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Versus

X

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 20 NOVEMBER 2018 & 17 JANUARY 2019

Civil Trial

J. J. Moyo for the plaintiff
Defendant in person

TAKUVA J: The parties were married to each other in terms of the Marriage Act Chapter 5:11 in Harare on 23 August 2008 and the marriage still subsists. There are two minor children of the marriage both boys, one of whom is 8 years old and the other is 6 years. The marriage has irretrievably broken down and the plaintiff has filed for divorce, custody of the minor children of the marriage Y born on 4 November 2010 and Z born on 12 January 2012. Plaintiff tendered reasonable access to the defendant. She also claimed maintenance of R20 000,00 per month for the two minor children, an equal distribution of movables with the motor vehicle a Mazda 3 registration number BX 81 TV GP being awarded to her and defendant upon receiving R50 000,00 from the plaintiff to then release her from liability from any joint debts.

Plaintiff's final prayer is for:

- “1. A decree of divorce.
2. Custody and sole guardianship of the minor children Y and Z with defendant to have reasonable rights of access
3. An order directing that the issue of immovable property of the parties 26 Cedar Hills Estate Cedar Avenue West, Four Ways Johannesburg, Republic of South Africa be dealt with in terms of the outcome of proceedings instituted by the

plaintiff out of the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 16715/2018.

4. An order that defendant contributes the sum of R10 000,00 per month per child as maintenance for the minor children Y and Z until they severally attain the age of eighteen years or become self-supporting whichever shall be the first to occur.
5. Cost of suit only if the matter is contested.”

In his plea, defendant admitted that the marriage had broken down irretrievably. He also admitted that the marriage had broken down due to an extra marital affair that he involved himself in. Defendant accepted plaintiff’s proposals with regard to the movable property as well as the immovable property. At the close of pleadings, the only issues in dispute were in respect of custody and maintenance. Defendant contended that it would not be in the best interests of the minor children if their custody was awarded to the plaintiff. Instead, he argued that it would be in the best interests of the children if he was awarded their custody. As regards maintenance for the minor children, defendant’s attitude was that if he is awarded their custody, he will not require maintenance from the plaintiff. If however their custody was awarded to the plaintiff he would out of poverty not be able to pay maintenance for the children since he was dependent on the plaintiff for his sustenance.

At pre-trial stage, the parties were heavily indebted to numerous creditors that includes the lender of the money, Standard Bank Home Loans, the Home owners Association in respect of levies, the City of Johannesburg in respect of taxes and the plaintiff’s father. Both parties accepted the position except that the defendant executed a u-turn and was no longer regarding plaintiff’s father as their creditor, despite the admission he had made in his plea which he never withdrew. During the course of the trial it became common cause that defendant had since received R50 000,00 from the plaintiff in respect of the Mazda motor vehicle. This was in terms of the agreement between the parties. Both parties were not particularly concerned with the rest of the movables. Plaintiff asking only for the bedroom suit in the spare bedroom, a set of stainless steel pots given

to her by her mother and the children's photographs. Defendant's attitude was that plaintiff could have any movables she wished to have.

That being the case, the issues for determination are:

1. Who should be awarded custody of the minor children?
2. What access should be enjoyed by the non-custodian parent?
3. In the event that custody is awarded to the plaintiff how much should defendant contribute towards the maintenance of the children?
4. What is the just and equitable manner of dealing with the immovable property of the parties?

I now deal with the issues *seriatum*.

In Zimbabwe, the attitude of the courts is that they will not readily deprive the mother of lawful custody without good cause being shown. See *Moore Richardson* 1974 (2) RLR 16 (G) and also *Nugent v Nugent* 1978 RLR 66 (G) and *Demontille v Demontille* 2003 (1) ZLR 240 (H). This principle is referred to as the "welfare principle" according to which the interest of the child takes precedent over those of its parents. In making a determination the courts should be guided by the arrangements and facilities each parent has made for the child. See *Makumbe v Chikwenhere* 2003 (1) ZLR 372 (H).

