

IGNATIUS GANYO
versus
MAULIDIA CHAONZA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 5 September, 12 September 2011 and 26 January 2012

Divorce Action

S D Maruza, for plaintiff
The defendant in person

CHITAKUNYE J: The plaintiff and defendant were married in terms of the Marriages Act [*Cap 5:11*] on 14 January 2005 at HARARE. Their marriage was blessed with one child born on 25 November 2008.

On 28 June 2010 the plaintiff sued for a decree of divorce on the ground that the marriage has irretrievably broken down to such an extent that restoration to a normal marriage relationship is impossible. He outlined the causes of the breakdown as including the following:-

- a. That the defendant has denied him love respect, affection and companionship ordinarily expected of a married couple;
- b. The defendant has demonstrated a quarrelsome and bellicose attitude towards the plaintiff whom she has physically and verbally abused. The plaintiff had to apply for a protection order in terms of the Domestic Violence Act [*Cap 5:16*] on 12 February 2010;
- c. Despite the protection order the defendant has continued to harass the plaintiff making life unbearable for him;
- d. The defendant is in the habit of forcibly taking money from the plaintiff;
- e. The defendant harasses and insults the plaintiff in front of school teachers and pupils at the school where he is the Headmaster;

- f. The parties have throughout their marriage exhibited all signs of incompatibility; and
- g. For a period of about 13 months the defendant lived in an adulteress relationship with a truck driver in South Africa. Here in Zimbabwe the defendant has a lover whom she has refused to cut ties with.

As a result of this the plaintiff alleged that the marriage has irretrievably broken down. He therefore prayed for a decree of divorce and that the defendant be awarded custody of the minor child and all the movable property they acquired during their marriage. He wished to retain the property he acquired before the marriage.

The defendant, in her plea, did not concede that the marriage had irretrievably broken down. She made a bald denial of the improper conduct alleged by the plaintiff against her. She instead contended that it is in fact the plaintiff who committed adultery. She revealed in her plea that the parties also acquired an immovable property in Domboshawa which is apparently registered in the defendant's name. She contended that that property/stand should be awarded to their child.

The defendant made a counter claim in which she sought that the immovable property in Domboshawa be awarded to their child.

At a pre-trial conference held on 11 February 2011 the parties reached settlement on a number of issues. They agreed that:-

1. Custody of the minor child be awarded to the defendant.
2. The maintenance order granted in case number M306/2010 in the magistrates court remain in operation until either party approaches the maintenance court for variation.
3. The minor child remains on the plaintiff's medical aid scheme.
4. The undeveloped residential stand in Domboshawa be registered in the name of their minor child.

The issues referred to trial include the following:-

1. Whether the marriage has irretrievably broken down or not.
2. What constitutes movable matrimonial property and how it is to be shared?

3. Whether the parties own a general dealer's shop and, if so, whether it is subject to distribution.

On 12 September 2011 when the parties appeared before me for trial they had apparently resolved some of the issues referred to trial. The only aspect on movable property pertained to the General Dealer's shop. The plaintiff had resolved that the defendant should get all the movable property of the marriage. In this regard the plaintiff amended his prayer in paragraph (f) to now read-

“An order that all property acquired during the subsistence of the marriage be awarded to the defendant.”

The aspect of the general dealer's shop was based on the defendant's perception that the shop belonged to the plaintiff and that it was still operating. When the plaintiff testified that he had been leasing the shop and he had since ceased the operations I did not hear the defendant to deny that. All she said was she expected to get something from the operations without specifying what she now needed. It is clear to me that the general dealer shop is in effect no longer a sustainable issue.

