

DEBORAH GLORIA KOUMIDES
and
PAUL KOUMIDES

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 19, 28, 29 and 30 October 2009 and 5 August 2010

Divorce Action

E. W. W. Morris, for the plaintiff
J. Samukange, for the defendant

MAVANGIRA J: The parties in this matter entered into marriage in terms of the then Marriage Act, [*Cap 37*] (now *Cap 5: 11*) on 9 July 1988. Some twenty years later, on 3 December, 2008 the defendant instituted this divorce action, citing various reasons which she claims indicate that their marriage has irretrievably broken down.

The parties were blessed with two children, Elena Gloria Koumides born 24 May 1990 and Andreas Wilfred Koumides born 13 March 1995. In addition to the claim for a decree of divorce the plaintiff also claims custody of the minor child of marriage, Andreas Wilfred, subject to the defendant's right of access. She also claims maintenance for both the minor child and the major child, Elena Gloria. Besides the monthly payments of maintenance for the children, she also seeks an order that the defendant continues to maintain the children as dependants on the medical and dental aid policy subscribed for them at his cost, for the defendant to bear all shortfalls and to reimburse her in respect of medical and or dental treatment in regard to either or both the children. She also seeks an order that defendant, at his cost, subscribe to a foreign medical and dental aid policy with Mars International or an alternative foreign medical aid provider suitable to her in respect of her and the children and maintain such policy and bear all shortfalls arising in regard thereto in respect of the children for as long as he is obliged to pay maintenance in respect of the said children. She also seeks an order that the defendant pay all the school fees, costs and charges in regard to the ongoing education of the children including the cost of school uniforms, sport clothing, footwear,

sports equipment, any extra mural activities and also transportation arising in respect of school activities.

The plaintiff also seeks an order that she continues to reside in the matrimonial home with the children until Andreas attains the age of 18 or becomes self-supporting, whichever first occurs. Thereafter the property would be sold and the net proceeds equally shared. She also seeks an order to the effect that the remaining matrimonial assets be equally divided between the parties.

When the matter came up for trial on 19 October, 2009 the parties advised the court that it was their intention, by consent and in terms of Order 29 Rule 199 to proceed by way of stated case on the issue of the defendant's liability for the maintenance of Elena and on the issue of an interdict barring the plaintiff from cohabiting with a boyfriend in the matrimonial home. They indicated that they would lead evidence only with regard to the issue of the level of maintenance for Elena should the defendant be found to be liable and also on the issue of the level of maintenance for Andreas and on the issue of costs. The parties then followed the said procedure and on 23 October 2009 they parties filed a "Stated Case In Terms Of Order 29." It states:

- "WHEREAS:
- A. The parties are plaintiff and defendant respectively in this matter the trial of which commenced on 19th October before the Honourable Justice Mavangira.
 - B. Two issues for trial as reflected in the Pre-Trial Conference minute are:-
 1. Whether the plaintiff should be interdicted from living with a boyfriend, now or in the future.
 2. Whether defendant has a legal obligation to providing maintenance fro his daughter Elena.
 - C. The parties are agreed that both issues are questions of law, the facts of which are not in dispute, and can therefore be determined on a Stated Case.
 - D. Accordingly the parties set out the agreed facts in respect of the two issues and will, as expeditiously as possible file Heads of Argument, setting out the respective parties contentions of law. The parties respectfully request that the issues be dealt with by the Honourable Court on the above basis.

