

COLLIN SYDNEY DICKS
and
AVERIL CAROL DICKS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 2 July 2010, 30 August 2010, 7 & 8 September 2010, and 10 March 2011

Matrimonial Trial

T. Moyo, for plaintiff
R. Harvey, for defendant.

CHITAKUNYE J. The plaintiff and defendant were joined in holy matrimony on 23 September 1992 at Harare in terms of the Marriages Act, [*Cap 5:11*]. The marriage still subsists. Both of them were born and bred in Zimbabwe hence they are domiciled in Zimbabwe. Their marriage was blessed with two children born on 29 December 1991 and 3 December 1993 respectively.

On 21 August 2002, plaintiff filed a suit for divorce against the defendant. He alleged that the marriage relationship between the parties has irretrievably broken down to such an extent that there are no reasonable prospects of the restoration of a normal marriage relationship between them. Plaintiff claimed custody of the minor children and offered to provide certain sums and amenities to defendant as in full and final settlement of the financial provision, post divorce maintenance and proprietary claims of plaintiff and defendant as against each other.

In her plea defendant conceded that the marriage had irretrievably broken down albeit laying the blame on plaintiff for the breakdown of the marriage. She also made a counter claim mainly for post divorce maintenance and other provisions.

On 8 February 2007 the parties reached agreement as to custody, maintenance and access to minor children and had that agreement recorded and to form part of the final order. That agreement reads:-

- “1. That plaintiff and defendant are agreed that the marriage relationship between them has irretrievably broken down to such extent that there is no reasonable prospect of a restoration of a normal marriage relationship between them and that a decree of divorce be issued.
2. That custody of the minor child Shane Sydney Dicks (born 3 December 1993) be awarded to plaintiff.

3. That defendant be afforded reasonable rights of access to the minor child Shane Sydney Dicks.
4. That custody of the minor child Carlene Dicks (born 29 December 1991) be awarded to defendant
5. That plaintiff be afforded reasonable rights of access to the minor child Carlene Dicks.
6. That plaintiff be and is hereby ordered to pay maintenance for the minor child Carlene Dicks in the amount claimed by defendant as amended in defendant's Plea, the amount to be paid during holidays and whilst the minor child is resident with defendant and until such time as Carlene shall have completed her secondary schooling and reached the age of majority or becomes self- supporting.
7. That plaintiff shall pay all necessary school fees, levies and other incidental costs for purposes of the schooling of Carlene, the parties to this action being agreed that it is in the best interests of Carlene, that she be enrolled at a suitable boarding school such as Watershed College or such similar institution in Zimbabwe as soon as reasonably practicable. Pursuant thereto, plaintiff shall be responsible for the payment of all necessary school uniforms, sporting equipment, stationery and other school material for Carlene in respect of such school including reasonable pocket money and expenses required during term times.
8. That plaintiff shall continue to retain Carlene on his Medical Aid Scheme and shall forthwith pay any shortfall that might arise in respect of any necessary medical attention to Carlene.
9. That defendant shall be responsible for the costs of maintenance for Shane on the occasions when Shane might reside with defendant in Zimbabwe, it being recorded that plaintiff has been and shall continue to be solely responsible for the maintenance and education of Shane who, it is recorded, is enrolled at school in the Republic of South Africa.
10. Plaintiff shall contribute the sum of \$60,000.00 maintenance per month to the defendant until such time as defendant dies or remarries whichever is sooner and further subject to a variation of maintenance on good cause shown in accordance with the Maintenance Act.
11. The parties shall forthwith make available to one another, copies of any school reports concerning the minor children of the marriage and shall do all that is reasonable to facilitate and ensure meaningful and reasonable access for the minor children to contact their parents through telephone and e-mail and the like."

The above was signed for by the parties' respective legal practitioners on 12 February 2007.

Thereafter the parties continued negotiating over the outstanding issues. Several meetings were held before GUVAVA J in the period 31 July to 2009 to 8 January 2010 in an effort to reach settlement. On 8 January 2010 a final pre-trial conference was held after which a joint pre-trial conference minute was drafted and agreed upon by the parties. The joint pre-trial conference minute shows that the parties agreed that:-

1. The marriage relationship had irretrievably broken down
2. Plaintiff will have custody of the minor child SHAYNE SYDNEY DICKS born on 3 December 1993.
3. Plaintiff will meet all of the reasonable costs of maintaining the said minor child, and those of the adult child CARLENE DICKS born on 29 December 1991.
4. Plaintiff presently pays US\$350,00 per month to defendant by way of agreed interim maintenance and plaintiff and defendant have further agreed that post-divorce, plaintiff will maintain defendant as a beneficiary to a recognized local Medical Aid Society until she obtains employment offering same as a benefit.
5. Subject to the outstanding trial issues, plaintiff and defendant will otherwise be declared sole respective owners of such other matrimonial assets as are presently registered in their respective names or as are currently in the possession or control of each of them respectively.
6. Plaintiff undertakes a contribution to defendant's attorney/client costs of suit in the event of an out of court settlement.”