In *Goto v Goto* 2000 (1) ZLR 257 (H) CHINHENGO J held that, "In determining which parent should have custody of a child following divorce there is no binding principle that girls should be placed on the custody of their mothers. It is only a starting principle that girls should go with their mother and boys to their father, but this is not a principle of law as it would be contrary to the rule that in deciding on custody of a child, the primary or paramount consideration is the best interest of the child. The presumption may be rebutted by facts that show that the best interests of the child will be served by awarding custody of girls to their father. The principle is applied in many countries the world over. Article 3 of the United Nations Convention on the Rights of a Child and article 4 of the African Charter on the Rights of and Welfare of a Child, which are

identical, provides for the rights of a child as follows; “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

Further and in the same view s81 (2) of the Constitution of Zimbabwe Amendment (No.20) Act 2013, states;

“2. A child’s best interests are paramount in every matter concerning the child.” See also *Mukundu v Chigumadzi & Ors* 2015 (2) ZLR 332 (H).

As regards the factors that a court should take into account in determining the meaning of “best interests” an almost exhaustive list is given in *Mcall v Mcall* 1994 (3) SA 201. They are listed as these’

- “(a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- (c) the ability of the parent to communicate with the child and the parents’ insight into, understanding of, and sensitivity of the child’s feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so called ‘creature comforts’ such as food, clothing, housing and the other material needs – generally speaking the provision of economic security;
- (f) The ability of the parent to provide for the educational well being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- (h) The mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child’s existing, environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching;
- (m) Any other factor which is relevant to the particular case with which the court is concerned.”

The evidence

Plaintiff gave evidence on her own behalf. She lives with her two sons aged 7 and 6 years respectively. She is assisted by a full time helper. Plaintiff is in full time employment as a Sourcing Consultant. When she moved out of the matrimonial home she took her two sons with her and has been living with them ever since. The two boys attend school in Johannesburg, South Africa. She has a current work permit and the children's permits are inseparable from her permit in that they are also accessory to hers. If she loses her right of residence, they will automatically lose theirs as well.

According to her the defendant had an extra marital affair with his former workmate and they have a child together. The defendant proposed to marry that woman and she could not stomach it leading to her leaving home. When she was expecting her 1st son in 2010 defendant voluntarily left his employment in July and she became the sole bread winner for the whole family up to now. The defendant besides being a qualified actuary is unemployed. Plaintiff is solely responsible for the children's school fees, clothing, food and medication. The couple sometimes gets assistance from relatives and friends.

In 2016 she had problems with renewing her work permit and this automatically affected the children's study permits. They returned to Zimbabwe to rectify the problem. Defendant who had custody of the children and in possession of their passports refused to release the children including their passports. Later he gave the plaintiff the children but refused to hand over their passports arguing that he had decided that the children should learn in Zimbabwe. The plaintiff was against this and she filed an urgent chamber application compelling defendant to release the passports. She was eventually able to successfully renew the passports and she took the children to South Africa. The court order had awarded custody of the children to the plaintiff.

Back in South Africa plaintiff enrolled the children at their former school, Heron Bridge College. She requested the school for time to regularize her documents and the school agreed. However, upon hearing this, defendant approached the school complaining that the plaintiff had brought the children into South Africa illegally. The school withdrew the children's enrolment in

September 2017. Defendant also sent communication to plaintiff's employer alleging that plaintiff was in South Africa illegally, causing the plaintiff to resign.

Plaintiff was compelled to return to Zimbabwe together with the children. She expedited her fresh application while at the same time she made arrangements for the children to learn through correspondence. However, defendant refused to release the children arguing that he had found places for them at Centenary School and although she did not intend to live in Bulawayo, she decided to go for the stability of the children until they returned to South Africa. Plaintiff eventually secured a new job and obtained a work permit and study permits for the children in April 2018. Both children were re-instated at their former school where they are currently attending.

