

NORMAN MANYANI
versus
MANDINYENYA TAKAMUPIHWA

HIGH COURT OF ZIMBABWE
TSANGA & CHIRAWU-MUGOMBA JJ
HARARE, 24 September, 2 & 8 October 2020

C.T Tinarwo for the appellant
Respondent in default

CIVIL APPEAL

CHIRAWU-MUGOMBA J

[1] The appellant issued summons in the court *a quo* against the respondent seeking \$10 000 adultery damages. The claim was dismissed and aggrieved by this ruling, the appellant noted an appeal on the following grounds. (1) The court *a quo* erred at law by dismissing the appellant's adultery claim despite the fact that there was overwhelming evidence that he had satisfied all the requirements for an adultery claim. (2) The court *a quo* erred at law by dismissing the appellant's claim despite the fact that there was overwhelming evidence that the respondent had committed adultery with the appellant's wife and (3) the court *a quo* erred at law and fact by holding that the respondent was not aware that appellant's wife was married failing to consider evidence of witnesses.

[2] In the court *a quo* the respondent raised a point *in limine* that the appellant had pleaded that he was in an unregistered customary law union with his wife and that did not give him the *locus standi* to sue for adultery damages on the basis that the union is not recognised at law as a marriage. On the merits, he admitted that he knew the appellant's wife but she had told him that she was not married having separated from the appellant. Essentially his defence was that he did not know that there was in existence an unregistered customary law union between the appellant and his wife. The respondent filed a claim in reconvention seeking damages for medical expenses, pain and suffering and loss of future earnings.

[3] The court *a quo* rightly dismissed the point *in limine* on the basis that a husband under customary law has the *locus standi* to sue for adultery damages. See *Jeke v Zembe* HH-237-18. On the merits the court accepted that there was a customary law union in existence between the appellant and his wife. This was based on the unchallenged evidence of the appellant's mother-in-law. The court held that although the appellant had managed to prove that the defendant had an extra marital affair, he had failed to rebut the respondent's defence that he was unaware that the appellant's wife was married to him. The appellant had therefore not managed to prove all the essential elements of adultery and his claim was dismissed. On the claim in reconvention, a decree of absolution from the instance was returned.

[4] At the hearing, Mr *Tinarwo* found himself in the unenviable position of being unable to advance any submissions in support of the appeal. The respondent was in default despite being served.

[5] Adultery is sexual intercourse between two people where one of the parties or both are married to someone else at the time of the intercourse. One of the requirements before an award of damages can be made is that the adulterer must have been aware of the existence of a marriage between the plaintiff and her or his spouse – see *Reith v Antao*. 1991(2) ZLR 317.

[6] In *casu*, at the trial, the record reveals that the appellant was unable to show that the respondent knew about the existence of the unregistered customary law union. He could not deny that his wife would get home in the early hours of the morning. He also admitted that he was often away from home. The appellant's witness was unable to show both in her evidence and under cross examination that the respondent knew about the existence of the unregistered customary law union between the appellant and his wife. As appears on page 43 of the record, the witness during her testimony was asked the following:-

“Q. In the papers filed before court, the defendant is alleging that he was not aware that one Brenda Mhlanga was married. What is your comment?

A. I do not know since I was not there when they met”.

[7] The three grounds of appeal are interrelated. They all address the requirements of a claim for adultery. We find no misdirection on the part of the court *a quo*. Once there is no proof of knowledge of the marriage on the part of a defendant, the matter ends there.

[8] According this appeal has no merit.

[9] On costs, the respondent did not appear and hence no costs will be awarded to him.

Disposition

1. The appeal is dismissed.
2. There shall be no order as to costs.

TSANGA J: agrees

Zimudzi and Associates, appellant's legal practitioners