

JAMIYA NYAKUDYA
versus
MOREBLESSING CHABVONGA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 July 2019 & 22 August 2019

**Civil Trial – Application for referral to the
Constitutional Court**

Plaintiff, in person
Ms *R Ruwona*, for the defendant

MUREMBA J: The plaintiff Jamiya Nyakudya sued the defendant Moreblessing Chabvonga for adultery damages in the sum of USD35 000.00 for engaging in an extra marital relationship with her now former husband. According to the plaintiff's declaration, at the time she issued summons in November 2014 her husband had moved out of the matrimonial home and was now staying with the defendant who was now expecting her husband's child. He had since filed for divorce. The adulterous relationship had started in 2013. Apparently, the two lovebirds were working together at Chinhoyi Magistrates Court. The plaintiff's husband was a magistrate whilst the defendant was an executive assistant.

The defendant in her plea denied engaging in an adulterous relationship with the plaintiff's husband. She denied the existence of a sexual relationship with the plaintiff's husband. She also denied having knowledge of the plaintiff and her husband being married in terms of the Marriage Act [*Chapter 5:11*]. She also denied that the plaintiff's husband was staying with her.

It is a fact that at the time the matter came for trial in June 2019 the plaintiff and her husband had since divorced. They had been married on 27 June 2010.

At the start of the trial the defendant raised a notice of preliminary objection to the constitutional validity of the cause of action relied upon by the plaintiff and made an application for referral of the matter to the Constitutional Court in terms of r 24 (2) of the Constitutional Court Rules, 2016 as read with s 175 (4) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. The defendant seeks to challenge the constitutional validity of the common law delict of adultery. In her notice of the preliminary objection the defendant stated that she raises the following constitutional questions.

- “1. Whether the common law delict of adultery as sued upon by plaintiff in her declaration is consistent with subsection (1) of s 56 of the Constitution of Zimbabwe, 2013 insofar as it allows the plaintiff to sue the defendant whilst simultaneously precluding her from suing her former husband for the same acts upon which she sues the defendant.
2. Whether the common law delict adultery as sued upon by the plaintiff in her declaration is consistent with para (d) of s 57 of the Constitution of Zimbabwe, 2013 insofar as it calls for scrutiny of and publicity of the defendant’s alleged sexual liaisons or other relations with the plaintiff’s former husband.
3. Whether the common law delict of adultery as sued upon by the plaintiff in her declaration is consistent with subsection (1) of s 58 of the Constitution of Zimbabwe, 2013 insofar as it restricts the defendant’s right to freely associate with any consenting adult person she chooses.
4. Whether the common law delict of adultery as sued upon by the plaintiff serves any rational and justifiable purpose or object protectable under the Constitution of Zimbabwe, 2013.”

The defendant took the witness stand and gave the following evidence under oath. She said that by being sued for adultery damages by the plaintiff her constitutional rights are being violated. These are her rights to freedom of association¹; the right to privacy² and the right to equal protection of the law³.

With regards to the right to freedom of association she said that she is being sued for adultery based on a marriage contract which she is not a party to yet she has a right to associate with any consenting adult. About the right to equality she said that she is entitled to equal protection of the law and as such the plaintiff should have also sued her husband since he is the one with whom she entered into a marriage contract. She said that there was no justification in him

¹ S 58 (1) of the Constitution.

² S 57 of the Constitution.

³ S 56 of the Constitution.

being spared yet he is the one who was guilty of breaching his marriage contract. In respect to the right to privacy the defendant said that the claim will bring undue ridicule and exposure to her private life. She said that in arguing her rights she was however not making an admission to the plaintiff's claim. The defendant said that she wants the matter referred to the Constitutional Court to determine if the plaintiff's delictual claim is constitutional and whether or not her rights are not being infringed.

Under cross examination the plaintiff asked the defendant if she is seeking to be allowed to associate with legally married men. In response she said that she is not seeking to be allowed to associate with legally married men but with any consenting adult. On the right to privacy, the plaintiff asked if the defendant was seeking to be protected so that the evidence of the adulterous relationship will not be led or adduced in court. In response she said that her right to privacy is enshrined in the Constitution and she is entitled to it whether or not it is to her advantage or disadvantage. About the right to equality, the plaintiff put it to the defendant that it is the defendant who should be sued because she is the one who involved herself with a married man. In response the defendant said that the person who made vows to the plaintiff was her husband and those vows should restrain him and as such it is him who should be sued and not a 3rd party. The defendant said that there is a conflict between the law that promotes marriage and the law pertaining to the delict of adultery. She however did not explain the conflict.

