

SAMUEL MAZIVANHANGA
versus
TRACY MAZIVANHANGA (NEE PHAKATHI)

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 20 JUNE 2011 & 19 JANUARY 2012

FAMIL LAW COURT

P. Kawonde, for the Plaintiff
A.A. Debwe, for the defendant

GUVAVA J: The plaintiff issued summons out of this court seeking a decree of divorce and other ancillary relief. The facts of this matter are not in dispute and may be summarized as follows. The plaintiff and defendant are husband and wife. They married in terms of the Marriages Act [*Cap 5:11*] on 24 August 1996. They have one minor child a little boy aged 11. In 2008 the parties separated due to marital differences. They have not lived together as husband and wife since that time. They are both certain that the marriage has broken down to such an extent that they cannot reconcile. During the course of their marriage they acquired various household goods and an immoveable property which is known as stand 346 Mandara Township, Harare. At a Pre Trial Conference held before CHITAKUNYE J the parties agreed on all the ancillary issues pertaining to the custody, maintenance and access of the minor child, division of all their moveable assets and costs. They also agreed in respect of their immoveable property that they both own a 50% share and that the property should be sold. They have asked the court to incorporate the terms of their agreement as an order of the court. The sole issue for determination is when the property should be sold.

The plaintiff gave evidence and told the court that they own a beautiful seven bedroomed house in Mandara. The property is situated on an acre of land with two lounges and a cottage at the back. He produced as exhibit photographs of the house which show a well kept property with beautiful gardens and a swimming pool. The plaintiff stated that he would like the property to be sold. He was retrenched from work and

therefore no longer has an income. The property is valued at approximately US\$285 000 to \$290 000. If the property is sold he will be able to inject some capital into a trucking business which he started a few months ago. He would also be able to purchase a property for himself. He stated that from her half share the defendant would also be able to obtain a property in the same neighborhood where she can live with the child. He further stated that the house was too big for just the defendant and the minor child and was a security risk as already it had been broken into on more than one occasion. The plaintiff stated that in his opinion the minor child would adjust to the change in circumstances. If a property was obtained in the same area he would continue to see his friends and to attend the same school.

In cross examination the plaintiff stated that he needed the money from the sale of the house to maintain the minor child. He agreed that the sale would upset the child as he was attached to the house. He was however adamant that the child would adjust to a new environment. He agreed that the child may need counseling but was of the view that if things were explained to him properly he would understand. He reiterated that a delay of six years would disadvantage the child as he would be unable to pay for his school fees at the school that he is accustomed to.

The defendant told the court that she is employed at Mr Edwards Securities as a reconciliation clerk. She stated that she resides at the former matrimonial home with the minor child. She would like the property to be sold after the minor child attains the age of eighteen. She testified that after the plaintiff left home the minor child was devastated. There was a change in his behavior and his grades at school fell. In 2010 they were invited to the school by the head teacher as they were concerned about his performance. They were advised to seek counseling for the minor child. The defendant stated that the house they live in is the only home that the child knows and if it is sold it would be very traumatic for him. She further stated that the plaintiff should find other means of raising funds for the maintenance of the child instead of selling the house. When plaintiff told the minor child that the house would be sold he cried for days.

In cross examination she maintained that the child would be devastated by any sale and suggested that it was prudent to wait until the child attained the age of eighteen.

She also stated that it was not prudent to sell the house to invest in a business because there was no guarantee that it would do well. She further stated that the minor child went for professional counseling for a while. He still sees a school psychologist. When questioned by the court she indicated that she would not be able to meet the child's expenses on her own should the plaintiff fail to pay maintenance.

In determining how a property should be dealt with a court is directed to apply the principles which are set out in s 7 (4) of the Matrimonial Causes Act [*Cap 5: 13*]. In this case the parties' are agreed that the property should be sold and the proceeds shared equally between them. The only point of dispute is the question of when the property should be sold. The thrust of the defendant's argument is that the minor child of the marriage needs to continue living in the same environment until he attains the age of eighteen. Before dealing with the requirements of the above provision I would like to deal with the evidence that was led by the defendant in support of her claim. The defendant has submitted that the minor child would be traumatized by the sale of the house as it is the only home that he has ever known.

