JOEL ITAYI MATONGO
versus
FLORA MATONGO (NEE JOE)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 6 June 2011 and 26 January, 2012

Matrimonial Trial

P Mabundu, for plaintiff
C Chengeta, for defendant

CHITAKUNYE J: The plaintiff and defendant were joined in holy matrimony on 13 June 1997, in terms of the Marriages Act, [*Cap 5:11*]. The marriage still subsists. They had however commenced living together as husband and wife in terms of customary law in August 1985. Their marriage was blessed with two children one born on 31 March 1989 and the other born on 17 August 1994.

After several years of apparently happy marriage some unhappy differences arose culminating in the plaintiff issuing summons for divorce and other ancillary relief on 6 July 2010. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects of restoration to a normal marriage relationship. He outlined the grounds for the breakdown as that:

(a) the defendant has been seeing other men;
(b) the parties are currently on separation; and
(c) consequently the parties have lost love and affection for each other.

In the circumstances the plaintiff sought a decree of divorce.

During the subsistence of the marriage the parties acquired an immovable property namely Stand No. 7865 Budiriro 5B Harare and various movable property. The plaintiff offered the defendant a 25% share in the immovable property with him retaining 75%.

On the movable property he offered most of the property to the defendant. He also asked to be given custody of the minor child born on 17 August 1994.

The defendant in her plea denied that she was seeing other men. She however did not deny that the marriage has irretrievably broken down as parties have lost love and affection for each other. She made a counter claim for:

(a) a decree of divorce
(b) 50% share in the immovable property
(c) Custody of the minor child born on 17 August 1994
(d) An order for maintenance in respect of herself in the sum of USD 300 per month
(e) Sharing of the movable property in terms of her counter proposal in paragraph 6

of her counter claim.

At a pre-trial conference held on 9 March 2011 the parties agreed that:

1. The marriage has irretrievably broken down.
2. Custody of the minor child born on 17 August 1994 be given to the defendant with the plaintiff enjoying reasonable rights of access.
3. The plaintiff pays maintenance in the sum of USD50-00 for the minor child.
4. The defendant shall get all the movable property except the following-
    (i) Carpet
    (ii) Radio (with amplifier, turner, cassette player and 2 speakers)
    (iii) 1 DSTV Decoder
    (iv) DVD

    which shall be retained by the plaintiff as his sole and exclusive property.

The issues referred to trial pertained to –

1. The fair and equitable distribution of the immovable property, namely Stand No. 7865 Budiriro 5B Harare

2. The quantum of maintenance to be paid by the plaintiff to the defendant for the defendant's upkeep; and
3. Who should pay the costs of suit?

The plaintiff gave evidence and tendered a number of documents in support of his case. The defendant thereafter gave evidence. From the evidence of the parties it was common cause that both parties are domiciled in Zimbabwe. They both appeared to have been born and bred in Zimbabwe.

They were agreed that their marriage has irretrievably broken down. Neither party seemed interested in reconciliation. Whilst the issue as to whether the marriage has irretrievably broken down is an issue for court, it is my view that as were in this case both parties appear unwilling to reconcile and no longer have any love or affection for each other, there is nothing court can do but to accept that the marriage has indeed irretrievably broken down. This will thus be my finding in this case.

Another aspect worth mentioning at this stage is that whilst the issue of costs was referred to trial as contested, there was nothing from the testimony of the two parties to suggest that this was still an issue. Neither party asked for their costs to be paid by the other party. In fact in their respective closing submissions each party prayed that each party be ordered to bear their own costs.

The only issues for determination were on the division of the immovable property and maintenance for the defendant.

1. **What share should each party get in respect of the immovable property, being Stand 7865 Budiriro 5B Harare**?

The evidence from both parties shows that the immovable property was bought after about 12 years from when the parties started living together as husband and wife under customary law. Incidentally it was the same year their marriage was solemnized in terms of the Marriages Act, [*Cap 5*:*11*]. It is common cause that the property was purchased through a loan granted to the plaintiff from Tel-one Pension Scheme. All loan deductions were made from the plaintiff's salary. In as far as payment of the purchase price is concerned the defendant admitted she had no direct contribution.

