FELIX KUMIRAI
versus
MEMORY KUMIRAI (NEE BUNGU)

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 30 November 2005, 30 January and 9 February 2006

Trial Cause

Ms *Hove,* for plaintiff
Mr *Muskwe,* for defendant

MAKARAU J: The plaintiff and the defendant were married in Harare on 25 April 1998. Their marriage was solemnized in terms of the Marriages Act [*Chapter 5:11*], then Chapter 37. Prior to that, the parties were in a customary union the rituals of which were performed in or about October 1997. The parties have one minor child, a son, Tanatswa, born in April 1998.

Certain differences emerged in the parties' relationship culminating in the plaintiff issuing summons out of this court, claiming a decree of divorce and ancillary relief. Immediately after issuing summons, the plaintiff moved out of the matrimonial home in October 2004 and set up home elsewhere in rented accommodation, where he remains. Appearance to defend was entered against the summons with the defendant claiming that the relationship was capable of mending. In the alternative, the defendant claimed certain ancillary relief that I shall detail later.

Thus, before I proceed to deal with the ancillary relief claimed by both parties, it appears to me unavoidable that I determine whether or not the plaintiff is entitled to the relief he claims in the main.

DIVORCE

In 1985, there was fundamental change to the matrimonial laws of this country that saw the basis of granting divorces shift radically from the fault system to one where the court would acknowledge the breakdown in a marital relationship even where none of the parties was appreciably to blame for the breakdown. So fundamental was the change that even the "guilty" party can set up his or her fault to have the marriage dissolved, a

position that was untenable under the old law. In changing the law thus, the legislators limited the court to granting divorce on the sole grounds of irretrievable breakdown and or mental illness or continuous unconsciousness.

Irretrievable breakdown of a marriage is not defined in the Matrimonial Causes Act [*Chapter 5:13*]. A few factors that the court may take into account in considering whether there is irretrievable breakdown have been laid out in section 5 of the Act. These are not exhaustive.

In view of the fact that the breakdown of a marriage irretrievably is objectively assessed by the court, invariably, where the plaintiff persists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985. So trite has the position become that one hardly finds authority for it.

To satisfy the court that the marriage still has some life in it, one has to adduce evidence to the effect that after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife. In my view, evidence that on one occasion after the service of summons, the parties took a holiday together and afforded each other conjugal rights, as was led in this trial, is insufficient on its own to show that the marriage has prospects of mending. If anything, it goes to show that despite attempts to rekindle the fires, the parties failed to reconcile.

In changing the law thus, the legislators also effectively took away the power of the court to order the parties to go on judicial separation for a given period. Thus, if the court is satisfied on the evidence adduced before it that the marriage can be restored, it will simply decline to grant the divorce. The court cannot however order judicial separation in the sense the term was judicially interpreted, to give the marriage a chance, failing which the innocent spouse will be granted the divorce. That practice is inconsistent with the irretrievable breakdown principle.

I raise this point specifically at this stage because that was the defendant's prayer in defending the plaintiff's claim. She also prayed that the plaintiff be ordered to undergo counseling to try and save the marriage.

It was the plaintiff's evidence that he is no longer desirous of remaining married to the defendant. In my view, that is adequate for this court to grant a decree of divorce in the matter. It is in my further view unnecessary that I detail the evidence upon which he based his claim or the evidence of the defendant in rebuttal thereof. The exercise before me is not to establish who was to blame for the breakdown of the marriage but to establish whether in fact it has. It is my further view that to repeat the evidence led by each of the parties against each other will not assist in the disposition of this matter but may simply act to embarrass both parties, which is not the primary objective of divorce proceedings.

I have taken the liberty of explaining in detail a trite position at law in view of the fact that the defendant was allowed to proceed beyond the pre-trial conference stage of the trial in the belief that she could pray for judicial separation in defence of the divorce proceedings. During trial, the plaintiff was cross examined on the possibility of reconciling with the defendant and despite his unchanged position that he no longer had that desire, the defendant was led in detail on the matter when she testified in chief. I have since been addressed in detail on the issue on behalf of the defendant. I have been urged to find that the plaintiff was the recalcitrant party in the relationship and so is not entitled to the relief that he seeks. Several allegations of unbecoming behaviour have been in turn made against the plaintiff, yet his alleged embarrassing conduct should be regarded as a "storm in a tea-cup" that should be disregarded and the divorce be denied.

The above gave me the impression that the concept of irretrievable breakdown of a marriage, the governing principle in our law on divorce, may be misunderstood in some quarters. It is my view that the issue of divorce should not have proceeded beyond the pre-trial conference of the matter.

On the basis of the forgoing, a decree of divorce shall issue.

MAINTENANCE

At the trial of the matter, the parties were agreed that it is in the best interests of Tanatswa, the minor child of the marriage, that his custody be awarded to the defendant,

his mother. I am satisfied that the agreement between the parties was made in the best interests of the minor child.