NOW THEREFORE THE AGREED FACTS ARE AS FOLLOWS:-

1. The parties have 2 children born of their marriage, namely:-

ELENA GLORIA KOUMIDES (born on 24th May 1990) (“ELENA”)
ANDREAS WILFRED KOUMIDES (born on 13th March 1995) (“ANDREAS”)

2. ELENA is at school and will be writing her “A” Level examinations later this term.
3. ELENA lives with her mother the plaintiff in this matter and with ANDREAS in the former marital home being 187 Dublin Road, Emerald Hill, Harare.
4. The Emerald Hill home is jointly owned by the parties in equal shares, and the parties are agreed that the plaintiff be entitled to continue to so reside there until such time as ANDREAS attains the age of 18 years or becomes self-supporting. Thereafter the property will be sold for the best account and the proceeds divided equally between the parties.
5. Defendant Claims that plaintiff’s continued occupation of the property, up until its sale, is conditional upon her refraining, even after the parties divorce, from living on the property with any man with whom she is romantically involved.
6. Plaintiff’s attitude is that she is not presently romantically involved with anyone and at present has not the remotest intention of cohabitation in the manner that defendant wishes to interdict. However, she disputes defendant’s legal grounds for claiming the interdict; opposes the interdict on a question of pure principal and wishes to have her options freely available in case at some future date she should meet and fall in love with another man.
7. ELENA is now and until she completes her tertiary education, totally financially dependant on the plaintiff and defendant for all her living, health, educational, and extra-mural requirements.
8. After graduating from school, it is ELENA’s desire and intention to Undertake tertiary education in the degree course of Bachelor of Education at the Australian Catholic University, for which course she will apply next year.

WHEREFORE the parties hereto do hereby file this Stated Case for the Order of the Honourable Court in respect of the following questions:-

1. Whether plaintiff should be interdicted from living in the matrimonial home with a boyfriend, now or in the future.
2. Whether defendant has a legal obligation to providing maintenance for his Daughter, Elena.”

I shall deal firstly with the issues raised by way of Stated Case, the first being whether the plaintiff should be interdicted from living in the matrimonial home with a boyfriend now or in the future.

In his written submissions on this issue the plaintiff's counsel correctly states that strictly speaking, this demand, coming as it does in a plea and not a counter-claim, is not before this Court as claims cannot be made in a plea. He states that the matter was however included as an issue in the pre-trial conference and was agreed by the parties in a stated case and that accordingly this Court is requested by the parties to deal with the matter. I have perused the pleadings in this matter and ascertained that the matter is not raised in the defendant's plea. It appears for the first time in para 8 of the defendant's summary of evidence where it is indicated that the defendant would request the Court to impose a condition that the plaintiff is interdicted from bringing her boyfriend to sleep at the house. The defendant next deals with this matter in closing submissions in response to the plaintiff's legal argument on it.

There is no prayer before me for such interdict to be granted. Claims are not made in summaries of evidence or closing submissions. Neither can a claim be made in a plea which does not incorporate a counterclaim. There is thus no issue before me. The issue was never pleaded. I do not think that there is any need for me to make any other pronouncement on this issue in these circumstances.

The next issue raised in the stated case is whether the defendant has a legal obligation to provide for his daughter Elena. It is common cause that Elena is a major. By virtue of that legal status, Elena can sue and be sued in her own right. There is no indication as to the legal basis on which or the justification for the plaintiff making the claim on behalf of Elena. As she is a major, the claim for maintenance for Elena can only be made by Elena herself.

In his written closing submissions, the defendant's legal practitioner made reference to HC 4977/09. I have had sight of the file. It is an urgent chamber application which was filed on 16 October 2009 by Elena and in which she sought to be joined as second plaintiff in the instant divorce action. A notice of opposition and an opposing affidavit were filed by the defendant in *casu* on the same date. It appears that no further action was taken in that matter thereafter. Significantly, however, Elena therein states in her founding affidavit, among other things, that the claim in this divorce action in respect of maintenance for her is to all intents and purposes

precisely the claim to be made by her against the defendant. She specifically states as follows in para 10 of her founding affidavit:

“I understand and verily believe that, because I have now attained the age of 18 years, I no longer fall under the guardianship of my parents, and therefore, in law, the claim in the divorce proceedings on my behalf against the first respondent is in fact my claim and not the claim of my mother on my behalf.”

I am for the above reasons in agreement with the defendant’s legal practitioner’s submission that the plaintiff’s claim on behalf of Elena is bad in law and should be dismissed. He seeks costs on an attorney and client scale. I will deal with the issue of costs later in this judgment.

