

**Kudzai Gombakomba
Versus
Tsitsi Bhudhiyo**

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 8 and 9 June 2006, 7 July 2006 and 8 November 2006

Civil trial

Mr *Mugadza*, for the plaintiff
Ms *B Nyamusamba*, for the defendant

KUDYA J: The plaintiff (the wife) sued the defendant (the girlfriend) for adultery damages in the sum of \$200 000 000.00 out of this court on 4 April, 2005 which she reduced at the pre-trial conference on 19 October, 2005 to \$100 000 000.00. She also claimed interest at the prescribed rate from the date of summons to the date of final payment and costs of suit.

The defendant filed an appearance to defend on 15 April 2005 and plea on 26 July 2005. There is no indication in the pleadings as to when the summons was served.

The plaintiff testified and called her daughter born on 13 August 1992 to testify after the defendant had closed her case. This was because the defendant raised new evidence which was not in her pleadings and which the plaintiff could not reasonably possibly have anticipated. The defendant testified and called one witness. In addition 6 documentary exhibits were produced.

It was common cause as demonstrated by Exhibit '1', the marriage certificate, that the plaintiff married Charles Gombakomba in terms of civil rites at Harare Magistrates Court on 23 June 1995. The plaintiff, however, stated that she commenced living together with him in 1980.

The plaintiff stated that she lived a blissful marriage union until September 2004 when her husband told her over the phone that he had a friend called Tsitsi Bhudhiyo. She stated that at that time she did not know her personally but was aware that the Bhudhiyos were related the Gombakombas. When she pressed her husband about the story at home, he recanted. In December 2004 while she was busy officiating at her niece's marriage, he took this Tsitsi around to see a number of his relatives. He seemed prepared to marry her until she categorically told him that their union was a monogamous one.

The plaintiff believed the defendant was aware that Charles was married for the following reasons.

1. Since 2002, the year she alleged she fell in love with her husband, she never visited him at the Waterfalls home where he lives with his family since 1986.

2. Instead she would go gallivanting with him while he went on many business trips which he undertook at the time he was employed as a Field officer by Willowvale Motor Industries. She produced Exhibit '2' a Barclays Bank of Zimbabwe foreign currency account withdrawal advise dated 16 April 2004 in which he received 2 000 rands for his and the defendant's use. Her husband visited South Africa with the defendant as indicated on a page of his passport produced as Exhibit '3' wherein he obtained a 6 month visa on 28 May 2004. Exhibit 4 was a list if items he purchased for the defendant. Exhibit 5 consisted of 4 pages covering the period 25 September 2003 to 28 September 2003. Her husband had apparently been with a woman at the Caribbean Bay whose blouse and skirt he had submitted for laundry on his account. He had apparently gone with a lady for a sunset cruise at Kariba on 28 September 2003. No names were indicated but she believed that he went with the defendant.
3. The defendant did not to her knowledge do any cooking, laundry or housekeeping for him at the Waterfalls home nor pack his clothes which he used when he went with her on these trips.
4. He had taken the defendant to the Trade Fair in Bulawayo where he visited his sister to whom he introduced her as his secretary at Willowvale Motor Industries.
5. His cellphone had the code name TSBH which each time it rang showing that code name, the caller would cut the call each time the plaintiff answered.
6. The defendant applied for maintenance for her daughter Charmaine Tafadzwa Gombakomba born on 2nd February 2005, case No. M767/2005 on 5 April 2005 at the Harare Magistrate Civil Court in the sum of \$12 650 000.00 as shown in Exhibit 6. At the conclusion of the hearing she told him that she was married in a monogamous union to Charles.
7. The plaintiff was to repeat the message on the nature of her union with him when he took the defendant for a paternity test of the child.

She averred that notwithstanding this knowledge, the defendant continued to associate with her husband. On 23 February 2006 she had the temerity to tell the plaintiff that it was her husband who phoned her telling her that he wanted her when she remonstrated with her as to why she was destroying her marriage. She retorted, "Take it that way" After this incident she had gone on business to Victoria Falls. Her husband picked her from the Airport. The defendant had sent a message to her husband's cell asking him to "sleep well as we are tired of waiting for you".