The issue of the quantum of maintenance that the plaintiff should pay as the non-custodian parent was referred to trial.

Evidence was led that the minor child currently requires the sum of $37 450 000-00 per month. These expenses, which the plaintiff accepted as reasonable taking into account the parties' lifestyles and the standard of living the minor child was used to, do not include the child's school fees, the cost of his uniforms, his medical expenses and the amount needed to replenish and replace his wardrobe at the beginning of each season. The parties however accepted equal responsibility to maintain the minor child. While the plaintiff adduced into evidence his earnings, the defendant did not feel this was necessary. Despite this, I am satisfied that she is capable of maintaining the minor child at a level that mirrors the plaintiff's contribution.

I am handicapped from arriving at the exact figure that will constitute equal proportions of maintaining the minor child per month as I do not have his monthly needs for the items referred to above. Rather than refer the matter to the matter to further evidence in this or to the Maintenance Court for proper quantification of the monthly needs of the minor child, I will be guided by the parties agreement in principle that they will contribute in equal terms to the maintenance of the child. I will therefore order that the plaintiff pays a certain amount to the defendant as an equal proportion of the known expenses and that the parties bear the remaining expenses in equal proportions.

ACCESS

The plaintiff claims reasonable access to the minor child as the non- custodian parent. The defendant concedes that the plaintiff is entitled to access but wishes the court to restrict such access to supervised access only.

It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. (See *Marais v Marais* 1960 (1) SA 844(C) and *N v N* 1999 (1) ZLR 459 (H)).

Nothing that has been said by the defendant in her evidence satisfies me that there is good reason to stultify the nurturing of a meaningful relationship between the plaintiff and Tanatswa.

The defendant has testified that the plaintiff never used to spend much time with the minor child during the subsistence of the marriage, that he would rather spend time with his friends and their children and that during the subsistence of the marriage, he never spent time alone with the minor child in her absence. She has also complained that the plaintiff has never assisted the child with his homework and has only bought the child five items of clothing.

With respect, the defendant was not properly advised as to what evidence would persuade the court to deny a natural parent of unsupervised access to his or her child. The plaintiff is not a stranger to the child whose unsupervised introduction into the child's life may traumatize the child. It was not shown that the plaintiff has been violent or abusive towards the child, (see *N v N* (supra)), or that his social life or domestic arrangements are such that exposure to them will injure the best interests of the minor child. It was attempted to show that the plaintiff on one occasion told the minor child the name of his current girl-friend and that he is therefore not suitable to have unsupervised access of his child on this account. That the plaintiff will have other women in his life now he is divorced from the defendant cannot be avoided. The minor child will have to know of and be acquainted with his father's friends sooner than later. That cannot be avoided and cannot be used as a ground for denying the father access to his child as long as contact with his father's female friend or friends is tastefully handled. There has been no suggestion in *casu* that the introduction of the minor child to his father's friend was not tastefully done or that it was done in a manner likely to injure the best interests of the minor child.

In conclusion, it is my finding that the plaintiff poses no danger to the life, health or morals of the minor child and as such, his access to the minor child shall not be rendered illusory by the imposition of any restrictions other than what is reasonable and in the best interests of the child. His access to the child shall not be supervised.

IMMOVABLE PROPERTY

Two issues arise for determination under this head. Firstly, I have to consider what constitutes the matrimonial estate and thereafter, what would constitute an equitable distribution thereof.

It is common cause that the defendant arranged through her employer, to purchase a property in Msasa Park called Stand 2041 Chadcombe Township of Stand 1257 Chadcombe Township. The defendant's employer paid for the property in full and also paid the cost of having the property developed. The defendant remained indebted to her employer and repayments for the loan were deducted from the defendant's salary at source from the date of purchase to some two years ago when the defendant paid off the loan to her employer.

The property is registered in the name of the defendant. It was transferred to the defendant in June 1998. The defendant alleges that since she entered into the arrangement to purchase the property prior to her marriage to the plaintiff, the property should be excluded from distribution. I am unaware of any law that provides that an asset acquired by any of the spouses just before the marriage and is paid for during the subsistence of the marriage shall be excluded from the matrimonial estate that falls for distribution at the dissolution of the marriage. Section 7 (3) of the Matrimonial Causes Act only excludes those assets that were acquired before or during the marriage by way of inheritance or in terms of a custom that excludes it from joint ownership or in a manner sentimental to the owner. It appears quite clearly to me that none of these exclusionary qualities attach to the property. The property was not inherited nor was acquired in terms of any customary law. No evidence was led that it was acquired in a sentimental manner as to exclude it from the joint estate. It was an investment just like the acquisition of the matrimonial home.