In his plea the defendant admitted that the marriage has irretrievably broken down albeit for different reasons to those cited by the plaintiff. Paragraph 3 of his plea reads as follows:

“Ad paragraph 8-11 thereof

These are denied, more specifically, (as a matter of law):-

- (a) It is denied that the defendant has any inherent legal obligation to pay maintenance in respect of Elena (who has attained the age of majority) unless ordered to do so by the Court on the basis that same appears just and equitable.
- (b) It is denied that the defendant has legal obligation to pay maintenance for children beyond the age of majority and/or until they are self-supporting, unless ordered to do so by the Court on the basis that same is just and equitable.

It is claimed that the context of the contribution claimed by the plaintiff from the defendant is just and equitable.

Defendant admits that it is just and equitable that both he and the plaintiff contribute to the maintenance of both the children (including their medical, educational and general subsistence requirements) to the extent, and for the period, determined at trial by the Court to be just and equitable, having regard to the respective means and assets of the plaintiff and defendant (and if necessary until each child is self-supporting).”

With regard to the plaintiff’s claim that she continues to reside in the matrimonial home with the children until the younger attains the age of 18 years the defendant avers that it should only be until the younger child completes his secondary education. Regarding the plaintiff’s claim to be awarded custody of Andreas, his only request is for a specific access order to be made in his favour.

In their joint Pre-Trial Conference minute the parties record the agreed issues for trial as being:

- “1. Should plaintiff be interdicted from having any boyfriend co-habit with her in the former marital home.
2. Is defendant liable to pay maintenance for Elena?
3. If so, what is the proper level of maintenance contribution in respect of Elena?
4. What is the proper level of maintenance for Andreas?
5. Liability for legal costs.”

The Pre-Trial Conference minute also records certain admissions as having been made. It is not intended to repeat these at this stage. It also records that the plaintiff gave notice of the intention to apply for Joinder of Elena Koumides, the elder child, who, it is stated, recently became a major, as co-plaintiff.

In view of my finding on the issues raised in the parties Stated Case the only outstanding issue for the determination of this Court is thus the *quantum* of maintenance for the minor child. In her summons and Declaration the plaintiff’s prayer is for US\$1 250 per month per child. In her evidence she stated that she now seeks a monthly contribution of US\$800 per month per child. The minor child was at the time of the trial in Form 2. The plaintiff’s evidence that her monthly expenditure averages US\$2 200 was not challenged. She said that this amount does not cover the insurance on the house or charges for the licensing of vehicles. She said that the defendant can well afford to pay US\$800 per month for the child as he runs a company which they set up together and which does installation of security alarm systems, camera surveillance equipment, water filters and medical and dental equipment. He has a contract with a large foreign embassy to maintain all the staff houses. He also does work for a major wholesale group.

The defendant on the other hand, said that business was not doing very well and he was only realising about US\$250 net per week. Initially he said that he was in such dire straits that he could not afford to pay maintenance for the minor child and that he was going to approach the magistrates’ court for the plaintiff to be ordered to pay maintenance to him. Thereafter, after being taken through the documents that he produced to show his business income and expenditure performance during cross examination, he then shifted his stance and said that he could afford to contribute about US\$100 per month towards the minor child’s maintenance. This is in addition to the payments for school fees, uniforms, medical aid, pocket money, extra-mural activities, electricity, water, telephone and rate bills. The defendant only

made available the profit and loss account documents referred to above after an adjournment was sought by the plaintiff's legal practitioner for that purpose.

The defendant also said that the plaintiff is in a better financial position than himself as she has an inheritance of more than 150 000 Australian Dollars in cash. He also said that the two of them have a joint account in Cyprus which has in excess of US\$100 000, which amount they will share equally. He thinks that after deducting his current liabilities he will be left with a net of US\$6 000 and it is from this amount that he will be able to pay US\$100 per month as maintenance for the minor child.

