

GAYLORD MASUKA
versus
MARGARET MASUKA

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 28 JANUARY 2011 AND 19 JANUARY 2012

FAMILY LAW COURT
TRIAL CAUSE

B Pesanai, for the plaintiff
Defendant in person

GUVAVA J: The plaintiff issued summons out of this court seeking a decree of divorce, custody of the parties' two minor children and distribution of their property. The plaintiff and the defendant married on 10 December 2005 in terms of the Marriage Act [*Cap 5:11*]. They had been staying together since 2002 when plaintiff paid lobola in terms of customary law. Two children were born and they are aged 8 and 3. The plaintiff has custody of the older boy and he is currently doing grade 3 at a school which is close to their home. The younger child is with the defendant. The defendant has counter claimed for custody of both children and for division of their property.

At a Pre Trial Conference before a Judge in Chambers the parties agreed that their marriage had broken down, that their movable property be distributed in accordance with the agreement they had reached and that the issue of maintenance be governed in terms of an existing maintenance order by the Magistrates Court. The parties further agreed that the following issues be referred to trial:

1. What immovable property should be awarded to each party
2. Which party should be awarded custody of the minor child T.NG Masuka

The plaintiff gave evidence and testified as follows. He resides at their matrimonial home which is stand 22195 Unit L Chitungwiza. He is employed by the Zimbabwe Republic Police as a police officer. He married the defendant in terms of the marriage Act [*Cap 5:11*] on 10 December 2005. The marriage has broken down to such

an extent that it can no longer be resuscitated. The plaintiff stated that there was no peace in the home as they were always quarrelling. Arguments arose from the defendant's failure to look after his daughter from a previous union. She was arrested on two separate occasions for child abuse. The child was also sexually molested on three separate occasions while under the defendant's care. The plaintiff testified that in 2008 the defendant decided to go to the United Kingdom and seek employment. She left the elder child with the maid while plaintiff was at work. When her trip to the United Kingdom failed to take off she tried to evict the plaintiff from the matrimonial home. The plaintiff then instituted proceedings for divorce.

He explained that he purchased stand 22195 Unit L Chitungwiza on 4 December 2002. This followed a sale of another property which he owned in Norton. This was soon after he married the defendant in terms of customary law. When he married the defendant she was a student at Species College. She was also working on contract at OK Zimbabwe based at Makoni Shopping Centre. When she fell pregnant she left employment and went and stayed with her parents in Chivhu until the birth of their son. At the time he paid for the property in Chitungwiza the defendant was not with him as she had gone to Chivhu. The plaintiff testified that he had already acquired the building material for the Norton property and he used those materials to construct the house. He produced as an exhibit a copy of the judgment in case number 7305/02 where he divorced his first wife showing that he was awarded the following building materials 30 asbestos sheets, 14 window frames and 20 000 bricks. He was also awarded the Norton property. He stated that he had also bought a further 30 asbestos sheets, pit sand, 3/4 stones and cement which he stored at Southerton Police Station. He also purchased door frames in June 2001 prior to his marriage to the defendant. He started building the house in 2003 and completed it in January 2004. He used the money from the sale of the Norton stand to pay the builders and to purchase plumbing material and the electrical fittings. In July 2008 he purchased a second property in Epworth being stand 8964 Glenwood in Epworth. The plaintiff testified that the defendant did not contribute towards its purchase price. It is a serviced stand which is undeveloped. Cession has been effected into his name. The plaintiff stated that since he had solely purchased both properties without any direct contribution by the

defendant he should be awarded the Chitungwiza property whilst the defendant is awarded stand 8964 Glenwood, Epworth.

