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TRUST MANDIZVIDZA

versus

SMOLLY MANDIZVIDZA

HIGH COURT OF ZIMBABWE

PARADZA J,

HARARE, 8 October, 2001 and 14 May, 2003

Divorce Action

Mr *Maware* for the plaintiff

Mr *Mandikumba* for defendant

PARADZA J: The plaintiff was married to defendant, initially by an informal customary union in 1984 or 1985. I say so because of the date of birth of their first child E., being [day/month], 1985. That marriage was solemnized under the then African Marriages Act, on 26th February, 1987. At the time of their marriage plaintiff and defendant were aged 22 and 21 years respectively. Their marriage subsisted until it finally collapsed around 1996, when their last child was born.

Three children were born out of this marriage, namely, E. born [day/month] 1985, S., born on [day/month] 1988 and N., born on [day/month] 1996. A fourth child, T. was born on [day/month] 1997. There is agreement that T. was not fathered by the plaintiff as it would appear that the child was the product of an adulterous relationship by the defendant.

Plaintiff sought in his declaration that he be granted an order dissolving their marriage on the ground that the marriage relationship between them had broken down irretrievably and that there was no prospect whatsoever of resuming a meaningful and normal marriage relationship. The defendant is in agreement with this.

The parties are also in agreement with regard to what they believe led to the breakdown of their marriage. In particular, they agree that even after they commenced

to live apart, efforts by both parties, including their families, to patch up the marriage and put it back on track failed completely. It is also clear from their pleadings and the evidence led in court that over and above allegations against each other of assaults, desertion, denial of conjugal rights, refusal to maintain the children, alienation of affection and adultery, plaintiff and defendant are agreed that as a result of the adulterous relationship by defendant with another man during the subsistence of their marriage, the fourth child was not fathered by the plaintiff. What is not in dispute is the paternity of the other three children as it is agreed that they are the children of this union.

At the conclusion of the trial I was satisfied that the issues for determination by this court had been narrowed down considerably particularly with regard to custody and maintenance of the minor children and to a large extent the distribution of matrimonial property. I do not wish to waste time dealing with aspects that the parties have agreed to as the basis upon which relief must be awarded. The only issue which was not clearly decided was the issue which was to do with other matrimonial property, apart from the motor vehicle which the parties came to some agreement. I will deal with this issue later.

Let me hasten to record what the parties have agreed. I will touch on the aspect of custody of the minor children.

The parties agreed that the plaintiff would have the custody of their first child, E.. The reason was that E. has always been in the custody of the plaintiff even at the time of the hearing of this matter. Any change in circumstances would not be in the best interests of the child. I have no reason to disagree with the parties.

The custody of T., the fourth child, is to remain with the defendant as that child has always been with the defendant. In any case, the defendant conceded that that child was fathered by another man and therefore there was no justification in ordering that the plaintiff have custody of this child.

The parties were however not in agreement about the custody of the two remaining children S. and N.. I have to make a determination as to who among the two parties shall have custody of the two minor children.

S. at the time of the hearing of this matter was approximately 13 years of age. At

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the time of judgment she will be close to the age of 15 years of age. There is no doubt in my mind that she has reached that stage in her life where she is going through a transformation from childhood to adulthood. Very soon she will be a young woman. To me, there is no doubt that she will need a parent who will guide her through that transformation otherwise her life could be adversely affected.

N. at the time of the trial was 5 years old. At the time of this judgment she would be approximately 7 years of age. She is a child of tender age and has just started school. The law relating to the custody of minor children is now settled both in statute and at common law. Common law used to provide that a father and a guardian of a minor children was entitled to have *prima facie* custody of his child. In the case of *Mutetwa v Mutetwa* 1993(1) ZLR 176 ADAM J, took time to trace the law prevailing prior to the changes brought about by the statute. He gives quite an explicit analysis of the varying views that come into play considering what factors should be taken into account when determining the issue of custody of a minor child. What is clear from his analysis is that the majority of case authority points towards the emphasis on the interests of the minor child. That, in all fairness, is the determining factor in deciding which parent should be granted custody of a minor child. Elements of fatherhood, innocence, or guilt of the spouses only come into play where it is not easy for a court to decide who, in the best interests of that child, should have custody of the minor child. The current trend in the law which has seen a removal of the fault of the spouse as a ground for divorce has made it even more difficult to find a basis for deciding what is in the best interests of the minor child when deciding who is the best parent that will take good care of the minor child. The best result would be better achieved, says ADAM J, by deciding and making a clear finding which of the spouses would best care, not only for the well-being of the child, but which parent is best placed or fitted to guide and control the child's moral, cultural and religious developments. The learned judge cited with approval the case of *Kallie v Kallie* 1947 SR 53 -

