

MARVELLOUS MARUFU  
versus  
RATIDZO NYAMUCHEGWA

HIGH COURT OF ZIMBABWE  
MUCHAWA J  
HARARE, 7 February & 20 June 2022

**Opposed Matter-Special Plea-Application for referral to the Constitutional Court**

*Ms PR Zvenyika*, for the plaintiff  
*Ms R Magundani*, for the defendant

**MUCHAWA J:** I heard this matter on the special plea raised by the defendant on the 7 February 2022 and the parties filed their statement of agreed facts on the 7 March 2022.

The plaintiff sued the defendant for adultery damages in the total sum of USD 50 000 for engaging in an extra marital affair with her husband. The statement of agreed facts shows that the plaintiff was married to her husband, one Albert Mhondoro initially in terms of an unregistered customary law union which was then upgraded into a civil marriage on 19 March 2018. The plaintiff alleges that the defendant was a workmate of her husband who even attended at their wedding ceremony and bought a wedding present for them. It is a further agreed fact that during the course of her marriage, the defendant allegedly at diverse places in Zimbabwe and on diverse occasions, allegedly committed adultery with plaintiff's husband. Plaintiff claims that as a result of the adultery, she lost the love, companionship and affection of her husband who moved out of their matrimonial home on 26 December 2020 and is alleged to be co-habiting with defendant. Further, the plaintiff claims that the adulterous affair which has become a public show has caused her embarrassment, shame and humiliation amongst relatives, hers and her husband's workmates and the community they live in. She claims USD 30 000 for loss of consortium, comfort and companionship and USD 20 000 for *contumelia*.

The defendant raised a special plea in which she pleads that the claim for adultery is no longer a part of the law of Zimbabwe as it is inconsistent with Chapter 4 of the Constitution of Zimbabwe. It is prayed that pursuant to sub r (2) of r 24 of the Rules of the Constitutional Court, 2016 as read with subs (4) of s 175 of the Constitution of Zimbabwe, 2013, this court refer the following constitutional questions to the Constitutional Court:-

1. Whether the common law delict of adultery sued upon by plaintiff is consistent with subs (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 of adultery sued upon by plaintiff is consistent with para (d) of s 57 of the Constitution of Zimbabwe, 2013 insofar as it exposes defendant to the prospect of being questioned on and testifying on intimate and personal details of her private sexual relations and in so far as it further 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 sued upon by plaintiff is consistent with subs (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.

Section 175 (4) of the Constitution of Zimbabwe (2013), provides as follows:

“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 to be merely frivolous or vexatious.”

In terms of r 24 (2) of the Constitutional Court Rules, 2016, when one is satisfied that the request is not frivolous or vexatious, she shall refer the matter to the Constitutional Court. Where there are no disputes of fact, the court need not hear evidence but the parties will prepare a statement of agreed facts, as provided by the proviso to rule 24 (4). This is what the parties *in casu* did and I have largely captured the facts in the background above.

Ms *Magundani* correctly captured my role as not to determine the constitutional issues which were raised at the commencement of proceedings but to determine whether the request placed before me was frivolous or vexatious.

The words “frivolous” and “vexatious” have already been interpreted in this context in the case of *Martin v Attorney General & Anor* 1993 (1) ZLR 153 (S) @ 157 as follows:-

“In the context of s 24(2), the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised bona fide, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJKB 857 at 859; *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476D-G; *Fisheries Development Corporation of SA Ltd v E Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F.

To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court.”

Ms *Magudani* submitted that the request for a referral is not frivolous and vexatious as it is important for the Constitutional Court to determine whether the common law of adultery damages still resonates with the provisions of the Constitution, particularly in respect to the following:-

1. Section 56 (1) which guarantees that all persons are equal before the law and have rights to equal protection and benefit of the law as the law of adultery arraigns only the third party who is the alleged adulterer and not the spouse with whom the adultery is committed. This was said to be placing the wrong parties in different positions regarding protection of the law.
2. Section 57 which guarantees the right to privacy in that two consenting adults, who in the eyes of morality have committed reprehensible acts are forced to divulge details of their private sexual encounters which become a matter of public record.
3. Section 58 which guarantees every person’s freedom of assembly and association with others.

Reference was made to the case of *Njodzi v Matione* HH 37/16 in which an application for a referral to the Constitutional Court was dismissed. The case of *Nyakudya v Chabvonga* HH 559/19 was pointed to as one in which judicial trends were analysed and it was found that it is the duty of the court to develop common law in light of changing trends and a referral was made. Further reference was made to the case of *DE v RH CCT* 182/14, from the South African

Constitutional Court which was alleged to comprehensively deal with the history of adultery in English Law and how this delict has been abolished there and also in Seychelles and Cameroon also by reference to the revered authors Hahlo, *Law of Husband and Wife*, 4<sup>th</sup> edition.

Ms *Magundani* further argued that there is a common law principle that if a law becomes useless, then it must be abolished and that the punishment meted out on a third party is unlikely to revive a dying marriage as the law's role is to regulate whilst the rest is in the hands of the parties. This request for referral was said not to be calculated to vex the plaintiff nor is it groundless and marked by a lack of seriousness. In short, Ms *Magundani* argued that the request for a referral is not an abuse of court process.

Furthermore, Ms *Magundani* pointed to changes in our family law which reflect changing societal values such as the no fault divorce which now allows even an adulterous spouse to get property. Also referred to is the fact that adulterine children are now treated equally to children born in wedlock

Ms *Zvenyika* argued on the strength of the case of *Njodzi v Matione (supra)* and that the court's decision must be contextualized to reflect societal values as reflected in ss 2 and 3 of the Constitution and that the delict of adultery is still relevant in our law as the Constitution still protects the marriage institution and the defendant's rights she seeks to protect are not absolute. It was pointed out that our values are different from the South African ones as they recognize same sex marriages yet Zimbabwe does not. The case from South Africa was said to be only persuasive therefore. Reference was also made to the case of *Dhlamini v Pamberi* HH 3/19 in which it was held that:-

“Regarding the alternate argument that adultery damages are inconsistent with the constitution of Zimbabwe I am of the view that that is misplaced. Counsel relied on the South African court reasoning in arriving at its decision and urged this court to take that route. It is pertinent to note that that in declaring the delict of adultery claim outdated and archaic in *DE v RH* 2015 (5) SA 83(CC), the South African Constitutional Court was dealing with the interpretation and application of the South African constitution which has its defined territorial limitations. Influences outside that territory are only persuasive and not binding.....it is my view that Zimbabwe currently has not reached that stage where delictual claims for adultery can be abolished. This is an area where public education and ‘enlightenment’ is still required on the pros and cons of the delict. In my view there has not been enough changes in public policy and the community's general sense of justice to justify the abolishing of this delict. Without a buy in from the community in general, any attempt at abolishing the delict may be met with fierce resistance to an extent whereby court will be going diametrically opposed to the public policy and community's sense of justice in this regard. The Zimbabwean community still considers adultery as deserving of punishment to the paramour. “

In the same year a diametrically opposed position was reached in the case of *Nyakudya v Chabvonga* HH 559/19 in which this court found that there was a possibility that the defendant could succeed in having the Constitutional Court find that there is a possibility that the delict of adultery is unconstitutional. The matter was duly referred to the Constitutional Court. However the *Nyakudya* matter was regarded as abandoned and was deemed dismissed in terms of the Constitutional Court Rule 39 (5) of the Constitutional Court Rules in case CCZ 01/20. There is therefore currently no referral on these similar issues before the Constitutional Court.

From the plaintiff's submissions, the parties will also advance arguments in respect to section 86 of the Constitution which provides for limitation of rights.

It was my finding that based on the conflicting decisions of this court on these issues, the developments in our own family law, in other jurisdictions such as South Africa in *RH v DE (supra)*, in Botswana in *Kgale v Mhotsha* 2018 CVHT 000237/17, in Namibia in *Sibonga v Chaka & Anor SA (17/2014) [2016] NASC 16, inter alia*, the request for a referral was not frivolous and vexatious.

**In the result it is 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 damages unconstitutional?
2. To that end the Constitutional Court shall determine:
  - a. Whether the common law delict of adultery sued upon by plaintiff is consistent with subs (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 sued upon by plaintiff is consistent with para (d) of s 57 of the Constitution of Zimbabwe, 2013 insofar as it exposes defendant to the prospect of being questioned on and testifying on intimate and personal details of her private sexual relations and in so far as it further 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 sued upon by plaintiff is consistent with subs (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.

*Muchirewesi & Zvenyika*, Plaintiff's Legal Practitioners  
*Scanlen & Holderness*, Defendant's Legal Practitioners