During that same pre-trial conference issues referred for trial were stated as:-

1. What order, if any, should be made in respect of the provision by plaintiff for defendant of transport and residential accommodation post-divorce?
2. What order, if any, should be made in respect of the provision by plaintiff of additional post-divorce maintenance for defendant? (in addition to the maintenance presently in place in terms of Admission 4..)
3. Costs of suit.

Due to the length of time it has taken for the matter to come to trial certain aspects of the claim and counter claim have been overtaken by events. During that period parties were making efforts to resolve areas of dispute hence agreements on some of the aspects as evident from the agreements referred to above.

The children, who were very young at the inception of the proceedings, have now grown. Carlene is now a major whilst Shane is now about 17 years old. From the evidence adduced in

court it appears that whereas at the inception of the action, plaintiff was doing well in his business venture that does not seem to be so now. It is common cause that plaintiff was a successful business man who operated two companies that are said to now be defunct, namely, Pro-Weld Engineering (Pvt) Ltd and Outrigger Transport CC. Pro-weld operated from Zimbabwe whilst Outrigger operated from South Africa. In their evidence in court the parties concentrated on aspects pertaining to:

1. The sharing of immovable property; and
2. Post-divorce maintenance for defendant including her claim for a motor vehicle.

The basic considerations in resolving the above issues are provided for in s 7 of the Matrimonial Causes Act, [*Cap 5:13*]. Section 7(1) of that Act states that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to-

- (a) the division of, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or any child of the marriage.”

In deciding on the issues court is enjoined to “..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 a position they would have been in had a normal marriage relationship continued between the spouses.”

Section 7(4) of the said Act provides that:-

“In making an order in terms of subs (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 or 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 being 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 contributions 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 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 parties.”

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) the Supreme Court enunciated a three tier approach in the division of matrimonial assets. This involves categorizing the assets as ‘hers’, ‘his’ and ‘theirs’. After allocating each what is ‘hers’ or ‘his’ the remaining category of ‘theirs’ would then be shared. If ‘theirs’ leaves one party in a worse of situation then the court is empowered to take from one spouse’s share and give it to the other. In that exercise it has been said that consideration of relevant factors that are not easily quantifiable in terms of money is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion. In the exercise of that wide discretion the question is what would be a fair and just distribution of the matrimonial estate? (see *Ncube v Ncube* 1993 (1) ZLR 93 (S))

In terms of the joint pre-trial conference minute the immovable property being seriously contested is the Westgate Matrimonial house. The Chishawasha Stands were not part of the minutes and in any case it is clear that they were acquired many years after the parties were no longer living together and have since been disposed off. The same applies to the remaining property in South Africa. This property, known as the Donnington property was acquired several years after the parties had ceased living together. The defendant’s contribution both direct and indirect in respect of these properties was almost none. These properties are clearly plaintiff’s and as such would be placed in the ‘his’ category. There was apparently no immovable property registered in defendant’s name for which we can refer to as ‘hers’. As regards the category of ‘theirs’, the immovable property acquired when they were living together, that is the Westgate property was registered in plaintiff’s name. The Westgate property was admittedly the matrimonial home. The defendant’s contribution was mostly indirect. It is not disputed that the property was registered in plaintiff’s name and that it was paid for by plaintiff through bond repayments from his earnings from his employment with Pro-weld Engineering Pvt Ltd. As the sole matrimonial home as at the time of separation it is only fair that defendant be accorded a share thereof.

On the Westgate property plaintiff offered a 50% share to defendant. The defendant, on the other hand, asked for a 100% share in the Westgate property. It is my view that taking into account the defendant's contributions both direct and indirect as a wife she deserves a fair share. I am however of the view that such a share cannot be the entire value of the property. The defendant argued her case for a 100% share on the basis that plaintiff had other properties. As was shown during the trial, plaintiff's businesses have fallen on hard times. The only property remaining beside the matrimonial home is the Donnigton property which is under mortgage bond. That property was acquired after separation and should be considered. The defendant not having contributed anything towards its purchase should logically not expect much from this property. I am of the firm view that a sharing of the matrimonial home in equal shares would meet the justice of this case.

