pandemic.
7. That he was shamed by it all.

He accepted that while he was bound by his pleadings, by the date of trial, he in retrospect believed that he should be awarded over a billion dollars in

damages to cool him down and assist him to forget the ordeal. He was alive too to the effect of inflation on his original claim.

### THE CROSS-EXAMINATION

He was cross-examined at length for two days. As the questions grew in intensity he abandoned the use of English and engaged the services of an interpreter. He revealed the following under cross-examination:

His spouse had taken him to the places where the alleged adultery had occurred after 1 week from his discovery of the messages. He was taken to a place along the Old Gweru road, a road which comes off Link Road off Chicago Plots in a bush track along the road. That was the only place the spouse had shown him as the scene of the alleged adultery. He further revealed that his wife confessed to two acts of sexual intercourse with the defendant on two separate dates in the vicinity of the spot in question. 2 weeks later he instructed his legal practitioner to institute these proceedings.

He was taken to task over the averment in his declaration that the adultery took place on divers occasions at places, and on particulars of, which he was unaware of, when in fact he already knew. The effect of his response was to blame his legal practitioner for choosing to draft his declaration in the manner in which it stands.

He was allowed to produce his written instructions to his legal practitioner on the identity of the scene of the alleged adultery and the number of times it took place, only. Page 2 of these instructions read:

“My wife admitted having slept with the accused on 2 occasions along Link Road (Old Gokwe Road in Kwekwe during the months of May and December 2003.”

He denied that he referred to places during his evidence in chief which he gave in English. He was accused of giving false testimony for under cross-examination he was now alleging he was taken to a place. The court checked its written notes and confirmed that the witness had used the word places and not place. The plaintiff was adamant that he never mentioned places. It is important, I believe, at this stage to put this aspect to rest.

In his evidence in chief the plaintiff was asked the following questions and responded:

"Q. Did you establish whether he had sex with your wife.

A. I did it through my wife. I went to the places they used to go. She showed me everything including the cars which they used."

He maintained that the first time he asked his wife about the messages she reacted by crying. He maintained his evidence in chief that he did not assault his wife but simply asked of her to tell only the truth if she wished to save their marriage.

He was shown Exhibit '2', which was written by his legal practitioner to the defendant on 8 April 2004 but dispatched on 3 May 2005. The second paragraph refers to different places and divers places in relation to the commission of the alleged adultery. It then sets out the plaintiff's position as how defendant abused his trust in encouraging him to join the Golf Club and abusing his trust while plaintiff was at the Club thus denigrating his manhood.

It further referred to the violation of a section of the Labour Act [*Chapter 28:01*] and threatened to institute criminal proceedings under that section. (No crime is created by that section or any other in the Labour Act to cover the defendant's alleged acts with the plaintiff's wife.)

Lastly it accused the defendant of behaving in an unethical manner thus flouting the ground ruler of the professional associations he was a member of like the Institute of Personnel Management, Zimbabwe.

The plaintiff denied that the tone and contents of the letter were extortionate notwithstanding that he did not follow up on his threats. After all he said he had known the defendant for 15 years and had no reason to seek to extort money from him. He stated that he was awaiting the outcome of this trial. He adopted all the messages in paragraph 1, 7 of his summary of evidence and retorted that, that discovery led to the confession by his wife, by the defendant and the suit in question. He was visibly in anguish as he referred to some of the messages which to his mind were unsavory and showed a sinister relationship between the defendant and his wife. To his mind the fact that the phone was not discovered did not detract from the veracity of the contents in the summary of evidence.

He further stated that his wife did not give her statement to his legal practitioner in his presence. He still loved her and was still living with her. She still cooks, launders and is intimate with him. In that sense he has not lost her comfort, society and services. He was however adamant that the alleged adultery disturbed and is still so disturbing his relationship with his wife. That relationship is no longer smooth. Thoughts of divorce were dispelled by his belief that she owned up to her waywardness, and the need to provide for a stable family environment for his children, who are still young and in need of their mother's succour and love. He vehemently disputed that the fact that he did not divorce his wife or contemplated such actions confirmed the defendant's view that the only reason he tolerated her presence after discovering the alleged adultery was because it never happened.