Turning to custody the plaintiff stated that he should retain custody of the minor child TNG as he has been staying with him since the defendant left. He is now eight and is in grade three. The school is about 100 meter away from their house. He has a maid who looks after the child together with his daughter from an earlier marriage who is in grade 6. He also lives with his sister who helps in looking after the children. The plaintiff testified that he is a good father and takes an active role in the school where his children attend. He is a member of the School Development Association and actively assists the community where he lives. The plaintiff alleged that the defendant was not a good mother as she was arrested for ill treating his daughter. The child at some stage had to be removed from the home and taken to a safe house. The plaintiff further alleged that the defendant had enrolled at a Nursing School at Gutu Mission. He argued that if she is admitted at the school then the child would be uprooted from the environment that he is familiar with.

In cross examination the plaintiff denied that the defendant had contributed in any way towards the construction of the house in Chitungwiza as all the building material had already been purchased. He also denied that the defendant had used her salary to buy groceries for the home or brought anything from Botswana for use towards the construction of the house. The plaintiff denied that he had been arrested and that defendant had paid bail for him. He however conceded the point after the defendant produced the bail receipts and warrant for his arrest. In my view the plaintiff was not a very honest witness and wanted to give the impression that the defendant had done nothing at all for the home. I however did not believe him as it was highly improbable that he would let the defendant go to Botswana on no less than six occasions if there was no profit to the enterprise. He had also denied the arrest until the defendant brought proof of such arrest.

The plaintiff called Tarwirei Takavengwa Chihota as his next witness. He told the court that he resides at 18119 Unit M, Chitungwiza and is self employed making window and door frames as well as burglar bars. He knows the plaintiff as his client. He stated

that he made some window frames and door frames in 2001. He produced two receipts as exhibit. He stated that he gave them to the plaintiff when he paid for the items. He was able to identify the receipts by his handwriting.

In cross examination he told the court that there were several receipts for the same goods as the plaintiff would pay a deposit and then pay the balance later. When asked for copies of the receipts he stated that he had destroyed the documents as the sale had taken place more than eleven years ago. When questioned by the court he accepted that he knew the plaintiff as he was introduced to him by his brother. He continued to relate to the plaintiff after the sale of the window frames and door frames. He denied that he ever met the defendant. The witness seemed an honest witness. From the evidence it was apparent that he had sold door frames and window frames to the plaintiff. He would not be mistaken as he knew the plaintiff and had met him through his brother whom he had previously done some business.

The defendant testified that she currently lives at her parent's house in Chitungwiza not far from the plaintiff. She told the court that she is self-employed as a hair dresser. Her parents assist with her living expenses. She told the court that she completed her secondary education in the year 2000. She then went to work for OK Zimbabwe in Chitungwiza. She enrolled at Species College and met the plaintiff whilst she was there. In April 2002 she got pregnant with their first child. The plaintiff then divorced his first wife and was awarded the Norton Stand which he subsequently sold. In December 2002 the plaintiff called her while she was at her rural home in Chivhu and advised her that he had secured a stand from Chitungwiza Municipality. She came back to Harare in January 2003 and started working at OK in August of the same year. In October they started to buy the material that they did not have in stock and started building during the same year. In March 2004 the walls and roof had been put up. Plastering and plumbing only started in June 2004 when she started going to Botswana to buy goods for resale. She brought things for the home as well as two toilet seats and cisterns, three main doors a tub and a shower. She said she would also bring foreign currency which would be used to buy building materials and paying the builders. She also

brought household goods such as TV, radio, DVD player, carpet and clothes for the family.

The defendant testified that she is entitled to a 50% share of both properties which were purchased during the marriage. She produced her passport which showed that she was going into Botswana and back on several occasions between June 2004 and May 2005. She also produced copies of pay slips relating to her employment at OK Zimbabwe but they related to the period in 2002 before she went on maternity leave and 2004 after she returned. With regards to the custody of their eldest child the defendant testified that she should be awarded custody as she is the mother of the child. She stated that the child suffers from stomach pains. She produced some hospital cards showing the occasions she had taken him to hospital with the problem. She however stated that although he lives a short distance from her she had not seen him in over a year. She was also of the view that the plaintiff's new wife would not be able to look after her child. She testified that the plaintiff was living with four children with different mothers and she did not think he would cope. She also alleged that the plaintiff had been involved in criminal activities. She produced a bail receipt where she had paid bail for him when he was arrested on a charge of contravening s 170 of the Criminal Law Codification Act [*Cap 23:04*] She also produce a warrant for his arrest which was issued after he was in contempt of a protection order which she had made against him.