It was also common cause that the plaintiff paid off the loan in about five years. During that same period he built a pre-cast wall around the property, opened savings accounts for their two children with building societies into which he made deposits for the future benefit of the children, he bought a motor vehicle and last, but not least, he paid for the defendant's college training in dress making and tailoring. This tended to confirm the plaintiff's argument that the loan repayments left him with enough money to comfortably provide for the needs of the family. It in a way dealt a severe blow to the defendant's contention that the loan repayment left the plaintiff with inadequate resources to provide for the family and so she provided for the shortfall.

Whilst the plaintiff's evidence was consistent with his pleadings, the defendant found herself having to alter some aspects of her pleadings in light of what had been accepted as common cause.

For instance whilst in her plea she contended that she engaged in tailoring and would make clothes for resale in South Africa and locally and that her income from this venture was used to take care of all other expenses at home after the monthly deductions on the plaintiff's salary of the house loan would have rendered his earnings inadequate to cater for the whole family, when the fact that the plaintiff actually remained with adequate resources to pay for other family needs as indicated above, was brought to the fore, the defendant could not refute that. When quizzed further on her business of tailoring it became evident she only qualified as a tailor after the property had been bought. She further could not with any amount of certainty show that whatever she was engaged in, albeit disputed by the plaintiff brought any meaningful income.

Equally in her plea she indicated that one of her sources of income was selling vegetables she grew at the Stand as the Stand was spacious. When the reality was placed on the table that the stand was not spacious as evident from the plan submitted to court, the defendant altered her position to now say yes inside the Stand there may not have been space but she meant that she also utilized space out side the Stand. Even then she could not show that such a venture if ever it existed brought in anything of substance.

After a careful analysis of the evidence by the parties I am of the view that the defendant's financial contribution, if any, was minimal.

The issue does not however end there.

It is a fact that the two stayed as husband and wife for about 25 years; initially in terms of customary law and thereafter in terms of the Marriages Act. There is no dispute that as persons sharing same board and life they provided each other with such necessities of married life as to make it possible for the plaintiff to acquire whatever he acquired as husband to the defendant. Our law recognizes the indirect contribution made by non-working spouse and other factors in a marriage to an extent were such spouses now deserve a reasonable share in the property acquired during the subsistence of the marriage.

Section 7 (4) of the Matrimonial Causes Act, [*Cap 5*:*13*], herein after referred to as the Act, provides that:-

> "In making an order in terms of subs (1) an appropriate court shall have regard to all the circumstances of the case, including the following-
>
> (a) the income-earning capacity, assets 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 or 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 contributions 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 any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
> (g) The duration of the marriage; and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the parties."

The weight to attach to each factor varies from case to case. All the circumstances of each case must be carefully considered in deciding on the weight to attach to each relevant factor.

In *Sithole* v *Sithole & Anor* HB14/94 court held that even if a wife made only indirect contributions, she cannot leave empty-handed merely because she did not

contribute financially towards the acquisition and development of the matrimonial home. The wife in that case was awarded a 40% share.

In *Muteke* v *Muteke* (S) 88/94 the wife made no direct financial contribution except as a housewife but court awarded her a substantial share. The court in that case considered primarily her needs and expectations rather than her contributions.

In *Usayi* v *Usayi* 2003(1) ZLR 684 (S) the Supreme Court in upholding a High Court decision to award a 50% share to a non-working housewife of many years held that:-

> "It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as a wife, mother, counselor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: 'throughout the marriage she was a housewife. She never worked.' It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the 'direct and 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."

In the *Usayi* case the parties had been married for about 35 years.

In *casu* the parties were in the marriage for about 25 years. That is certainly not a short period. During that entire period the defendant made indirect contribution in all manner. It is unfortunate that after such a long period the parties have to part ways with accusations of infidelity being made against the defendant as the cause for the breakdown of the marriage.

I am of the view that taking into account all the circumstances of this case an award of a 35% share to the defendant would be just and equitable.

Quantum of maintenance for Defendant

Section 7(1) (b) of the Act provides that:-

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to - the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or child of the marriage."