In November 2016, plaintiff instituted domestic violence charges against the defendant leading to a social worker being engaged to assess the needs of the children and facilitate discussions between the parties. The officer compiled a report that became exhibit 2A. This report was also produced before a magistrate during custody proceedings that resulted in plaintiff being awarded custody of the two children. The magistrate's judgment was produced by consent as exhibit 2B.

When asked how as a working mother plaintiff will find adequate time to look after the children, she said she drops them at school in the morning. In the afternoon there is a school arranged transport service with aides on board that make door to door deliveries. The two boys are handed over to her maid who looks after them until she returns from work. When she gets home, she supervises their homework and prepares them for school. She was categorical that these arrangements are not only adequate but not different from the setup during the parties' stay together.

As regards access rights to the defendant in the event that she is awarded custody, plaintiff agreed that defendant has such a right and that it would be reasonable to allow defendant access every alternate weekend i.e. Friday to Sunday or Monday and during half the school holidays. Further, in respect of the Mazda motor vehicle the parties entered into an agreement that was

produced as exhibit 2C. The agreement was signed by the parties on 23 August 2018. Plaintiff confirmed that she has since paid R50 000,00 to the defendant in line with the terms of their agreement. Most of the parties' movable assets were auctioned to cover a debt owed to Home Owners Association. Defendant acquired a television set, a decoder and a microwave. Plaintiff moved out of the matrimonial home in May 2017. Of the movable property, plaintiff prayed to be awarded the following assets;

- (a) bedroom suite and head board in the guest bedroom,
- (b) a set of stainless steel pots which she received as a gift from her mother; and
- (c) pictures of the children.

She agreed that defendant should be awarded the bedroom suite in the main bedroom and the children's beds.

Plaintiff's version of how the parties acquired the immovable property is as follows. The property was acquired through a loan from her father in 2009. Her father owns H.C.S. Arena Properties. The loan covered the full purchase price. However defendant took R150 000,00 to use in his business exploits. The parties then obtained a loan from a bank to cover that shortfall. Defendant failed to repay this loan and the bank is now one of the creditors together with the Home Owners Association, plaintiff's father and the Johannesburg Municipality for rates and taxes. The property is a complex with communal services. The arrangement between the parties was that plaintiff would take care of the children's welfare while defendant would attend to issues to do with the house loan and related charges. However, the latter failed to perform his part of the agreement resulting in the parties being heavily indebted to the above creditors.

Primarily, plaintiff is concerned that if one of the three creditors forecloses on the property the parties will be unable to secure a fair value on the property, making it difficult if not impossible to pay all other creditors. Plaintiff said defendant has not been formally employed since July 2010. As regards her claim for the children's maintenance, plaintiff contended that defendant as the children's father has a legal and moral obligation to support them. She said these expenses relate to food, school fees, clothes, transport, uniforms, extra-mural activities, medical aid and other

related expenses. According to the computation these expenses amount to R30 000,00 per month for both. Based on this quantification plaintiff said defendant should be ordered to pay R7 500,00 per month per child.

When asked how defendant was going to afford that amount, she said defendant holds a BSc in Mathematics and Statistics specializing in Actuarial Science which is a highly sought after qualification globally. She believed defendant would easily find employment or engage in entrepreneurial pursuits he chooses, either way he should comfortably be able to provide the R15 000.00 per month for both children.

Under cross-examination, she stated that she had the following qualifications:

- (i) Bachelor of Technology in Chemical Engineering
- (ii) Post Graduate Diploma in Business Administration
- (iii) Masters in Business Administration

She conceded that when she was away due to college studies defendant and his mother would look after the children and at times it would be defendant on his own who would remain with them. Plaintiff also conceded that the defendant was a good father in all other aspects except for lack of resources i.e. financial incapacity. When defendant suggested that he was the children's "primary" care giver from birth, plaintiff denied it arguing that defendant falls short when it comes to emotional relations as their father. Also she contended that defendant missed important dates in the school calendar like failing to attend graduation ceremonies and other school activities like sports days.

