

DOROTHY SIBANDA (NEE RUGARA)

Versus

RICKY ADSON SIBANDA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 March 2024 & 25 April 2024

Civil trial

J. Chidawanyika for the plaintiff
Ms. V. Kwande for the defendant

DUBE-BANDA J:

Introduction

[1] This is a divorce matter. The parties were married to each other on 4 September 1992 in terms of the Marriage Act [Chapter 37], now Marriages Act [Chapter 5:15]. The marriage still subsists. There are no minor children of the marriage. The plaintiff sued out a summons for a decree of divorce and ancillary relief. When the matter was allocated a trial date, the plaintiff filed a notice of withdrawal and tendered costs.

[2] The defendant had filed a counterclaim together with his plea. A reading of r 38(6) of the High Court Rules, 2021 shows that counter-claim is a distinct action; it is separate and has a life of its own and it survives even where the substantive action is withdrawn. It is on this premise that notwithstanding the withdrawal of the claim in convention the court proceeded to hear this claim in reconvention.

[3] For ease of reference, I will refer to the parties by virtue of their identities or their citations in these proceedings before the withdrawal of the claim in convention i.e., “Mrs Sibanda” or “plaintiff” and “Mr Sibanda” or “defendant.”

[4] In his claim in reconvention the defendant sought a decree of divorce on the grounds that the marriage relationship between the parties has irretrievably broken down to such an extent that there were no reasonable prospects of a restoration of a marriage relationship between the parties. He further averred that it would be just and equitable that plaintiff be awarded Stand

number 3626 Ascot Infill Gweru (3626 Ascot) as her sole and exclusive property and he be awarded stand number 5014 Mkoba North Gweru (5014 Mkoba North), as his sole and exclusive property.

[5] In her opening address Ms *Kwande* counsel for the defendant informed the court that it had been established that Stand number 3626 Ascot no longer exists. In the circumstances the defendant conceded that in the absence of the Ascot property, it will be just and equitable that Stand 5014 Mkoba North be sold to best advantage and the net proceeds be shared equally between the parties.

[6] Mr *Chidawanyika* counsel for the plaintiff in his opening address informed the court that the marriage relationship between the parties has not irretrievably broken down and that there was a reasonable prospect of a restoration of a normal relationship between the parties. Counsel submitted that in the event the court finds that indeed the marriage has irretrievably broken down, the plaintiff would be agreeable that the Stand 5014 Mkoba North be shared equally between the parties. As it will appear later in this judgement, in her evidence the plaintiff disputed that it will be just and equitable that this property be shared equally between the parties.

[7] This matter turns on two issues for trial, these are:

- i. Whether the marriage relationship between the parties has irretrievably broken down to such an extent that there are no reasonable prospects of a restoration of a normal marriage relationship between the parties.
- ii. Whether it would be just and equitable that the Stand 5014 Mkoba North be sold to best advantage and the net proceeds be shared equally between the parties.

The case for the defendant

[8] In his claim in reconvention Mr Sibanda averred that the marriage relationship has irretrievably broken down in that the parties have not lived together as husband and wife for a period of six years. In his evidence he testified that the parties separated in 2007 and have not lived together since then. He said his life with the plaintiff has not been smooth as he expected it to be in that he endured tribulations and hardships while living with her. He testified that when he got married, he gave the plaintiff a ring which she lost and she was not truthful about

the circumstances surrounding the loss of her ring. He said he has lost love for her. He produced a copy of the marriage certificate which is exhibit 1.

[9] Mr Sibanda testified that during the subsistence of the marriage he acquired Stand 5014 Mkoba North, Gweru. This property was acquired through mortgage finance from CABS, and the repayments were deducted from his salary. His evidence was that the plaintiff did not contribute to the acquisition of this property. The property is registered in his name and he produced a copy of the Deed of Transfer which is exhibit 2. He testified that since the property was acquired during the subsistence of the marriage it will be just and equitable that it be shared equally between the parties.

[10] Under cross examination the defendant testified that he lost love for Mrs Sibanda when she lost the ring. Asked whether there are prospects of a reconciliation, he said “over his dead body.” He testified that when Stand 5014 Mkoba North was acquired it was a four roomed house. The parties together extended the house and Mrs Sibanda single handedly built a cottage in the property. Mr Sibanda was a very good witness, and I accept his evidence without reservation.

[11] After his evidence the defendant closed his case.