A further attempt was made during the trial to allege that the property was donated to the defendant's parents and no longer belongs to the defendant. I am not satisfied that the defendant donated the property to her parents. No deed of donation was produced. No evidence was led form the defendant's parents that they regard the property as their own. Transfer has not yet been effected in their favour to evidence the donation and its acceptance by them. If anything, there is evidence that the property is tenanted

and that the plaintiff and the defendant used to lease out the property for their benefit. Rentals accruing from the property were regarded as part of the income accruing to the family each month and were part of the family's budget. The lease agreements to the property were entered into by the plaintiff and defendants as the landlords and not as agents of the defendant's parents.

The evidence led by the defendant on the alleged donation to her parents was not credible and I reject it. It is my finding that the Msasa Park property is part of the assets to be distributed between the parties.

I now turn to the second issue.

It is common cause that the parties had two properties one registered in each of their names. They purchased the two properties in similar fashion, each obtaining assistance from their employer and the loan being deducted from their respective salaries. The parties hold similar qualifications, left University together after pursuing the same degree program and were at one time employed at the same level by the same employer. I have yet to come across any other case of such equality between spouses for the purposes of section 7 of the Matrimonial Causes Act. I cannot think of any of the factors listed in subsection (4) of the section that will tilt the scales in favour of any one of them.

I will thus make an order that will reflect their equal status by awarding to each as their sole and absolute property, the property registered in their names and allowing a cash adjustment to the defendant whose property does not command as much value as the property registered in the plaintiff's name. In taking this approach I am heavily influenced by the approach taken by the Supreme Court in *Takafuma v Takafuma* 1994 (2) 103 (S) and in *Ncube v Ncube* 1993 (1) ZLR 39 (S). I have acknowledged the equality of the spouses in all respects and have thus started from a position where they own the matrimonial estate in equal shares. I have searched and find no reason in equity to move from that position.

SHARES IN TWO COMPANIES.

The parties incorporated two companies namely Tanatswa Construction Company and Simukai Enterprises (Pvt) Limited. The plaintiff is the major shareholder in both companies with other directors whose identities are not necessary for the purposes of this

trial. The plaintiff has conceded that the defendant is entitled to 50 % of his shareholding in each of the companies. Again, I find no reason in equity to disturb this position. The award of 50% to the defendant in the plaintiff's shareholding does not ignore the fact that the two companies are separate legal personae from the directors. The award simply makes the defendant entitled to 50% of the plaintiff's shares in the companies without affecting the shareholding or the operations of the company. The award does not seek to impose the defendant as a shareholder in the company in which event it would have been imperative to bring the company before the court for it to be heard on the issue.

COSTS.

As a general rule, the approach of this court in matrimonial matters has been to make no award of costs. This is in line with the irretrievable breakdown principle that does not seek to apportion fault to the divorcing parties. Where a marriage has irretrievably broken down, none of the parties are in the main successful as a decree of divorce will be issued to both the parties. Thus the general principle that costs follow the cause is not of general application in matrimonial matters. It may however be applied in the discretion of the court in the event that the defence to the divorce and to the ancillary relief was grossly unreasonable and amounts to vexing the party approaching the court for divorce. I see no reason for departing from the general approach in *casu*.

DISPOSITION

In the result, I make the following order:

1. A decree of divorce is issued.
2. Custody of Tanatswa Kumirai (born 9 April 1999) is awarded to the defendant.
3. The plaintiff shall contribute towards the maintenance of Tanatswa in the sum of $18 million per month with effect from 28 February 2006. In addition, the parties shall jointly contribute towards Tanatswa's school fees, school uniforms, clothing and medical expenses.
4. The plaintiff shall have access to Tanatswa every alternate weekend, every alternate public holiday and one half of each school holiday.

5. The plaintiff is awarded as his sole property the immovable property whose street address is no 50 Garlands Ride Mount Pleasant, Harare.
6. The defendant is awarded as her sole property, Stand 2041 Chadcombe Township of Stand 1257 Chadcombe Township.
7. The two properties referred to above shall be valued within 30 days of this order, by an evaluator agreed to by both parties, and failing such agreement, by one appointed by the Registrar of this court to establish the net value of each. The plaintiff shall within 30 days of the evaluation pay to the defendant a sum of money (if any) requisite to bring the value of Stand 2041 Chadcombe Township of Stand 1257 Chadcombe Township to 50% of the net value of the two properties combined.
8. The cost of the evaluations referred to above are to be borne by both parties in equal shares.
9. The plaintiff's shareholding in Tanatswa Construction Company (Private) Limited and Simukai Enterprises (Private) Limited shall, within 30 days of this order be evaluated by an accountant to be agreed upon between the parties and failing such agreement, to be nominated by the Registrar of this court. Within 90 days of the evaluation, the plaintiff is to pay the defendant a sum equivalent to 50% of the net value of such equity. The cost of the evaluation shall be borne by both parties in equal shares.
10. Each party shall bear its own costs.

Hove & Associates, plaintiff's legal practitioners.

Muskwe & Associates, defendant's legal practioners.