The defendant whilst being cross examined agreed that he had paid the following amounts to the plaintiff as maintenance during the period since he moved out of the marital home; US\$545 on 4 March, US\$791 on 1 April, US\$789.50 on 2 June, US\$200 on 12 June, US\$680 on 2 July, US\$200 on 10 July, US\$100 on 15 July and US\$500 on 7 August. He agreed that all these amounts were in excess US\$250 per month but explained that all these were borrowings from his family, mainly his elder brother. He was however unable to say how much he owes his elder brother. He said that he will pay his brother back when he requests him to do so and that he will repay him using his share of the money from the account in Cyprus. He was then asked:

“So you are quite clearly able to pay more maintenance than what you are offering?”
He answered:

“From the monies in Cyprus yes, and half of that is my wife's and notwithstanding the in excess of 150 000 Australian Dollars my wife has.”

It was also during cross examination that the defendant agreed that besides the amounts that he had been paying to his family, he had also been spending considerable amounts of money on his family; he agreed that in November 2008 he bought the minor child a motor bike. He said that he paid US\$500 for it. In December he bought a motor vehicle for Elena. He said that it was paid for from the Cyprus account and it cost US\$6 500. This was at the plaintiff's request after both the plaintiff and he had promised to buy Elena a car. He agreed that in January he took both children to Durban for twenty days and he bought them clothes, cell phones and a spear gun. In March he bought the minor child another motor bike for US\$1 300. He took the minor child on holiday in Kariba from 19 to 23 June. He said that the rugby boots that he gave to the minor child in April were a gift to him from a friend. He then also said that the holiday in South Africa was paid for by his elder brother. His elder brother also

lent him money for the motor bike for the minor child. He also funded the trip to Kariba and gave them his car to use.

I am in agreement with the plaintiff's legal practitioner's submission that in determining the defendant's ability to pay the only question is his credibility. Can he be believed when he says that he is unable to pay US\$800 per month for the maintenance of the minor child? The defendant was very reluctant to tell the court how much he was earning per month saying that it was difficult to calculate. But, as submitted by the plaintiff's legal practitioner, how can a tradesman not be able to calculate what he earns per month? He does the work, renders an invoice and receives payment. What can possibly be complicated about that? It was also quite startling that despite the defendant's evidence that he borrowed from his brother on a monthly basis, he was unable to say how much he had borrowed. He gave the impression of one who has decided not to be candid with the court. It was also apparent that there is great animosity between the parties and unfortunately that animosity had clearly also transferred onto both legal practitioners who constantly "fought" during the trial. At one stage early in the trial I had to call them to chambers because of their unbecoming conduct and remonstrate with them.

The defendant's claim that he is unable to contribute more than US\$100 is not supported by the evidence and by the probabilities especially when one has regard to his demeanour and to the lack of cohesion of his story and his explanations. The plaintiff's legal practitioner aptly cited *Lindsay v Lindsay* 1993 (1) ZLR 195 at 197E – F where KORSAH JA stated:

"I entertain no doubt that the *quantum* of maintenance, *pendente lite* or otherwise, which a court may order a husband to pay to a wife without means is at the discretion of the court. In order to ensure the proper exercise of that discretion, the court requires that every party to an application for maintenance shall deal with the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, which will enable the court to make a fair and just assessment."

In *casu*, the defendant was very reluctant to have the court know his true financial position. Rather, he sought to create the impression that he is almost impecunious and intends for that reason to sue the plaintiff for his own maintenance. It was only during cross examination that it then turned out that he is in fact not impecunious. He does appear however to resent paying maintenance for the child because of the acrimonious relationship currently prevailing between him on the one hand and the plaintiff and the children on the other. His financial position

appears to be quite healthy judging by the amounts of money that he has paid to the plaintiff and also by the amounts of money that he has spent on the children as already recorded above. His explanation that the monies were all borrowed from his elder brother is not worthy of any belief. Despite indications made to him during cross examination by the plaintiff's legal practitioner, he did not see it fit to call his elder brother to confirm his story. I disbelieve him.