The case for the plaintiff

[12] In her plea in reconvention the plaintiff averred that she be awarded Stand 5014 Mkoba North as her sole and exclusive property because she developed the property. In this court she testified that she did not file an action seeking a decree of divorce. She merely filed a complaint against the defendant because he wanted to sell Stand 5014 Mkoba North. Her evidence was that she will not divorce the defendant “no matter what happens.” She testified that the defendant was not telling the court truth when he said he has lost love and affection for her. Her evidence was that the parties did not separate in 2007, the defendant merely relocated to South Africa to look for employment. She would visit him every month in South Africa. He relocated back from South Africa in 2016 and did not come home. The ring the defendant was complaining about was broken when the two were repairing his car.

[13] The plaintiff testified further that she used her pension earnings to extend Stand 5014 Mkoba North from a four-rooms to a ten-roomed house. She also paid for a durawall erected

around the property and built a cottage at the property. She paid for the plastering of the house both inside and outside and paid for the tiling of the floor. She testified that she is staying with her grandchildren at the house. Her evidence was that she was not moving from the house. Under cross examination she testified that defendant was living with another woman. On being asked by the court where she was employed, she said she was a police officer.

The application of the law to the facts

Whether the marriage relationship between the parties has irretrievably broken down to such an extent that there are no reasonable prospects of a restoration of a normal marriage relationship between the parties.

[14] Section 5(1) of the Matrimonial Causes Act [Chapter 5:13] says:

(1) 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.

[15] It is clear that s 5(1) of the Act lays down two requirements: the marriage relationship must no longer be normal; and there must be no reasonable prospect of the restoration of a normal marriage relationship between the spouses. In *Schwartz v Schwartz* 1984(4) SA467 (A) 475 CORBETT JA stated the court's approach clearly:

“In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, i.e., the history of the relationship up to the date of the trial, and also to the present attitude of the parties to the marriage relationship as revealed by the evidence at the trial.”

[16] It is trite that a court of law has no discretion if the presence of a ground for divorce has been objectively proved, it has to grant the divorce. See *Schwartz v Schwartz* 1984(4) SA 467 (A) at 473; *Levy v Levy* 1991(3) SA 614 (A); *Kumirai v Kumirai* (HC 11135 of 2004) [2006] ZWHHC 17 (8 February 2006); *Msimanga v Msimanga (Nee Ncube)* (HB 7 of 2007) [2007] ZWBHC 7 (24 January 2007).

[17] Mr. *Chidawanyika* submitted that the court must give the parties time to reconcile and save their marriage. This submission was anchored on s 5(3) of the Matrimonial Causes Act, which say:

(3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.

[18] What is clear is that the pre-requisite to the exercise of the power contained in s 5 (3) of the Act is that it must appear to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection. If there is this reasonable possibility, it cannot be said that the marriage has irretrievably broken down. Section 5 (3) can only be engaged if there is evidence that the marriage has not irretrievably broken down, otherwise if it has there is no discretion, a decree of divorce must follow. See *Levy v Levy* 1991(3) SA 614 (A).

[19] First, the inquiry is to determine whether the marriage relationship between the parties is no longer normal. It is the plaintiff who first sued out a summons for divorce contending that there are irreconcilable differences between the parties which rendered the continuance of the marriage relationship impossible; that the parties have lost love and affection for each other; and that the parties have not stayed together as husband and wife since 2007. It is accepted that she withdrew her matter, however her evidence in court that she did not sue out a summons seeking a decree of divorce cannot be the truth. She did. She is a former police officer, and therefore is not an unsophisticated or illiterate person. On the contrary, she is an educated person who had during her evidence spoke in English language and appeared articulate and proficient. She was merely being untruthful when she denied that she sued out a summons and alleging that she only filed a complaint that the defendant wanted to sell the house.

[20] The plaintiff's protestations now that there is a reasonable possibility of a reconciliation cannot be taken seriously. In her summons she was clear that the parties have not stayed together as husband and wife from 2007. Now she disputes that they have not lived together as husband and wife since 2007. She cannot be allowed to approbate and reprobate. This court accepts the defendant's version that indeed the parties have not lived together since 2007. In terms of s 5 (2)(a) of the Act the fact that the parties have not lived together as husband and wife for a continuous period of at least twelve months immediately before the date of

commencement of the divorce action is an indicator that the marriage has irretrievably broken down.

[21] Further the plaintiff testified that the defendant is staying with another woman. This is an indicator that the marriage is for all intents and purposes dead. The defendant testified that he has lost all love and affection for the plaintiff. The marriage has broken down if one of the parties no longer wishes to continue with the marriage. It is of no consequence that the plaintiff might still have love and affection for the defendant, or wishes to save the marriage. In addition to the expressed firm desire to terminate the marriage relationship the defendant has moved out of the matrimonial home and has remained absent for a period in excess of seventeen years. This is a relevant factor in terms of section 5(2)(a) of the Matrimonial Causes Act [Chapter 5:13]. See *Msimanga v Msimanga (Nee Ncube)* (HB 7 of 2007) [2007] ZWBHC 7 (24 January 2007). The evidence shows that the marriage relationship between the parties is no longer normal.