The issue that remained to be resolved is whether the marriage had irretrievably broken down. The plaintiff in his testimony maintained that the marriage had irretrievably broken down and he had no intention of restoring it to a normal marriage relationship. He no longer had any love or affection for the defendant. He maintained the grounds for the breakdown as contained in his declaration. It was his evidence that when the defendant went to South Africa he called her to come back but the defendant refused. The defendant remained in South Africa for 13 months serve for 2 weeks when she came after he had told her that their child was ill after which she went back against his wish. When the defendant came back from South Africa they did not stay together and are still not staying together as husband and wife. The other ground he highlighted was that during their stay together they became so incompatible that quarrels were numerous and the defendant would harass him to an extent whereby he sought and obtained a protection order against her in terms of the Domestic Violence Act, [Cap 5:16].

Faced with the above the defendant had not much to show that the marriage had in fact not irretrievably broken down. Thus whilst saying the marriage had not

irretrievably broken down she did not deny that the two were no longer staying together as husband and wife. She could not show that since the issuance of the summons they had reconciled or even made efforts to reconcile. She instead contended that the plaintiff is seeking a divorce order so that he can marry another woman.

Section 5(1) of the Matrimonial Causes Act, [*Cap 5:13*], states that:

“An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.”

There are two characteristics of irretrievable breakdown of the marriage namely:

- (a) the marriage relationship is not normal any more; and
- (b) there is no reasonable prospect of the restoration of a normal marriage relationship.

In considering the characteristics an objective test is used.

In *Kumirai v Kumirai* 2006 (1) ZLR 13(H) MAKARAU J (as she then was) said at p 136 B-D that:

“In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably, where the plaintiff insists 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.”

Equally in *Murada v Murada* 2008 (2) ZLR 326 (H) at p 329E-F NDOU J had this to say:

“... it is hardly possible for a court to find that there is a reasonable prospect of reconciliation between parties when one of them is determined to bring the marriage to an end.”

Thus were the plaintiff insists the marriage is at an end and he or she has no intention of reconciling, it is clear the marriage cannot be served.

In *Kumirai v Kumirai* supra at p 136 D-E MAKARAU J aptly stated that:
“To satisfy 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 *casu* neither the plaintiff nor the defendant gave evidence to the effect that they have reconciled or that they are now living together as husband and wife. Evidence led showed that they are not living together and the plaintiff has no intention of reconciling.

The plaintiff persisted with his argument that the marriage has irretrievably broken down. He maintained the grounds for the breakdown as in his declaration.

The defendant, apart from failing to show that the parties have reconciled, was unable to show that the specific allegations laid against her by the plaintiff were in fact false. All she did was to tender a bald denial of the allegations. That in my view was highly inadequate to show that there was reasonable prospect of restoring the marriage to a normal marriage relationship.

Accordingly, I find that the marriage between the plaintiff and defendant has indeed irretrievably broken down to such an extent that there is no reasonable prospect of a restoration to a normal marriage relationship.

As the other aspects had virtually been either agreed upon or not persisted with, I, accordingly, make the order that:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child Nyasha Ganyo, born on 25 November 2008, 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. The defendant shall not unreasonably withhold her consent to the plaintiff enjoying rights of access whenever such a request is made as long as the request is made at reasonable intervals without prejudicing the defendant's rights as the custodian parent.
4. Issues of maintenance shall be governed in terms of the maintenance order granted in case number M306/2010 in the magistrate's court on 10 March 2010,

- subject to any variation that may be made by the maintenance court at the instance of the parties.
5. The plaintiff shall retain the minor child on his medical aid scheme until the child attains the age of 18 years or becomes self supporting whichever is earlier.
 6. The plaintiff shall meet all the minor child's educational needs and shall purchase other clothes for the minor child twice per year.
 7. The defendant is hereby awarded all the movable property acquired during the subsistence of the marriage.
 8. The undeveloped immovable property the parties acquired in Domboshawa is hereby awarded to the parties' minor child.
 9. As the property is registered in the defendant's name the defendant shall within 90 days of the date of this order sign all necessary documents and take all steps required to have the property registered in the minor child's name. The plaintiff shall pay the costs involved in the registration of the property into the minor child's name.
 10. Each party shall bear their own costs of suit.

Chingore & Associates, plaintiff's legal practitioners