Plaintiff strongly refuted defendant's assertion that when she was at work or college, he would be looking after the children. She said, "Not correct that they would be in your care. Defendant was not always there. He travelled quite a lot and the children would remain in the care of their grandmother until I returned". She went on to say defendant would be away on business as a commodity broker while at other times he would be with the other woman. The money

defendant made from his entrepreneurial exploits was never brought home for the benefit of the family. Instead the family got assistance from the defendant's mother, friends and other relations.

At one time plaintiff applied for a protection order which was however dismissed on a technicality. The reason for seeking the order was that she was emotionally and physically in danger from defendant. Plaintiff stated that although medical aid was initially in defendant's name when he was in full time formal employment, when he left employment she took over the responsibility from him by paying monthly subscriptions from her salary. Defendant remained the primary member.

As regards the events of the 15th day of May 2017, plaintiff said;

"Defendant had been standing in the parking lot abusing me verbally like he normally did. I ignored him and he ran in front of the vehicle and fell down. Police were called and plaintiff was detained and charged with attempted murder. Later the charges were dismissed and she was released. At the time of this incident, the children were inside the car and they witnessed the whole episode. Amazingly, when an ambulance arrived, defendant turned it away".

Plaintiff said, it was shocking to hear defendant alleging that her father gave them R1 million to buy a house as a gift. She mentioned that her father was one of their creditors. Finally, plaintiff said she currently lives in a rented house with the children and a helper and she is solely responsible for the running of the home.

The plaintiff closed her case and the defendant took to the witness stand and gave evidence. Defendant stated that he is a director of a company called M.I.H. Commodities operating in South Africa, DRC, Zambia and Zimbabwe. As a director, he draws a salary of R20 000,00 per month. Since the company is internet based, he operates from home thereby devoting the bulk of his time to care for the children. He confirmed that he holds a BSc in Mathematics and Statistics from the University of Cape Town. Defendant said although he worked as an Actuarial Consultant, he is not a qualified Actuary. After resigning he decided to venture into commodity broking working from home. Since his wife (plaintiff) had discovered his extra-marital affair with a co-worker he thought it wise to resign in order to save his marriage.

Defendant stated that from May 2016 to 15 May 2017 the parties were happily married until plaintiff moved out with the children when he was in hospital. He contended that he had more time with the children thereby contributing to the emotional stability of the family. Defendant also alleged that in 2013 he paid R180 000,00 towards plaintiff's MBA fees thereby playing a role in her progression. For these reasons defendant said he was a fit person to be declared the sole custodian of the children. If the court agreed with him, he would offer plaintiff access rights every alternative holiday. In his view the plaintiff is a fit parent as well. However, he contended that the fact that he works from home tilts the scale in his favour.

As regards the attempted murder allegation, defendant said plaintiff tried to run him over with a motor vehicle in full view of the children. Arising from this, plaintiff has a pending criminal charge of attempted murder. In the event that she is awarded custody and the criminal trial ends up with her conviction, the chances of her being imprisoned are very high. This will directly affect the children in that they will be left without a mother and custodian parent.

Defendant's position as regards the immovable property is that the house be sold on the open market and the known 3 creditors namely Standard Bank (the mortgagee), the City of Johannesburg and Home Owners Association be paid first and thereafter the net proceeds to be shared between the parties equally. He disputed Mr Nkala's debt alleging that he donated R1 million on their 1st anniversary. Defendant conceded that the bank's debt was not serviced from "late 2016". Since he was financially dependent on the plaintiff, he expected her to continue servicing the loan. Asked by the court why he failed to service the loan by paying R3 000,00 per month when he was taking home R20 000,00 per month defendant surprisingly said he wanted the house sold in order to settle the other debts.

Under cross examination, defendant said since he is not on full time employment he is able to dedicate every afternoon i.e. 1pm to 8pm to his children. Asked why he did not tell plaintiff he had paid R180 000,00 for her MBA fees, defendant stated that he did not think it was important to mention it. Defendant said he suffered:brain injury: which left him with no sense of smell or taste for 2 months. He described plaintiff's custody of the children in South Africa as "joint custody".

