

BEATRICE NDEBELE

Versus

DUBILIZWE NDEBELE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 AND 21 OCTOBER 2004

L Makonese for plaintiff
J Sibanda for defendant

Civil Trial

NDOU J: The plaintiff seeks a decree of divorce with ancillary relief.

Both legal practitioners have rightly submitted that the issues for determination are very narrow.

The parties were married to each other on 2 May 1986 at Bulawayo Magistrates' Court in terms of the Marriages Act [Chapter 37], now [Chapter 5.11]. This marriage still subsists. Both parties are domiciled in Zimbabwe. The marriage between the parties was blessed with three children, namely, (a) Sithembekile Victoria Ndebele, a girl born on 2 September 1985, (b) Nqobani Philemon Ndebele a boy born on 11 July 1989 and (c) Ntombezinhle Magret Ndebele a girl born on 18 June 1996. Sithembekile is aged 19 and is no longer a minor rendering her irrelevant for the purposes of this matter. It is common cause that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of its restoration. The only decent thing to do is to grant a decree of divorce. The marriage has irretrievably broken down. Both parties accept this. The parties agree that it is the best interest of the two minor children Nqobani and Ntombezinhle that the plaintiff be granted their custody. The parties also agree that the defendant

shall be entitled to exercise access to the minor children every alternate school holidays, alternate public holidays and alternate Christmas holidays. The plaintiff objects to defendant having access over weekends fortnightly. The parties agree on distribution of all the movable assets save for a 4 plate stove. The parties agree that the matrimonial home be shared but differ on the sharing ratio. The defendant has offered to buy the plaintiff of over a period of six months which offer is not accepted by the plaintiff. From the above, it can be discerned that there are three substantive issues for determination i.e. access fortnightly and weekends in respect of Ntombezinhle, the distribution of the 4 plate stove and sharing ratio of the matrimonial home. I will deal with these issues in turn.

Fortnightly access by defendant to Ntombezinhle

The main contention by the defendant is that he needs this access for him to bond with his 8 year old daughter. Since the parties separated in 2003 he has hardly exercised access over his daughter. He states that it is in the best interest of the daughter that he re-establishes the father-and- daughter relationship at her age. The way I understand it the plaintiff's main objection is based on two reasons. First, she feels that fortnight access would be onerous. Second, she says that in the past the defendant exhibited irresponsible behaviour that is detrimental to the well being of the children viz, he drank excessively and also frequents night clubs which resulted in him coming home in the early hours. In such a situation the court has to strike a balance between the wishes and claims of the parents with the welfare of the minors, the latter being decisive – *Mare v Richardson* 1974(2) RLR 16, *Nugent v Nugent* 1978 RLR 66, *W v W* 1981 ZLR 243, *Fortune v Fortune* 1955(3) SA 34 (A), *De Montille v De Montille* HB-6-03 and *De Montille v De Montille* HB-20-03. There is a need for

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Ntombezinhle to develop father-and-daughter bond with the defendant. It is in her best interest for this to happen. The court has the common law power to look after this interest and if necessary, interfere with the exercise of parental power of the plaintiff – *Jeche v Mahovo* 1989(1) ZLR 364 (5), *Maluwana v Maluwana* HH-155-01 and *Makumbe v Chikwenhere* HB-42-03. I have heard testimony from both parents on this issue of extra access. My approach is that such parental claims and interests should, however, not overshadow the interests of the child. The question is one of relative weight to be given to the wishes and claims of the parents against those of the minor. This involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare – *J v C* [1970] A.C. 668. I have to take into account the child's need for stability and continuity in relationship with her father – *Re (a minor) (custody of child)* (1980) 2 FLR 163 and *B and B (custody of children)* [1985] FLR 166. In *casu*, I think it is possible to award the access sought by the defendant subject to logistical, practical and risk considerations alluded to in the plaintiff's testimony. With this in mind I consider that monthly access is achievable. I will grant monthly access to be exercised in the presence of one of the older children of the parties. In this regard I would urge both parents to co-operate as the hardline positions exhibited in court are not in the best interest of their children.

