

RITA SEKESAI CHIWANDAMIRA

versus

JOSEPHINE MUPANDAWANA

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 16 September 2009 & 12 January 2011

Civil Trial,

M. C. Mukome, for the plaintiff

Defendant, *in person*

CHATUKUTA J: The plaintiff issued summons on 10 March 2008 claiming from the defendant adultery damages in the sum of ZW\$400 billion, being a sum of Z\$200 billion for contumelia and a sum of Z\$200 billion for loss of consortium. The basis of the claim was that the defendant committed adultery with her husband Stanley Chiwandamira from 1981 to the date of summons. As a result of the adultery, the plaintiff lost the love, affection, society and companionship and services of her husband. She also suffered pain and indignity during that period at the hands of the defendant. Her husband has, as a result of the adulterous relationship instituted divorce proceedings.

The defendant admitted having a relation with plaintiff's husband between 1981 and 1982 but denied being aware at the time that the plaintiff was married to Stanley. She pleaded that the relationship was resuscitated in 2006 when Stanley assured her that he had divorced the plaintiff. She further pleaded that the plaintiff had in fact condoned the adultery.

The plaintiff testified that on 12 July 1975 she married Stanley in terms of the Marriages Act [*Cap 5:11*] and the marriage still subsists. They were blessed with six children. The last three children were born in 1982, 1984 and 1988 respectively. The adulterous relationship between the defendant and Stanley started in 1981 resulting in the birth of a child, Blessing. The defendant was fully aware of the existence of the marriage between the plaintiff and Stanley. In 1983 Stanley forced her to reside at their

rural home. He would visit her now and then at the rural home. The defendant moved in with Stanley at their Highfield home in Harare. Stanley deserted their matrimonial home permanently in 2004. He went to reside with some prophetess in Budiriro Township, Harare. He then moved in with the defendant sometime in 2006.

Before 1981 when the defendant came into the picture, her marriage was blissful. During the period from 1981 to 2006, Stanley was normally resident at their Highfield home. During the same period, Stanley sired two children with two different women. She later heard that Stanley had resumed his relationship with the defendant and moved in with her in 2006. In 2007, Stanley filed for divorce. She testified that she was willing to save and preserve her marriage for the sake of her children and grandchildren despite the fact that Stanley has transgressed for the greater part of their marriage.

The defendant testified that she first met Stanley in 1981. She did not, at the time, know that Stanley was married. She only became aware of the marriage after she became pregnant and went to Highfield where Stanley resided with the plaintiff. The relationship ended in 1982 after the birth of Blessing. During the period from 1982 to 2005, she communicated with Stanley only in connection with the payment of maintenance for Blessing or when the child visited his father.

At the end of 2005, Stanley started phoning her indicating that he had separated with plaintiff. In 2006, she accepted him back as the father of her child. After a week of staying together he took her to his rural home. The plaintiff was at the rural home. Stanley told her that the plaintiff was refusing to go back to her parents' home although they were now divorced. She believed the explanation because the plaintiff and Stanley did not greet each other during that visit. She however, refused to be married to Stanley until he produced proof of the divorce.

When the plaintiff sued her for adultery damages, she tendered, through her legal practitioners, a total sum of Z\$400 billion in full and final settlement of the plaintiff's claim. She produced a copy of the letter to the plaintiff's legal practitioners dated 28 July 2008 reflecting the tender. The money was not returned to her and she assumed that the matter had been concluded. She was surprised when she was summoned to appear in court for trial.

Stanley testified for the defendant. He confirmed having a relationship with the defendant between 1981 and 1982. The relationship was resuscitated in 2006 to the present date. During the period from 1982 and 2006 he did not have an intimate relationship with the defendant. In 1987 and 1988 he sired two with other women. In 2004 he left the matrimonial home because the relationship with the plaintiff had irretrievably broken down. He went to Budiro where he resided with the prophetess. He never returned to the matrimonial home after he went to Budiro. When he resumed his relationship with the defendant he was coming from Budiro.