The effect of the relationship has been devastating on the plaintiff. In 2004, though her husband is a mechanic, he did not repair her car for 6 months. When he went with defendant to South Africa he cancelled the trip which he was supposed to take all his family along. He did not bring them any gifts as he used to. The plaintiff had purchased an undeveloped stand in Tynwald which she was developing with her husband. He abruptly withdrew his support and stalled development.

Her marriage was severely affected. She lost conjugal love. Even as she testified she was having sexual relations with her husband once in a blue moon, that is once every 4 months. He still sleeps away from home though he is now self employed and boasts to her that he would be with the defendant. She is a training officer in the hotel and catering industry and believes the hotel staff in Mutare and, Bulawayo that the two lovers visited knew he was married to her. She has been humiliated and hurt such that her own self-esteem has been affected. His family has lost the respect they had for her. She has been depressed. She therefore prayed for \$100 000 000.00 in damages, an amount she believed would assuage her hurt.

Under cross-examination she stated that she was not aware that the defendant had visited the Waterfalls home in her absence and that she had been falsely led to believe that her husband lived with his mother. She was adamant that in her view, the defendant had constructive knowledge of her marriage, before she personally advised him. The line of questions that were put to her were designed to lay the blame for the whole fiasco on her husband, where it truly belongs.

The effect of her 13 year old daughter's testimony was that she did not know the defendant and had never met her before she came to court. Ms *Nyamusamba* had clear difficulties in cross-examining her. The young girl maintained her testimony.

The defendant also testified. She fell in love with plaintiff's husband in June 2002. He had assured her that though he was in his late 40s he was not married as his wife had deserted him leaving him with the children whom he lived with in Waterfalls. It was a topic he did not wish to discuss. He also said he lived with his mother. They did everything together. They went for lunch, and on business trips to Mutare and Bulawayo. He kept some of his clothes at her home. She went to South Africa with him but denied she went with him to Kariba. She fell pregnant and he took her around to see his relatives while he made arrangements to pay roora. It was then that one of his aunts alerted her on his true marital status. She was then 8 months pregnant. She terminated the affair. Later she received summons from his wife.

She was pained by the depth of his lies to her. He wasted her time and in the process hurt both his wife and her.

Under cross-examination she made out that she was 29 years old when she fell in love with the then 48 year old Charles. In June of 2002 he took her to his Waterfalls home. She found his mother, the children and a maid present. He introduced her to

his children as "a friend who is in love with dad." She also spoke to his mother who declined to be involved in a discussion concerning the plaintiff. She did not ask the children about their mother even though he often passed by her work place or at her saloon with them each weekend when he took them for swimming. She mentioned the names of 2 of his children, one of whom testified. She had visited his sister in Bulawayo but never had the opportunity to discuss about Charles' first wife with her. She was to visit his Waterfalls home with him one Sunday in 2004. She was there for about 1 hour. She had rummaged through his wardrobe and had not seen any female attire.

She admitted that she still communicates with him over the phone to discuss the children's health and life's needs. She denied being sexually involved with him after she knew of his true marital status.

She called one Edna Andiki a maternal cousin of hers. She stated that the defendant came with the plaintiff's husband to her rural home in Mhondoro. The first visit was an introduction while the second was for her to arrange for the family gathering for the payment of roora. She questioned him on his marital status because of his age and he alleged that he was not married. Later the defendant asked her to cancel the roora arrangements.

It emerged during her cross-examination that she was the only relative of the defendant that plaintiff's husband had seen. It appeared that no relative of the defendant had accompanied her on her visits to the relatives of the plaintiff's husband.

In assessing the plaintiff as a witness, she struck me as a mature and dignified woman who believed that the defendant was aware that her husband was married but clung on to him nonetheless. She seemed keen to lay the blame on her. She was not prepared to lay the blame on her husband who in the final analysis was the wrongdoer. The 5 points she highlighted before the defendant applied for maintenance indicated that had the defendant acted diligently she would have realised that Charles was a married man. Even after she alerted her of her marriage, the defendant continued to see her husband. Outside the birth of the child she had no evidence that sexual liaison continued between the defendant and her husband. She in my view was justified in her suspicions taking into account the admission of the continued association between her husband and the defendant without a chaperon. Her daughter supported her version as regards the absence of visitations by the defendant to her home during the period on excess of 3 years that the relationship raged.