In cross examination she conceded that she had not made any significant direct contributions to the construction of the house. In fact other than the tub and toilet seats there was very little contribution by the defendant. During the time of construction she was also not earning an income as evidenced by her pay slips. She could not produce any for the period 2003 when the construction of the house was done. She clarified that she was a contract worker at Ok and that when she returned in 2003 she would only work during the weekend. She said during this time she would not receive a payslip as she would be paid an hourly rate. She did not know the cost of the stand or the amount she contributed to its purchase. It was apparent that whatever she had earned she had just brought home and it was used in the home. She also conceded that he had building

material which she had disputed in her summary of evidence. She further conceded that she had not contributed towards the purchase of the Epworth stand.

When questioned by the court the defendant stated that although she had asked for 50% of each of the properties she was happy to accept the stand in Epworth if plaintiff would build a structure for her to stay with the children.

In determining the issue of custody a court is guided by the principle that the best interest of the child is paramount. In the case of *McCall v McCall* 1994 (3) SA201 the court set out the factors to be taken into account in determining the best interests of the child. These were set out at p 205 as follows:

- “(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 minor child TNG is presently in the custody of his father. He has lived with him for the past two years. He is 8 years old and attends a nearby school. He is currently in grade three. When the court had occasion to meet with the child he was clean and healthy and appeared to be doing well at school. He had not seen his mother in almost two years as access has not been allowed. He has obviously missed out on the maternal nurturing that is required at this tender age. The younger child TMG is four years old and lives with his mother. The children have thus also been separated and have not seen each other for two years.

It seems to me that the parties have not considered the best interest of their children in this matter. In the case of *Van der Linde v Van der Linde* 1996 (3) SA 509 @ 510 the court highlighted the fact that upon divorce minor children form a very strong bond with their siblings. The court should therefore, in making custody awards, try not to separate them. The arrangement at the moment is that the older child is with the father while the younger one resides with the mother. The effect of this arrangement is that the children are separated and therefore do not see each other when they should be together.

The question is whom should the children reside with. The plaintiff alleged that the defendant was an unsuitable mother because she had ill treated his daughter from another relationship. There was no allegation that she had at any stage ill treated her own children. She could have taken a more pro active role to see the older child as it was apparent from the evidence that the defendant lives less than two kilometers from the school where he attends. However I accepted her evidence that she did not want the child to get into trouble with the father for seeing her behind his back. The defendant has stated that the plaintiff is not a fit parent to be custodian of the young children as he has been in conflict with the law. The offence for which the plaintiff was on bail relates to an offence of bribery. While I accept that he has not been convicted of the case it is my view that it weighs heavily against him as it is a serious offence particularly for a police officer to be facing. The defendant also alleges that the plaintiff is living with another woman and is therefore committing adultery. These allegations were not denied by the plaintiff.

Where a parent has been guilty of moral transgression the court may find that he is not a suitable custodian of minor children. However the transgressions must be so bad

that they will affect the child and it will be in the child's best interest that he be removed from that person's custody. Having weighed the evidence and had the opportunity to interview the minor child I am of the view that his interests would be served by living with his mother. He is still very young and needs his mothers care. I accept that the minor child is a boy and requires the influence and directions of his father. I will therefore order that the plaintiff has as much access to the minor child as possible. It is convenient at the moment because the parties are staying in the same neighborhood.