It appears to me that the plaintiff was not a very truthful witness. She withheld evidence on what transpired in her marital life during the period from 1981 until 2006. She therefore gave the impression that the relationship between the defendant and Stanley had existed for a continuous period of 28 years up to the time of hearing. She also withheld from the court the fact that Stanley was not the faithful husband she sought to portray who had been snatched from her by the defendant. It is only under cross examination and that she disclosed that Stanley had sired two other children with different women after Blessing and that he had in fact moved out of the matrimonial home in 2004 to reside with the prophetess before he went back to the defendant. The impression that she sought to create was therefore that all her pain and suffering had been caused by the defendant when in fact there were other women in Stanley's life.

The defendant appeared to be a truthful witness. In fact at times her truthfulness was mixed with spite towards the plaintiff. However, her evidence that she only became aware that plaintiff was married to Stanley after she became pregnant with Blessing, remained unchallenged. It was also clear from her evidence that when Stanley came back to her in 2006, she must have been aware that he had not divorced the plaintiff hence her insistence that Stanley produce proof of the divorce before marrying her.

Loss of Consortium

It is not in issue that a wife has a right to the consortium of her husband. The action for adultery protects that consortium. (see *Misho v Sithole* 1992 (1) ZLR 291 (SC) at 291F).

It therefore seems to me necessary to examine the state of the marriage which existed between the plaintiff and her husband before he moved in with the defendant. The evidence is relevant to the nature of the consortium which the plaintiff was then enjoying and lost as a result of the defendant's conduct.

Although the defendant denied knowledge of a marriage between the plaintiff and Stanley, it appears she soon became aware of the marriage when she went to live with Stanley after getting pregnant. The defendant does not state that she then desisted from having any sexual encounters with Stanley when she moved in with him.

However, the relationship between the defendant and Stanley was thereafter short lived. It was not put into issue that the defendant returned to her parent's home soon after the birth of Blessing. The relationship between the plaintiff and Stanley continued resulting in the birth of three children in 1982, 1984 and 1986. It therefore appears that the plaintiff did not lose any consortium with Stanley as a result of the then short lived relationship with the defendant in the 1980s. Even assuming that there was a brief loss of such consortium, it is evident that the plaintiff condoned Stanley's transgression because of the three children born between 1982 and 1986.

It appears that the period that has really resulted in this action is the period between 2006 and the date of hearing of the matter, when Stanley moved in with the defendant. According to the evidence before the court, it appears that Stanley, before he moved in with the defendant in 2006, had already started abandoning the plaintiff and had gone on a frolic of his own. In 1987 and 1988, he sired two children, Farai and Lorraine, with different women. Although he appears to have been coming back home now and then, the marriage was no longer a garden of roses. The anguish that the plaintiff suffered during that period cannot be attributed to the defendant. The same can be said of the period between 2004 and 2006 when Stanley finally abandoned the plaintiff and went to stay with the prophetess. The marriage which has existed between the plaintiff and Stanley can therefore only be described as a façade of a marriage.

I therefore find it difficult to hold that Stanley left the plaintiff as a result of his association with the defendant. Stanley had already left the plaintiff for another woman,

the prophetess. It does not appear that the defendant is the one who coaxed Stanley out of his marriage with the plaintiff.

Commenting on the loss of consortium, MALABA J in the case of *Khumalo v Mandishona* 1996(1)ZLR 434(H) at page 448-449 stated that:

“... The most important factor under this head is that there should be proof of actual loss of consortium. ... The wife should be shown to have left the matrimonial home as a result of the adultery. Damages for loss of consortium are aggravated where the adultery has led to the break up of the marriage. Where the defendant is not shown to have enticed the errant spouse to abandon his or her duties of providing the plaintiff with comfort, society and services, the damages reduce. ...The damages will also be low where the marriage is shown to have broken down in all but name at the time the adultery was committed: *Reith v Antao* 1991 (2) ZLR 317 (S) at 319A.” (see also *Nyakudya v Washaya* 2000 (1) ZLR 653 (H) *Misho v Sithole*, supra

As already indicated above, Stanley did not leave the matrimonial home as a consequence of his relationship with the defendant. The defendant did not intrude on the plaintiff's and defendant's marriage. That had already been done by the prophetess. It therefore follows that the defendant was not the direct cause of the loss of consortium between the plaintiff and her husband. The damages for the loss of consortium can therefore only be minimal.