The defendant did not strike me as a truthful witness. She revealed new facts which her legal practitioner did not put to the plaintiff. She did not give detail for the plaintiff's comment on the exact number of visits she made. She only sprang them as surprise during her own cross-examination. Her behaviour had the hallmarks of a liar who created facts as the trial progressed. I did not believe her testimony. Even

though she applied for maintenance, it appeared from her testimony, as regards the arrangements she allegedly struck with the plaintiff's husband of how they often meet for him to see his child and buy the necessities of life for it, that the claim was a ruse designed to mislead the plaintiff.

Her witness did not advance her ignorance of the plaintiff's husband's status version any further. She appeared to have very limited knowledge of the plaintiff's husband and his dealings with her cousin.

3 issues were referred to trial.

These were:

1. Whether or not defendant knew that plaintiff was married to Charles.
2. Whether or not defendant was called upon to stop her adulterous relationship and whether she took notice of the plaintiff's protestations.
3. Whether plaintiff suffered damages of \$100 000.00 as claimed.

I resolve these issues in *seriatim*.

1. Whether or not the defendant knew that Charles was a married man.

Mr *Mugadza* for the plaintiff submitted that the defendant's conduct demonstrated that she was aware of the plaintiff's husband's marital status. Her failure to visit him at his Waterfalls home save for 1¼ hours of their three year relationship showed that she was avoiding that home because she knew he was a married man. On the other hand Ms *Nyamusamba* for the defendant submitted that Charles conducted his relationship with the defendant in such a cunning manner that she could not have suspected that he was married. She was able to do all that was necessary to achieve a lasting relationship with him at her own residence. They went on trips locally and to foreign lands together.

Takadini v Maimba 1996 (2)ZLR737 (S) at 741C coined the phrase "diligent in ignorance" and supplied its meaning as "suspected the facts but took care not to confirm her suspicions since she did not want to know." It was held that, that was sufficient to establish that she knowingly committed adultery with him.

I accept that there is no set protocol by which lovers should conduct their affair. The evidence given by the plaintiff established in my view that if the defendant was desirous of finding out the correct marital status of the Charles, she would have done so. Her avoidance of the Waterfalls home in preference to her own residence, her failure to make preparations for him as they went on the various trips support the view that she knew he was a married man. I would think that lovers who are besotted to one another would seek always to be together.

That she knew is further confirmed by the plaintiff's testimony that each time plaintiff answered the husband's cellular phone with the code name TSBH for Tsitsi Bhudhiyo, the caller would cut the call. The fact that she raised new matters only during her own cross-examination was clear demonstration of her fore knowledge of

Charles' marital status. She attempted to find refuge in the proven lie that even the plaintiff's daughters were aware of her existence as their father's paramour. In the fore knowledge of his marital status she engaged in an adulterous relationship with him which resulted in the birth of a child on 2 February 2005.

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

The second issue seeks to resolve whether or not the relationship has ended.

The plaintiff stated that it has not ended. Her husband still does not come home. He alleges that he will be with the defendant. She referred to a telephone conversation she had with the defendant on 23 February 2006 in which the defendant suggested that the affair was still persisting. She referred to another incident when she was picked up at the Airport by her husband on her way from Victoria Falls and the defendant later texted a message to her husband that he should sleep well as they were tired of waiting for him. While the defendant denied the contents of the conversation and text message, she admitted that she was still seeing the plaintiff's husband to discuss about the child. She admitted that he visits the child at night but denied she was still carrying on an adulterous relationship with him. Clearly the opportunity for such an adulterous relationship is available, the two parties appear inclined towards one another such that it is reasonable to conclude that this affair still subsists. In the face of a maintenance order, such meetings are unnecessary. In any event defendant confirmed that the plaintiff had used vulgar language to the effect that she should find her own man.

