

MORGEN DEKETE
versus
WINNIE DEKETE (nee FARAO)

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 6, 7 June 2023 & 27 March 2024

Divorce Action

Z T Zvobgo, for the plaintiff
H Mutasa, for the defendant

WAMAMBO J: On 30 September 2006 the parties entered into a marriage in terms of the Marriage Act [*Chapter 5:11*]. The couple were blessed with three children namely, Shamah Alisandra born on 24 June 2007, Jayden born on 14 September 2011 and Shalom born on 31 October 2016. Just over 12 years later, on 12 December 2018 plaintiff issued summons for divorce.

The joint pre trial conference minute reflects that the parties established the following as issues agreed between the parties.

- “1. That the marriage relationship between the parties has irretrievably broken down and that a decree of divorce should be granted.
2. That custody of the minor children should be granted to the defendant.
3. That all of the party’s movable assess be awarded to the defendant.
4. That plaintiff agrees to purchase school uniforms and all-other school requirements for the minor children.
5. Plaintiff agrees to pay half of each of the children’s school fees provided that the school fees are pegged at the amounts obtaining at reputable government schools.”

Three issues were referred for trial as follows:

- “1. How often should the plaintiff have access to the minor children.
2. Whether the plaintiff’s proposed payment of US\$50 per child per month is adequate in light of the plaintiff’s means of income.

3. In what proportion should the immovable property be shared between the parties.”

Plaintiff and defendant testified and called no witness. A number of exhibits were produced by consent as follows:

Exhibit A – Marriage certificate of the parties.

Exhibit B – Shama Alisandra’s birth certificate.

Exhibit C – Jayden’s birth certificate.

Exhibit D – Shalom’s birth certificate.

Exhibit E – Registration book for a Toyota Runx motor vehicle with registration number AET0681 (registered in defendant’s name.

Exhibit F – Deed of transfer for stand 3091 Marborough Township measuring 532m² registered in both parties’ names.

Exhibit G - Agreement of sale for stand 2310 Glaudina.

Exhibit H - Invoices reflecting purchase of windows, copper tubes and various other accessories.

Exhibit J – Valuation report of 3091 Marlborough Township of stand 2804 Marlborough Township

Exhibit K- Agreement of sale of stand 2310 Glaudina Park reflecting the parties as the joint sellers.

Exhibit L- Agreement of sale between the parties as joint purchases of 2310 Glaudina Park.

Exhibit M – Defendant’s bank statement.

Plaintiff’s evidence can be summarized as follows- He seeks a divorce because of the constant bickering between the parties. The parties have not been intimate for five years. When plaintiff was asked if the marriage has irretrievably broken down his answer was “absolutely.”

On access plaintiff testified that he is close to the children and proposed having access to the children for two weeks during the school holiday and then every alternate weekend during the

school term or any alternate public holidays. He testified that only Shama (the first born) is in boarding school while the other two children are day scholars. Plaintiff painted a picture reflecting his closeness to the children and referred to himself as a responsible and loving father. He was emphatic that he can not be a threat to his own children.

On maintenance plaintiff proposed to expend US\$50 per month for each child. He testified that he does not have a stable income as he works part time procuring a wide spectrum of raw materials for clients. He was however, quick to mention that if he gets a project with substantial returns the quantum of maintenance can always be revisited.

He proposed to pay 50% of school fees at a good government school, and to pay for 50% of school uniforms as well as to buy the children clothes after every six months. It turned out from his evidence that Shama attends Sandton Academy a private school in Gutu where fees are US\$1600 per term. the fees for the other two children are US\$450 per month per child. He confirmed that defendant pays the school fees.

On the matrimonial home he proposed that as joint owners the property can be sold and the parties share the proceeds in equal shares. He conceded that defendant earns more than him as she works for a non-governmental organization. He testified that defendant was at work most of the time while he supervised the development of the stand. The stand for the matrimonial house cost US\$12600 which was paid from proceeds derived from the sale of the Glaudina Park property. The parties jointly bought the Glaudina Park property with him contributing US\$1000 while the rest came from defendant. Upon moving from Glaudina the couple resided at his brother's house. He sold his kombi and directed the proceeds from the sale to develop the new stand from slab to wall plate level. He was not agreeable to the suggestion that he should get 30% of the value of the matrimonial home which home is valued at US\$65000.

At the end of his examination in chief plaintiff pointed out that when he married defendant, she accomplished a societal advantage of being a married woman and he also gave her children.

In cross-examination it was put to him that in February to June 2023 he worked in South Africa. He responded that he only worked on a part time basis and earned a R4000 salary per month. It was also clarified that when he married defendant, he was employed at Unifreight as a call centre representative for eight months. From 2017 to 2019 he worked at Ancient. Gates Logistics as a coordinator. From 2007 to 2017 he was unemployed. He was however, running a

tuckshop in Gweru. From US\$5500 he drew from the tuckshop he bought a Toyota hiace kombi. He disagreed with the suggestion that defendant solely bought the said kombi.

He testified over the years the couple bought a number of vehicles. He placed his contribution on the Gladina property at US\$2500. A number of questions were put to plaintiff alleging misuse of matrimonial assets including money which allegations he rejected.

In re-examination plaintiff suggested that he be awarded 45% while defendant should be awarded 55% of the value of the matrimonial home.

Defendant's evidence was to the following effect:-

She is employed at CAMFED a non-governmental organization specializing in education and the empowerment of women. She attained a Masters degree in development studies. When she married plaintiff, she was already employed at CAMFED. She got employed at CAMFED in 2004 and is still employed by the same organization. Some months after the wedding plaintiff left his employment at Unifreight and was not employed up to February 2023. She has been solely responsible for the family bills and the general sustenance of the family including buying clothes for the family members. Plaintiff left his employment due to inflation rendering his salary insufficient to continue working. As a mother and wife she paid rentals and was as she touted it the person providing. She loved the plaintiff and felt obliged to carry the burden of providing for the family. In the course of her work, she travelled extensively including being seconded to Malawi. She even gave plaintiff the bank card so that he could attend to the family's financial needs and she maintained respect to him and covered up for him.

The Gladina stand was bought through money she received from her place of employment for research. She received R24000 (US\$3700) but remained with a surplus of US\$2800. She saved until the property was fully paid for while plaintiff did not make any financial contribution as he was unemployed. Plaintiff brought nothing from the Gweru tuckshop business. In fact according to her the plaintiff was only assisting at the Gweru tuckshop which was actually owned by his brother.

The couple sold the Gladina property and through her efforts plaintiff would supervise the building of the matrimonial home and buying building material from Mbare with money she gave him.

After selling the Glaudina property the Marborough property was then bought for US\$12400 Plaintiff made no financial contributions towards the acquisition of the Marborough property. She is also the one who bought the kombi so that the plaintiff would find something to do. The kombi business did not assist in the construction of the Marlborough house as it did not bring in much cash. She testified to plaintiff duping people of their money and generally being reckless with money and sometimes colluding with the builders to overcharge their services. The plaintiff's conduct led to arguments. She gave a detailed account of occasions when plaintiff borrowed money and paid it off from money she disbursed to him to buy building material. Plaintiff according to her also attempted a juice making business which was a failure.

Defendant testified that plaintiff has anger issues resulting in him assaulting her. This led to police reports and church members intervention. She also approached the police over plaintiff selling off family cars.

She proposed that the matrimonial home should be sold when the youngest child, Shalom turns eighteen.

On access defendant's position is that plaintiff should exercise access to the minor children on each alternate birthday, alternate Christmas and New year holidays and during other times agreed to between the parties.

Defendant is agreeable to plaintiff paying the US\$50 per child that he has proposed.

She proposed that the motor vehicle a Toyota Runx AET 0681 be awarded to her.

In cross-examination counsel for plaintiff asked questions, revolving around defendant's financial contributions to the acquisition of the properties and the source of the funding. He also questioned the issue of the withdrawals of cases reported against the plaintiff. It would appear to me that not much was done to dent the defendant's credibility.

In testimony I found plaintiff as a reluctant and untruthful witness. He was not forthcoming in a number of areas. For instance, it only emerged in cross-examination in June 2023 he was employed in South Africa. Plaintiff had not adverted to this important aspect in his evidence in chief or in any of the pleadings filed of record. While defendant's testimony was to a large extent supported by documentation plaintiff's case was left open on most of the issues.

I found defendant generally honest. Her claims to setting up plaintiff in a number of business enterprises have a ring of truth to them. I believe her when she testified to the effect that she covered up for her husband who had left work due to inflation.

Defendant proved a viable source of income through her job at CAMFED and gave a detailed account of her earnings and the trips which brought in substantial amounts of money.

I found plaintiff's situation rather unfortunate. He is a father who appears to dote on his children. It seems however that the economy and possibly personal ambition left the plaintiff behind. The wife with the better and consistent job earned far more than him. She effectively bore the burden of the family's financial needs virtually without plaintiff's assistance.

I now turn to the four issues referred for trial. The first issue relates to how often plaintiff should exercise access on his minor children. I note here that although she is still a minor the first born will in a few months turn eighteen. Jaden is about to turn thirteen and is soon to be a teenager. The last born is however, at a very vulnerable stage of growth.

The parties have agreed that custody of the children should be awarded to the defendant. I find the proposal in line with the particular circumstance of the parties. The minor children have consistently resided with the defendant up to the present.

It appears from a reading of the record that plaintiff requires more time to exercise his access rights. He proposes that he exercises his access rights on every alternate weekend during the school term, two consecutive weeks during the school holiday every alternative public holiday and any other times agreed upon by the parties.

Meanwhile defendant proposes that plaintiff should have access to the children in very limited circumstances. She proposes access on each alternate birthday anniversary for each child, on alternate Christmas and New year holidays and at such other times as the parties may agree.

I am mindful that the children have consistently resided with their mother. In evidence in chief plaintiff was asked about defendant being concerned about the safety of the children if access is awarded for plaintiff to access the children too often. His answer was to the effect that he is a responsible father and he is there to protect them and he can not be a threat to his own children.

While his answer appears respectable and reasonable a number of other factors have to be considered. I am of the view that it is not enough to be a good father. There should be more. In such instances I have to consider the best interests of the minor children. The children are used to

their interactions and mutual existence with the defendant. To disturb that existence with long periods where they will be with plaintiff doesn't appear to be in the best interests of the children. The plaintiff has not placed the court in his confidence by intimating under what conditions he will be residing with the children, who will look after their needs in terms of paying attention to their food intake, their entertainment and generally how he will cater for the children to be well rounded individuals. Where he will be residing with the children and with whom was not canvassed before me.

I also take note that plaintiff is now employed in South Africa. The question is how often will he exercise his access rights and at which home. I am of the considered view that as said before the first born Shama will soon turn eighteen and can decide when, how and if she wants to associate with the plaintiff Jayden, the teenage boy will need guidance to navigate the world in a consistent manner. As for Shalom at age eight she is in a vulnerable condition and requires constant supervision and attention. The question is can plaintiff be able to expend all these requirements. So far defendant appears to have acted in the best interests of the children including paying for their school fees alone. I find that the children at this stage require as minimal change in their living habits and habitat as possible.

Clearly, the parents if so advised or inclined so to do can always agree or apply for the amendment of the order on access depending on the shifting circumstances if necessary.

To that end I find that the access order as couched by defendant is in the best interests of the children at present.

The second issue referred for trial has been resolved with the defendant agreeing to the proposal as advanced by the plaintiff. I will thus issue an order for plaintiff to pay US\$50 per month or the equivalent at the prevailing bank rate for each child.

The third issue relates to the distribution of the immovable property acquired by the parties during the course of their marriage.

Section 7(4) of the Administration of Estates Act becomes directly relevant.

I find that the marriage has lasted from 2006 to the present which is a period in excess of seventeen years. The plaintiff testified that he earns in the vicinity of R4000 at his part time work in South Africa.

Defendant finds herself in a steady and well-paying job earning in the vicinity of US\$2400 per month. She however, has to expend fees on her own without plaintiff's assistance including US\$1600 per term for Shamah's schooling. The defendant has carried the sole burden of taking care of the family for the bulk of the duration of the marriage.

The financial burden of the defendant taking care of the needs of the children is current and is likely to continue to be shouldered by her alone. This considering that plaintiff is unlikely to make a sizeable contribution soon. I note here that plaintiff is only offering US\$50 as maintenance for the children.

At the time of their marriage in 2006 the plaintiff and defendant were 28 and 27 years old respectively. They are now about 18 years older which makes them about 44 and 45 years old, this year. Their difference in age appears to be a year or less. They are still of productive age. It was not brought to my attention that there is a party with a serious health or mental affliction. The two are still productive citizens.

A reading of the evidence leads me to the conclusion that defendant expended more than plaintiff in the acquisition of the properties. Defendant demonstrated capacity to do so as has been adverted to before. Where the evidence of the two differ I prefer that of defendant for the most part I am convinced plaintiff made little financial contribution in the acquisition of the Gludina home and the Marlborough home. I find it hard to believe that he expended no financial contributions whatsoever. I find that he contributed financially but his contribution was not substantial. He also made indirect contributions by buying building materials and supervising the builders. He also made negative contributions by selling off assets of the family.