Contumelia

The plaintiff also claimed damages for contumelia. That she must have suffered injury, hurt, insult and indignity at the hands of the defendant as a result of the adultery is not in issue. What in my view is the issue is the extent of the suffering at the hands of the defendant. It appears to me that the harm suffered by the plaintiff was not solely occasioned by the defendant. In fact, it is Stanley who has been the main cause of the plaintiff's anguish and hurt throughout the entire marriage. It is unfortunate that the plaintiff has sought to attribute all the anguish and pain to the defendant. I am again of the view that the plaintiff is entitled to minimal damages under this heading.

Tender of damages

I have chosen not to assess any damages on the basis that the defendant contended that she paid the damages that the plaintiff had claimed in her summons. Any such assessment would be dependant on my finding whether or not the defendant discharged her liability.

On 28 July 2008 the defendant, through her erstwhile legal practitioners M.T Chiwaridzo & Co, tendered without prejudice to the plaintiff, the sum of Z\$400 billion claimed in the summons. The tender was in full and final settlement of the plaintiff's claim. It is not in issue that the plaintiff's legal practitioners received the amount on 30 July 2008 and as at the time when the matter was heard the money had not been returned to the defendant. It was the defendant's evidence that she had discharged her liability to the plaintiff and that she was surprised to be summoned to court for trial.

Mr Mukome, the plaintiff's legal practitioner, submitted that his firm did not issue out a receipt to the defendant's legal practitioners when they received the defendant's tender. This was therefore an indication that they had not accepted the tender on behalf of the plaintiff. He further submitted that the tender was not made in terms of Order 22 of the Rules of the High Court, 1971 in that the defendant did not apply for judgment to be entered as per the tender or file a consent to judgment. It was further submitted that when the tender was made, the plaintiff had already filed a notice of amendment, amending her claim to reflect that she was claiming a total sum of ZW\$400 trillion. Therefore the tender was not in accordance with the plaintiff's claim.

I will now deal with each of the submissions.

I find it difficult to understand *Mr Mukome's* submissions that the mere fact that his firm did not issue a receipt implies that they did not accept the payment on behalf of the plaintiff. The tender the exact sum claimed in the summons. The plaintiff did not produce proof of rejection of the offer or refund of the money almost a year after the tender. It is in my view improper to rule that the failure to issue a receipt amounts to a rejection of a tender where the plaintiff's legal practitioners have retained the money to the present date and at the same time persist with the claim. As stated in *Harris v Pieters* 1920 AD 644 at 650 which was cited with approval in *Levy v Geoff's Motors (Pvt) Ltd* 1992 (1) ZLR 127 (SC) at 130 F-H

"The test in all these cases, therefore, is this: was there a tender accompanied by money or cheque, or was there a payment with an attempt to annex a condition? In the former case, if the tender is refused the money should be returned; in the latter, if the condition is rejected the money may be retained and the balance claimed. The result of the test must depend upon the intention of the parties in each case as shown by their statement and conduct."

In the present case, the plaintiff proceeded with the claim without taking into account or explaining what became of the amount that was received and retained by her legal practitioners on her behalf. It can be inferred from the retention of the amount that the plaintiff accepted the tender. It must be noted that the defendant tendered the full amount claimed and without any conditions which would suggest that she intended that the plaintiff compromise her claim.