I have no doubt in my mind that the divorce of his parents and any changes that will take place as a result will affect the minor child as they would affect any child who suddenly, through no fault of his own, finds his family falling apart. Indeed the defendant has given evidence of the effect that the divorce has had on him. His grades have been affected and he has had to undergo some counseling so that he adjusts to the changes in his circumstances. She also testified that when he was advised by the plaintiff that the property would be sold he was devastated. I have no reason to disbelieve the defendant on this evidence. It is the reaction that one would expect of a child who is undergoing the trauma of a divorce. It is however my view that the defendant should have gone a step further if she wished the court to rely on the emotional state of the minor child to delay the sale of the house. It seems to me that it was incumbent for the defendant to have provided evidence from a psychologist who would have had an opportunity to examine the minor child and therefore provide the court with their expert evidence on the socio – psychological make up of the child. The expert would also be able to provide expert opinion on the effect of the sale on the child. He would also be able to state whether the

effect of the sale on this minor child would be so devastating that the results cannot be contemplated. Judges are not experts in the field of psychology and would not be able to determine how the sale of a house will affect an eleven year old child. In my view in such a case the test is not whether the sale would affect the child because it obviously will. The test should be whether the emotional consequences for the child would be so great that he would be scared for life. It seems to me that without this evidence I am unable to determine the issue on the basis of this argument.

Section 7(4) of the above act provides some direction with regards to the interests of children when it comes to dividing the matrimonial estate. The relevant provisions provide as follows:

“(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following:-

- (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 and child 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 educated or trained or expected to be 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;

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”.

It seems to me that paragraphs (a) to (d) of the above provision touch upon the issues raised in this matter. The plaintiff is currently unemployed. He is trying to establish a transport business which has had a few major set backs. He has stated in evidence that he requires the money from the sale of the house to inject into the business and to help in raising the maintenance that he will pay for the minor child. He says that he has tried to find employment with no success. The defendant is employed but does not earn enough

to maintain the minor child on her own. Although she stated in evidence that as parents they should just find a way of raising the money without disturbing the child she has offered no concrete solution on how the child will be maintained.

It seems to me that both parents are in very difficult circumstances. The court can take judicial notice of the fact that employment is not easy to secure due to the economic problems being faced by the country. The only asset that the parties have is the house. The property has been valued at an amount of US\$285 000 – US\$290 000. The plaintiff stated in evidence that the net proceeds which will be realized after the sale will be sufficient for the defendant, if she so wishes, to purchase another house in the same area albeit a smaller one than the seven bed roomed mansion that they currently enjoy. In this way the minor child will not be uprooted from the environment that he is used to. A sale will ensure that the child has a fairly comfortable roof over his head and enough money for maintenance and his other expenses. Retaining the property may well mean that the child will not have the same quality of life as he has been used to as he will lack the basic necessities in life while retaining a house which may well be lost if the defendant cannot keep up with the rates and other payments for the property.

It is apparent that both parties have the best interest of the minor child at heart. He has received the best primary education that they can afford and it is intended that he continues at St John's College for his secondary education. If he does get a place at that school the plaintiff would have to pay about US\$2 000 for his fees and uniforms. It is clear that the plaintiff and the defendant both do not wish the divorce to alter his standard of living or to affect his education. However it has been proved that divorce has the unfortunate effect of impoverishing people and changing their lives. A divorce by its very nature is certain to jeopardize life's routine for the parties and the children, standards of living are inevitably reduced, social circles change, parties should expect general decline in their social profiles as a direct result of the divorce.

In my view the only way that the parties may continue with a semblance of the lifestyle that they were used to is if the property is sold and a sufficient amount realized to enable the defendant to purchase another property. In terms of the agreement that the parties have, the plaintiff will pay a further US\$30 000 from his half share to the

defendant. This amount together with the defendants half share should be sufficient for her to purchase another property. If she finds a house in the same area she will be able to minimize the effects of the divorce to the minor child as he will be able to continue with his circle of friends. From the proceeds the plaintiff will be able to pay for the child's maintenance and meet his obligations towards school fees and other requirements so that the child will not be too affected by the change in his life.

It is my view therefore that the plaintiff has established the need to sell the property upon divorce and I therefore order as follows:

1. A decree of divorce is hereby granted.
2. Custody of the minor child BM (born 5 June 1999) is hereby awarded to the defendant with the plaintiff having access rights at all reasonable times.
3. The plaintiff shall pay maintenance for the minor child in the sum of US\$120 per month until the minor child attains the age of 18 or becomes self sufficient whichever occurs first.
4. The plaintiff shall pay for all the minor child's medical and educational requirements.
5. The moveable property being an Isuzu KB registration number AAL 1538 shall be sold at best advantage and the net proceeds thereof shall be shared such that the plaintiff gets 65% and the defendant 35%.
6. The rest of the moveable property situated at stand 146 Mandara shall be awarded to the defendant as her sole and exclusive property.
7. That the immovable property being stand 146 Mandara shall be sold upon the grant of this order at best advantage and the net proceeds thereof shall be shared equally between the parties.
8. The parties shall agree on an estate agent within 30 days of this order failing which either party may approach the Registrar of the High Court who shall appoint one from his list.
9. The plaintiff is hereby ordered to pay to the defendant from his 50% share of the proceeds of the sale of stand 146 Mandara the sum of US\$30 000.00.
10. Each party shall bear their own costs.

Kawonde and Company, plaintiff's legal practitioners
Debwe and Partners, defendant's legal practitioners