I am thus satisfied that even after the issue of summons the defendant has continued with the adulterous relationship with the plaintiff's husband as the triad of desire, opportunity and willingness can be interpolated from the defendant's conduct. See *Smit v Arthur* 1976(3) SA 378(AD)

I would answer the second issue in the plaintiff's favour.

The last issue relates to the measure of damages that are due to the plaintiff.

Mr *Mugadza* in his oral submissions contended that the plaintiff was seeking damages for *contumelia* and loss of consortium. In paragraph 6 of her declaration she averred thus:

"As a consequence of the defendant's unlawful, immoral and adulterous association with the plaintiff's husband, plaintiff has suffered loss of love from her husband, consortium, support, contumelia as well as general humiliation."

Ms *Nyamusamba*, on the other hand, submitted that where an innocent spouse has condoned the adultery and marital relations have been resumed damages may be awarded for *contumelia* only and not for loss of consortium.

It seems to me that the issue whether condonation debars a claim for loss of consortium has already been decided by both the Supreme and this court.

In *Doyle v Slago*(1)1957 R & N840, the Federal Supreme Court, per Clayden FJ at 844E-H stated:

"Counsel for the Respondent contended that she had not condoned the adultery by resuming cohabitation. But if she has not that does not appear on the evidence. To the request for particulars from what date have plaintiff and her husband been living apart, the answer was that she was not living and had not lived apart from him. He said he was still living with her. She said nothing to indicate that the answer in the particulars was confined to being in the same house. And in the particulars of the partial loss of *consortium*, there is only mention of loss of affection and strained marital relationship. On this pleading and evidence it can only be assumed that cohabitation continues.....If plaintiff claims damages for partial loss of consortium she must establish her damages by showing the extent to which, if at all, she has lost it."

In the same case TREDGOLD CJ at page 841D-E stated:

"I am satisfied that on the pleadings and the evidence, that the adultery of the plaintiff's husband has been condoned. This was clearly implied by what she and her husband said and if, as was suggested in argument, they created the wrong impression in this regard, they have only themselves to blame. Condonation must be an import factor in the assessment of damages. It obviously rules out almost completely any damages for loss of *consortium*, and it must have some bearing on the other damages that may be awarded."

It seems to me that the Federal Supreme Court decreed that condonation may very well almost rule out completely the loss of consortium and that were partial loss is claimed, evidence to establish such partial loss must be adduced. In the absence of such evidence, which is founded on relevant pleadings, then condonation is deemed to debar the claim for loss of consortium.

The decision in *Doyle v Salgo (1) supra*, was unfortunately not referred to in *Misho v Sithole* 1992(1) ZLR 291 (S). KORSAH JA defined both loss of *consortium* and *contumelia* at 297C. At pages 297 D-298B, he extensively dealt with this issue. He accepted at 297D that "any intentional assault on *consortium* may entitle the injured spouse to claim for damages." At 297F he viewed that "as the respondent condoned her husband's adultery, there was no great loss of consortium". While he awarded damages for *contumelia* only he did not rule out an award for loss of consortium even where condonation had been granted and the marriage continued to subsist.

In *Katsumbe v Buyanga* 1991 (2) ZLR 256(H) at 258B ROBINSON J, held that there was no loss of consortium since the plaintiff had 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.

In *Khumalo v Mandishona* 1996(1) ZLR434 (H) at 448 G-449C it was held that there should be proof of actual loss of consortium, that is that the wife should be shown to have left the matrimonial home as a result of the adultery.

These views as expressed in *Katsumbe, supra* and *Khumalo supra*, are not borne out by McNALLY JA's sentiments in *Takadini v Maimba* 1996(2) ZLR 737(5) at page 738E-G. On loss of consortium the learned Judge of Appeal. posed the question:

"And on the second ground, to what extent had that companionship, love, affection, comfort and service already disappeared before the adultery took place."

In my view it does not necessarily follow that where condonation has been granted by the innocent spouse, she disentitles herself from receiving an award of damages for loss of consortium as long as she pleads it in her papers and establishes it by her evidence.

In the present case I am satisfied that she pleaded loss of consortium in paragraph 6 of her declaration and that she attempted to establish it in her oral testimony.