The defendant claimed a sum of USD300-00 per month till she remarries or dies which ever is the earlier. She however did not indicate how she arrived at that figure. In her evidence in chief and under cross examination she maintained the same figure albeit without explaining how she arrived at the figure. All she said was it was because the plaintiff can afford it. It was only in answer to my specific question that she indicated that in arriving at USD 300-00 she looked at rentals which she will have to pay, groceries, her health needs, electricity and water. This was without quantification at all. It was only in the closing submissions that the defendant's counsel provided specific sums for each of the items the defendant said she needed the money for. Unfortunately closing submissions are not the proper forum to tender new evidence.

It is clear to me that the defendant had just plucked out a sum of USD300-00 because she believed plaintiff can afford it and not because it was necessary for her upkeep.

The plaintiff fell into the same pitfall in that in objecting to the sum of USD300-00. He disclosed his income as USD 1030-00 per month plus other benefits like a company motor vehicle and school fees assistance. He however did not go on to show specific expenditure patterns for him to confirm his inability to pay the sum claimed. Thus apart from a mortgage deduction of about USD405 per month he did not provide any other expenditure figures. It was only in the closing submissions that the plaintiff's counsel provided further expenditure figures. Unfortunately such evidence could not be accepted at such a stage.

It is imperative to point out that in claims for maintenance it is always important for the claimant to lay bear her or his expected expenditure and the basis thereof. If one's claim is based on the standard of living they used to enjoy as a couple that must be made clear by showing that what she/he intends to use the money for and quantity thereof is what they used to enjoy as a couple; it had thus become a necessity which she/he should

not be deprived now as the other party can still afford it. Where the claim is based on new expenditure one has to show that such expenditure in its nature and quantum is necessary and the other party can afford to pay for it.

Equally the one defending a claim for maintenance must lay bear his expenditure pattern in nature and quantum. It is for him to show that due to such extent of expenditure he cannot afford the sum being claimed.

It is only when court is seized with such information that it will be better placed to assess a fair and reasonable quantum of maintenance to grant the claimant.

Another aspect that was not well attended to is the justification for post divorce maintenance. I did not hear the defendant to address her mind in this regard at all. She seemed to be of the view that she was entitled to be maintained by plaintiff till she remarries or dies purely because she had been married to him. Marriage, to her was the meal ticket for the rest of her life.

Section 8 of the Act provides for the duration of payment of maintenance as between the spouses in subs 1(a) as follows-

> "An order for the periodic payment of maintenance in respect of a spouse shall cease-
>
> (a) when the spouse dies or remarries;.."

This section has not been taken as granting a spouse post divorce maintenance without requiring her/him to justify its need and duration for such maintenance. The modern trend in our courts has been to require a spouse to justify the need for maintenance and the duration for such maintenance. Whilst remarriage and death will bring any order of maintenance to an end a spouse is required to show that in the first place he/she requires to be maintained, for how long and at what sum.

The need to justify post divorce maintenance was ably put forth in the case of *Kangai* v *Kangai* HH 51-07 wherein at p 5 of the cyclostyled judgment GOWORA J stated that:

> "A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position

> to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short period to allow her time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance."

In stating the above the honorable judge referred to the case of *Chiomba* v *Chiomba* 1992 (2) ZLR197 wherein the Supreme Court endorsed the statement made in Hahlo South African Law of Husband and Wife 5 ed at pp 363-4 that:

> "It remains to be said that with the emergence of the 'working wife' and 'woman's liberation', the attitude of the courts towards the award of maintenance has been changing the world over. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The idea that marriage ought to provide the wife with a 'bread ticket for life' is on its way out. Not long ago, an 'innocent' wife who obtained a divorce on the ground of her husband's misconduct could count on being awarded maintenance until death or remarriage almost as a matter of course. Today, the courts are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work again after the divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. Middle aged women, who have for years devoted themselves fulltime to the management of the household and care of the children of the marriage, are awarded 'rehabilitative maintenance' for a period sufficient to enable them to be trained or retrained for a job or profession. 'Permanent maintenance' is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry. As MR. JUSTICE MOOREHOUSE remarked in the Canadian case of Knoll [(1969) 2 QR 580 at 584; 6 DLR (3d) 201 at 205]:
>
> > 'In this day and age the doctrine of assumed dependence of a wife is in many instances quite out of keeping with the times…The marriage certificate is not a guarantee of maintenance.'
>
> At present, these trends may be more pronounced in Europe and America than in South Africa, but with the replacement of the 'guilt' with the 'marriage breakdown' principle they are likely to become more marked in South Africa, too."