He maintained that during his one on one meeting with the defendant in the defendant's office on 8 March 2003 the defendant confessed to having sexual relations with the plaintiff's spouse.

He was cross-examined on the quantum. He based it on the abuse of the trust he had in the defendant and the abuse of office he perpetrated in committing the alleged adultery. Further, he recognized the difficulty posed by attempting to compute the injury and hurt he sustained from the pain and suffering wreaked on him by the defendant actions.

At first he broke down his claim under cross-examination to \$150 million for pain, \$100 million for trust and \$100 million for embarrassment. He then altered this and sought \$150 million for loss of business, abuse of trust at \$250 million arriving at a total of \$400 million.

To my mind, the adduction of new evidence on the revised figures simply demonstrated the plaintiff's belief that the \$350 million he initially claimed in May 2004 had been overtaken by the ravages of inflation and he believed therefore that he should be awarded a much higher figure on judgment day.

The plaintiff's wife also testified. She stated that the defendant was her superior at ZIMASCO (Private) Limited. He knew that she was married. She confirmed the plaintiff's testimony as to the nature of the social interaction their family had with that of the defendant.

She gave the background information on how the defendant proposed love to her. He would phone her after work on her mobile to chat her up. He

progressed further by inviting her for drinks with him. For some months she resisted his advancements, invitations and blandishments. She related the discomfort and apprehension she had in meeting him at work after each of these incidents. His persistence eventually wore down her resistance and she capitulated to his wiles in May/June 2003.

It was her evidence that she had sexual intercourse with him within Kwekwe at some secluded place along the Chiundura road in a bush where there were trees around the place and the roads are not properly attended to, in the back seat of his motor vehicle. He had shown the plaintiff the place. It was her clear testimony that there is a board written Link Road, but it is the same road which leads to Chiundura so it is referred to as the Chiundura road. She also confirmed that she did not give her version to the plaintiff's legal practitioner in the plaintiff's presence. She further confirmed the plaintiff's testimony as to how he discovered the messages. She added that she was asleep when he scrolled through her cellphone without her authority or encouragement. She confirmed that her younger sister was also in the house at the time.

She confirmed that the messages on the right hand side of the paragraph 1,7 of the summary of evidence were sent by her to the defendant while she received from the defendant the ones on the left hand side. He sent her to tell the defendant of his discovery.

She last had sexual intercourse with the defendant in December 2003, but last met him in December 2004 and continued to talk with him over the phone.

After her husband found out about the love affair between the defendant and her, communication between the two spouses deteriorated.

She maintained that the sexual liaison took place between the defendant and herself. Her husband had demanded the truth from her if at all she wished to save her marriage. She had told him the truth. Though he was angry, he did not assault her nor force her to confess to her misdeeds.

She was not proud of what she had done and was ashamed of her conduct. She knew she had deeply hurt her husband but now accepted the need to own up after he discovered it and try to rebuild their relationship.

Under cross-examination she stated that her affair had been discovered by her husband and she was prepared to face any possible outcome and the

consequences of her wrong doing. She had come to testify of her own volition. She still loved her husband and wanted to save her marriage. She had had sexual intercourse with the defendant on 2 occasions but she did not tell the plaintiff's legal practitioner where it happened.

She denied that she connived with the plaintiff into entrapping the defendant into a non-existent adulterous relationship through the mobile messages. Paragraph 17 of plaintiff's summary of evidence was a correct depiction of the messages.

