

FELISTAS MUTSETA
and
ELLIOT ENOCK MUTSETA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 23, 24 and 26 June 2009 and 6 May 2010

Divorce Action

B. Mtetwa, for the plaintiff
C. Maunga, for the defendant

MAVANGIRA J: The parties are husband and wife. They married customarily in 1981 and later solemnized their marriage in terms of the Marriage Act, [*Cap 5:11*], (then *Cap 37*), on 18 October 1985. Three children were born of the marriage and one of them is still a minor. Certain unhappy differences have arisen in the marriage. The plaintiff now seeks an order of divorce from her husband, custody of their minor child and division of their property. The defendant has counterclaimed for a decree of divorce, custody of the minor child, division of the matrimonial estate and maintenance for himself in the sum of ZW\$40 000 per month.

The joint pre-trial conference minute in terms of which this matter was referred to trial records that the defendant abandoned his claim for maintenance. It also records that the custody of the minor child of the marriage is no longer an issue as the minor child concerned is beyond the jurisdiction of this court. The parties reached agreement as to the disposal of most movable items. They only require this court to determine the distribution of two immovable properties being Stand 3687 Old Highfield, Harare and Stand 7635 New Stands, Old Highfield, Harare as well as a Nissan Sunny motor vehicle.

The parties agree that their marriage has irretrievably broken down but each proffers different reasons therefor. The reasons given by the plaintiff for the breakdown of the marriage are that the defendant is a philanderer who has fathered at least six children with different women during the subsistence of their marriage. She contends that the defendant would desert the matrimonial home for long periods of time leaving the plaintiff to single-handedly shoulder the bulk of the family expenses. Furthermore, that he was also physically and emotionally abusive towards her and failed to treat her with the love, affection, companionship and friendship as is expected between husband and wife. She contends that the parties have lost all love and affection for each other. She further contends that the defendant's wayward conduct

during the subsistence of the marriage constitutes gross marital misconduct and that this is a proper case in which in terms of s 7 (4) of the Matrimonial Causes Act, [*Cap 5:13*], (“the Act”), it is reasonable and practicable for this court to take his misconduct into account in determining the proprietary rights of the parties in respect of the outstanding items of property on which no agreement has been reached.

The defendant on the other hand gives as the reason for the breakdown, interference by the plaintiff’s relatives in the affairs of their marriage. He admits having had a relationship with some of the women named by the plaintiff. He admits that he fathered three children with one of the women. He said that he also discovered at a late stage that a son whom he had allegedly fathered with yet another woman and whom he had maintained for some time was in fact not his child. He contends that the plaintiff was fully alive to the fact that he was having mistresses but that she was able to live with it and that she forgave him for this. He also contends that the plaintiff has failed to treat him with love and affection as she has resorted to abusing alcohol and has also constantly denied him his conjugal rights.

With regard to the immovable property, the plaintiff prays for an order that Stand 3687 Old Highfield, Harare and Stand 7635 New Stands, Old Highfield, Harare be donated to two of the children of the marriage with the defendant having a life usufruct on Stand 3687 Old Highfield. Alternatively, that the plaintiff transfer her half share in Stand 3687 Old Highfield, Harare to the defendant in exchange for defendant’s claims in Stand 7635 New Stands, Old Highfield, Harare. The plaintiff also wants to be awarded the Nissan Sunny motor vehicle. The defendant on the other hand wants the immovable properties to be valued and for him to be awarded a half share. He also wants the Nissan Sunny to be awarded to him.

The plaintiff stated in her evidence that the defendant had many mistresses at various times during the subsistence of the marriage. She told the court about an extra-marital affair that the defendant had with one workmate at his former workplace when he was still in government employment. She had to resort to approaching the administrator at the workplace and she did so in the company and at the behest of the defendant’s mother. This resulted in the administrator causing the transfer of the workmate from the same station with the defendant. She also produced letters purportedly written by another named mistress to both the defendant and to herself respectively. The letters are written mainly in the vernacular with some random portions that are in the English language. The plaintiff stated that the defendant had sired three children with this particular mistress and that the children were born in 1989, 1992 and 2001

respectively, a period spanning twelve years. She said that the defendant had married the said mistress under custom. This relationship may have ended when the defendant got involved in another relationship with a different woman. She also said that the defendant also sired one child with a Hatcliffe woman for whom he had also paid lobola and performed all traditional marriage rites. He allegedly also had one child with a Chegutu woman whom he also purported to marry under custom and another child with a Zvimba woman with whom he also purported to contract a customary marriage.

The defendant admitted having three children with one mistress. He claimed that he had only paid damages for making one woman pregnant and denied having purported to enter into any kind of marriage with any other woman besides the plaintiff. With regard to yet another named woman he claimed that although he had met her, nothing serious had taken place. He denied fathering a child with her. It was only whilst he was being cross-examined that he admitted that a child had been born to the woman and that he was registered in the Births Register as the father. He however immediately claimed that he had later discovered that the child was not his.

As submitted by the plaintiff's legal practitioner, if the defendant at some stage believed that the child was his, that on its own is an indicator that the relationship was sexual and therefore adulterous. His denial of the other adulterous relationships was rather feeble and lukewarm. The falsity of his denials was embarrassingly exposed particularly during cross-examination when he reneged on various material aspects of his evidence in chief. He also denied that he had fathered a daughter who is now aged four and who stays with his sister in Glen View. He said that the girl was his sister's son's daughter and that if his sister had introduced her to the plaintiff as his son, she lied to the plaintiff.

Regarding the defendant's contention which the plaintiff denied, that the plaintiff had condoned his adultery, it would appear to me that had the plaintiff done so, she then would not have instituted these proceedings for divorce. Furthermore, the parties would still be living together as husband and wife which they are not. She would not be denying him his conjugal rights as he now complains. In any event, it is highly unlikely that in this day of the deadly HIV virus the plaintiff would have condoned each of the defendant's numerous and unending adulterous relationships. The defendant appears to have continuously engaged in these with total arrogance, complete disregard and a blatant disrespect for the institution of marriage and for the plaintiff's feelings. The defendant's demeanour before the court was also pervaded

with an aura of self-righteousness and a lack of any acknowledgment on his part that his conduct was incompatible with the tenets of a civil marriage. He rather sought to hit back at the plaintiff by calling her a drunk yet this was neither pleaded in his papers nor put to her at any stage.

The plaintiff also testified that the defendant would physically assault her and that one such instance resulted in her going to live with the defendant's elder brother for a month. She also said that she had to approach the courts on many occasions for peace orders. The plaintiff said that she was so stressed in the marriage that she asked her employer to transfer her out of Harare. She was transferred to Kwekwe but the defendant sent emissaries to convince her to return to Harare and she did so in the belief that the defendant had turned a new leaf. It turned out sooner than later that he had not. The defendant's responses to these allegations were non-committal and rather feeble as he would only say that the plaintiff had had to go and live with his brother on the said occasion because of a misunderstanding without elaborating on the details of the alleged misunderstanding and without specifically denying the plaintiff's specific allegations stated above. It also appears to me in the circumstances that the plaintiff cannot be said to have condoned the defendant's adultery. Rather, she appears to have patiently entertained the hope that the marriage could be salvaged hence her agreement to return to Harare to resume married life with the defendant, which hope as it later turned out was misplaced.

The plaintiff has urged the court to take the defendant's conduct into account and find that the defendant is guilty of gross marital misconduct; and in terms of s 7(4) of the Matrimonial Causes Act, [*Cap 5:13*], accordingly make an appropriate order with regard to the division, apportionment or distribution of the two immovable properties and the Nissan Sunny motor vehicle as would place the spouses and the children in the position they would have been had a normal marriage relationship continued between the plaintiff and the defendant. For the reasons appearing above I am satisfied that the defendant's conduct during the subsistence of the marriage amounts to gross marital misconduct.

Stand 3687 Old Highfield, Harare, was donated to the parties in equal shares by the defendant's parents. Stand 7635 New Stands, Old Highfield, Harare was purchased in the plaintiff's name through a mortgage loan that she applied for in 1994 from her then employers, Standard Chartered Bank. The plaintiff said that she facilitated that defendant apply for an overdraft to raise the required 10% deposit for Stand 7635. She helped the defendant repay the

overdraft. This was in addition to the instalments that were deducted from her salary for the repayment of the mortgage loan. She testified that during the defendant's many sojourns away from the matrimonial home his concentration was on his mistresses and their children whilst she took care of all family and household business. She has carried out extensive renovations which are still ongoing at Stand 7635 New Stands, Old Highfield, Harare. The defendant's response to this initiative on her part was that she should not have carried out the renovations pending the divorce.

In addition to the testimony already discussed above, the defendant conceded during cross-examination that he does support his three children with the one mistress and that for some time he also supported the one child he fathered whom he said he later discovered was not his as the mother had been having an affair with another man at the same time. He conceded that the three letters produced as exhibits by the plaintiff were written by one of his mistresses. The letter to the plaintiff is undated. The two letters to the defendant are dated 5 April 1993 and 15 April 2003 respectively. He denied any knowledge of the claims made in the letters addressed to him, to certain items of property. He maintained that he did not set up a household with the mistress and did not purchase any property and that he had no idea as to what she was talking about. He said that the claims that the mistress made in the letter addressed to the plaintiff that he had paid lobola for her as well as the traditional "mombe yeumai" and that she was accepted by all the in-laws as a daughter in law were all false.

The defendant claimed that his financial woes only started in 2004 and not earlier as claimed by the plaintiff yet when he was cross-examined on this he was unable to give a coherent account. He denied having stayed with one named woman during the time that he was based in Norton claiming instead that he lived in a friend's furnished cottage. The letter dated 5 April 1993 from the said woman starts off with an apology and also absolves the addressee, the defendant, from any fault for whatever had happened the previous day. The rest of the letter is in the vernacular and I did not have any regard to that portion. The letter dated 15 April 2003 states among other things, that the defendant had asked the author of the letter to take over the payment of accounts as he could no longer do so. It states that the defendant had indicated that she could thereafter take everything in Norton, save for a bed which the author proceeded to state that she had nevertheless taken. The author states that they had discussed and agreed that the property would be ferried to Banket from Norton with the help of one Kundi. Reference is also made in the letter to a wrangle over some property items

between the author and another named woman who the author implied was another of the defendant's mistresses.

The defendant's denial is highly improbable. It is more probable that he stayed with the said woman in Norton. From the letter it appears that the relationship became troubled around 2003, some fourteen years after the birth of the first of the three children of this relationship. It also emerges that the cause may have been the defendant's new relationship with yet another woman, which relationship this particular mistress also found unacceptable. In fact reference is made to not only one other woman but two other women. The denials by the defendant of the plaintiff's claim that he would expend his attentions and his finances on his various adulterous relationships and neglect his family are baseless and ought to be dismissed as untrue. The probabilities tend to support the plaintiff's testimony as to the defendant's wayward conduct in the various respects that she stated. After he left Government service the defendant appears to have ventured into projects that did not meet with any meaningful measure of success. They all appear to have flopped. As a result he failed to support his family adequately leaving the plaintiff to bear most of the burden. He said that he had to sell a Peugeot 405 motor vehicle in order to service a loan he had obtained from the ZDB, yet it is during this period that he curiously claims to have been giving plaintiff cheques "for herself and for household expenses". He lost his computers in Kadoma to thieves; his canteen equipment in Harare went up in smoke. His claim that he gave the plaintiff Z\$6 million to pay off the house in November 2004 was proved to be false as the house had been paid off in early 2003.

He refused to disclose his monthly income in South Africa where he is now employed on the ground that he did not think it would be in his interests to do so. He conceded that in 2002 the plaintiff went to the United Kingdom where she worked and came back home in May 2003. He however denied that when she came back in 2003 she used the money that she had earned in the United Kingdom to pay off the loan that they had acquired from the bank to purchase Stand 7635. He rather claimed that the cheque that he issued in 2004 to the plaintiff was for payment in full of the loan. He also then said that due to an oversight on his part he had failed to ascertain from the bank as to how much was outstanding on the loan account. He said that from mid 2005 to April 2008 when he left for South Africa he was not gainfully employed and thus could not contribute to the improvements being made to the house. He was

surviving on assistance from friends. He maintained however that he did not see the logic of having these renovations done before the divorce action was over.

The defendant said that when the plaintiff asked him to contribute to the payment of university fees for their first born daughter he felt that he had no legal obligation to do so as she was then married and was someone's wife. It was the plaintiff's evidence however that the defendant had since taken their daughter back home and that by the time that she left for the United Kingdom where she attended university she was already back home with them. The defendant also said that from the time that their youngest son went to stay with his sister in the United Kingdom in 2002 he had only sent some items of clothing for him in 2009. In one breath he said that this was because when he asked his daughter if she would cope with looking after her brother in the United Kingdom she said that she would not have any problems. In another breath he said that during the same period he continued to support his three children with his mistress because it was easier for him to buy them food than it was to send food to his son in the United Kingdom. It would appear however that his failure to support their youngest child was not a result of financial inability as he stated that his financial woes only began in 2005. He is currently living in a two-bedroomed house in South Africa for which he pays a monthly rental of ZAR3 500. He further said that he is not in control of Stand 3687 Old Highfield as the rentals are collected by his parents. Yet, he also conceded that he had in March 2002 used the house as security for a loan without the plaintiff's knowledge despite the fact that they are co-owners of the property. Furthermore, the plaintiff said that the two of them decided that instead of them buying groceries for his parents every month, it would be more convenient for the rentals from the said property to be used for the upkeep of his parents and she was not challenged on this aspect. .

The defendant's vindictiveness against the plaintiff also came to the fore when during cross-examination he conceded that the plaintiff needs a place to stay in Harare as that is where her work is but vehemently opposed the idea of her continuing to live in the house at Stand 7635 New Stands, Old Highfield. In the very next breath, in answer to another question he said that he also needs that house as much as the plaintiff does as he could come home to Zimbabwe at any time.

Section 7 (4) of the Act requires the court to have regard to all the circumstances of the case including the following factors in making an order with regard to the division, apportionment or distribution of the assets of spouses. These are:

- (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 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;
- (d) the age and physical and mental condition of each spouse and 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

The subsection ends with the following provision:

“and in so doing the court shall endeavour 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”.

That the defendant is guilty of gross marital misconduct appears to me to be borne out by the evidence placed before this court. The issue was fully ventilated by the parties and in my view, on a balance of probabilities, the plaintiff proved her case on this aspect. However, on a reading of s 7 (4), it is clear that the conduct of the parties is not the only, nor indeed the major factor that the court takes into account in determining the issue of the division, apportionment or distribution of the assets of spouses. With regard to the first listed factor, it is noted that *in casu*, the plaintiff is currently earning about USD100 while the defendant who refused to say how much he is currently earning in South Africa lives in a house for which he pays ZAR3 500 every month.

With regard to present and future financial needs, obligations and responsibilities, it appears that the plaintiff is currently engaged in the renovations and extensions to the matrimonial home at Stand 7635, New Stands, Old Highfield. Presumably, they both have and will continue to have to bear the expenses relating to their respective self-sustenance.

With regard to the parties' standard of living the plaintiff has always lived at the matrimonial home save for the period that she was in Kwekwe after she had asked to be transferred. She devoted her earnings to the needs of the family. Whilst in earlier times the two of them would sometimes work together and would both contribute to any improvements, renovations and extensions of the house, the plaintiff has during most of the latter part of the marriage continued to do this alone and without any input from the defendant. The defendant

has on the other hand not directed his full attention and earnings solely to his family but has rather dissipated resources as he moved from one extra-marital relationship to another and as he has had to maintain the children borne out of those relationships. He chose to spend a lot of time away from his family leaving the plaintiff to hold fort alone. He behaved almost like a nomad. As at the date of trial he was not even aware of the renovations and refurbishments that were being carried out at the matrimonial home. Yet it is telling that he opposed the distribution of the immovable property in terms of the plaintiff's suggestion for the reason that whilst the matrimonial home is now a modern house, the other property is a four roomed house consisting merely four walls and a roof as it has not been similarly modernized. It thus appears that the defendant and the plaintiff have not been enjoying the same standard of life for the mere reason that they have not generally always lived together continuously under the same roof as the defendant did not stay in one place due to his philandering. Despite his denial the available evidence shows, on a balance of probabilities that he did set up home with the one mistress in Kadoma and that he purchased household goods which it appears he later failed to pay for resulting in the mistress paying off the accounts and taking the property with her when their relationship reached a rough patch.

With regard to their ages, when the parties solemnized their marriage some 24 years ago in 1985 the defendant was aged 24 while the plaintiff was 22. They are now thus about 49 and 47 years old respectively. This in all fairness ought to be regarded as a period that represents a lifetime as they have both gone past the youthful and most productive years of their lives.

Regarding their respective contributions, in view of the evidence placed before this court, I have no doubt that the plaintiff made a greater contribution to the family both directly and indirectly, not only by looking after the home and caring for the family and doing other domestic duties but also by way of financial, managerial and other contribution for the livelihood of the family and the improvement of their standard of life.

With respect to the sixth factor no evidence was placed before the court regarding the value to either spouse of any benefit, including a pension or gratuity which any of the spouses will lose as a result of the dissolution of the marriage. As for the duration of their marriage the parties' customary marriage was in 1981, some 29 years ago. It was solemnized 25 years ago in 1985.

In terms of s 7 (4) of the Act, it is the duty of the court to make an order that as far as is reasonable and practicable, places the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses. *In casu* the defendant does not appear to have placed much value on his being fully or wholly available for his family, particularly the plaintiff in the physical, emotional, moral and financial sense. He lived a life that in a way resembles that of a nomad yet he appears to want to have his cake and eat it. It appears to me that the plaintiff's life will be unduly disrupted if she should have to move out of the matrimonial home. I do not think that the same can be said of the defendant. I do not see much prejudice to the defendant if he should, as prayed for by the plaintiff in her alternative prayer, be awarded the other property, Stand 3687 Old Highfield. I am persuaded by the plaintiff's legal practitioner's submission that if the defendant wishes Stand 3687 Old Highfield to be spruced up to the same level as Stand 7635 New Stands, he can do that from his undisclosed salary. In view of the respective contributions made by the parties to the development of the matrimonial assets as well as the defendant's level of misconduct, it is my view that the plaintiff is entitled to the order that she seeks in the alternative in respect of the outstanding items of property. On this particular aspect the defendant chose not to be candid with the court and I again find persuasive the further submission made that that can only mean that he faces no financial hardships and his life would continue as normal whatever the result. In fact his explanation of why he would not disclose his salary to the court is quite telling; he said that he felt that it would not be in his interest to do so.

I am aware that Stand 3687 Old Highfield is jointly owned by the parties. However, s 7 (1) (a) of the Act empowers the court to order that any asset be transferred from one spouse to the other. I will therefore order the plaintiff to transfer her half share in that property to the defendant.

This now leaves the issue of the Nissan Sunny as the only outstanding issue. On this issue Mrs. *Mtewa's* in her closing submissions said that the defendant has shown no justification for claiming this vehicle as he disposed of two family motor vehicles without account to plaintiff. The plaintiff did not benefit from the proceeds of the two vehicles. Furthermore the vehicle was purchased by the plaintiff during a period when he was absent from home and he did not make any contribution towards its purchase. The defendant thus wants to reap where he did not sow. He also has no need for the vehicle whilst it has been the

plaintiff's mode of transport during the defendant's absence and continues to be even as at the date of trial.

I am in agreement with Mrs. *Mtetwa*'s submissions which in my view succinctly lay bare the futility of the defendant's claim to the motor. The defendant has not justified his claim. I will award the Nissan Sunny motor vehicle to the plaintiff.

The plaintiff also prayed for an award of costs in her favour. In her closing submissions the plaintiff's legal practitioner urged the court to award costs against the defendant who caused the unnecessary lengthening of the trial by his unreasonable attitude in disputing his various acts of misconduct which were mostly confirmed during his cross-examination. The plaintiff was thus forced to give evidence on every minute detail resulting in the unnecessary prolongation of the trial. She cited *Gambiza v Gambiza SC 75/2009* as authority for awarding costs against the defendant on a punitive scale. She also cited *Marimba v Marimba 1991 (1) ZLR 87* as authority justifying this court awarding costs as a sign of its displeasure where a litigant in a matrimonial case behaves badly. At p98 A-B of the *Marimba* case GILLESPIE J stated:

“Finally, as to costs, I consider the plaintiff the substantially successful party and deserving of an award of costs, notwithstanding that in matrimonial matters courts may be less inclined to order costs to follow a finding of substantial success. Not least of the factors influencing this award is the thoroughly reprehensible treatment the defendant has meted out to the plaintiff over the past eighteen years. It is not a husband's place to beat his wife nor a wife's lot in life meekly to endure. It is most regrettable that the advice given to the plaintiff for so many years only served to perpetuate her submission to abuse. My order of costs signifies the repugnance with which marital violence is viewed.”

The learned judge proceeded to order the defendant to pay the costs of suit. In my view for the reasons already discussed above, the instant matter is a proper case in which the repugnance of the defendant's conduct should result in an order of costs. The defendant abused the plaintiff not only physically but also emotionally for most of their married life.

For the reasons above the following order is now made:

It is ordered:

1. That a decree of divorce shall issue.
2. That the assets of the parties shall be divided as follows:
 - (a) Stand 7635 New Stands, Old Highfield, Harare be and is hereby awarded to the plaintiff who shall retain it as her sole and exclusive property.

(b) Stand 3687 Old Highfield, Harare be and is hereby awarded to the defendant as his sole and exclusive property; and

(i) The plaintiff shall transfer her half share in Stand 3687 Old Highfield, Harare to the defendant within (fifteen) 30 days of being requested, in writing, to do so by the defendant failing which the Sheriff or his lawful deputy is hereby empowered and authorised to sign all necessary documents and do any acts as may be necessary to give effect to the transfer of the plaintiff's half share into the defendant's name.

(c) The Nissan Sunny motor vehicle is hereby awarded to the plaintiff as her sole and exclusive property.

3. The defendant shall pay costs of suit.

Mtewa & Nyambirai, plaintiff's legal practitioners
Maunga & Associates, defendant's legal practitioners