The issue of division of property is determined by s 7 (4) of the Matrimonial Causes Act [*Cap 5:13*]. The provisions of this section make it incumbent for a court to consider various factors before making an award of property. The court is mandated to look at such factors as the income earning capacities of the parties, the financial needs, obligations and responsibilities which each party will have in the future, the standard of living of the parties, the age and physical and mental condition of the parties and the direct and indirect contributions of the parties. All these factors must be considered together to enable the court to reach a just and equitable distribution of the matrimonial estate. From the evidence it was quite apparent that the plaintiff was the main breadwinner in the family. He is employed as a police officer and at the time he married the defendant he already owned another property in Norton which he sold and used the proceeds towards the development of the Chitungwiza property. The defendant on the other hand had made very little direct contributions to the acquisition and development of the Chitungwiza property and no contribution towards the Epworth property. She however did make indirect contributions to the well being of the home. She was a wife and mother for four years and prior to that she had lived with the plaintiff in terms of a customary law union for two years. She used her income to buy clothes and food for the family and household goods for the home. It seems to me that her contribution has been significant to the marital estate and is thus entitled to a share in the matrimonial estate. The plaintiff in his pleadings and in his evidence has consistently offered the defendant the Epworth stand. The defendant had claimed a 50% share to both properties but during her evidence she stated that she was happy to accept the Epworth stand. She also stated

that she did not have the capacity to develop it herself and requested that the plaintiff put up a structure where she would be able to live.

The plaintiff is employed as a police officer. He told the court that they earn a very small salary. Although he did not produce his payslip the court can take judicial notice of the fact that civil service salaries are generally extremely low. He has obligations to his children and another wife whom he lives with. He is paying maintenance to the defendant in terms of an order granted by the Magistrates Court. In my view he would not have the financial resources to build a structure as requested by the defendant. I have noted from the Joint Pre Trial Conference Minute which was filed by the parties that the defendant has in fact received the bulk of their movable property. She resides at her parent's house in Chitungwiza. In the event that she succeeds in getting the place to train as a nurse she advised the court that she would be provided with accommodation where she can stay with the children. In my view therefore taking into account all these factors it would be just and equitable if the plaintiff was awarded the house in Chitungwiza and the defendant the stand in Epworth.

In the result, I will therefore make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the two minor children of the marriage TNG Masuka (born 25 December 2002 and TMG Masuka (born 27 November 2007) are hereby awarded to the defendant.
3. The plaintiff is hereby granted access to the minor children every week end from Friday after school activity to Sunday at 5.00pm. He shall also be entitled to access every first two weeks of the school holiday. Any other access shall be by arrangement between the parties.
4. Maintenance shall be governed in accordance with the order granted by the Magistrates Court in case number M 71/09.
5. The plaintiff is awarded as his sole and exclusive property the movable property set out in Annexure A to this order.
6. The defendant is awarded as her sole and exclusive property the movable property set out in Annexure B to this order.

7. The plaintiff is hereby awarded stand 22195 Unit L Chitungwiza as his sole and exclusive property.
8. The defendant is hereby awarded stand number 8964 Glenwood Epworth as her sole and exclusive property.
9. The plaintiff is ordered to sign all the necessary papers to effect cession to the defendant of the property described in paragraph 8 within 30 days of the grant of this order failing which the deputy sheriff is hereby ordered to sign all the necessary papers for cession to be effected.
10. Each party shall bear their own costs.

ANNEXTURE A – PLAINTIFF

- Fridge
- Satelite dish and decoder
- Bed
- Wardrobe
- Room divider
- Sofas
- 6 blankets
- 24 x 50 fertilizer
- One hand set and line 0912858488

ANNEXTURE B – DEFENDANT

- Panda TV
- Warfdale dvd
- Metal Kitchen unit
- Kitchen chairs and table
- Bread bin
- Carpet
- Radio
- home theatre
- Three plate stove
- VCR
- Tent
- One handset and line 0912606424
- Horse pipe
- Five cushions
- Fan
- 6 blankets
- Four crates
- Kitchen utensils
- Coffee table

I E G Musimbe & Partners, plaintiff's legal practitioners