She was adamant that she had sexual intercourse with the defendant and maintained that the defendant was aware of it. She did not agree with the suggestion that divorce was the only possible reaction of the innocent party to adultery. It is indeed correct that lived human experience shows that innocent parties remain in a marriage relationship with their philandering spouses. She maintained that she fell for the defendant's blandishments and ended up committing adultery with him. She related a conversation she had with the defendant after summons had been issued in which the defendant made clear to her that it was taboo in Shona Culture for a man to admit to adultery with another man's wife. The phone with the messages was still with plaintiff's legal practitioner at the time she testified on 29 September 2005.

She was aware that the defendant had met at the Golden Mile with her uncle and a church mate of theirs. She was not present so she did not know what was said.

She denied that she had been coached and explained that her testimony was flawless not because she been coached but because she was relating the truth. She stated that even if the plaintiff divorced her after she had testified it did not matter to her as she had told the truth.

The application for an absolution from the instance was dismissed as I was satisfied that the plaintiff's evidence was such that a reasonable man might give judgment against the defendant, more so as the defendant's counsel grudgingly accepted that the plaintiff's spouse's testimony might be regarded as flawless.

#### THE DEFENDANT'S TESTIMONY

In his evidence in chief, the defendant described the plaintiff as a friend, a fellow Kwekwe resident and a relative through the defendant's wife who is from the Nyandoro clan. The plaintiff's wife was his secretary.

He denied sexual intimacy with the plaintiff's wife. He however admitted sending the cellular phone messages found in the plaintiff's wife's mobile phone and in turn to receiving from her the messages she dispatched to him.

He stated that on the date the messages were discovered she came with her sister to his house and advised him of the discovery by the plaintiff. His response was "What did he accuse you of?" and he alleged that she retorted that under threats she was coerced to admit to more than was in the messages.

He admitted that it was not good to send in his words, "such untoward and nasty messages" and asked her why she did not delete them before they were discovered.

He stated further that the plaintiff phoned him and came to see him the day following the discovery and asked him, "Tsano what is it that you are doing to my wife?" He apologized for sending the messages. He expressed his view that he would not countenance any man sending such messages to his wife too but stated that he never had sexual intercourse with the plaintiff's wife. He feared that the plaintiff might have misinterpreted the messages.

He alleged that the plaintiff sent messengers who threatened him that unsavoury misfortune would befall him if he did not own up to the adultery. He held meetings with 2 of the plaintiff's relatives who were billed to testify at this trial. The plaintiff's wife did not attend these meetings according to the defendant because the plaintiff was forcing her to admit to adultery.

The two emissaries asked him to transfer her from his department but he declined to do so citing his lack of authority.

He stated that by admitting to 2 acts of illicit sexual intercourse with him, the plaintiff's wife was responding to pressure, beatings and violence from her husband.

He believed from the amount claimed that the plaintiff and his wife connived to extort money from him.

Under cross-examination he made out that he was 55 and therefore 20 years older than the plaintiff's wife. His first child was 29 years old. He accepted that it

was unethical and unprofessional for a boss to have a love affair with a subordinate more so a friend's wife who is a relative for that matter.

He was referred to the message of 21 February 2004 which he sent to the plaintiff's wife at 20:22:11 which started with " its up to you love" and to the plaintiff's wife's message of 12 February 2004 at 09:43:53 which used the words "fuck and suck". He, in my view had no answer to give on these messages.

Exhibit "3" was produced during cross-examination. It was a letter written on 26 October 2004 by the defendant's employers. They investigated the allegation of sexual harassment against the defendant and found no evidence of it. They expressed their hesitation to probe and comment on the social conduct of the employees' conduct especially where a civil suit was pending and their willingness to transfer the plaintiff's wife from working under the defendant once a vacancy came to hand.

To his mind Link road was not the same as Chiundura road. He apologized for the messages, in court, but denied committing adultery with the plaintiff's wife and therefore could not apologize for that which he had not done.

