

EUGENIA MTENGWA  
versus  
OLIVER MTENGWA

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 1, 8, 9 and 12 September 2008, 24 November 2008 and 13 May 2010

Family Law Court  
Divorce Action

Mr J. *Shekede*, for plaintiff  
Ms *Mutswangwa*, for defendant

MUSAKWA J: Plaintiff issued summons in which she sought a decree of divorce, custody and maintenance in respect of their minor child, a division of matrimonial assets and an order that defendant be ordered to purchase 63 120 First Mutual shares or alternatively pay their equivalent value and costs of suit.

At the pre-trial conference stage the parties agreed that the marriage relationship had irretrievably broken down. They also settled on the sharing of movables.

Plaintiff testified to the effect that she married defendant according to custom in 1998. The marriage was subsequently solemnized in terms of the Marriages Act on 18 March 2000. She confirmed that the marriage had irretrievably broken down. The parties have one child, a girl called Nicole Kudakwashe Mtengwa born on 27 February 2001.

Plaintiff's reasons for claiming custody were the child's gender and that she goes to work and returns home by 5 p.m. On that basis she said she would have adequate time to spend with the child. On the other hand she stated that the defendant sometimes returned home late. At the time of trial she was residing in the matrimonial home in Westlea and did not know where

defendant was residing with the child. Defendant moved out of the matrimonial home with the child during plaintiff's absence at the beginning of June 2008.

Defendant is said to have undertaken to return the child. However, plaintiff only stayed with the child overnight. Subsequently the child only visited the plaintiff twice during weekends. They then agreed that defendant would take the child to school as he had at his disposal a company vehicle and fuel allowance. On the other hand plaintiff was self-employed.

Plaintiff was asked to respond to claims that defendant is the one who used to help the child with home work. She explained that when they started to experience problems with their marriage the child would inform her that she had already done home work with defendant. On claims that she used not to take the child to school during defendant's absence she explained that she would take the child to school if defendant communicated his absence. In the event that custody is awarded to defendant, plaintiff stated that she would prefer to be with the child every weekend and school as well as public holidays.

Under cross-examination plaintiff conceded that the child enjoys staying with defendant although she attributed this to her age. The weekend the child visited her she elected to go back to defendant. Plaintiff also agreed that if custody is granted to defendant she should be granted to exercise rights of access every alternate holiday. She also conceded that defendant paid most of the fees for the child.

In respect of the matrimonial home plaintiff testified that she paid the entire purchase price for the stand without a contribution from defendant. The property is registered in their joint names. Development of the stand commenced in 1999 and was completed in 2001. She conceded that whilst she solely funded the construction of the house defendant was responsible for food. She furnished proof of payments she made either in her name or in some instances, their joint names or through the company in which she was a director.

Plaintiff claims a seventy percent share of the matrimonial home with defendant getting the balance. According to plaintiff the house should be valued within forty days of the granting of the divorce order with the parties sharing the costs equally. Thereafter the house should be sold with the parties sharing the net proceeds as suggested.

On the First Mutual shares plaintiff told the court that she took an insurance policy in 1998 prior to her marriage. Upon demutualization of the company she was offered 52 600 shares which she subsequently increased to 63 120. When defendant experienced problems at his workplace which required that he reimburse his employer some shortfall, he requested plaintiff to dispose of her shares in order to raise the requisite funds. In fact defendant is said to have requested for Z\$120 000. The balance of the money required was sourced by plaintiff from her father's friend. Plaintiff then sold the shares through Kingdom Stockbrokers and the cheque was made payable to Powerspeed Electrical.

It was plaintiff's evidence that she agreed with defendant that he would reimburse the shares once he was reinstated at work. Defendant was reinstated in December 2005 but he did not retribute the shares. Plaintiff used to demand the shares and defendant would promise to retribute but to no avail.

Costa Bare who is plaintiff's cousin also testified. He stated that he and plaintiff used to own First Mutual shares. Plaintiff had subsequently purchased additional shares. In January 2006 when he visited the parties defendant told him that he had experienced problems at his workplace which had resulted in plaintiff selling her shares in order to raise money that was required. Defendant told him he would reimburse the shares.

