STEWART MUNGOFA

versus

WILLIAM SANDE

and

DRUSILLA MUNGOFA

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE 21 September 2006 & 23 January 2008

Opposed matter

Mr Dondo, for the applicant,

Ms Muchadehama, for the 1st respondent,

CHATUKUTA J: The 2nd respondent instituted proceedings for divorce and ancillary relief in case No. HC 1195/04 against the applicant. The applicant filed a counter-claim in which he cited the 1st respondent as the 2nd defendant in that matter. He claimed from the 1st respondent adultery damages alleging that the 1st respondent was the man with whom the second respondent had committed adultery. During the pre-trial conference, the court queried the propriety of joining the 1st respondent in a counter-claim. The applicant now seeks, in terms of Order 13 Rule 87 of the High Court Rules, to join the 1st respondent to HC 1195/04.

Mr Dondo, for the applicant, submitted that it was proper and convenience to join the 1st respondent to the proceedings in Case. No. HC 1195/04 for the avoidance of multiplicity of actions. This would be cost saving. *Mr Dondo* submitted that a counter-claim stands as summons and declaration. Therefore the applicant was *dominus litis* in respect of the counter-claim. He submitted that such a joinder was consistent with Rule 276 of the High court rules which allows for the service of summons and any pleadings upon a paramour who is cited in the summons and pleadings.

The applicant further submitted that the 1st respondent did not proceed by way of exception but made a request for further particulars. He filed a plea and a counter-claim claiming defamation damages. It was contended that this was an indication that the 1st respondent had not objected to being joined to the proceedings.

The *Mr Muchadeham,* for the 1st respondent, submitted that the 1st respondent had not been properly joined and it still was not proper to join the him to HC 1195/04 in a counter application. He submitted that the applicant did not institute proceedings in Case No HC 1195/04 and therefore he could not be the *dominus litus* in that case. The applicant was attempting to clothe a wrong joinder with legality without having withdrawn the claim against the 1st respondent first. It was further submitted that the 1st respondent did not have any interest in the divorce proceedings and did not want to be part of proceedings. He would therefore be inconvenienced by required sit in during the divorce proceedings. The 1st respondent submitted that he filed pleadings in the main out of a abundance of caution.

The 1st respondent prayed for costs on a high scale against the applicant. It was submitted that the propriety of joining the 1st respondent in the action by the 2nd respondent was first raised by the 1st respondent in his plea to the main action. It was again raised by the court during the pre-trial conference. The applicant still persisted with his application.

The main issue for determination is therefore whether it is competent for the applicant to join the 1st respondent as a co-defendant by way of a counter-claim.

Order 13, Rule 87(2) permits the joinder of any person to any proceedings. Rule 87(2)(b) provides:

> "(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-
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> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, cease to be a party;
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> (b) order any person who ought to have been joined as a party or whose presence before the court **is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party**;" (Own emphasis)

The joinder envisaged in Rule 87 is a joinder to the main claim. In other words, the cause of action remains the same but there is an addition of either the plaintiff or the defendant. In this case, the joinder of a co-defendant would be to "ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. The applicant was emphatic that he did not seek an order to join the 1st respondent to the main claim but as a co-defendant to the counter-claim.

It was difficult for this court to fathom how the 1st respondent can be a co-defendant to either the main claim or the counter-claim. In relation to the counter-claim, Rule 120 makes clear the effect of a counter-claim or claim in reconvention. The Rule provides:

> "(1) The defendant in an action may set up by way of claim in reconvention any right or claim he may have against the plaintiff, and such claim in reconvention shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention."

The effect of the counter-claim is that it becomes a cross-action, where the plaintiff in the main matter becomes the defendant and the defendant who has counter-claimed becomes the plaintiff.

The general principle on whether or not the applicant can counter claim as he has done is set out in Nathan and Barnett, **Rules and Practice in the Supreme Court of South Africa** 1st Ed. It is stated at p49 that:

> "A defendant cannot claim in reconvention against any other party (e.g) a defendant) than the plaintiff in the action."

This is premised on the understanding that a reconventional claim is dependent upon allegation which would defeat plaintiff's claim in convention. Therefore in order for the applicant to be able to join the 1st respondent as a co-defendant, the 1st respondent must have a basis for defending the claim for divorce that was brought by the 2nd respondent.
The present matter is on all four with the case of *Soundprops 1160 cc and Another V Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (N). In that case, the applicants, as plaintiffs, had issued summons against the first respondent, a partnership comprising 20 individuals who included the second and third respondents, as defendants,

for the payment of moneys which had been advanced as loans to the partnership. Only the second and third respondents and one other partner of the first respondent defended the action. The second and third respondents filed a joint plea and, together with their plea, they had filed a document in which they claimed certain relief from the remaining partners. The document cited the second and third respondents as the first and second defendants and the remaining partners as the third to twentieth defendants. The court held that the claim in reconvention by the second and third respondents was irregular because it was directed not against the plaintiff, but by two defendants against their co-defendants. PAGE J had this to say at p1031B-G:

> " In support of the application, counsel for the applicants has correctly pointed out that the claim is not a claim in reconvention since it is directed, not against a plaintiff, but by two defendants against their co-defendants. The weight of authority was that it was not competent for one defendant to join a co-defendant as a defendant in a claim in reconvention; but this matter is now regulated by Rule 24, which deals with claims in reconvention in general. Rule 24(2) provides the following:
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> > 'If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the Court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the Court may direct.'
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> It is apparent on a proper reading of this Rule that it is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is no claim in reconvention against the plaintiff. It also requires the leave of the Court.
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> It seems clear that the only means whereby the respondents could permissibly bring a claim against their co-defendants in the action in the absence of any counterclaim against the plaintiff would be by virtue of the provisions of Rule 13, which regulates third party procedure. Rule 13(1) provides the following:
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> 'Where a party in any action claims -
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> (a) as against any other person not a party to the action (in this Rule called "a third party") that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
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> (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,
>
> such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff.'"