It is on the basis of this evidence that I proceed to answer the first issue raised at the pre-trial conference: viz:

WHETHER THE DEFENDANT COMMITTED ADULTERY WITH THE PLAINTIFF'S WIFE.

The onus lies on the plaintiff to show on a balance of probabilities that adultery took place between his wife and the defendant.

Adultery is proved amongst other ways either through circumstantial evidence.

*See R H Hahlo: The South African Law of Husband and Wife 3<sup>rd</sup> ed page 377 2<sup>nd</sup> paragraph or by direct evidence of a party to that adultery: See Norman Scoble: Law of Evidence 3<sup>rd</sup> ed*

DIRECT EVIDENCE

The plaintiff relied on the evidence of his wife, who was one of the parties to the alleged adultery.

Mr *Uriri* for the plaintiff submitted that the plaintiff's wife was a credible witness. He based his submission on the detailed nature of the wife's evidence. That evidence was clear and easy to follow.

She outlined how she came to fall in love with the plaintiff. The evidence she gave in this regard was not challenged by the defendant. It is deemed to have been accepted. That a love affair was going on between the plaintiff's wife and the defendant is apparent from the messages that she received from the defendant and the ones that she in turn sent to him. The plaintiff referred to them as seriously unhealthy. He referred to them as sex on the phone. The defendant found them untoward and nasty and not suitable between persons not married to each another. At no stage did he suggest that they were dirty jokes. He could not explain them. The defendant attempted to assign them to a context which he did not and could not explain. Those messages are only consistent with an exchange of sweet nothings between two lovers.

I am thus satisfied that the plaintiff's wife told the truth when she stated that the defendant and herself were lovers.

She also told the truth as regards how the plaintiff discovered the messages. Her testimony as to what happened on that Sunday was confirmed by the plaintiff and the defendant. She was dispatched by the plaintiff to the defendant's residence. At the defendant's residence she told him about the discovery. The reaction of the defendant was consistent with a man who suddenly realized that his game was up.

The defendant also confirmed her testimony that she was not at the meeting attended at the Golden Mile by the defendant and two of her close connections, (a church mate and an uncle).

In his evidence in chief the defendant stated that the plaintiff's wife was pressurised into giving false testimony of adultery by beatings and violence visited on her by the plaintiff. Mr *Chikumbirike* did not put such claims to the plaintiff's wife when he cross-examined her. The suggestions and details proffered by the defendant were therefore an after thought.

In my view there was a steamy relationship going on between the plaintiff's wife and the defendant. The fact that the plaintiff's wife was candid about what happened and was able to describe with decorum the sexual intimacy that took place between herself and the defendant cannot be used to show that she created facts. She was ashamed of what she had done, and she said as much. The way she conducted herself in court, by looking at the defendant's counsel as she

responded to his questions as she had been asked to do by defence counsel, showed that she was telling the truth. She fully accepted the consequences of her conduct. She was not shaken in cross-examination, hence the suggestion that her evidence was flawless because she was coached.

It became apparent however that she was not coached. She testified after the plaintiff had done so. The words and names she used to describe the scene of adultery were not the same as stated by the plaintiff. She mentioned that it was in the bush, in area where there is a board which identifies the road she used with the defendant as Link Road. The road to her knowledge is referred to as Chiundura road. The plaintiff on the other hand described the spot as a place along the old Gweru road, a road which comes off Link Road off Chicago Plots in a bush track along the road. In his instructions he cancelled the Gweru and replaced it with Gokwe so that it read Old Gokwe Road.

The place was in a bush. It was not along a road. To get to the spot one had to travel in Link Road but would leave that road. It seems to me that there was agreement between the plaintiff's wife and the plaintiff as to where she alleged the two acts of sexual intercourse took place.

The consistency in her testimony with the plaintiff in certain respects and the defendant in others demonstrates to me that she was truthful. After all she was directly involved with the defendant. Her testimony was not impugned in any way.