"The erosion referred to in this principle is found in section 3(3) of the Guardianship of Minors Act [Chapter 508]. It provides that where parents of a minor child commence to live apart, the mother shall have sole custody until there

is an order of the court to the contrary or until action is taken under the Children's Protection and Adoption Act [Chapter 506]".

In making any order I deem fit in the circumstances, I have to satisfy myself that it is proper and justified in law, and in fact, and mostly so, that it is in the best interests of the minor child for me to do so.

Plaintiff in his evidence made it quite clear that after separation from the defendant, the children remained with him. While in those circumstances, he co-habitated with another woman, or more precisely, two women simultaneously, not at the same time. One of these women has had a child with him. At the time of the hearing of this matter he was living with yet another woman. No mention was made of any offspring with this woman other than the fact that she has come to live with the plaintiff together with her own child she had from a previous association. In addition, she also brought with her, her elder sister, who, it would appear, is under the direct care of the plaintiff as she is not able to fend for herself. What this means is that plaintiff has now created a new extended family which now includes three extra members who are total strangers to the minor children. Plaintiff hopes that these people, the strangers, will be better company to the minor children than their mother. My concern is how would these people be able to help with the physical, spiritual and moral development of these minor children. I find it difficult to find for the plaintiff for the following reasons -

Firstly plaintiff continues to be in breach of the Guardianship of Minors Act, Section 3(3). The provision makes it mandatory that children should be with their mother until the court makes an order to the contrary. The defendant tried hard to take the children but without success. She related in her evidence an incident in which her effort ended in physical exchange of force. The police were eventually called in to intervene to put an end to this confrontation. Defendant has since given up efforts to regain custody of the minor children.

Secondly, defendant has now managed to settle down well. Despite her blemish of having committed adultery resulting in the birth of the fourth minor child during the subsistence of their marriage, she has settled down quite well. She has managed to

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secure decent accommodation in a low density suburb in Bulawayo. She is looking after her child, T. and lives with her maid. She has also been able to secure a job that pays her a modest salary. In my view, and quite clearly, the children are better looked after by a parent who, unlike the plaintiff, has not burdened himself or herself with responsibilities to the detriment of his or her minor children. Defendant is more likely to have more time for her children than the plaintiff. With the assistance of her maid, there can be no doubt that her sole concern would be that of her children. This can hardly be said of the plaintiff. Plaintiff must find time not only for his children but for his new wife and her sister. I have no doubt in my mind that that time, especially for the children, will be greatly compromised. I therefore consider that, for the reasons I have given above, that it is in the best interests of the minor children that they be placed in the custody of the defendant with plaintiff contributing towards their welfare by way of payment of maintenance.

Going back to the other issues settled between the parties is the issue of maintenance. This is in respect of the two minor children I have referred to above whose custody is not in dispute.

The defendant had made a claim asking for an award of maintenance in the sum of \$2 500,00 per month per child. She did not seek to amend her pleadings to have that figure reviewed one way or another. The parties were in agreement that such an amendment, including other aspects concerning the welfare and education of the children would be the subject of separate litigation should the need so arise. For the purposes of these proceedings it was agreed that an amount of maintenance payable by plaintiff to defendant must be fixed at the sum of \$2 500,00 per month per child.

Now that I have awarded custody of the other children to the defendant, I have no difficulty in awarding the same amount of maintenance payable by plaintiff to defendant. What I will need to add, however, is that plaintiff has to ensure that he does everything in his power to ensure that the children are well cared for in respect of their material and educational needs. Plaintiff earns an amount \$35 000,00 per month as at the time of the trial. By now that amount would have drastically changed. He drives a company car and receives perks and allowances. He runs a business venture in partnership with his

own brother. I noted that he tried to play down the value to him of this venture but I have no doubt in my mind that it should be a fairly profitable venture. In any case it is the same venture which he said it helped him to build the Norton property. It suffices for me to order and direct that plaintiff be ordered to ensure that all that is required for the education and upkeep of the children including medical aid, school fees, school uniforms and the like are paid timeously to ensure as little inconvenience as possible to all the minor children that are in the custody of the defendant.