Whilst the South African Rule permits a defendant to file a cross application against the plaintiff and any other person, the equivalent rule in our jurisdiction, Rule

120, cited above, does not provide for a claim in reconvention on other person other than the plaintiff. Although *Soundprops 1160 cc and Another V Karlshavn Farm Partnership and Others* dealt with the joinder of defendants who were already co-defendants, the general principle enunciated in that case apply to the present case and more particularly so where the applicant seeks to introduce a third party. The applicant filed a counter-offer against the 2nd respondent in relation to the claim raised for divorce and ancillary relief against the applicant. The counter-claim which seeks to introduce the 1st respondent as a defendant cannot be considered as a counter-offer to the 1st respondent's on the grounds that the applicant does not seek any relief against the 1st respondent.

In any event, it should be noted that the applicant's counter-claim for divorce on the basis of adultery cannot be strictly termed a counter-claim in light of the Matrimonial Causes Act [*Chapter 5:13*]. Prior to amendment of that Act in 1985, fault and misconduct were relevant to the existence of grounds for divorce. Therefore it was possible to counter-claim for divorce on the basis of a different fault cited by the plaintiff in her or his claim for divorce. The relevance of the fault factor is adequately dealt with in *Marimba v Marimba* 1999 (1) ZLR 87. At p 91G-92C GILLESPIE J observed as follows:

> "Certainly, it is not relevant to the existence of grounds for divorce. Once evidence establishes the irretrievable breakdown of the marriage, then it is neither helpful nor proper to enquire further into whether those grounds constitute misconduct by, or disclose the fault of, either party unless the existence of misconduct is relevant to some issue other than grounds for divorce.
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> For instance, the alleged misconduct of one or other party might be advanced in support of the proposition that that party is not fit to be a custodian of minors. Reluctant as the courts are to delve into the general issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of children.
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> The related principle is more difficult to formulate when it is suggested that the conduct of a party is such that it B should have a bearing on a property distribution order. Mindful of the move away from the fault system of divorce, 1 judges in this jurisdiction have set their faces against any invitation to delve into the "minutiae of ancient domestic grievances".(Gibson J in *KAssim v Kassim* 1989 (3) ZLR 234 (H) at 239C) They have declined to permit counsel "to resurrect the old spectre of guilt and innocence and drag the judge to hear their mutual recriminations and go into their petty squabbles of days on end, as he used to do in the old days". (*Per* KORSAH JA in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 41C). And rightly so.
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> Nevertheless, the relevant legislation specifically preserves the potential relevance of marital misbehaviour to the question of a division of property. The court is enjoined to –

> "endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ... " (Section 7(3)).”

The applicant also sought to justify the relief claimed by relying on Rule 273. Subrule (1) clearly relates to a situation where the plaintiff, who is *dominus litus* is making allegations of adultery against the defendant and another person in the summons and declaration. Going back to the general principle stated above, that a defendant cannot claim in reconvention against any other party other than the plaintiff in the action where it has not filed a claim against the plaintiff. It is my view that the Rule 273 therefore does to take the matter any further.

As submitted by the 1st respondent, the applicant did not advance any meaningful authority in support of his submissions. It has been pronounced in a number of matrimonial cases that a claim for divorce against a spouse where allegations of adultery are made can be heard together with a claim for adultery damages against the paramour. In *Baker v Baker* 1930 CPD 230 at 233, Gardiner J.P. held that it was proper for an action for divorce against a wife and an action for adultery damages against a co-defendant be heard at the same time. In that case the plaintiff brought an action against his wife and co-defendant in which he claimed against the wife a decree of divorce and against the second defendant damages for his adultery with his wife. The wife did not enter an appearance to defend and was accordingly barred. The second defendant had entered an appearance to defend. The plaintiff sought to have the matter heard against the second defendant.

In *Eorfino V de Pretto* (Eorfino Intervening) 1959 (3) SA 787 (W) the court ruled in favour of hearing a claim for divorce against one defendant and a claim for adultery damages be heard at the same time. In that case, the plaintiff sued for damages for adultery alleged to have been committed by the defendant with the plaintiff's wife. In a separate case, which was pending between plaintiff and his wife, plaintiff claimed a divorce against his wife on the grounds of adultery with the defendant in the present action, and the defendant's wife counter-claimed for a divorce on the ground of the husband's adultery with another woman and also on the ground of constructive malicious desertion. Defendant's wife intervened in the action against Pretto seeking a consolidation of the two cases.

What is apparent from these cases is the fact that it was the plaintiff who brought the action against both the spouse and the paramour. In the *Baker* case the spouse and the paramour were the co-defendants in the one action. In the *Eorfino* case there were two separate actions initiated by the same plaintiff against his spouse and the paramour.

As rightly submitted by *Mr Muchadehama*, the 1st respondent was misjoined to the main action in HC No. 11961/06. This was not a proper case for the exercise of judicial discretion to condone or permit a misjoinder of the 1st respondent as sought by the applicant.

The application is accordingly dismissed with costs.

Chinamasa, Mudimu, Chinogwenya & Dondo, applicant's legal practitioners
Messrs Mbidzo, Cuchadehama & Makoni, 1st & 2nd respondent's legal practitioners