#### CIRCUMSTANCIAL EVIDENCE

In *Smit v Arthur 1976(3) S A 378(AD)* the head note reads:

“ In an action for damages on the grounds of the defendant's adultery with the plaintiff's wife, where there is no direct evidence of such adultery the issues must be resolved not by appraising each incident pointing to adultery simply on its own circumscribed facts, but by a careful survey of the whole of the history of the relationship of the parties of their behaviour at all relevant times. All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom. While the triad of desire, opportunity and willingness will often be sufficient to justify the inference of adultery, it does not follow that each of those elements must be independently proved depending on the circumstances, proof of the first two of those elements might justify an inference that the third, too, was present.”

The plaintiff's testimony demonstrated the coincidental nature of how he discovered the messages and that the defendant was the one who was in intimate communion with his wife. The messages show beyond doubt that the plaintiff's wife and the defendant were lovers. They clearly desired each other.

The defendant did not dispute but rather confirmed that his wife and the plaintiff were from the same totem. Plaintiff and defendant referred to each other as brother-in-law.

In such a relationship, the defendant was obliged by our indigeneous culture to keep at an arms length with the plaintiff's wife. The breaking of the cultural and traditional taboo in that respect through the messages sent and received between the two demonstrated the height of the ardour they had for each other.

The plaintiff's wife and the defendant worked in the same office. The plaintiff's wife was the defendant's secretary. Opportunity presented itself between them. It would have been expected that the two would communicate. It is the nature of the messages which, in the defendant's admission, were unethical and unprofessional.

The plaintiff's testimony as to how he discovered the messages was confirmed by his wife. The actions that he took were confirmed by the defendant. He first sent his wife to the defendant and followed it up with a meeting with the defendant. The words that he confronted the defendant with "Brother-in-law, what are you doing to my wife" were confirmed by the defendant. The plaintiff alleged the defendant confessed to his misdeed and failed to explain why he had done so. The defendant alleges he accepted sending the messages but denied adultery. This aspect of the defendant's testimony was not canvassed with the plaintiff when he was cross-examined. The additional information proffered by the defendant was therefore an after thought on his part.

The suggestion that the plaintiff and his wife connived to extort money from the defendant does not make sense to me. Adultery is not viewed in benign light by our society. The plaintiff would not in my view have gone through with the trial, subjecting himself and his wife to the trauma of such an ordeal just to extort money.

His demeanour during the trial was of one who was clearly pained by what transpired, one who sought not to take the law into his own hands but to receive recompense through the legal system.

On the other hand while the defendant owned up to the messages, he did not explain how these messages originated and eventually graduated to the nasty level that they did. He was content to ignore this at his peril. He was not being candid with the court. In any event he clearly was a poor witness during cross-examination. Before he answered each question he took a cue from his legal practitioner and the court had to warn him to desist from doing so.

His behaviour gave credence to the testimony of the plaintiff's wife that he had told her that he would never admit to committing adultery to her husband as it was taboo to do so. He was also clever enough to know that the response that he gave to the plaintiff in the safety of defendant's office would be his word against the plaintiff's.

The essence of the messages also show a willingness on his party to "fuck and suck" with the plaintiff's wife. In the final analysis the defendant's protestation of innocence would fall and fail in the face of the plaintiff's wife's testimony.

It is essential that I deal with the seemingly discrepancy between the plaintiff's evidence and the declaration on the number of times and the number of places that adultery took place.

I was referred to *LTC Harms in Amhlers Precedents of Pleadings 5<sup>th</sup> edition*, 4<sup>th</sup> paragraph at page 23 which deals with the degree of particulars required in a declaration.

It does not appear to me that what is contained in the 5<sup>th</sup> edition is any different from what is found in the 4<sup>th</sup> edition of the same book.

It is apparent that full particulars must be given unless the plaintiff is unaware of them. Indeed Amhlers spells out the profomas of the declaration where the particulars are not known and where they are known.

