CHIEDZA MUGARI
versus
CHARLES MUGARI
and
REBECCA CHIKWENGO
and
REGISTRAR OF THE HIGH COURT, N.O

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 8 November and 7 December 2021

Opposed Matter

Z.T Zvobgo, for the applicant
T. Shadreck, for first and second respondents

MUCHAWA J: This is an application for consolidation of two separate summons actions which is made in terms of O 13 r 92 of the High Court Rules, 1971.

The applicant is married to the first respondent in terms of the Marriage Act [*Chapter 5:11*]. The marriage has however fallen on unhappy times and second respondent instituted divorce proceedings under case number HC 8278/17. The applicant defended this action and the matter is still pending. In 2018, the applicant sued the second respondent for adultery damages under case HC 3122/18. This action was defended too and the matter is also pending. This is an application to consolidate these two matters so that they proceed as one action.

Mr *Zvobgo* submitted on the strength of r 92 that it is both convenient and practical that the two actions be consolidated. For the interpretation of the import of r 92, I was referred to the case of *Africom Holdings (Pty) Ltd &2 ORS* v *Kwanayi Kashangura & Anor* HH 357/18 wherein it was held that the overriding consideration is that of convenience.

It was argued that in this case the marriage certificate is the epicenter of both actions and the relief sought need not be identical so the application should be granted.

It was further argued that since the same legal practitioners represent the parties in the two actions, no surprise would be sprung on any party due to the consolidation. Consolidation was said to have the additional benefit of saving money and avoiding a multiplicity of actions.
Furthermore, Mr *Zvobgo* submitted that the applicant, who is based in Geneva under the Ministry of Foreign Affairs, will save money if she travels once particularly due to Covid and related quarantine rules which come at a cost to her. It was also averred that two trials will cost more for all the parties rather than one consolidated trial. It was pointed out that the respondents have not pointed to any prejudice they are likely to suffer hence the balance of convenience favours the granting of the application for consolidation.

My attention was drawn to the fact that the second respondent, who is a legal practitioner had not opposed the application but had indicated that she would be bound by the court's decision.. The first respondent's concern that consolidation would delay finalization of the divorce matter was alleged to be insincere as the second respondent could have consented to consolidation upon request by the applicant and speeded up finalization.

When asked on how the consolidated matter would work out, Mr *Zvobgo* explained that the applicant intends to rely on the evidence regarding the conduct of first and second respondents to her advantage in the division of matrimonial property by relying on s 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*] and the same facts would work for her in the adultery damages claim. She intends to call the same witnesses.

Mr *Shadreck* submitted that the applicant has not met the requirements set out in the case of *Africom Holdings (Pty) Ltd &2 ORS* v *Kwanayi Kashangura & Anor supra* in that the parties are not the same in the two actions as the applicant is the only common denominator. The issues to be decided are said to be different and unrelated. It was pointed out too, that the applicant did not institute the divorce action and the onus of proving irretrievable breakdown rests on the first respondent whilst the adultery which was said to have been admitted is no longer to be proved and what the applicant is alleged to have to prove is the loss suffered as a result of the adulterous affair. It was submitted that if the two matters are consolidated, the second respondent may suffer the prejudice of being dragged into divorce proceedings which she is not a party to. Mr *Shadreck* averred that there is a difficulty for the judge presiding over the consolidated matter in terms of sequencing of the two matters. It was suggested that it is within the applicant's rights to request

that the two matters be heard consecutively or sequentially before different judges and the respondent would consent to that so that she only travels once.

Mr *Zvobgo* retorted that the litigants cannot control how different judges set down matters allocated to them. He then suggested that if consolidation was to be granted, then it was most likely that a fresh pre-trial conference would be held for both matters.

The legal basis for this application is O 13 r 92 which I quote below.

> ***"92. Consolidation of actions***
> Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon—
> (*a*) the said actions shall proceed as one action;
> (*b*) the court may make any order which it considers proper with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.
> Provided that, with the consent of the parties to the actions, a judge may make an order consolidating the actions and any order which he considers proper with regard to the further procedure."

Rule 11 of the South African Uniform Court Rules is identical to our r 92. The South African Courts have had occasion to interpret the word "convenient". In the case of *Mpotsha* v *Road Accident Fund* 2000 (4) SA 696 it was held that convenience connotes "not only facility or expedience or ease but appropriateness in the sense that procedure would be convenient if in all the circumstances of the case, it appears to be fitting and fair to the parties concerned.'

This was put differently in *New Zealand Insurance v Stone and ORS* 1963 (3) 63 CPD wherein it was stated as follows;

> "…..the court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the court to refuse consolidation of actions, even though the balance of convenience would favour it."

Amler's Precedents of Pleadings, 4th Edition by Harms, puts adultery damages as a related cause of action to divorce as follows;

"A claim for damages is usually conjoined with a claim for divorce against the guilty spouse"

In *casu* the two actions are pending in the same court. The parties are not necessarily the same. It is only the applicant who is common to both actions. She is the defendant in the divorce matter though she states she has put forward the reason for breakdown of her marriage as the

adulterous affair between first and second respondents in her counterclaim. The issues to be decided are somehow related in that the divorce centers on a subsisting marriage and the adultery damages claim stems from the consequences of the marriage.

In terms of the evidence, what would be common to both actions are the particulars of the adultery in order to prove general damages in respect of loss of consortium and infliction of *contumelia.* That evidence would be important for the applicant's claim in respect of sharing of matrimonial property, by operation of section 7 (4) of the Matrimonial Causes Act [*Chapter 5: 13*]

> " (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances
> of the case, including the following—
> (*a*) the income-earning capacity, assets and other financial resources which each spouse and child has or is
> likely to have in the foreseeable future;
> (*b*) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in
> the foreseeable future;
> (*c*) the standard of living of the family, including the manner in which any child was being educated or trained
> or expected to be educated or trained;
> (*d*) the age and physical and mental condition of each spouse and child;
> (*e*) the direct or indirect contribution made by each spouse to the family, including contributions made by
> looking after the home and caring for the family and any other domestic duties;
> (*f*) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such
> spouse or child will lose as a result of the dissolution of the marriage;
> (*g*) the duration of the marriage;
> **and in so doing the court shall endeavor as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses**." My emphasis.

The above section makes it clear that the conduct of the parties is relevant in determining on division of matrimonial property. This means therefore that the issues to be decided are related Since the fact of the adultery having occurred is admitted, there is no prejudice to be suffered by the first and second respondents. They are already parties in a three way dance, whose actions affect each other.

The only prejudice pointed to by the first respondent is that there will be a delay in the finalization of the divorce. It appears that in the divorce matter, the parties have signed the joint

pretrial conference minute but in the adultery damages matter, the second respondent appears to be stalling matters as she has not filed own Pretrial conference papers despite a reminder on 12 July 2021. If the matters are consolidated, there would be need for a new joint PTC minute to be signed.

There is the obvious convenience to all parties and the court as costs would be saved through one trial. The applicant who is based in Geneva would not have to travel twice for the two matters to be heard. The legal practitioners are the same and time would also be saved. The second respondent wisely did not oppose consolidation.

The balance of convenience favours the granting of consolidation as no substantial prejudice was shown by the first respondent warranting the refusal of consolidation.

I hereby order as follows:

1. The application for consolidation of the two actions instituted under case numbers HC 8278/17 and HC 3122/18 be and is hereby granted
2. The third respondent be and is hereby directed to consolidate the two court records HC 8278/17 and HC 3122/18 so that they proceed as a single record under case number HC 8278/17
3. The third respondent is ordered to file her pretrial conference papers in matter HC 3122/18 within ten days of this order to facilitate the holding of a joint pretrial conference for the consolidated matters
4. The first and second respondents to pay costs

Messrs Chingoma Zvobgo Attorneys, applicant's legal, practitioners
Mungeni & Muzvondiwa, respondent's legal practitioners