WENDY KATHRYN BOWES
versus
CLYDE MATTHEW BOWES

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 22 January 2024, 12 February 2024, 13 February2024, 26 November 2024 and 19 February 2025

Divorce Action

G *Mabwe,* for the plaintiff
Defendant in person

WAMAMBO J: On 23 November 2008, the parties got married in New Zealand and in terms of the marriage laws of that country. Subsequent upon their marriage, the parties migrated to South Africa and eventually to Zimbabwe, which country they both resolved and adopted as their permanent domicile, a fact which clothed this court with jurisdiction to deal with this matter as it did. Two children were born out of the marriage both of whom are still minors.

On 2 November 2021, the Plaintiff issued out a summons claiming as against the Defendant, an order for divorce and other ancillary reliefs. At the closure of pleadings, the parties were in agreement that their marriage had indeed irretrievably broken down to the extent that it could not be salvaged and therefore that this court may grant the order for divorce as prayed for. The following issues remained for and were referred to trial:

1. Whether or not the issues of maintenance and school fees are *res judicata* if not how much the Defendant should contribute.
2. Who should be awarded custody of the minor child.
3. What should be the order as to access.
4. What constitutes assets and liabilities of the parties and how should these be shared.

During the course of the trial 35 documents were produced as exhibits.

I now turn to deal with the issues for which the parties referred to trial as per the joint Pre-Trial Conference minute.

CUSTODY, MAINTENANCE, ACCESS IN RESPECT OF THE MINOR CHILDREN OF THE MARRIAGE

Both parties seek custody of the two minor children of the marriage. Whereas either parent has a right at divorce to claim custody of the minor children, it is undesirable for parties to treat children as chattels or pawns to leverage parties' positions in their acrimonious contentions. The deciding factor on the competing interests should always be the best interest of the minor children.

In supporting her claim, the plaintiff told the court that her husband is a workaholic and he was hardly home claiming he is preparing a future for the children. the plaintiff further told the court that she felt controlled by the Defendant. Further, the Defendant's mother constantly interfered in the marriage making critical decisions for both of theme and she felt like she was a third wheel in the marriage.

Plaintiff testified that if the defendant is to be given custody, the children will effectively be in the custody of the Defendant and his mother. The Plaintiff also told the court that she suffered psychological abuse at the hands of the Defendant and his mother and she fears that the children will suffer in the same way she did if their custody is granted to the Defendant.

Plaintiff further testified that during the subsistence of the marriage and the time when the Defendant was in South Africa, he used to send money for the upkeep of the children once in a while which left her with the heavier responsibility of taking care of the children virtually by herself.

On the other hand, the Defendant testified that he lacks the means to contribute to the welfare of the children. he stated that his earnings are less than US$600.00 per month from his teaching services at U-Demy, an online educational platform. He said if granted guardianship and custody, he would reside at his mother's house and get the assistance from his mother to get the children educated only in a homeschool setting. He conceded that there were four male staff at his mother's and she was the only female. He said he would devote his time to homeschooling the girls while doing his Udemy teaching job.

In my assessment on credibility, I find the evidence of the Plaintiff more credible than that of the Defendant. The Plaintiff, in her testimony presented a story of the struggles she encountered

in raising the minor children during the time she was alone in Zimbabwe while the Defendant was in South Africa. She did so without hiding the shortcomings which attended her in so doing which include the improper association with Gareth. She regretted that part of the story but did not seek to conceal it. She was forthright about it. She managed to explain the decisions she made about parenting the children which included the choice of schools and form of education. She did not dwell on casting the Defendant in bad light but she approached the matters on their facts.