In the instant case they were known. The plaintiff gave them to his legal practitioner. The legal practitioner also interviewed the plaintiff's wife who was a witness. He however did not set out the particulars as given. He should have done so.

I accept that there are instances where a plaintiff will sink or swim with his legal practitioner. It does not seem to me that this is one of them. This is so because in the declaration the plaintiff had clearly set out that his wife had admitted to the adultery. The defendant at least had at that stage the opportunity to seek further particulars based on the alleged admission. The defendant's failure to act contributed in lulling the plaintiff's legal practitioner into failing to disclose what his client had disclosed to him.

It seems to me, therefore, that I cannot draw the inference that because of that discrepancy the plaintiff's wife had not disclosed the number of times and the place that adultery took place.

I also did not find the fact that the plaintiff used the term places instead of place fatal to his testimony. It seems to me that it is hardly likely that the plaintiff's wife and the defendant would park at exactly the same spot that they had some six months before. They may have returned to the general vicinity that they had visited. It was not as if they were at a marked spot. I see no fatality to his testimony whether he used place or places in referring to the bush area along an off shoot track from Link Road.

I am thus satisfied that both the plaintiff and his wife told the truth of what transpired.

Thus whether one proceeds on the basis of circumstantial evidence or direct evidence, it is clear to me that the defendant committed adultery with the plaintiff's wife twice.

I therefore answer the first issue in the plaintiff's favour.

WHETHER PLAINTIFF SUFFERED LOSS AS CLAIMED OR IN ANY LESSER AMOUNT

The second issue essential refers to the amount of damages due to the plaintiff.

It was common cause between the parties that the plaintiff is bound by his claim in the pleadings. If he genuinely desired a higher figure he ought to have moved for an amendment. He did not do so.

It seems to me that the manner in which the second issue is worded betrays a recognition by the plaintiff though that he may have pitched his claim for damages a little higher than normal.

I however do not share Mr *Chikumbirike's* outrage and conclusion that the plaintiff was driven by greed to claim the sum he seeks. The plaintiff himself explained his feelings of hurt both in his person, reputation, self-esteem, business and in the disruption to his *consortium*.

In his testimony, I understood him to say that though he remains circumscribed by his declaration to \$350 million, taking into account the ravages of inflation on the date he testified an equivalent of \$350 million then would run into billions.

In the final analysis Mr *Chikumbirike* conceded that once the court finds that adultery was committed, the plaintiff is entitled to damages.

Both counsel referred to a variety of cases which would assist me to arrive at the appropriate amount of damages. The cases that were referred to were:

1. *Katsumbe v Buyanga 1991(2) ZLR 256(H)*
2. *Khumalo v Mandishona 1996(1) ZLR 434(H)*
3. *Nyakudya v Washaya 200(1) ZLR 653(H)*
4. *Karimazondo and Ano. V Minister of Home Affairs 2001(2) ZLR363*
5. *Takadini v Maimba 1996 (2) ZLR 737(S)*

The plaintiff in his declaration sought \$250 million for *contumelia* and \$100 million for disruption of *consortium*.

#### DISRUPTION OF CONSORTIUM

In *Washaya's case supra*, at page 655 G SMITH J referred to *Misho v Sithole 1992 (1) 291 ZLR (S)* where KOSSAH JA held that the loss of *consortium* is the main element in the estimation of damages. "The loss will be less where the plaintiff has condoned the adultery and the marriage still subsists."

Mr *Chikumbirke* used these sentiments to show that the plaintiff's claim was skewered as he seeks more for *contumelia* than for *consortium*. Mr *Uriri* on the other hand submitted that the plaintiff is not claiming loss of *consortium* but its disruption. He used the same sentiments to show that condonation lessens the claim for *consortium*.