The plaintiff who opposed the objection in turn took the witness stand and gave evidence under oath. She stated that the delict of adultery is constitutional and does not violate any constitutional rights. The plaintiff said the defendant is seeking to associate with married men, to be protected from producing evidence to do with the adultery which she committed with her now former husband. She also said that on the right to equal protection before the law it is the 3rd party who involves themselves with a married person who should be sued. The plaintiff said that there is nothing meaningful to be referred to the Constitutional Court for determination. She referred to the case of *Njodzi v Matione* HH 37/16 as having already determined the issue. Under cross examination she said that an unlawful association cannot be protected by the Constitution. She said that on the contrary the Constitution protects the sanctity of marriage. She also said the right to privacy cannot be used to protect people who commit unlawful acts. In short the plaintiff objected to the referral arguing that:

- a) The claim for adultery damages is constitutional as it protects the sanctity of marriage.
- b) The High Court has already determined the issue in the case of *Njodzi v Matione* HH 37/16.
- c) The defendant merely raised the issue to prevent evidence from being led at trial.

The defendant's counsel in her closing submissions submitted that the defendant has raised a valid constitutional matter. She submitted that the right to equality and non-discrimination as provided for in s 56 (1) of the Constitution provides that all persons are equal before the law and have a right to equal protection and benefit of the law. This right entails that all persons are to be treated equally before the law without discrimination. In principle those who are in equal circumstances are dealt with equally. On the contrary the delict of adultery does not touch one of the adulterers i.e. the person who is married to the plaintiff yet it is that married spouse who would have broken a term of his or her marriage contract. The law spares him or her and allows him or her to follow the proceedings from a distance and to even take pleasure in the fight between his or her spouse and a third party. Ms *Ruwona* made reference to *law of Delict 2nd Edition* p 336 wherein J Neethling, J M Potgieter and P J Visser state that:

“The action *iniuriarum* may, however, only be instituted against the third party and not against the guilty spouse (her emphasis)

Ms. *Ruwona* submitted that the delict is unconstitutional because it allows only one party to an extra marital affair to be sued with the other party being spared. Ms *Ruwona* contended that to this end, the claim for adultery damages is inconsistent with the right to equal protection and benefit of the law.

In respect to the right to privacy and the right to freedom of association Ms. *Ruwona* submitted that in defending the adultery claim, the private life of the third party being sued is probed into and placed under a microscope leading to the exposure of details of his or her sexual relationship with a person who is a consenting adult who might be a guilty spouse. She submitted that this is a clear violation of the rights to privacy and freedom of association.

Ms. *Ruwona* submitted that the constitutional issue raised by the defendant has merit and is not merely a “frivolous” and “vexatious” request. She contended that in other jurisdictions where there are comparable constitutional provisions the delict of adultery has been deemed

unconstitutional. In particular she referred to the South African case of *DE v RH* [2015] ZACC 18.

Ms. *Ruwona* contended that whilst the sanctity of marriage should be protected, the remarks made in *DE v RH supra* are apposite. Times have changed and the law has moved with the times both in its conception of the institution of marriage and the punitive extremes to which it will go to protect it. There is no justification to penalize a third party for adultery. It is unjustifiable in a democratic society and not even the limitation of rights provided for in s 86 of the Constitution can justify the violation of the fundamental rights in an adultery suit.

The plaintiff also filed her closing submissions. She repeated what she said in her evidence in submitting that the constitutional issue raised is unsustainable. She said that the issue is manifestly groundless or utterly hopeless and without foundation. She submitted that the rights the defendant says are infringed by the delict of adultery are not absolute. They are subject to limitation in terms of s 86 of the Constitution. She said the limitation of these rights by the delict of adultery is fair, reasonable, necessary and justifiable in a democratic society. The plaintiff submitted that in *Njodzi v Matione* HH 37-16 a similar request having been made for referral and having been held to be frivolous and vexatious and that decision not having been set aside represents the current position of the law. The plaintiff said that the sanctity of marriage derives from our culture as a nation and this is what makes us different from other jurisdictions where adultery has been allowed. She contended that the delict of adultery is constitutional because it seeks to punish third parties for failing to respect the sanctity of marriage. The plaintiff submitted that South African decisions are not binding on us but only carry persuasive value. She said that there is no chance that our Constitutional Court can find the delict of adultery to be unconstitutional given our societal, cultural and religious values as enshrined in the Constitution. She said that the request is just meant to buy time and delay the trial.

Section 175 (4) of the Constitution provides that:

“If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.”

The provision means that if a constitutional issue is raised during proceedings and a request is made for that issue to be referred to the Constitutional Court for determination, the role

of the court presiding over that matter is to refer the issue to the Constitution Court if it considers that the request is not frivolous or vexatious. What is important therefore is for the court to be satisfied that a constitutional issue has been raised and that the request for referral is not frivolous and vexatious. In *The State v Almerico De Guoveia* HH 193/19 it was stated that,

“In short therefore, in this application, the applicant’s request can only succeed if the court considers that the matter or question is firstly, a constitutional matter and secondly, that it is not frivolous or vexatious.”

The meaning of the words “frivolous and vexatious” have been defined in a plethora of cases. In *Rogers v Rogers & Another* SC 64-07 MALABA JA (as he then was) said;

“In *S v Cooper & Ors* 1977 (3) SA 475 at 476D BOSHOFF J said that the word ‘frivolous’ in its ordinary and natural meaning connotes an action characterised by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense “frivolous” or “vexatious” when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation.”