The tender was certainly not in terms of the rules. Had it been in terms of the High Court Rules the defendant would have been required to follow the procedure spelt out in the rules. As observed above, the conduct of the plaintiff's legal practitioners in retaining the amount tendered amounted to an acceptance of the tender whether or not the tender was in terms of the rules.

I now turn to the submission on whether or not the plaintiff had amended her claim. What is clear is that at the time of hearing, there was no notice of amendment filed on 25 July 2008 as claimed by the plaintiff. The only notice of amendment on record is dated 31 July 2008. According to that notice, the plaintiff sought to amend her claim from a total of ZW\$400 billion to a total of ZW\$400 trillion. The notice of amendment was issued a day after the plaintiff's legal practitioners had received the tender. Mr Mukome sought to rely on a letter dated 4 August 2008 to explain that the notice of amendment reflecting the sum of ZW200 trillion for each heading had indeed been filed before the tender. The letter reads:

"Kindly be advised that our messenger misplaced the Notice of Amendment which we filed on the 25th July 2008. Instead of notifying the writer, he prepared another copy which he filed and served upon yourselves on the 31st July 2008. We only realised this on this (sic) 4 August 2008."

The explanation is improbable to say the least. It is surprising that a clerk would have prepared and filed a notice of amendment without the mandate of the legal

practitioner. There is no proof that the notice was served on the defendant's legal practitioners. In any event, the clerk was not called as a witness and his evidence was placed before the court by *Mr Mukome* from the bar.

It should be further noted that the amendment had not been granted by the court. The notice simply provides as follows:

“TAKE NOTICE THAT the plaintiff hereby amends her Summons and Declaration as follows:.....”

As stated in *ZFC Ltd v Taylor* 1999 (1) ZLR 308 (HC) at 310D-311A there are only two possible methods of procuring an amendment to process or pleadings after the issue of summons. One is by consent of the parties and the other is by order of court. The defendant did not consent to the amendment and therefore it was necessary for the plaintiff to have filed a proper application setting out the reasons for the amendments. (see also *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (HC)) 215E-216D.) The necessity of such an application becomes very apparent from the issues raised above on the authenticity of the notice of amendment. *Mr. Mukome* had to impropedurally make averments on behalf of his clerk from the bar.

The confusion regarding the notices of amendment is exacerbated by another notice of amendment which was not on record but which *Mr. Mukome* sought to produce during oral submission. The notice of amendment reflects that the plaintiff was to apply at trail to amend her summons to reflect a total claim for US\$5 000 consisting of US\$2 500 for contumelia and US\$2 500 for loss of consortium. The notice was allegedly issued by the court on 19 May 2009. The notice however proposes to delete the sum of ZW\$200 billion and replace it with US\$2 500 for each heading. This is despite the fact that *Mr. Mukome* submitted that the plaintiff had in fact had proposed to amend her claim for each heading to ZW\$200 trillion in the notice allegedly issued on 25 July 2008. It is therefore surprising that the 2009 notice of amendment does not reflect the sum of ZW\$200 trillion that appears in the notice of amendment allegedly filed on 25 July 2008. The notice still reflects the sum of \$200 billion claimed in the summons. Further, there is no proof that the notice filed on 19 May 2009 was served on the defendant. The only conclusion that

can be drawn is that the two notices of amendment, that is the one purportedly filed on 25 July 2008 and the one filed on 19 May June are both not authentic and were not properly issued by this court.

It is my view that the summons had therefore not been amended and the plaintiff's claim therefore remained in the sum of ZW400 billion. In view of my findings that the defendant discharged her liability by paying the full amount claimed it is therefore not necessary for me to assess any damages.

Regarding whether or not the plaintiff is entitled to costs, it is my view that she is not despite the fact that she succeeded in my determination that there was adultery. The trial was unnecessary. The defendant had already settled the claim and it appears to me to have been improper for the plaintiff to have persisted with a claim that had been settled.

In the result, it is ordered that the claim be and is hereby dismissed with no order as to costs.

Mvingi, Mugadza & Mukome, plaintiff's legal practitioners