Defendant conceded that the school children are enrolled in a good school and that throughout the children have been attached to their mother's work permit. He also conceded that he does not hold a permit but he plans to apply for a business permit. If awarded custody defendant said he will run what he termed "a blended family" composed of three children and his "woman". He further contended that the two boys are happy to live with his "new wife". As regards maintenance for the children in the event that custody is awarded to the plaintiff, defendant said he was not prepared to pay anything. However, he admitted that the R15 000,00 plaintiff was claiming is not excessive in the circumstances. Defendant denied receiving any income from Uptake Trading a company he jointly owns with his mother. When it was put to him that he was creating a sensation that plaintiff is likely to be imprisoned when there has been to his knowledge no court appearance, defendant said he suspected "corruption" to have taken place.

Defendant admitted that in his plea, he acknowledged the existence of a loan from plaintiff's father and that he agreed to the cession of the house to his father in law upon divorce. Surprisingly, he said he changed his mind when he realised that plaintiff was being "malicious" and bent on "prejudicing" him by delaying the whole process. Defendant initially denied visiting the school but later admitted he did that "only to ask the procedure". He admitted filing a complaint with the Ministry of Home Affairs about plaintiff's status in South Africa. Finally, defendant agreed to pay R7 500,00 per month for both children as maintenance.

Analysis

Custody

I must, from the onset state that I agree with comments by UCHENA J (as he then was) in the *Mukundu* case *supra* that a custody hearing is "not a contest" between the parties' respective rights over the minor children. I take the view that a court must focus on the best interests of the minor children and not be detained by the feelings and protestations of the plaintiff and the defendant. In that respect, the court will consider the parents' suitability in advancing the best interests of the minor children. In the present case, it is common cause that when the plaintiff moved out of the matrimonial home, she took the children with her. During this period the parties

agreed to an arrangement where the defendant would have the children on alternate weekends and half the school holidays. It is common cause that the parties preferred country of residence is South Africa. It is also common cause that after a period of turbulence and disruptions, the children are now learning at their old school, Heron Bridge College. Further, it was accepted by the defendant that it is the plaintiff who has made all this continuity possible by firstly regularising her South African permit, secondly, secured a new job and thirdly, by securing the children's right of residence in South Africa.

Defendant did not assist in any way in the above processes, instead when the plaintiff's permit and those of the children expired resulting in them returning to Zimbabwe, the defendant applied to the Magistrates' Court, Bulawayo for custody of the children pending the determination of this matter. The application was refused on the grounds that in the circumstances as outlined by the plaintiff, it was in the best interests of the children that their custody remains with the plaintiff.

What should be noted here is that the defendant wanted the children to remain and learn in Zimbabwe at Centenary Primary School. Defendant said he preferred to live in South Africa with his girlfriend. The question then becomes who will have custody of these children in Zimbabwe? It appears that defendant's plan was to leave the children in his mother's custody. This is why defendant did not challenge the plaintiff's evidence to the effect that it is in fact his mother who secured a place at Centenary Primary School in Bulawayo where his mother lives. I am of the view that defendant's plans outlined above would not be in the best interests of the minor children.

One of the factors listed on the *Mcall's* case *supra* is "the ability of the parent to provide for the basic physical needs of the child, the so called "creature comforts" such as food, clothing, housing and the other material needs – generally speaking the provision of "economic security". The defendant does not have a permit to reside and work in South Africa. In his own words, he is in the process of applying for a "business permit". This court is not interested in what a party promises to do in the future. Rather the court is concerned with what a party has done and is doing for the children. The defendant is not in full time employment, has no accommodation in

Johannesburg in view of the impending sale of the matrimonial home, and has been plaintiff's dependent financially. In such circumstances one wonders how, it will be in the best interests of the minor children to continue living and learning in Johannesburg but in the custody of a parent residing there unlawfully and therefore without stability. On the other hand, plaintiff and the children are lawfully in South Africa. Plaintiff is in formal employment and has accommodation in Johannesburg. She is paying school fees, feeding the children and buying them clothes. On the evidence, most of which is common cause, the plaintiff is of the two solely parents providing the creature comforts or economic stability and security of the minor children.

