

VELDA MUSHANGWE
versus
WARREN MUTISI

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 11 OCTOBER 2018 AND 1 NOVEMBER 2018

Civil Trial

A Mhaka for the plaintiff
W Bherebende for the defendant

MABHIKWA J: This is a matrimonial action where plaintiff instituted divorce proceedings on 17 May 2016 claiming:

- a) A decree of divorce
- b) A division of the parties' matrimonial property
- c) Custody of the two minor children of the marriage
- d) A contribution by defendant to the educational expenses only for the three children of the marriage.
- e) An order that each party pays its own costs of the divorce proceedings.

The parties according to plaintiff's declaration, were married in terms of the Marriage Act [Chapter 5:11] on 27 December 1999 and the said marriage has not been dissolved. Three children were born of the said marriage, namely X (Female, Y (Male and Z (male).

At the time, summons were issued on 2016 X was 19 but doing Form 6 at Midlands Christian College in Gweru. The other two children were still minor. Plaintiff also averred that the marriage between the parties had irretrievably broken down with no prospects of a normal marriage relationship more particularly in that the parties have not lived together as husband and wife for a continuous period of 12 months immediately before the issuance of summons. The plaintiff had also lost love and affection for the defendant. She contended also that during the

subsistence of the marriage, the parties acquired two immovable properties namely a residential stand at Belvedere in Harare registered in the parties' joint names and a residential stand, semi developed to window level, situated at Gilden Acres at Kwekwe and registered in the defendant's name.

The parties had also accumulated various immovable properties. Plaintiff further averred that it would be in the best interests of the minor children, namely Y and Z that their custody be awarded to her with the defendant enjoying reasonable access by spending every alternate school holiday with the children on prior arrangement. Plaintiff finally claimed a half contribution by defendant, of every expense of each of the three children on school fees, levies, uniforms, books, educational trips and the like until each child attains the age of 21 or becomes self-supporting whichever occurs first. Alternatively, that defendant be ordered pay to plaintiff the sum of US\$3500-00 per term representing half the total current school fees for the three children per term in addition to other education related requirements on production of invoices.

I wish to state that our legal age of majority in Zimbabwe is 18 and therefore unless otherwise shown, the usual legal position is to require that the non-custodian parent contributes to the upkeep of a child until he/she attains the age of 18 (not 21) or becomes self-supporting whichever occurs first.

It appears and the parties confirmed that before the commencement of trial, the issues of a decree of divorce, custody of the minor children, the bulk of the movable property and costs of suit had been resolved. I say so because the issues referred to trial as per the pre-trial conference minute were

- a) the issue of ownership of the two immovable properties at Harare and Kwekwe
- b) the issue of sharing of the two motor vehicles
- c) the issue of defendant's contribution towards the children's educational needs.

It is pertinent to mention at this stage that after a full trial on the above three issues, that is to say, just after the close of the defendant's case but before closing submissions, the parties sought an adjournment. After the adjournment, the parties indicated that they had further resolved two of the outstanding issues. These were the sharing of the two immovable properties and the two motor vehicles presumably guided by the evidence as it had unfolded. They further entered into and signed a deed of settlement to that effect which they filled with the Registrar of

the court on the said date of trial on 12 October 2018 at the resumption of trial, both counsel addressed the court indicating that they had decided to settle as shown above. Both counsel and their respective clients are commended for displaying professional maturity in that regard.

They, however indicated they still could not solve the issue of maintenance or the respondent's contribution towards the children's educational needs. The court remained sieged with the issue and the parties indicated that they had no submissions to make as they would abide by the evidence they led during the trial in respect of that issue. This judgment will thus concentrate on the issue of the defendant's contribution towards the children's educational needs which the parties occasionally and loosely referred to as maintenance for the three children.

Plaintiff testified that she is a specialist doctor (Gynaecologist Obstetrician) at Gweru General Hospital. There is no dispute that defendant sired the three children during the subsistence of their marriage. She testified that the parties have lived apart for 5 years and 5 months and that she has been living with the children throughout the period of separation.