The joint account in Cyprus is not the defendant's only source of money. The defendant is in business. The defendant was able to pay and or spend the amounts referred to above in addition to his payment of the expenses relating to the minor child's education and utility bills. It would appear to me that whilst he continues to meet the said costs the defendant would also be able to contribute an amount of US\$500 per month towards the minor child's maintenance. The order that this court will make will take into account the fact that the parties have agreed that the plaintiff and the minor child will continue to enjoy living in the matrimonial home until the minor child attains the age of 18 years or becomes self supporting whichever last occurs. Furthermore that they also agreed that all household furniture and contents in the marital estate shall remain in the matrimonial home until the house is sold, the proceeds to be divided equally between the parties.

With regards to costs, as stated by KORSAH JA in *Lindsay v Lindsay (supra)*, at 203B, "it is unusual to deprive a successful party of her costs." Despite the dismissal of the plaintiff's claim for maintenance on behalf of Elena, the plaintiff has in my view, generally succeeded and is entitled to her costs.

In the result it is ordered as follows:

1. That a decree of divorce shall issue.
2. That custody of the minor child A be and is hereby awarded to the plaintiff with the defendant having reasonable access to him.
3. That the defendant shall be entitled to have access to the minor child as set out below:
 - (a) every alternate weekend from close of school on Friday afternoon until he returns the minor child to school on Monday morning; and
 - (b) every alternate public holiday, half of every school holiday and alternate Christmas periods
4. That the defendant shall contribute to the maintenance of the minor child A:
 - (a) by paying to the plaintiff the sum of US\$500 for A, the first such payment for the month of June 2010 to be made forthwith and subsequent payments

to be made on the first day of each succeeding month until the child attains the age of 18 years or becomes self supporting whichever last occurs; and

- (b) by maintaining the minor child A as a dependant on a medical and dental aid policy and bearing all shortfalls and shall reimburse plaintiff in respect of any monies paid by her for the medical or dental treatment of the minor child; and
 - (c) by paying all school fees, including tertiary education, and any costs and charges in regard to the education of the minor child including the cost of school uniforms, sport clothing and equipment, footwear and any extra mural activities as well as the cost of all transportation arising in respect of school activities up to tertiary education.
5. That the plaintiff shall reside in the matrimonial home with the minor child until such time as the minor child attains the age of 18 years or becomes self supporting, whichever last occurs.
6. That at the expiry of the period referred to in para 5 above the matrimonial home which is equally co-owned by the parties, shall be sold and the net proceeds shall be equally divided between the parties subject to the following:
- (a) if the parties cannot within 30 days of the minor child attaining the age of 18 years or becoming self supporting whichever last occurs, agree on a valuator, the Registrar shall at the request of either party appoint a valuator from his Panel of Valuators within 30 days of such request;
 - (b) the valuator shall as soon as possible value the property and if there are any outstanding obligations, shall indicate the net value thereof;
 - (c) the costs of valuation shall be paid by both parties in equal shares;
 - (d) The plaintiff shall, within 6 months of the date of the valuation referred to in subpara (b) above pay to the defendant 50% of the net value of the property as determined in terms of subpara (b) above.
 - (e) If the plaintiff fails to comply with subpara (d) above then the defendant is given the option to pay to the plaintiff 50% of the net value of the property within 6 months thereafter.
 - (f) In the event that neither party is able to pay out the other in terms of subpara(s) (d) and (e) above, then the property shall be sold to best advantage by an independent estate agent appointed by the Registrar from the Registrar's Panel of Estate Agents and the net proceeds shared equally between the parties.

7. That all household furniture and contents in the matrimonial estate shall remain in the matrimonial home until the house is sold in terms of para 6 above when the furniture and contents will then be equally divided between the parties as agreed at the pre-trial conference.
8. That the defendant shall pay costs of suit.

Atherstone & Cook, plaintiff's legal practitioners
Venturas & Samukange, defendant's legal practitioners