It follows therefore that of the two parents, it is the plaintiff who has the ability to provide for the educational well being and security of them children.

The other factors in the *McCall's* case are the parent's understanding of, and sensitivity of the child's feelings and the ability of the parent to provide for the children's emotional, psychological, cultural and environmental development. Here I agree with *Mr Moyo's* submission that, "If there is anything that has been constant for the children throughout, there is no doubt traumatic period of separation of their parents, it has been their mother who has made sure by continuing to work and provide for them while in her custody". As for the defendant, his eventual plans are for the children to live with him together with his girlfriend and the same woman who caused the breakdown of their parents' marriage. I am not persuaded that placing these infants in a life with the step mother who caused the separation and divorce of their parents can be in the best interests of the minor children. Instead, it certainly would result in emotional and psychological conflicts detrimental to the children's well being.

As regards the stability or otherwise of the minors existing environment having regard to the desirability of maintaining the *status quo* I find that this factor would be best served if the children remained in the custody of their mother given that she has always had custody of her minor children providing all their needs. There is no good cause shown *in casu* to deprive the plaintiff who is the children's mother of custody of her children.

I note that the parties are fairly complimentary of each other as parents with neither regarding the other one as a bad parent. Defendant however contends that he has advantage over plaintiff because he has more time with children during the afternoons since he works from home. Going by the children's timelines as given by both parents, there is no need for the children to be with their father every afternoon. In any event defendant can impart whatever valuable lessons he wishes when he exercises rights of access during weekends. This does not tip the scales in his favour.

The words of PRICE J in *Myres vs Leviton* 1949 (1) SA 203 at 214 are very apposite, "there is no person who quite takes the place of a child's mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that the child derives from its own mother - an important factor in the normal psychological development of a healthy child".

All in all given that the plaintiff has always had custody of the minor children aged 7 and 6 years respectively, that she has been a provider to them in respect of all their needs, that she is in a position to continue doing so, that she is more stable than an attempt to introduce the minor children to a new family and the custody of a woman implicated in the breakup of their parents' marriage, it is in the best interests of the minor children that custody be granted to their mother.

Access

What should be noted here is that there is access arranged by the parties in the past and it is the same access proposed by the plaintiff. That access is alternate half the school holidays. This arrangement is in my view adequate and reasonable in the circumstances. Defendant's proposal of having access every afternoon is unreasonable in that it is likely to confuse the children on where home is. What is certain is that their parents have divorced and they need to adjust to the new circumstances. Therefore, a situation where they spend every day with the non-custodian parent cannot assist them adjust to the new reality.

Maintenance

According to both parties, the expenses of raising the minor children currently is R30 000,00 per month. On that basis plaintiff asked for a contribution of R15 000,00 per month from the defendant. On the other hand, defendant offered to pay R7 500,00 per month for both children. This, as was accepted by the defendant, amounts to half the children's school fees. Defendant wants to leave the plaintiff with the other half plus all the other expenses of raising the children. This cannot be described as fair and equitable, more importantly where defendant prevaricated on his sources of income. He did not provide proof of his alleged income of R20 000,00, neither did he make a full disclosure of his expenses. I find the defendant's evidence incredible and therefore unreliable for the following reasons:

- (a) When he wants the court to consider him as a responsible father who can provide and therefore he should have custody, he gives the impression of somebody who owns a lucrative business that has expanded to Zimbabwe, Zambia and DRC.
- (b) Also in a bid to support a suggestion that he would at times contribute to the family expenses, he said he was in addition a director and shareholder in a separate company that he ran with his mother that imports fruits from South Africa to Zimbabwe. However, when that is pointed out as additional source of income he then says the company is currently not operating.
- (c) Further, the defendant's submission that if awarded custody, he would support the minor children on his own without requiring a contribution from the plaintiff is evidence of a lack of full disclosure because the school fees alone as put by the defendant amounts to R15 000,00 per month.