It seems to me that Mr *Uriri* did not appreciate the sentiments attributed by SMITH J to KORSAN JA in *Misho's case*. SMITH J did not point out that it lessened *consortium* but that it lessened the overall adultery damages. Indeed

references to *Misho's case supra* indicates that KORSAH JA at 298A-B stated as follows:

“But in my view the trial court misdirected itself in its assessment of damages by overlooking the all important fact that the marriage still subsists and that the appellant’s intrusion was not an unusual and disturbing element to the stability of the union between the respondent and her husband. This court is therefore at large to consider the question of damages afresh taking into account the factors considered above. Thus viewed there remains only the claim for sentimental damages due to the injury or *contumelia* inflicted upon the respondent by the appellant.”

A reading of *Misho's case* demonstrates that the adultery damages were awarded only for *contumelia* and not for both *contumelia* and loss of *consortium* as there was no loss of *consortium* due to the condonation of the adultery by the respondent.

In *Katsumbe's case*, (also reported as HH 248/91 at page 15 of the cyclostyled judgment) ROBINSON J at 258B stated:

“Next, it is crucial to note that, in this action, there is no question of damages being awarded to the plaintiff for the loss of his wife’s *consortium*, that is to say, for the loss of the comfort, society and services of his wife as a result of the defendant’s adultery with the plaintiff’s wife since the plaintiff elected to condone his wife’s acts of adultery and to remain married to her to the extent of having two further children with her.”

See also MALABA J’s sentiments in *Khumalo v Mandishona supra* at page 448 G” The most important factor under this head is that there should be proof of actual loss of *consortium*. In other words “the wife should be shown to have left the matrimonial home as a result of the adultery”

Even in *Nyakudya's case supra* there was an actual loss of *consortium*.

I therefore agree with the submissions made by Mr *Chikumbirike* that no claim can be awarded to the plaintiff under this head.

#### CONTUMELIA

It seems to me that this is the only head on which the plaintiff is entitled to receive an award of damages.

*Contumelia* involves the infringement of the plaintiff’s right to privacy, dignity and reputation. I prefer the definition in *Katsumbe supra* at page 258C:

“ Injury, hurt, insult and indignity inflicted upon by the plaintiff by the defendant as a result of the latter’s adultery with the plaintiff’s wife.”

The quantum of damages is a factor which is eminently in the discretion of the court. The court is however guided by a variety of factors.

Mr *Uriri* made reference to the eleven criteria highlighted by PJ Visser and J M Potgieter: *Law of Damages* from page 421.

I prefer the factors outlined in *Khumalo’s case supra* that is:

- (a) the character of the woman/man involved
- (b) the social economic status of the plaintiff and the defendant
- (c) whether the defendant has shown contrition and has apologized.
- (d) The need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse and
- (e) The level of awards in similar cases.

In *casu*, the plaintiff’s wife was a woman of virtue until she fell therefrom at the wiles, blandishments and charms of the defendant. She enjoyed a happy and loving relationship with her husband. The defendant intruded into a strong marriage institution. I find this conduct aggravating.

The plaintiff is a self-employed business man while defendant was a senior executive in a private corporation. The two were friends and relatives. The defendant was also in charge of the plaintiff’s wife who was his secretary. He abused the trust reposed in him by the plaintiff. His conduct was therefore insensitive and reprehensible. The defendant was also 20 years older than the plaintiff’s wife and paid scant regard to the effect of his actions on the plaintiff’s young family. The defendant had all but raised his own family with the youngest child in university in South Africa.

The defendant did not apologise for his conduct. Instead he cast various aspersions on the integrity of the plaintiff and his wife. He was brazen and unfeeling in the conduct of his defence to the extent of accusing the plaintiff and his spouse of collusion and extortion. His conduct was therefore contemptuous of the plaintiff and had the effect of enhancing his hurt.

The mental anguish the plaintiff experienced is obvious. While he produced no medical proof, his blood pressure and his health was affected by the adultery.

All the above factors are aggravation and would favour the imposition of punitive damages.

The only mitigating feature advanced was the condonation of the adultery. The other is the modern recognition that while the institution of marriage serves a social good, and should be protected, women should no longer be regarded as chattels but as equals who are able to exercise their own minds independent of men.

The most important consideration in my view is the level of awards in similar cases. This head is replete with pitfalls for the judicial officer especially in our economic environment where inflation has officially been declared by the Minister of Finance and the Governor of the Reserve Bank of Zimbabwe as the number one enemy. It becomes well nigh difficult to use awards that were granted in cases decided 5 years ago to come up with an appropriate figure.

The guiding principles as regards the consideration of the fall in the concomitant purchasing power relate to the use of the consumer price index as applied by McNALLY JA in *Biti v Minister of State Security 1999(1) ZLR 16 5(S)* at 171 referred to in *Karimazondo and Another v Minister of Home Affairs supra* at page 371G.

While the amount awarded should not be regarded as a road to riches, it should be such as to persuade and satisfy the plaintiff that it was worth his while not to take the law into his own hands.

In *Nyakudya's case*, an award of \$7 000.00 was granted for *contumelia*. This was in July 2000. The facts are distinguishable from the present case. In *Khumalo's case* the facts are almost similar to the present case, save that in *Khumalo's case* his marriage was unstable. In the present case it was stable and rock solid. *Khumalo* was awarded \$4 000 for *contumelia* (It was actually higher than for the loss of *consortium*) This was in April 1996.

Inflation as measured by the consumer price index rose by almost 23 000% from April, 1996 to January 2006, while it rose by about 21 000 percent from June 2000 to January 2006.

I am alive to the caution raised by BARTLETT J in *Chinamasa v Jongwe Printing and Publishing Company (Private) Limited and Another 1994 (1)ZLR 133* at 170F that courts should not reduce the awards to an exact mathematical

calculation. It is however interesting to convert the local currency awards in *Washaya and Nyakudya's case supra* into their equivalent values in US dollars at the time. In 1996, \$9.00 Zimbabwean dollars were equivalent to 1 US Dollar, while in 2000, \$38.00 Zimbabwean Dollars were equivalent to 1 US Dollar. At the date of this judgment \$100 000.00 Zimbabwe dollars are equivalent to 1 US Dollar. It is however not the intention of my judgment to seek to dollarise adultery damages awards as these must always, I believe, be related to the capacity of the economy to absorb them.

Taking into account the circumstances of this case, the range of damages awarded in other cases referred to, after factoring in inflation, I estimate the quantum in this case at \$100 million for *contumelia* as being fair and adequate recompense to the plaintiff.

#### COSTS

The defendant contended that because the plaintiff sought an outrageous award even if the court found that he was a fit and proper candidate for recompense he be deprived of an award of costs.

The plaintiff on the other hand initially sought costs on the ordinary scale but prayed for punitive costs if the court upheld the plaintiff's claim on the first issue notwithstanding that the award granted would be less than the upper limit sought in the pleadings. His attitude was that the defendant should be punished for declining to make admissions at the Pre-Trial Conference and for his unrepentant attitude.

In my view costs are within the discretion of the court. The defendant suggested an upper limit of less than \$1 million be awarded to recompense the plaintiff. The fact that he eventually obtained an award on the lesser side than his maximum claim is no reason to deprive him of his costs. There is no reason why the defendant should be punished on the higher scale as he was within his rights to test plaintiff's evidence. In any event the plaintiff did not succeed in getting an award on the upper limit.

In the premises, judgment is granted to the plaintiff and it is ordered that the defendant pay the plaintiff the sum of \$100 million as damages for adultery with

interest thereon at the prescribed rate from 14 May 2004 to the date of full payment. The defendant is to pay the costs of suit.

*Honey & Blanckenberg*, plaintiff's legal practitioners

*Chikumbirike and Associates*, defendant's legal practitioners