Maintenance

The issue of post divorce maintenance requires justification. The defendant is about 44 years old. The evidence led showed that she had worked at some time in the past before and during marriage. At the time of trial she said she was working on a temporal basis. Whilst it is true that she is not highly qualified, she is still able to get employment. She must thus not expect to be maintained for life. (See *Chiomba Chiomba* 1992(2) ZLR 197(SC))

In *Kangai v Kangai* HH 52/07 GOWORA J remarked that-

“A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance. See *Chiomba v Chiomba*. 1992 (2) ZLR 197”

I fully associate myself with the above remarks.

In *casu* the defendant cannot be said to be elderly at all. She is capable of being employed or remarrying. As already alluded to above she has been employed before and she can still get employed. The parties stopped living together as husband and wife in the year 2002 and since then defendant has been alive to the fact of an impending divorce and the need to find sources of income for her own survival. She is some one who has been receiving maintenance pending divorce since January 2010, that period to now must surely have been

adequate for her to reorganize her life. She cannot expect to continue receiving maintenance for long. I am of the view that maintenance for a further period of 4 months should be adequate in the circumstances of this case.

The plaintiff pleaded incapacity to continue paying maintenance due to the fact that the companies he worked for and from where he earned his income have since been liquidated. To buttress his position he alluded to the fact that he has in fact fallen in arrears on the interim maintenance due to those changed circumstances. I am however of the view that he should nevertheless be saddled with a few more months of paying maintenance so as to give defendant opportunity to re adjust to the realities of her new situation in terms of securing employment or any other sources of earning a living.

Another aspect pertains to whether plaintiff should provide defendant with a motor vehicle of the value of about 5000 United States dollars. As with maintenance for long, I am of the view that this is not possible. The motor vehicles that defendant pointed to and even those she had used whilst in the marriage were shown to have been company motor vehicles. Now that those companies have gone down under it may not be feasible for her to expect plaintiff to provide her a motor vehicle post divorce. Whilst this court is enjoined to try as far as is reasonable and practicable to ensure that the parties' standard of living is maintained where, as in this case, the breadwinner's source of income has dried up or shrunk it is no longer feasible to expect the parties to maintain the same standard of living. The parties must accept the loss of some amenities of life they may have gotten used to. In the circumstances of this case the companies that owned the motor vehicles are defunct and so there is no motor vehicle to expect.

Accordingly it is hereby ordered that-

1. A decree of divorce be and is hereby granted.
2. The defendant is hereby awarded a 50% share of the value of the Matrimonial Property being Stand 1417 Bluffhill Township of Stand 1644 Bluffhill Township of Stand 1180 Bluffhill Township also known as 1417 Sugar Bush Avenue, Westgate, Bluffhill, Harare.
3. The parties shall agree on the value of the property within 14 days of the date of this order failure of which they shall appoint a mutually agreed evaluator to evaluate the property within 21 days of the date of this order.
Should the parties fail to agree on an evaluator the registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of independent evaluators to evaluate the property.
The plaintiff shall meet the costs of such evaluation.

4. The plaintiff shall pay off defendant her share of the value within six (6) months of the date of receipt of the evaluation report.
5. The plaintiff shall pay maintenance to defendant in the sum of 350 United States dollars per month for the months of April 2011, May 2011, June 2011 and July 2011 thereafter the maintenance shall be discharged. Plaintiff will maintain defendant as a beneficiary to a recognized local Medical Aid Society until she obtains employment offering same as a benefit.
6. The plaintiff and defendant are hereby declared to be sole respective owners of such other matrimonial assets as are presently registered in their respective names or are currently in the possession or control of each of them respectively.
7. The plaintiff is hereby awarded custody of the minor child, Shayne Sydney Dicks born on 3 December 1993.
8. Defendant is hereby granted reasonable rights of access to the minor child upon notice to plaintiff.
9. The defendant shall be responsible for the costs of maintenance for Shane on the occasions when Shane might reside with defendant in Zimbabwe, it being recorded that plaintiff has been and shall continue to be solely responsible for the maintenance and education of Shane who, it is recorded, is enrolled at school in the Republic of South Africa.
10. Each party to bear their own costs of suit.

Mutamangira & Associates, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners