

MOREBLESSINGS MAKOSA  
and  
PATRICK MAKOSA

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J.  
HARARE, 13 May 2010

**Matrimonial Action**

No appearance for plaintiff  
*J. Dondo*, for defendant.

CHITAKUNYE J. The plaintiff and defendant were married in terms of the Marriages Act [*Cap 5:11*] on 23 April 1994.

Their marriage was blessed with 3 children of whom two are now majors. These two were born before the solemnization of the marriage on 22 April 1994. The 3<sup>rd</sup> child was born on 29 June 1994 and is thus a minor.

On 19 December 2008 plaintiff sued defendant for a decree of divorce, division of the matrimonial property and custody of the minor child.

The plaintiff averred that the marriage has irretrievably broken down and that there was no reasonable prospect of restoration of a normal marriage relationship between them in that:

1. the parties have not lived together as husband and wife since April 2001
2. the parties have lost all love and affection for each other.
3. the parties have lost trust in each other and the defendant has formed improper relationships with other women, and has married another woman who he is staying with at the matrimonial home.

The defendant in his plea admitted that the marriage has irretrievably broken down and that there are no reasonable prospects of restoration of a normal marriage relationship. He made a counter claim seeking a decree of divorce, division of the matrimonial property and custody of the minor child. He outlined the basis for the breakdown as that:

1. the plaintiff deserted the matrimonial home in 2001 and left Zimbabwe for the Diaspora
2. parties have not lived together as husband and wife since 2001; and
3. parties no longer have the love and affection for each other.

When the matter was set down for a pre-trial conference plaintiff could not avail herself. The matter was postponed on a number of occasions to enable plaintiff to avail herself for the pre-trial conference without success. Eventually the pre-trial conference was held on 29 November 2009 without plaintiff's attendance.

When the matter was set down for trial the plaintiff could not avail herself. On 15 March 2010 the plaintiff's then legal practitioner indicated that the plaintiff was not available for trial despite notice of the trial date in good time. The plaintiff had no valid travel documents for her to travel from Canada where she is now residing. The plaintiff was thus seeking a postponement *sine die*. The application was opposed by defendant. The grounds for opposition were that right from the issuance of summons in 2008 plaintiff knew she would be required for trial but had not obtained valid travel documents. The same reasons were used at the pre-trial conference stage leading to the pre-trial conference being postponed but still plaintiff did not come. The judge before whom the pre-trial conference was held had to proceed without plaintiff. The defendant was thus opposed to a postponement *sine die* as there was no clear indication as to when plaintiff would obtain valid travel documents. Such a postponement would serve no useful purpose.

Upon hearing the arguments I postponed the trial to 22 March to enable plaintiff's legal practitioner to clarify the position with her client.

On 22 March 2010 plaintiff's legal practitioner advised that she had been in touch with the plaintiff and had duly advised the plaintiff of the need to come for trial. She advised the plaintiff that trial had been postponed to 22 March 2010. The plaintiff was thus aware of the trial date. In spite of the advice plaintiff insisted on her request for the matter to be postponed *sine die*. In the circumstances, the plaintiff's then legal practitioner renounced agency. It was in those circumstances that the defendant's legal practitioner applied for the plaintiff to be held to be in default and for the plaintiff's claim to be dismissed. He also applied for the plaintiff's defence to defendant's counter claim to be struck out and for judgment to be granted in favor of the defendant.

Upon being satisfied that the plaintiff was fully aware of the trial date and that she had not availed herself for trial I granted the defendant's application. The plaintiff's claim was dismissed and her defence to the defendant's counter claim was struck out.

As the case was ready for trial, but for the plaintiff's default, the defendant gave evidence on all the pertinent aspects on an uncontested counter claim.

The defendant gave evidence to the effect that he married the plaintiff on 22 April 1994 in terms of the Marriages Act, [*Cap 5:11*]. Of their three children only one is still a minor. He confirmed that the marriage has irretrievably broken down. The causes thereof were that:-

1. The plaintiff deserted the matrimonial home in 2001 and went to the United States of America. She has now moved to Canada.
2. Since the plaintiff's desertion in 2001 the parties have not lived together as husband and wife, that is, they have not enjoyed conjugal rights.
3. As a consequence they have lost love and affection for each other.

He averred that there is no reasonable prospect of restoration of a normal marriage relationship.

On custody of the minor child the defendant indicated that he is best suited as he has had custody of the child since the plaintiff deserted the family in 2001. He has been taking care of the child as the custodian parent. Defendant said he is amenable to plaintiff being granted reasonable rights of access whenever she is in Zimbabwe and wishes to see the child. This can be over weekends or she can take the child for holidays. He would however want the plaintiff to contribute towards the upbringing of the child by paying the child's school fees whilst he meets the child's other daily needs. It was his evidence that he had reason to believe that the plaintiff is capable of making such payments from the income she is earning.

On the property, it was his evidence that he be awarded the motor vehicle and the few remaining chairs that are in the matrimonial house as his sole and exclusive property. He testified that the rest of the property including plaintiff's clothing was taken by their daughter a long time ago.

On the immovable property the defendant averred that he bought that property on his own without plaintiff's direct contribution. He only had it registered in their joint names because he thought that as husband and wife the law demanded so. It was also spurred on by his love for his wife. In the circumstances, he is prepared to grant plaintiff 20% of the value whilst he retains 80%.

Upon hearing the defendant I was satisfied that indeed the marriage has irretrievably broken down with no reasonable prospects of restoration. I was also satisfied that a default judgment can be granted.

Accordingly a default judgment is hereby granted in favor of the defendant as follows:-

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

2. In respect of the minor child TINOTENDA PATRICK MAKOSA (born 29<sup>th</sup> June, 1994)
  - (a) custody be and is hereby awarded to the defendant
  - (b) the plaintiff be and is hereby ordered to pay all school fees for TINOTENDA PATRICK MAKOSA and other expenses reasonably required for the attendance of the minor child at school with the defendant taking care of all daily needs of the child.
  - (c) the plaintiff is awarded reasonable rights of access to the minor child to be exercised upon request over weekends and during holidays whenever she is in Zimbabwe.
3. The defendant is hereby awarded the Ford Telster motor vehicle registration No. 523-510G and the household goods currently in the matrimonial house as his sole and exclusive property
4. The immovable property stand 506 Hatfield Township 16 of Medehampstede, Block C of Hatfield Estate also known as number 3 Cawood Close, Hatfield, Harare registered in the joint names of the parties shall be valued by a firm of estate agent appointed by the registrar from his list of evaluators after which the defendant shall within a period of six (6) months from the date of the said evaluation pay to the plaintiff 20% of the net value of the property.

*Chinamasa, Mudimu, Chinogwenya & Dondo*, defendant's legal practitioners