She said the first child Tinevimbo Mtisi who is now 20 years old is now a second year student at a University in Manchester in the United Kingdom. She added that although he is now a major, he still was at school and in foreign land and so needed parented support financially. Before going to University, he had been at Midlands Christian College from January 2011 to December 2016. She produced documentary confirmation to that effect from the Christian college which was produced by consent and marked Exhibit 2. She further produced a statement of account showing that from 2013 to 2016 she expended on him a total of \$42, 860,00 on school requirements only which included tuition, hostel and laundry fees plus wage levy, PA funds and book magazine funds. The statement was produced by consent and marked exhibit 3. Plaintiff also produced confirmation from the same college in respect of Y that she attended from 2014 to 2017 when she completed her "O" Level. She also produced a statement again by consent showing that she expended on the child the total sum of \$41,678.00. Apparently she is now doing 'A' level at the same college and so far, receipts and a statement from the college show that applicant has already expended on the child a further \$4 190.00. The confirmation, statements and receipts in respect of Y are marked exhibit 4, 5, and 7(a) respectively.

The third child (Z) she said is at Cecil Rhodes Primary School doing grade 3. Respondent did not challenge the validity of the expenses tabled by the plaintiff to the court.

Plaintiff contended that initially she would call and advise the defendant of the children's school requirements. He would continue to promise but do nothing until she realised that he was not prepared to pay. She eventually paid all fees for the children and literally single handedly looked after them for the entire separation period of 5 years and 5 months now.

She said though she had wanted to be re-imbursed part of the amount she had expended on the children since 2013 to date. She had decided against that claim and now simply wanted defendant's contribution in the sum of \$3 500-00 per commencement of each school term for all three children.

In cross-examination, plaintiff maintained that she was asking for far too little than she should be. When it was put to her that defendant could only afford \$500-00 per term for the three children, she said that was way too little that it would not help at all. She maintained that the fact that defendant lived at the same house she lived with him paying \$500-00 rentals and could still afford a number of other expenses proved that he earned much more than is reflected in his "payslip". She maintained that defendant owned a company where he is a director and that the payslip from that company does not reflect the true position of defendant's finances. She was adamant that the fact that his expenses for exceeded his earnings in the payslip means that there are other sources of income which have not been disclosed to the court. When asked by the court if she did not send the children to very expensive private schools out of reach for the defendant, she replied that the children had always been attending private schools even when the parties were together and therefore she did not want to break that tradition.

Defendant on the other hand argued that the culture of sending the children to private schools started when the Rio Tinto mine would pay the greater part of the school fees. He denied that he did not contribute towards the children's fees. He says he told the plaintiff that he was struggling as he was failing to meet his obligations. He however, would contribute whatever he would get, be it \$300, \$200 or \$500 but that plaintiff had stopped him from paying saying paying too little at different times was confusing. He said he even suggested that they take the children to less expensive schools but plaintiff would not budge. He further submitted that there was no reason to burden him with the fees of the 20 year old as he is a grown up and smart guy who is furthering his education and should therefore find jobs to finance the further studies. He said he could only afford \$500-00 per month per school term for the other two children.

In *Maravanyika v Hove* 1997 (2) ZLR 88 (H) applicant had sought an order that respondent pays a monthly sum of \$1300 as maintenance towards their child. Applicant had herself incurred expenses well in excess of her share of support in the sum of \$52 800-00. She worked at the National Railways of Zimbabwe earning gross salary of \$8 629.58 and a Net of \$4 467-47. She had argued that the applicant, whose job in government was equivalent to that of a minister, must have earned more than double her salary. Yet his expenditure bill far exceeded his earnings and for that reason, she contended that there must be some other sources of income which defendant did not disclose. At page 97, paragraph C the learned MALABA DCJ, (as he then was) commented thus;

“I must point out, at this stage, without taking anything from his case, that the applicant, as the custodian parent who has single handedly maintained the children for 12 years, is better placed than respondent to give more reliable information on the costs of the maintenance needs of the child.”

The learned Judge went on to state at page 98 that:

“I am not impressed however, by the balance sheet presented by the respondent. It exaggerates the debit side. He did not properly produce any pay slip. If he wanted the court to believe his assertion that he cannot afford to pay more than \$438.11 per month shown for the maintenance of the child, he should have produced documentary evidence of his income and expenditure.”

At page 99, the Honourable Judge had this to say;

“Taking into account the fact that the respondent is prepared to incur expenses in excess of his disclosed income, it is easy to accept that he has some undisclosed sources of income. He said he paid tuition for his children at three foreign Universities. It is highly unlikely that the amount of \$2 192.50 in the schedule of expenditure as being for school fees for the children takes account of the tuition for the children at the Universities. That confirms the suggestion that the respondent has other sources of income that he did not disclose to the court.”