The defendant also testified and indicated that he resides at 6027 Westgate. In respect of the minor child he stated that he wants custody to be granted to him for the child's best interests. In addition he stated that the child prefers to stay with him. He takes the child to school and has been responsible for fees since pre-school. When he took the child to the matrimonial home and

left her there she cried as she wanted to go back to him. On another occasion when he went to collect uniforms the child was crying claiming that plaintiff had refused that she take away some of her clothes. The defendant conceded that the best interests of the child mattered. He also saw nothing wrong in custody being awarded to plaintiff. He also resides with his niece who assists in taking care of the child. The latest time he claims to be at home is 6 p.m. He also stated that he supervises the child's homework. He is the one who initiates communication with plaintiff in respect of the child. Plaintiff used not to take the child to school in his absence.

In respect of the matrimonial home defendant stated that he paid for all the electrical wiring. He also paid the transfer fees. He also assisted in the operations of the companies in which plaintiff is a director. This was by way of making deliveries to Gweru and sourcing clients such as Zimbabwe National Army's 4 Brigade, Wha Wha Prison, the Magistrates Civil Court in Harare and Bindura Prison. By virtue of his indirect contributions he wants a fifty percent share.

Concerning the First Mutual Shares defendant explained that he incurred a shortfall amounting to Z\$320 000 at his workplace. He discussed the issue with plaintiff and his young brother. He also contemplated approaching relatives. Plaintiff then decided to sell the shares. There was no talk of reimbursement until he received the letter of demand.

Under cross-examination defendant conceded that he had no problem if custody of the child is granted to plaintiff and he is granted reasonable access. He also conceded that his niece has a child. He is renting a two bed roomed property in Westgate.

Defendant's brother, Winter Chingore also testified. He stated that he was present when plaintiff agreed to sell the shares. There was no undertaking to reimburse the shares. He also made some contributions. Under cross-examination he agreed that the issue of selling the shares had been discussed in his absence.

It is well established that the determining factor in a custody dispute are the best interests of the child. In support of this submission Mr *Shekede* cited the case of *Zvorwadza v Zvorwadza*

1996 (1) ZLR 404 (H). He also submitted that the plaintiff is better placed to be granted custody as she has more earning power than the defendant. Mr *Shekede* also submitted that the sex of the child should be taken into account and cited the case of *Goba v Muradzikwa* 1992 (1) ZLR 212 (SC). In that case after the dissolution of the parties' customary law union the wife went to her parents' home with their two daughters. The husband subsequently sought custody of the children. The community court granted custody of one of the children to the husband whilst the wife retained custody of the other. In upholding the appeal by the wife GUBBAY CJ had this to say at page 214:

"In this case I am satisfied that the presumption that the interests of female children of tender years are better served in the custody of their mother, was not rebutted by the respondent. I need only refer to the sagacious words of BROOME J (as he then was) in the celebrated case of *Dunsterville v Dunsterville* 1946 NPD 594 at 597: C

". . . it is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending to the bodily needs of their offspring as efficiently as an institution-trained nurse. D But that is not the end of the matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later. It seems to me that if the father is awarded the custody of these young children they will in all probability, notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the paternal link."

Notwithstanding the above remarks, the underlying consideration is best interests of the child and each case must be decided on its own facts. Mr *Shekede* also cited the case of *McCall v McCall* 1994 (3) SA 201 (C) went into great detail on what constitutes the best interests of the child. The case concerned an application for variation of a consent order in which custody of the

minor child had been granted to the respondent. KING J had this to say about what constitutes the best interests of the child, at pp 204-205:

“ In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.

(d) The capacity and disposition of the parent to give the child the guidance which he requires;

(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;

(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;

(h) the mental and physical health and moral fitness of the parent;

(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;

(j) the desirability or otherwise of keeping siblings together;

(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

(l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and

(m) any other factor which is relevant to the particular case with which the Court is concerned.”

The above except is quite useful in determining which parent should be granted custody of the minor child in the present case. The defendant took away the minor child and one might be tempted to say to take advantage of that to secure the affections of the child. However, it can also be noted that he facilitated communication between the child and plaintiff and this happened the first weekend after the separation. It is common cause that the child did not want to remain with plaintiff.

It is also not in dispute between the parties that the child prefers to be with defendant. From the evidence led before this court it is clear that plaintiff did not prove why she is a better parent. Despite the child having been taken away against plaintiff's will she did not exhibit any desire to be reunited with the child. Even before separation it is defendant who always assisted the child with its homework and paying school fees. After separation plaintiff did not make meaningful efforts to be apprised of the child's progress at school. It must be pointed out that both parties were fair in that they did not mind custody being granted to either of them save that even without the court having interviewed the child, it was also common cause that the child prefers staying with defendant. I would therefore hold that the best interests of the child are best served by awarding custody to defendant.

On the matrimonial home the starting point is that the parties have equal shares as the property is registered in their joint names. In the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) cited by plaintiff's counsel McNALLY JA had this to say at pp 105 106:

“The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's Principles of South African Law 8 ed p 255.

The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "as The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's Principles of South African Law 8 ed p 255.

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers". E far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ...".

The plaintiff produced proof of the various payments that were made to the contractor who constructed the house. They cover the period between 4 February 1999 and 12 June 2001. The payments were recited to Tadex Trading (Private) Limited and Zectopine Investments (Private) Limited which are the two companies in which plaintiff holds directorships. These payments, including the purchase price for the stand amounted to Z\$3 532 230. The plaintiff also produced invoices relating to quotations for other work done or items supplied but in relatively smaller amounts.

On the other hand, apart from claiming that he made some indirect contributions defendant did not tender any documentary proof. For example it should not have been difficult to give evidence on the value of the contracts he secured with the clients he mentioned. From the pay slips belonging to defendant that were produced by plaintiff defendant's net earnings between April 1999 and September 2001 roughly averaged Z\$12 488 per month.

Ms *Mutswangwa* submitted that the court should take into account the provisions of the s 7 of the Matrimonial Causes Act is as far as among other things, it provides that in making an award the court should place the parties in the position they would have been had a normal marriage relationship continued. She also submitted that the defendant should not impoverished by the divorce.

The plaintiff also owns another house which was acquired for her by her father before she got married. In making an award the court will have to take that into account.

This court was also referred to the case of *Shenje v Shenje* 2001 (2) ZLR 160 (H) in which GILLESPIE J in considering the provisions of s 7 of the Matrimonial Causes Act had this to say at p 163-164;

“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. The list is not complete. It is not possible to give a complete list of all the 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 inevitable, of becoming divorced.”

The factors listed in the subsection deserve fresh comment. One might form 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 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 objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped."

In the exercise of my discretion and taking into account the provisions of s 7 (4), I am satisfied that notwithstanding that plaintiff contributed more to the matrimonial home, awarding her a greater share than the defendant would result in an overall inequitable distribution. This is because she has another property to fall back on whereas defendant has none. Consideration must also be taken that defendant is going to shoulder the burden of looking after the parties' daughter.

The claim in respect of First Mutual Shares is unsustainable. Plaintiff appears to be a meticulous person who keeps records of her transactions as evidenced by the documentation she produced in respect of the development of the matrimonial home. It is unlikely that she could have failed to document the very significant transaction in respect of the undertaking by defendant to buy back the shares. It is also inconceivable that she would not have assisted in bailing out her spouse who was in trouble with his employers. The disposal of the shares took place in 2005 and a written demand was only made in 2007 when most probably the marriage relationship had soured. Going by defendant's average net income as earlier on stated it could have taken him ages to buy back the shares.

In the result it is ordered as follows-

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor child, Nicole Kundaimunashe Mtengwa be granted to defendant with plaintiff exercising access during every weekend, public holidays and school holidays.
3. That the movable assets of the marriage be shared in accordance with paragraph 10 of the declaration.

4. That stand 6295 Warren Park Township of Warren Park be shared equally between the parties.
5. That within forty days of this order the property described in paragraph 4 above shall be valued by an estate agent agreed to between the parties, failing which the registrar shall appoint one such estate agent and in either case the parties shall equally share the costs of such valuation.
6. Upon such valuation the property shall be sold to best advantage with the parties sharing the proceeds equally.
7. The claim for delivery of 63 120 First Mutual shares or payment of their equivalent value is hereby dismissed.
8. That each party shall bear their own costs.

*Wintertons*, plaintiff's legal practitioners

*Mutswangwa & Partners*, defendant's legal practitioners