The defendant in his testimony exhibited anger, resentment and vindictiveness. He majored so much on casting the Plaintiff as a bad mother to the minor children. he focused on the perceived weakness of the Plaintiff which I find to be of little bearing to the interests of the children or to the other issues for determination. To point but a few instances, he attacked the Plaintiff for her improper association with Gareth. He also labelled the Plaintiff as not caring for the simple reason that she had enrolled the children at a boarding school. He also went as far as telling the children that Plaintiff had no love for them which is why she had dumped them at a boarding school. I find that the Defendant's evidence was clouded with so many irrelevant issues which had nothing to do with the issues for determination. His testimony, to a greater extent was not credible.

I find that it is in the best interest of the two minor children that their sole custody and guardianship be awarded to the Plaintiff. I say so for a good measure of reason. Firstly, it is not in dispute that for at least the two years immediately prior to the Plaintiff issuing summons, the minor children were in the consistent custody of the Plaintiff. That was during the period when Defendant was in South Africa and Plaintiff was in Zimbabwe with the minor Children. Despite efforts by the Defendant to cast the Plaintiff's parenting style in bad light I did not find anything amiss with how the Plaintiff has been taking care of the minor children. In my view and as the evidence adduced show, the Plaintiff did her best in her circumstances. She led the children alone through a difficult time during the lock down brought about by covid 19 when Defendant was in South Africa. She made difficult decisions about the children's education even in the face of Defendant's withdrawal of support in their education. She did not have the children sit home but she made choices which saw the children go to school. The children were not only taken to school but to a school where they themselves were happy to go. I did not find anything wrong with the decisions taken by Plaintiff for the children on the choice of schools.

On the other hand, I find the decision by the Defendant to withdraw support in the children's education simply because he did not believe in education at a formal school, hurtful on the children themselves. This is a school where the children were happy to go and were enjoying the education. One would wonder what the children had done to him to deserve such kind of attitude towards them. Quite clearly the Defendant had ventured to use the children to get at the plaintiff for some other unknown reason which had nothing to do with the best interest of the minor children. It would have been a different story had the Defendant continued to support his children while negotiating with their mother about the method of education to be adopted in the best interest of the minor children.

I do not find the alleged shortcomings of the Plaintiff militant against her suitability as a custodial parent. She is fallible just like any other human but I am not convinced that she is a bad mother. A conceded mistake by a mother does not make her a bad mother to her children see the case of *Goba* v *Muradzikw*a 1992 (1) ZLR212 (SC). I find that in the difficult circumstances the Plaintiff did her best to advance the best interest of the children. I find in the circumstances that custody of the minor children should be awarded to the plaintiff.

Defendant's contention is that the question of maintenance of the minor children, which include payment of their school fees, should be treated as *res judicata.* I find this question to be one for which the law can resolve. It is indeed a question of law.

Defendant's argument is that this court dealt with this issue to its logical conclusion in an order granted by this court. I do not agree. The law is clear on the fate of maintenance orders which exist or are granted pending divorce proceedings. Section 11 of the Maintenance Act (*Chapter* 5:09) answers the question. It provides as follows

> *"(1) Subject to subsection (4), an order made in favor of a child shall, with respect to that child, cease if and when:*
>
> *(a)……..*
>
> *(b) in respect of the marriage between his parents, an order of divorce or judicial separation or decree of nullity is made which includes an order for the maintenance of the child.*

It follows therefore that once a decree of divorce is granted, by operation of the law, any existing order for maintenance of the minor children is discharged and the court is at large to grant an appropriate order for the maintenance of minor. I therefore dismiss the point raised for lack of merit.

In coming up with an appropriate order as to the maintenance of minor children post-divorce, the guiding principle is that children's standard of living should not materially decrease following a divorce. The same is also true for maintaining the status quo for children's education expectations. Based on their means, the non-custodial parent should be made to pay as maintenance for the minor child, such amount of money as will maintain and propel, as much as possible, the same lifestyle that the children led before the marriage. Considering the roles of the parties during the subsistence of the marriage I find it in the best interest of the minor children that the Defendant pays maintenance for their upkeep as prayed for in the summons. The Plaintiff further claims as against the defendant that he pays school fees for the minor children. from the evidence on record, it is clear that the Defendant has been the economic power horse of the parties' household. From the defendant himself the court was told that the Plaintiff has for the greater part of the marriage unable to fully contribute financially because of her residence status which does not allow her to work. This means the Defendant has been the financial provider and I have no doubts in my mind that he can continue to make provision for his children in so far as their school fees is concerned. In the result, I will order that the Defendant should pay school fees all school related expenses and medical expenses for the two minor children. Meanwhile, the plaintiff can cater for the children`s day to day expenses including their food, clothing and other incidentals.

In determining the appropriate order as regards I did not lose sight of the fact that the children are in boarding school. What this essentially entails is that notwithstanding that custody of the minor children is with the Plaintiff, the actual time she will be with the children will be during the first two weeks of every school holiday. It is that time when the children are home that a portion must be provided for defendant to have access to the minor children. I find that it will be in the best interest of the minor children that the defendant be allowed access to the minor children during every first half of the duration of their school holidays.

ASSETS OF THE PARTIES AND HOW THEY SHOULD BE SHARED

In so far as the joint assets to be shared are concerned, the parties are not agreed on which assets form the joint matrimonial assets of the marriage. It is pertinent to identify first the assets of the marriage which should be subjected to sharing by the parties. In its summons and subsequent pleadings, Plaintiff maintained that the parties acquired as joint matrimonial assets, various movable and immovable properties. The properties were listed in the Plaintiff's declaration as follows: The movables were stated as life policies and several investments, offshore accounts and companies. The immovable property in issue was stated as Unit 41 II Villaggio in South Africa (hereinafter referred to as the Villaggio). During the trial, evidence was led which established that there were two motor vehicles which formed part of the parties' matrimonial assets namely a Toyota Hilux and a Land Rover. The parties are not agreed on which of them should be awarded which car.

> In my assessment concerning the immovable properties, the Plaintiff testified that she was unaware of the parties financial position as the Defendant was in charge of all the finances. Of the movables, she suggested that she gets the Land Rover whilst the defendant gets the Toyota Hilux. The former was a non-runner and her father bought her (a Honda) motor vehicle to assist with movement and transportation of the children.

The defendant suggested that the Land Rover was priced at over US$20 000 whilst the Hilux was pegged at around US$ 10-12 000. He wanted the Plaintiff to compensate him for the difference. In cross examination he failed to substantiate the values he had ascribed to the vehicles. He agreed that the Land Rover was bought by Plaintiff's father.

On the immovable properties, Plaintiff agreed that they had bought the Villaggio on mortgage in 2012 but that by now it had since been paid off as there were deductions on it. She indicated that Defendant was aware of nature of the payments. This property was co-owned. Defendant wanted to be afforded a 100% share in the Villaggio with Plaintiff paying off the debt among other options as appear in the defendant`s closing submissions. In an email to the Plaintiff, he had suggested that his mother would help him 'financially' if he was a sole owner. He denied that such help would extend to payment of the mortgage. The current balance for the Villaggio which they bought for around R1 200 000 was around R920 000. For the past years he agreed that there was a tenant renting out the Villaggio, whose rentals paid for the mortgage. He however suggested that there was need for an extra about R5 000 to cover for the rates and levies. Both

parties should benefit from the Villaggio. Plaintiff appears to have discharged her duties as a mother and wife. The defendant meanwhile is on the ground and has been managing the property directly. He has also made substantial financial contributions towards the acquisition of the property I am aware of the proposals by the parties however I find that it is just and equitable that each party should be awarded 50% of the Villaggio.

The Plaintiff further pointed out that Defendant had put their wealth in investment companies known as Takamuka, Chenjera and Kufara Zuva. These in turn owned six properties in South Africa. The defendant in turn indicated that the companies were owned by his mother as the only shareholder. No share certificates were tendered as proof. He testified that he was the sole director in the companies and received no benefit as he was 'helping' his mother. In essence his mother also owned 21 Rolf Valley where he was currently being accommodated. The deed for this property was not tendered in evidence. The deeds for the companies were tendered in evidence by the Plaintiff.

Ordinarily, assets belonging to or owned by a company cannot possibly be subjected to sharing by the parties at divorce. *Stricto senso* such assets are property of the company and not of either party. If the company is owned by the parties, then the shares in the company can be subjected to sharing. In any other instance, the veil of the corporate entity can be lifted to establish who is the true owners of the assets in the company for the purposes of equity. In pursuit of a similar approach I am persuaded by the authority in *Pedzisai Miriam Lilliethy Garwe Pedzisai Miriam Lilliethy Garwe* v *Daniel Garwe* HH 408/18 where the court stated that

> "Whilst it is indeed true that a company is a separate legal entity from the shareholders who in this case are husband and wife. There are instances where the corporate veil has been lifted and assets distributed between spouses at the dissolution of the marriage."
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> Similarly, in *Gonye v Gonye* 2009 (1) ZLR 232(SC) at p 233 the Supreme Court held that:
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> "Where the issue arises of whether the property rights, a proportion of the value of which is claimed by the one of the spouses, in reality lay with the other spouse or a company run by him, it is permissible to 'lift the corporate veil' in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. Where the company can be said to be the spouse's alter ego, the company's assets and proceeds can be said to be the spouse's and thus can be subject of an order under s 7(1)."(the emphasis is mine).

In these circumstances, the Defendant is a director in all the companies namely Takamuka, Kufara Zuva and Chenjera as is proven in the documents which form part of the exhibits. The

letters from the companies that the Defendant provided as evidence that he is not in any way associated with the company are not evident enough to prove so. I find the companies to be conduits created by the defendant to hide the parties' wealth for his personal gain. I find comfort in the above authorities in arriving at the conclusion that the true owner of the companies Takamuka, Chenjera and Kufara Zuva is the Defendant.

As such the shares in the company must be distributed equally between the parties. I also rely, in so doing, in the cited authority of *Denhere* v *Denhere* S-51-17..

In the result I order as follows

1. A decree of divorce be and is hereby granted
2. Custody of the two minor children namely Kate Brooklyn Bowes (Born on 2 July 2013 and Kayleigh Jessicca Bowes (Born on 26 September 2010) be and is hereby awarded to the Plaintiff.
3. Defendant shall exercise his right to access to the minor children during every first half of the duration of their school holidays.
4. Defendant shall pay all school fees and all school related expenses and medical expenses for the minor children namely Kate Brooklyn Bowes (born on 2 July 2013) and Kayleigh Jessicca Bowes (born on 26 September 2010) until each child reaches 18 years or becomes self-sustaining whichever occurs first.
5. The plaintiff and defendant be and are hereby awarded each their personal belongings and household goods and effects.
6. The Plaintiff be and is hereby awarded the (2003) Land Rover motor vehicle as her sole and exclusive property whilst the Defendant is awarded the (2006) Toyota Hilux as his sole and exclusive property.
7. Plaintiff and defendant be and are hereby awarded Takamuka Investments (Pvt)Ltd in the ratio 50% to the defendant and 50% to the plaintiff.
8. Plaintiff and defendant be and are hereby awarded Chenjera Investments (Pvt)Ltd in the ratio 50% to the defendant and 50% to the plaintiff.
9. Plaintiff and defendant be and are hereby awarded Kufara Zuva Investments (Pvt) Ltd in the ratio 50% to the plaintiff and 50% to the defendant.

10. The plaintiff and defendant be and are hereby awarded Unit 41 II Villaggio in the ratio 50% to the defendant and 50% to the plaintiff.
11. Each party shall bear its own costs.

Matsika Legal Practitioners, Plaintiff`s legal Practitioners
Defendant in person.