The above confirms the need to justify post divorce maintenance. It can longer be granted willy-nilly.

In *casu* the defendant is not in the category of a young woman and neither was it shown that she is elderly. Evidence adduced shows that she is about 44 years old, thus middle aged. Whilst she may not have been employed during the marriage, it was never contended that with the qualifications she obtained during the subsistence of the marriage she cannot get employed. All that was contended was that self employment as a tailor is no longer profitable due to cheap imports. That in my view is not good enough a reason to burden the plaintiff with a maintenance order for the rest of the defendant's life or till she remarries. The reality of any divorce is that the divorcing parties must adjust to their new status. This implies that the defendant must put effort at setting herself up. She can not sit down expecting her daily bread from the divorce.

As a middle aged woman who had not been engaged in employment, she needs a period within which to find her feet. Unfortunately no evidence or suggestion was made as to how long she would need to set herself up.

The plaintiff suggested maintenance for a period of about eight months only.
It is my view that taking into account the period of the marriage and the fact that the defendant was virtually a fulltime house wife she may need a period longer than eight months to set-up herself. A period of a year and a half would in my view be adequate in the circumstances.

Regarding the quantum of maintenance I have already alluded to the inadequacies in the evidence on both sides justifying the figures each tendered. It is however clear to me that the defendant needs basic provisions which a sum of USD50-00 offered by the plaintiff may not meet. On the other hand USD 300-00 per month even for a year and a half appears too high taking into account the basic expenditure items the plaintiff alluded to and the loan repayments. After a careful analysis of the scant evidence adduced I am of the view that a sum of USD100-00 per month would meet the justice of the case.

As indicated earlier, a lot of the issues were agreed at the pre-trial conference and will be incorporated in the final order that I issue. Accordingly I make the following order:-

It is hereby ordered that:

1. A decree of divorce be and is hereby granted.

2. Custody of the minor child namely Tanaka Matongo born on 17 August 1994 be and is hereby awarded to the defendant.
3. The plaintiff is hereby granted reasonable rights of access to the minor child upon notice to the defendant and at such times and during such periods as is necessary for the plaintiff to enjoy good relations with the minor child.
4. The plaintiff pays maintenance in respect of the minor child in the sum of USD 50-00 per month until the minor child attains the age of 18 years or becomes self supporting which ever is earlier. In addition the plaintiff shall pay all school fees, buy school uniforms and pay for other related expenses in respect of the minor child until the child attains the age of 18 years or becomes self supporting which ever is earlier.
5. All the movable property of the family be and is hereby awarded to the defendant as her sole and exclusive property except a Carpet, Radio (with amplifier, turner, cassette player, 2 speakers) DSTV Decoder and DVD which shall be retained by plaintiff as his sole and exclusive property.
6. The plaintiff shall pay maintenance for the defendant in the sum of USD100-00 (one hundred United States dollars) per month for a period of 18 months reckoned with effect from 1February 2012.
7. The plaintiff is hereby awarded a 65% share of the value of the matrimonial immovable property being Stand 7865 Budiriro Township, Gleneagles Farm, also known as Stand No. 7865 Budiriro 5B, Harare with the defendant being awarded a 35% share in the said immovable property.
8. The parties shall agree on the value of the immovable property within 14 days of this order failing which they shall appoint a mutually agreed evaluator to evaluate the property within 30 days of the date of this order.

   Should the parties fail to agree on an evaluator within the stated period subject to any extension the parties may both agree to, the Registrar of the High Court shall and is hereby directed to appoint an independent evaluator from his list of evaluators to evaluate the property.

   The plaintiff shall meet the costs of evaluation.

9. The plaintiff is hereby granted the option to buy off the defendant within six (6) months of the date of receipt of the evaluation report.

   Should the plaintiff fail to pay off the defendant within the stipulated time, or such other extended time as parties may agree to, the property shall be sold to best advantage and the net proceeds shared in the ratio 65:35.

   In the case of a sale the parties shall appoint a mutually agreed selling estate agent failing which the registrar of the high court shall appoint one from his panel of estate agents.

10. Each party shall bear their own costs of suit.

Maganga & Company, plaintiff's legal practitioners
Pundu & Company, defendant's legal practitioners