What is left for me to deal with now is the aspect of distribution of matrimonial property. I have noted that not much dispute exists either on the papers or in evidence as regards other ordinary matrimonial property which includes movables. I direct that in so far as movables are concerned, and taking into account the fact that the defendant took away with her at the time of separation quite a large amount of matrimonial property, each party should be allowed to keep as his or her own property whatever is in his or her possession at the time of this order.

The immovable property, was indeed a point of contention. What I have noted is that it was purchased by proceeds of the sale of a house belonging to the parties which was in Bulawayo prior to them moving elsewhere. It was purchased and developed with the involvement of both parties although the defendant's involvement was insignificant other than payment of the certain transfer fees. What I however note is that she showed a keen interest in the property as she regarded the property as her future matrimonial home. That never happened because of these divorce proceedings.

Plaintiff has offered to pay defendant 25% of the agreed value of \$2 million dollars for that property. Defendant says she has contributed a lot and is therefore entitled to more. In particular she has asked for 50% of the value of that property.

I have not lost sight of the fact that defendant has worked and contributed a lot to assist her husband over the years. While they were living in Bulawayo, as I have already stated above, they acquired certain immovable property which they sold to enable them to purchase their Norton property. To me she has directly contributed to the acquisition of this property.

Their marriage subsisted for a period in excess of 10 years. By way of simple

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calculation it will reveal that their marriage did indeed last up to around 1996. They had commenced to live together some two or so years before the solemnization of their marriage in 1987. To me this is a reasonably long time for a marriage to last. She was looking forward to a better future with her husband and children. It is necessary and important that she be placed in more or less the same position as she would have been if the marriage had subsisted. The way to do it is to ensure that she is awarded a fair share of the value of the matrimonial property.

Section 7 of the Matrimonial Causes Act has laid down broadly factors which should guide me in arriving at an equitable distribution of matrimonial property. It enjoins this court to

"have regard to all the circumstances of this case, including the following -

- a)** the income, incapacity, access 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 would lose as a result of the dissolution of the marriage;
- g)** the duration of the marriage....."

It has been stated by these courts that the purpose of the provision cited above is to place the spouses and their children in a position in which they would have been if the marriage relationship had continued. (See *Nyatava v Nene* 1990(1) ZLR 97(HC) at p 104).

As already stated above the marriage relationship between the two parties lasted for a substantial period of time. Both parties contributed substantially to the acquisition of matrimonial property. The defendant in particular had to leave employment in some circumstances in order to accommodate the plaintiff who kept on transferring from one job to another. I have no doubt that the defendant is entitled to an equal share of the matrimonial assets which they acquired together.

As far as the Norton property is concerned the agreed value of the parties was \$2 million dollars. Where parties have agreed as to the value thereof and no dispute has arisen in that regard, I see no reason why I should not respect that agreement. Defendant is therefore entitled to receive an amount of \$1 million dollars as her share of the value of the property known as Stand 1676 Knowe, Norton.

In conclusion I therefore make the following order -

- A)** A decree of divorce is hereby granted by consent of both parties;
- B)** That the custody of E., born [day/month] 1985 be and is hereby awarded to the plaintiff;
- C)** The custody of S., born [day/month] 1988 and N., born [day/month] 1996 be and is hereby awarded to the defendant;
- D)** By way of distribution of matrimonial property awarded to the defendant - Plaintiff be ordered to pay one million dollars and \$70 000 dollars being half the value of both the Mazda 323 and the property known as Stand 1676 Knowe, in Norton;
The parties be ordered and directed to keep as their own property whatever other matrimonial property is in their possession at the time of this order;
- E)** That plaintiff be ordered and directed to pay as for and by way of contribution towards the maintenance and upkeep of the minor children an amount of \$2 500,00 per month per child until such child attains the age of 18 years or becomes self-supporting whatever occurs sooner. In addition plaintiff be directed to provide fully for the education of the minor children including their school fees, school uniforms and pocket money and such as is expected to sustain the children in school;

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F) That there be no order as to costs.

Sawyer & Mkushi, legal practitioners for plaintiff

Chihambakwe Mutizwa and Partners, legal practitioners for defendant