The plaintiff appears to have cost his family a number of cars and substantial amounts of money. Plaintiff adverted to a tuckshop business in Gweru. He provided no documentation in support. He called no witness to support him. I find that the Gweru business was either not his and/or it did not change the couple's fortunes for the better.

That it is in the best interests of the children that they remain in a safe, comfortable and loving atmosphere can not be overemphasized. Although the financial contributions are but one of the factors to be considered in the distribution of matrimonial property, there are other factors enumerated in s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] that also deserve consideration.

I have also considered the fact that the parties are registered as joint owners of the matrimonial home.

Plaintiff also deserves a share of the matrimonial home having been a father figure and husband since 2006 when the marriage was solemnized. His financial contributions seem minimal especially compared to those by defendant.

Plaintiff also made indirect contribution by buying building materials for construction of the Glaudina and Marborough houses and supervising the builders while defendant was at work.

In *Shenje v Shenje* 2001(2) ZLR 160(H) at 163E – 164A GILLESPIE J in considering s 7(4) of the Matrimonial Causes Act said:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual circumstances are listed in the subsection. This list is not complete. It is not possible to give a complete list of all possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another and avoids the disadvantages to the extent they are not inevitable, of becoming divorced.”

“The factors listed in the subsection deserve fresh comment. One might from the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps it is time to recognize that the legislative intent, and the objectives of the courts is more weighted in favour of ensuring that the parties needs are met rather than that their contributions are recouped.”

I note the wide discretion imposed on this court when distributing assets of the parties. In the full circumstances of this case I find that the immovable property should be shared as follows 35% for the plaintiff and 65% for the defendant.

I do not agree that such distribution should occur when the last born who is only eight years old turns eighteen. That would prejudice the plaintiff who would have to wait for a whole thirteen years. I pay particular attention to the plaintiff because he is the one who is not residing at the matrimonial house.

The parties have agreed that all the moveable property be awarded to the defendant.

I am satisfied that a decree of divorce should be granted. The parties have demonstrated that their union has irretrievably broken down to such an extent that there is no reasonable prospect of the restoration of a normal relationship between them.

The parties have not resided together as husband and wife for an extended period exceeding. The relationship between the two has soured to a considerable degree.

I will thus proceed to render an order encompassing the whole spectrum of aspects inclusive of those issues agreed to between the parties as follows:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children Shamah Alisandra Dekete (born 24 June 2007) Jayden Dekete (born 14 September 2011) and Shalom Dekete (born 31 October 2016) be and is hereby awarded to the defendant with the plaintiff having reasonable rights of access on each alternate birthday anniversary for each of the minor children during each alternate Christmas and New Year holidays and during such other times as the parties may from time to time agree.
- 3a. Plaintiff shall pay maintenance of US\$50 per child per month or the equivalent at the prevailing bank rate until each child turns 18 or becomes self-sufficient whichever occurs earlier.
- 3b. The plaintiff shall contribute 50% towards all of the school uniforms and other school requirements for each of the children.
- 3c. The plaintiff shall purchase a new set of clothes for each of the children every 6 months.
- 3d. Plaintiff shall pay USD 60 or its equivalent at the prevailing bank rate per school term for each child towards school fees.
4. The plaintiff be and is hereby awarded a 35% share in the immovable property namely stand 3091 Marlborough Township of stand 2804 Marborough, Harare with the defendant being awarded a 65% share.
5. The defendant shall be granted the option to buy out plaintiff's share within 6 months of this order.
6. Should defendant fail to buy out the plaintiff within the stipulated period on (5) above or such longer period as the parties may agree the property shall be sold to best advantage by an estate agent mutually agreed to by the parties. If the parties fail to agree on an estate agent one shall be appointed by the Registrar of the High Court.
7. The net proceeds of the sale shall be paid to the parties as per their respective shares.

8. The parties shall pay all statutory and other costs associated with the sale in proportions equal to their shares.
9. All movable assets and household goods at the matrimonial home including a Toyota Runx registration number AET0681 be and are hereby awarded to the defendant.
10. Each party shall bear its own costs.

Zvobgo Attorney, plaintiff's legal practitioners
Gill Godlonton & Gerrans, defendant's legal practitioners