The issue of the four-plate stove

Initially the plaintiff had, in her pleadings, offered this stove to the defendant. She changed her position when the defendant informed her that some of the movable assets awarded to her were stolen from his custody. She says she has moved out of

the matrimonial home and stays in a flat. She stays with all the three children of the parties. Although she has the bulk of their small family, she uses a hot plate whilst the defendant, on his own, has a 4 plate stove. In exercise of my discretion I will award the 4 plate stove to the plaintiff so that it is available for use by the plaintiff and the parties three children. The balance of convenience favour the plaintiff in this regard.

Sharing ratio of the matrimonial home

Section 7(1)(a) of the Matrimonial Causes Act [Chapter 5:13] has to be used to determine this issue. It gives the court to order that any asset be transferred from one spouse to the other if in all circumstances of the case, it is just to do so and is reasonable and practicable way by which to place the spouses in the position they would have been in had a normal marriage relationship continued between them – *Dlamini v Dlamini* HB-27-00; *Takafuma v Takafuma* 1994 (2) ZLR 103 (S); *Ncube v Ncube* 1993 (1) ZLR 39 (S); *Chikomba v Nkomo* SC-62-91; *Zuze v Zuze* HH-66-02 and *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H). I am enjoined to have regard to all circumstances of the case including the factors set out in paragraphs (a) to (g) of section 7(3).

The duration of the marriage is around eighteen (18) years. I find that the earning capacity of the parties during the duration of the marriage was more or less the same. The plaintiff was in gainful employment throughout the currency of the marriage. The defendant was however, employed by the Posts and Telecommunications Corporation for a greater part of the marriage but he was on suspensions for some months and eventually became unemployed for a further period. Both parties contributed to the upkeep of the family. The plaintiff bought clothes for

the parties and their children. She bought food and contributed towards the purchase and improvement of another stand which they sold. She says the proceeds thereof were ploughed into the purchase of the matrimonial home. He says the proceeds were used to purchase the vehicle (awarded to him). To me this difference does not take issue any further because in the end the proceeds were jointly used by both parties. The parties used the proceeds as a family. The plaintiff contributed directly and indirectly towards looking after the home and allied domestic chores. The defendant's salary was the main source of servicing the mortgage bond. The property is in his name. The plaintiff is the custodian parent of the parties' children. This fact impacts heavily on her financial needs, obligations and responsibilities in the foreseeable future. I have to look at the standard of living of the family including the manner in which the two minor children were being educated. One minor child Nqobani is a border outside the city of Bulawayo, Ntombezinhle is a day scholar attending a city school.

In matters of this nature it is seldom possible for the court to ascertain with total accuracy or precision the incomes and contributions of the parties. I have a wide discretion in the distribution of the assets which I have to exercise in order to achieve the statutory objective. In my view this is a case where the contribution of the parties is more or less equal. The most reasonable and practicable way is to share the matrimonial home equally.

Accordingly, it is order that:

1. A decree of divorce be and is hereby granted.
2. Custody of the two minor children –
 - 2.1 Nqobani Philemon Ndebele, a boy born on 11 July 1989 and

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Ntombezinhle Magret Ndebele, a girl born on 18 June 1996 is awarded to the plaintiff

- 2.2 The defendant is entitled to exercise access over the said minor children every alternative school holidays, alternate public holidays and alternate Christmas holiday.
- 2.3 The defendant shall subject to the presence of one of the older children of the parties be entitled to exercise access over Ntombezinhle Magret Ndebele once a month over a weekend.

3. The movable assets are awarded to the parties as follows:-

3.1 Awarded to plaintiff

- (a) 4 plate stove
- (b) refridgerator
- (c) 4 piece lounge suite
- (d) 3 children's single beds
- (e) kitchen table
- (f) kitchen utensils
- (g) shoe rack
- (h) baby tender

3.2 Awarded to the defendant

- (a) television set
- (b) Marin bedroom suite
- (c) Renault 5 motor vehicle
- (d) Video cassette recorder
- (e) Wardrobe

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4. 4.1 The immovable property described as house number 1385 Luveve, Bulawayo shall be valued by a reputable estate agent within 30 days of this order with the parties sharing the costs of such valuation equally.
 - 4.2 The defendant is ordered to pay 50% of the net value of the property to the plaintiff within 2 months of this order, failing which the said immovable property, known as house number 1385 Luveve, Bulawayo is to be sold to best advantage and the net proceeds thereof are to be divided equally between the parties.
5. Each party to bear own costs.

Makonese & Partners, plaintiff's legal practitioners
Job Sibanda & Associates, defendant's legal practitioners