Looking at the rights the defendant says are infringed by the delict of adultery and the fact that the South African Constitutional Court has held the delict to be unconstitutional, I am satisfied that the issue raised is a constitutional issue and the request for its referral is neither frivolous nor vexations. In the South African case of *DE v RH* [2015] ZACC 18 *supra* in paras 53-54 the Constitutional Court of South Africa held that:

“Of relevance in respect of the adulterous spouse and the third party are the rights to freedom and security of the person, privacy and freedom of association. These rights do not necessarily weigh less just because the two have committed adultery. The delictual claim is particularly invasive of, and violates the right to, privacy. This very case is illustrative of this. The Supreme Court of Appeal dealt with the abusive, embarrassing and demeaning questioning that Ms H suffered in the High Court. She was “made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion.” Likewise, in order to defend a delictual claim based on adultery, the third party is placed in the invidious position of having to expose details of his or her intimate interaction-including sexual relations – with the adulterous spouse. That goes to the core of the private nature of an intimate relationship.”

Further in paragraph 62 to 63 the court held that:-

“Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and

relationships between people. This must be viewed in light of current trends and attitudes towards adultery both nationally and internationally. These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals.

I am led to the conclusion that the act of adultery by a third-party lacks wrongfulness for purposes of a delictual claim of contumelia and loss of consortium; it is not reasonable to attach delictual liability to it. That is what public policy dictates. At this day and age it just seems mistaken to assess marital fidelity in terms of money.”

With the persuasive value the South African decisions carry, chances of the defendant succeeding in the Constitutional Court cannot be ruled out. There is a possibility of the defendant succeeding with her challenge in the Constitutional Court. The Constitutional Court may find that the delict of adultery is unconstitutional. Once it is accepted that there is a possibility of the constitutional issue succeeding, it must be found that the request for referral is not frivolous or vexatious. With that it cannot be said that the request is groundless or helpless and without foundation.

It is in the interests of justice that the matter be determined by the Constitutional Court. Interesting arguments and submissions have been made in respect of s 86 of the Constitution which provides for limitation of rights, it will be interesting to hear what the Constitutional Court will have to say. The provision provides:

“86 Limitation of rights and freedoms

- (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or freedom concerned;
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
 - (f) whether there are any less restrictive means of achieving the purpose of the limitation.
- (3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
 - (a) the right to life, except to the extent specified in section 48;
 - (b) the right to human dignity;
 - (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;

- (d) the right not to be placed in slavery or servitude;
- (e) the right to a fair trial;
- (f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).

It is clear that the rights the defendant says have been infringed are not covered under s 86(3) which provides for rights that are absolute. These rights not being absolute, the question is will the Constitutional Court agree with the defendant that the limitation of these rights by the common law delict of adultery is not fair, reasonable, necessary and justifiable in a democratic society or it will agree with the plaintiff that the limitation is fair, reasonable, necessary and justifiable in a democratic society? I have taken note of the determination which was made by this court in the case of *Njodzi v Matione supra*. The issue before Mwayera J in that case was “whether or not the common law delictual claim for adultery damages is constitutional or unconstitutional.” After hearing arguments and submissions Mwayera J held that the application to have adultery damages claim declared unconstitutional was dismissed. I am made to understand that that determination was not appealed against. With this, I do not believe that it will be wrong for me to grant the request for referral of the same constitutional challenge to the highest court on the land in constitutional matters so that it can pronounce itself once and for all for the benefit of our jurisdiction. Once that is done the issue will be settled. After all s 2 of the Constitution provides that:

“(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

In the result, it be and is hereby ordered that:

1. The matter is referred to the Constitutional Court in terms of s 175 (4) of the Constitution of Zimbabwe (Amendment) Act, 2013 for a determination of the following constitutional issue: is the common law delict of adultery unconstitutional?
2. To that end the Constitutional Court shall determine:
 - (a) Whether the common law delict of adultery as sued upon by plaintiff in her declaration is consistent with subsection (1) of s 56 of the Constitution of Zimbabwe, 2013 insofar as it allows the plaintiff to sue the defendant whilst simultaneously precluding her from suing her former husband for the same acts upon which she sues the defendant.
 - (b) Whether the common law delict of adultery as sued upon by the plaintiff in her declaration is consistent with para (d) of s 57 of the Constitution of

Zimbabwe, 2013 insofar as it calls for scrutiny of and publicity of the defendant's alleged sexual liaisons or other relations with the plaintiff's former husband.

- (c) Whether the common law delict of adultery as sued upon by the plaintiff in her declaration is consistent with subsection (1) of s 58 of the Constitution of Zimbabwe, 2013 insofar as it restricts the defendant's right to freely associate with any consenting adult person she chooses.
- (d) Whether the common law delict of adultery as sued upon by the plaintiff serves any rational and justifiable purpose or object protectable under the Constitution of Zimbabwe, 2013.

Nyahuma's Law Golden Stairs chambers, defendant's legal practitioners