Loss of *consortium* involves the loss of companionship, love, affection, comfort and services by the aggrieved spouse; See *Takadini supra* at page 738E and *Khumalo's case supra* at 449 G. In *casu* the plaintiff's husband did not abandon his home or his wife. He curtailed the frequency he was at home. When he was there he was no longer performing his sexual duties to his wife as he used to before he commenced the adulterous affair with the defendant. He was always tired and stressed up such that he ended up having sexual relations with her once every four months. He was no longer involved in developing the Tynwald stand. He no longer went to South Africa with his family nor did he buy them presents. He did not repair the wife's car.

In my view the plaintiff suffered partial and not total loss of consortium from 2002 to date. I therefore agree with Mr *Mugadza* that she is entitled to damages under this head.

In *Doyle Salgo (1) supra* at, page 844 A *contumelia* is equated to the injury inflicted upon the person of the innocent spouse by the adultery. The phrase injury or contumelia was also used in *Takadini's case supra* at 738F. It covers the injury, hurt, insult and indignity inflicted on the innocent spouse by the adultery.

In *casu* the plaintiff related the humiliation and consequent loss of self-esteem that she experienced at the hands of her spouse's relatives and employees at the hotels he visited with the defendant. She, after all, had been with her spouse for 26 years and had borne 5 children. I am satisfied that she is entitled to damages for *contumelia* too.

In assessing the appropriate damages I am guided by the factors which were conveniently crystallised in *Khumalo's case, supra*

These are:

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

(e) The level of awards in similar cases.

In the present case, the plaintiff's husband instigated the affair with the then 29 year old defendant when he was 48 years old. He is the one who decided to stray from his marital bed. By his blandishments he misled the defendant into committing adultery with him and then pretended to set in motion customary procedures for union. In my view the character of the plaintiff's husband as exemplified by his conduct is mitigatory for the defendant.

As regards the social standings of the plaintiff and the defendant, it seems to me that the plaintiff had been married by civil rites for 7 years, and had lived with her husband for 26 years. They had 5 children, some of whom are living abroad. She believed that her husband's family was related to the defendant's family. She works as a trainee officer for a private corporation. The defendant was a 29 year old spinster. She was impregnated by plaintiff's husband and bore him a daughter on 2nd February 2005. She is employed by a parastatal. The plaintiff suffered both partial loss of consortium and *contumelia*. These are aggravating features against the defendant.

On the third feature of contrition and apology the defendant has not shown either contrition or apology. She has carried on with the relationship without regard to the pain and disruption it is causing the plaintiff. This aggravates the damages.

The fourth feature on deterrence calls for the protection of the marriage institution. This however is dependent also on the character of the plaintiff's husband who after all was the creator of the anguish and hurt which the plaintiff has experienced. There was no medical evidence led to show that HIV or Aids has been contracted by the plaintiff. I however appreciate the anxiety she must have experienced on discovering that her husband had impregnated a 32 year old spinster. To the extent that the need to safeguard the marriage institution is measured against the brazen conduct of the defendant, I find this as an aggravating feature against her.

Lastly, after weighing all these factors, I need to consider awards in comparable cases in this jurisdiction. Such comparable cases have ceased to have any utility value due to the rising inflationary spiral which has beset our currency. I am mindful of the fact that an award of adultery damages should not be seen as a path to riches for the plaintiff. It however must not be so low as to punish the plaintiff for having sought recompense for the ill visited on her by the defendant's conduct.

In the end the award is really an estimate of what I consider to be fair and adequate recompense for the loss suffered by the plaintiff.

Taking into account all the above factors I consider that for the partial loss of consortium the plaintiff is entitled to \$30 000.00 (revalued) while for *contumelia* she is entitled to \$50 000.00.

In the premises, it is ordered that:

The defendant shall pay the plaintiff the sum of \$80 000.00(revalued) as damages for adultery with interest thereon at the prescribed rate from 15 April 2005 to the date of full payment and costs of suit.

Mugadza and Company Attorneys: Plaintiff's Legal Practitioners

B Nyamusamba and Partner: Defendant's Legal Practitioners