[22] Mr. *Chidawanyika* submitted that the court must give the parties time to reconcile and save their marriage. I reject this submission as it is not borne out by the evidence. I am satisfied that Mr Sibanda has discharged the *onus* of showing 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 is need to grant a decree of divorce and thus normalise the lives of parties and rescue them from a dead marriage. On the basis of the forgoing, a decree of divorce shall issue.

Whether it would be just and equitable that the Stand 5014 Mkoba North be sold to best advantage and the net proceeds be shared equally between the parties.

[23] The point of departure in discussing the law regulating the division of the assets of spouses at divorce is reference to s 7 (1) of the Matrimonial Causes Act which empowers an appropriate court to make an order with regard to “the division, apportionment or distribution of the assets of the spouses.” See *Sayi (Nee Magara) v Sayi* SC 22/24. What the court has regards to in that exercise is set out in s 7 (4), which says:

“(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 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 or 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 will lose as a result of the dissolution of the marriage;
 - (g) the duration of the marriage;
- and in so doing the court shall endeavor 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 spouses.”

[24] The law provides a wide range of factors that go into the division of the assets thereby giving the court an extremely wide, if not unfettered, discretion to divide the assets. In doing so, the overarching consideration is to place the parties in the position they would have occupied if the marriage had continued, as far as possible in the circumstances. See *Sayi (Nee Magara) v Sayi* SC 22/24; *Mhora v Mhora* SC 89/20; *Lock v Lock* SC 51/20.

[25] The only asset of the spouses is Stand 5014 Mkoba North, Gweru. This is an asset of the parties as envisaged in s 7 of the Matrimonial Causes Act. The only question for determination is what would constitute a just and equitable division of this property between the spouses. It is common cause that the defendant paid for the acquisition of this property through mortgage finance. The plaintiff used her pension funds to develop the property from a four-roomed house to a ten roomed house. She plastered it inside and outside and tiled the floors. She built a cottage at the property. All in all the evidence shows both parties made significant contributions to the property.

[26] Mr. Sibanda is 78 years old and Mrs. Sibanda is 70 years old. These are now old people. They have both retired from employment. There are no minor children of the marriage. Ms. *Kwande* submitted that the property is approximately valued at USD\$38 000.00, and if sold to best advantage each party may get a share sufficient to buy a four roomed house in Gweru.

[27] I acknowledged the substantial equality of the spouses in all respects. Both parties have been employed in one form or the other throughout their lives earning an income. They both contributed directly and indirectly to the acquisition and development of the property. In doing so, they intended to live in that property to old age. On the evidence before court, none of them has means outside this property to acquire a house of his or her own. Fairness and equity require that each party be enabled to acquire a house to live in their old age. Factoring into the equation the provisions of s 7 of the Matrimonial Causes Act and the jurisprudence it is important to place the parties in the position they would have been in had a normal marriage relationship continued between them, such can be achieved by having the property be sold and the proceeds shared equally. See *Takafuma v Takafuma* 1994 (2) 103 (S); *Ncube v Ncube* 1993 (1) ZLR 39 (S). From the proceeds of the sale each party may be able to acquire a house to live in old age. It is for these reasons that the I find that it would be just and equitable that the property be sold to best advantage and the proceeds shared equally between the parties.

Costs

[28] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. In this case there are good grounds for departing from the general rule. This is a matrimonial case involving an elderly couple, who are both on retirement. The justice of the case requires that there be no order of costs.

Disposition

In the result, I make the following order:

- i. A decree of divorce be and is hereby granted.
- ii. Each party is awarded a fifty percent share of the value of Stand 5014 Mkoba North, Gweru.
- iii. The property referred to in paragraph ii above shall be valued by an Estate Agent appointed by the Registrar of the High Court within fourteen days of this order.
- iv. The Estate Agent shall submit a valuation report of the property within a period of one month from the date of appointment.
- v. The costs of valuation shall be shared equally between the parties.

- vi. The property shall be sold to best value by an Estate Agent appointed by the Registrar of the High Court and the net proceeds shared equally between the parties after deducting the costs of sale.
- vii. There is no order as to costs.

Chitere, Chidawanyika & Partners, plaintiff's legal practitioners
Kwande Legal practitioners, defendant's legal practitioners