Accordingly, I come to the conclusion that defendant is a businessman of some sort who should be able to contribute to his children's expenses. Defendant said his income is R20 000,00 per month from a company he wholly owns. I am convinced that as defendant initially indicated, he earns an additional income, the quantum of which he has concealed from a company he jointly owns with his mother.

Accordingly, defendant should pay R15 000,00 per month as maintenance for the minor children.

The immovable property

The starting point is section 7 of the Matrimonial Causes Act (Chapter 5:13). Section 7(1)(a) grants the court the power to deal with the assets of the parties in a manner that it considers just and equitable. Section 7(2) then states; “An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates early as between the spouses and may in particular but without prejudice to the generality of the subsection ...”

Quite clearly the Act does not circumscribe the order that a court can make in determining what is just and equitable. In casu, it is accepted by both parties that they are heavily in debt and to numerous creditors in respect of their immovable property. They have been sued by some of the creditors resulting in the sale of part of their movable property in the form of household furniture. It is generally accepted that property sold in execution does not realise its full market value. In that regard, the plaintiff’s application to the High Court of South Africa for an order for the property to be sold to best advantage and all creditors paid from the proceeds prior to any residue coming to the parties is not only reasonable but necessary. This idea is shared by both the plaintiff and the defendant save that defendant would like the plaintiff’s father excluded from the list of creditors.

Defendant gave various reasons for his suggestion that the plaintiff’s father be excluded. Initially he said there was never a loan that was advanced in that the R1 million they received was a gift for their anniversary. Later when he was asked why he admitted in his plea that the property be ceded to plaintiff’s father upon divorce if it was a mere contribution or gift, his response was he did so because of “societal norms and African custom”. Thirdly, he said he acknowledged indebtedness to plaintiff’s father only as a means to save his marriage. He had hoped plaintiff would withdraw the divorce action. It does not need clairvoyant powers to notice that the

defendant is contradicting himself. In light of this contradiction, the defendant's submission that plaintiff's insistence that her father be treated as one of the creditors is "malicious" and "prejudicial" is not only inaccurate but patently false.

In my view, the defendant's u-turn to suggest that plaintiff's father is not a creditor, flying against his admission in his plea is of less weight because the proposed manner of dealing with the issue, namely deferring it to the decision of the South African court, cannot prejudice the defendant as he is a party in that application and is free to challenge the right of his father in law to receive a share of the proceeds. What in my view is fair and equitable is that the question as to who constitutes a legitimate creditor will be answered in those proceedings that have been instituted for the purpose of a determination by a competent court of the best course of action in disposing of the property and meeting the claims of creditors from the proceeds.

Disposition

In the result, I order as follows;

1. A decree of divorce on the grounds of the irretrievable breakdown of the marriage be and is hereby granted to the plaintiff.
2. Custody of the minor children Y (born on 4 November 2010 and Z (born on 12 January 2012) be and is hereby granted to the plaintiff with defendant to enjoy access to the minor children every alternate week end and half of the school holidays.
3. Defendant shall contribute the sum of R7 500,00 per month per child towards the maintenance of the minor children until they attain the age of 18 years or become self supporting whichever shall come first.
4. Plaintiff is awarded as her sole and absolute property the Mazda 3 motor vehicle, registration number BX 81 TV GP, the suite in the spare bedroom of the matrimonial home, set of stainless steel pots and photographs of the minor children, with defendant being awarded the balance of the available assets of the parties.
5. The immovable property of the parties number 26 Cedar Hills Estat4e, Cedar AV West, Four Ways, Johannesburg, Republic of South Africa shall be sold to best advantage

with the proceeds therefore first going to the legitimate creditors of the parties in respect of the said immovable property and the balance if any be shared between the parties equally, the question as to who is a legitimate creditor and the modality of the sale and distribution of the proceeds if not agreed between the parties being determined by the outcome of the pending application before the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 16715/18 in which both plaintiff and defendant are parties.

6. Defendant shall pay costs of suit.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners