SIMON RUDLAND
versus
TIMOTHY TROMBAS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 September 2017 & 11 October 2017

Opposed Matter

T. Mpofu, for the plaintiff
M.T.Rujuwa, for the defendant

MANGOTA J: A counter-claim is the defendant's claim against the plaintiff. It must have a cause of action. Whilst it is filed together with the defendant's plea, a counter-claim exists independently of the plaintiff's claim. A defence which is couched in the words *counter-claim* defies logic, the rules of court and procedural law.

The above mentioned words describe the situation of the parties to the present case. The plaintiff sued the defendant for adultery damages. The defendant entered appearance to defend. He filed his plea. He also filed a counter-claim. The claim in reconvention was to the effect that the delict of adultery was unconstitutional and should, therefore, he abolished.

The plaintiff excepted to the defendant's claim in reconvention. He submitted that the defendant did not set as against him a right or claim which he (defendant) has. He stated that what the defendant did was, in effect, to extend his defence.

The issue for determination was whether or not there was a proper counter-claim and, a *fortiori*, a cause of action which the defendant set up. Mr *Mpofu*, for the plaintiff, was quick to draw my attention to r 120 of the High Court Rules, 1971. The rule has a bearing on the subject matter of the parties' case. It makes reference to a counter-claim and its effect. It reads, in part, as follows:

"120. CLAIM IN RECONVENTION AND EFFECT

(1) The defendant in an action may set up by way of claim in reconvention any right or claim he may have against the plaintiff and such claim in reconvention shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention.
(2) ……." [emphasis added].

The defendant did not suggest, in the counter-claim, that he has any right or claim against the plaintiff. The contents of his claim in reconvention show that he does not have any right or claim against the plaintiff. He admitted that he went to bed with the plaintiff's wife. He submitted that, his admission notwithstanding, the law must say that he should not be sued. He stated that the common law delict of adultery has outlived its usefulness and it must be abolished.

The counter-claim which the defendant raised was nothing but an extension of his defence to the plaintiff's claim. It lacked a cause of action as against the plaintiff. It, in short, did not contain a set of facts which were sufficient to confer a right upon him to sue the plaintiff and obtain a relief against the latter person. It, in any event, could not exist on its own outside the plaintiff's claim.

It is trite that a claim in reconvention which leaves the plaintiff out of the equation is not a counter-claim. The defendant's claim in reconvention leaves the plaintiff out of the equation. It offends r 120 of the High Court Rules, 1971.

The defendant anchored his claim in reconvention on sections 51 (1) and 56 (1) of the Constitution of Zimbabwe. He submitted that the common law delict of adultery offended the mentioned sections. He stated that the delict was bad, did not serve the intended purpose and should, therefore, be done away with. He rested his case on s 176 of the Constitution of Zimbabwe which confers jurisdiction upon the Court to develop the common law or customary law. He roped into his claim in reconvention s 13 of the High Court Act which recognises the fact that the court has full and original jurisdiction over all persons and over all matters within Zimbabwe. He acknowledged the court's discretion to inquire into and determine any existing, future or contigent right or obligation at the instance of any interested person as provided for in s 15 of the High Court Act. He said he had an interest in having the common law delict of adultery developed.

The court, indeed, does have the power, authority and jurisdiction to make or unmake law. The section of the constitution and those of the High Court Act which the defendant cited are relevant to the issue of the court having the power, authority and jurisdiction to order as he moved it to do. The case of *Carmchele* v *Minister of Safety and Security* 2001 (4) SA 938 (CC) and that of *RH* v *Del* 594/2013 (2014) ZASCA 133 which the defendant referred the court to do speak volumes of the courts' ability to develop the law.

What the defendant missed, however, is that law development is not an event. It is a process. It, as such, requires consultation among stakeholders. These must take a particular

position to have a law either changed or abolished. Parliamentary debates are one such route through which the law is modified, changed or altogether abolished.

The defendant stressed the power and jurisdiction of the court to develop the common law. What he did not state, however, are the circumstances under which the court may exercise the power, authority and jurisdiction to develop the law as he moved it to do.

Before me were two individuals who sued each other in terms of an existing law. One of them, the plaintiff, has no interest in the declaration which relates to the defendant's counter-claim. This leaves the defendant as the sole actor of the motion which he made. The motion is, no doubt, misplaced. A *fortiori* when it was couched in the form of a counter-claim which, as has already been observed, was not such. No law can be developed or changed let alone abolished at the instance of the defendant alone.

It requires little, if any, effort to realise that the defendant's counter-claim was misplaced. It did not have to be part of the case of the plaintiff when the latter person had nothing to do with it. It should have been filed as a separate matter from the plaintiff's claim. It, in other words, should have come as a constitutional matter in which relevant stakeholders were cited. Among those are the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General of Zimbabwe. These should have been cited as the respondents. Their input was a *sine qua non* of what the defendant sought to achieve. Without a ventilation of the matter through the stated procedure, the court and the defendant would have run the risk of engaging in a futile exercise whose result the people of Zimbabwe would frown upon.

The court could not, at the mere say so of the defendant, proceed to make such a fundamental decision as the defendant moved it to make without offending the *audi alteram paitem rule* which lies at the centre of the principles of natural justice. The people of Zimbabwe should be heard on such a serious matter as the defendant raised.

Whilst the defendant's argument did, from a *prima facie* perspective, look sound, the fact which remains is that it was not at all in consonant with a counter-claim. It was completely divorced from matters which relate to a claim in reconvention. It was a constitutional matter which was improperly referred to as a counter-claim. It was, therefore, misplaced and was without merit.

Equally misplaced was the defendant's assertion which was to the effect that a claim in reconvention can be used as a defence. The assertion defies the rules of logic, procedural law and the rules of court. A claim is what its name suggests. It is not, and can never be, a defence.

The plaintiff proved, on a balance of probabilities, that the defendant's counter-claim was not such. In the result:

(1) the exception is upheld

(2) the counter-claim is dismissed

(3) costs shall be costs in the cause.

Gill Godlton & Gerrans, plaintiff's legal practitioner
Messrs, Mtetwa & Nyambirai, defendant's legal practitioners