The Honourable judge then calculated the maintenance using the calculation formula of three adults to one child, and ordered respondent to pay maintenance in the sum of \$700-00 per month with effect from 1 January 1996.

The above scenario appears to be the case in *casu*, made the more skeptical by the fact that from the evidence in this case, defendant is a director and literally the owner of Geo-Delta (Pvt) Ltd company. It is for that reason that it is difficult to cypher his exact financial position

from exhibit 8 documents, and even difficult for anyone, even his own counsel to describe the deposits into his Barclays bank account as salaries, because they are not even described as such. Exhibit 8 (c), purported to be his payslip, gives his net pay as at \$431-00, for less than his monthly expenditure. The possibility of manipulation of figures cannot be ruled out. Plaintiff however failed to point out any other source.

The respondent himself was so doggy as to the real financial possession of himself and or his company. It is not disputed that since separation, defendant contributed very little if any whilst plaintiff bore the brunt of the children's fees for 5 years.

In any event plaintiff is not asking for a large sum of money per child per month. She is merely asking for a figure of \$3500-00 per school term for all three children. This in effect translates to almost 1200 per school term per child and slightly less than \$300 per child per month. This in all fairness is reasonable considering the schools the children are attending and considering the contribution that plaintiff has had to put into the children's education and general upkeep and continues to contribute way in excess of the defendant's input over the years.

However, the court is still presented with the very delicate position wherein it has to try and assess the defendant's contribution which has to cater for his means and circumstances generally. It was held per MCNALLY JA (as he then was) on *Gallante v Gallante* -2000 (2) ZLR 453 (S) that;

“..... The court will try to arrive at a figure within the payer's means that will allow the continuation of a standard of living comparable with that formerly enjoyed. In arriving at this figure the court will make an assessment based on its own experience, as well as on the information supplied by the parties.”

This court is satisfied that defendant has exaggerated his financial woes. He certainly has other sources of income that he has not disclosed to this court and he certainly cannot expect this to formally perpetuate a situation where only one parent bears the brunt of raising the couple's children.

It is the court's findings that whilst it may be true that he is struggling financially he can at the very least afford \$1500 per school term for all three children. This in effect translates to \$500-00 per child per school term and \$125-00 per month per child.

In the circumstances the court orders as follows, that:

- a) A decree of divorce be and is hereby granted
- b) Custody of the two minor children of the marriage namely Tinetariro and Tinenyashsa Mtisi be and is hereby awarded to the plaintiff, with defendant enjoying the rights of reasonable access by spending every alternate school holiday with the children after prior consultation and arrangement with the plaintiff.
- c) The parties' matrimonial property be shared as stated below;
 - (i) The developments made at stand 6348 Link Drive Golden Acres in Kwekwe shall be valued and the defendant shall pay off to the plaintiff half the value thereof.
 - (ii) The defendant shall retain the Golden Acres property as his sole and exclusive property subject to payment to the plaintiff of half the value of the development only.
 - (iii) The Belvedere property stand number 19059 shall be valued and thereafter the plaintiff shall pay to the defendant half the value of the whole stand.
 - (iv) The plaintiff shall retain the Belvedere property as her sole and exclusive property subject to paying off the defendant half his share of the property.
 - (v) Each party shall pay the other as stipulated in paragraphs 1 and 3 above within 90 days from the date of the valuation report.
 - (vi) The master of High Court shall appoint a valuer from among the valuers in his shortlist to evaluate both properties and issue a valuation report which the master of High Court shall give to the parties through their respective legal practitioners.
 - (vii) The parties shall jointly pay for the cost of the valuation of the properties, each party paying half the cost thereof.
 - (viii) The defendant shall have the following movable properties as his sole and exclusive property
Isuzu KB vehicle registration number ABY 4194
Mazda DX vehicle registration number AAG 9161
 - (ix) The plaintiff shall have the following movable property as her sole and exclusive property
Honda CVR vehicle registration number ABG 8725
- d) Defendant contributes an amount of \$1500-00 per commencement of every school term for all three children towards their educational expenses only which translates to \$500-00

per school term per child until each completes their schooling or the amount(s) are otherwise varied whichever occurs first.

- e) Each party pays his/her own costs of suit.

Mhaka Attorneys’ plaintiff’s legal practitioners
Bherebende Law Chambers, defendant’s legal practitioners