

JOSEPH CHAZIREMUNHU
versus
MELIN CHAZIREMUNHU nee MADZIVANYIKA.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 6 and 10 May 2013

Civil Trial

Plaintiff in Person
Defendant in Person.

Uchena J: The plaintiff and the defendant married each other in 1999 in terms of customary law. They upgraded their marriage to a civil one in terms of the Marriage Act [*Cap 5:11*] on 25 April 2004. Their marriage was blessed with a daughter Tatenda born on 14 March 2000.

When this case appeared before the pre trial conference judge it settled on the issues of custody, maintenance for the minor child and the defendant, as well as on the distribution of their movable property. The only issue which remained in dispute is the irretrievable break down of their marriage. The plaintiff says their marriage has irretrievably broken down. The defendant says it has not and that if they are given time, there are prospects of a reconciliation. The case was fast tracked to my court for the determination of this sole issue. The sole issue I have to determine is whether the marriage has irretrievably broken down.

The parties had marital problems soon after the inception of their marriage. The defendant did not regularly afford the plaintiff his conjugal rights. He initially understood her as there was a medical problem. He however later got the impression that the defendant was manipulating the medical problem to deny him sexual pleasure. He formed this view from the plaintiff's condition dramatically changing for the worse whenever he wanted to exercise his conjugal rights. He complained to the defendant's aunt, the

defendant's sister and finally to the defendant's mother. There was no change. The problem was compounded by the defendant staying in South Africa between 2007 and 2012. She acquired South African permanent residence. The plaintiff wanted her to come back home. She resisted him. He said this traumatized him leading to his losing love and affection for her. He also told the court that he wanted a second child, but the defendant took two consecutive five year no plant contraceptives without his consent. In 2011 he threatened her with divorce when she refused to come back home. She told him to go ahead. He pondered on these things till he decided to issue divorce summons in November 2012. He lured the defendant back home where she was served with the summons a day after her arrival.

In her evidence the defendant confirmed that they had settled on all other aspects of the divorce except that their marriage had irretrievably broken down. She said she believes the plaintiff still loves her, as he paid the balance of her lobola to her parents in October 2012. She said this is an indication that it is not all over. She also said he did not during their marriage speak to her in a harsh manner, but was always showing generosity and love. He would send her money to supplement her little income in South Africa. Whenever she needed large sums of money he would give it to her. She said he never rebuked her to warn her that their marriage was in danger. She therefore strenuously resisted the granting of a divorce order and asked for time to mend whatever the plaintiff did not like about her character.

On the issue of denying the plaintiff conjugal rights she said it was not deliberate but she suffered a medical condition which caused her pain whenever they had sex. She however said she has now been cured of that medical condition. On her refusal to have children she said it was because she started having that medical condition during her pregnancy for their child Tatenda. The problem continued till recently.

In cross examining the defendant the plaintiff put it to her that he is not a violent person and does not believe in harassing others. The defendant agreed that that was the plaintiff's character. He put it to her that he has lost all feelings for her to the extent that even when she undress before him he feels nothing. The defendant pleaded for time to mend her ways as he had not rebuked her to warn her of a possible divorce. He put it to

her that he paid the balance of lobola so that they could divorce amicably, having paid all he owed to her parents.

The irretrievable breakdown of a marriage need not be accepted by both parties for an order of divorce to be granted. It is enough if the marriage has irretrievably broken down in the view of one of the parties. See the case of *Kumirai v Kumirai* 2006(1) ZLR 134 (H) at page 136 B-D. Marriage can only work if both parties are willing to continue with the relationship.

In this case the plaintiff's conduct, calls for closer scrutiny to determine if he has really lost love and affection for the defendant. He has for many years been defied by his wife. He had to seek intervention from the defendant's aunt, sister and mother. He threatened defendant with divorce in 2011. The defendant dared him. He eventually tricked her to come home so she could be served with the divorce summons. His good character may have deceived the defendant to believing that all was well. She said he send her a good message before she left South Africa. He received her at Road Port, and drove her to Mbare Market where he bought her mangoes, her favourite fruit. He remained considerate to the end. Is that a sign of continuing love?. He while cross examining the defendant said to him love is about feelings and not the giving of material things. That may be so but normally giving is a sign of love. In his case it may not be a conclusive sign of love as he continued in his giving even when he had issued summons. If his giving was for love I see no reason why he would seek a divorce in spite of the good things he continued to do for the defendant and the defendant's assurance that her medical condition has been cured and is willing to change to save the marriage. I am satisfied the plaintiff has lost love and affection for the defendant. Their marriage has therefore irretrievably broken down.

The defendant's plea for time to mend her ways to win the plaintiff back has no merit. She was aware of his desperation over the years when she denied him sex and stayed away from him. She was aware he had to seek help from her aunt, sister and mother. It is taboo for a son in – law to discuss bedroom matters with his mother in law. This must have rung warning bells in the defendant's mind. She ignored all this to her peril. He even threatened her with divorce in 2011 and she dared him He then hoped she

would take the issues of their marriage seriously but she did not. Her evidence that she did not receive any rebuke during the marriage is therefore not true.

There are no reasonable prospects of the parties reconciling. I therefore can not invoke the provisions of section 5 (3) of the Matrimonial causes Act [*Cap 5:13*]. Section 5 (3) provides as follows;

“(3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.”

It is only when there is a reasonable possibility of reconciliation when a divorce case can be postponed for that purpose. Reasonable prospects are indicated by the willingness of both parties to reconcile after the issuance of a summons. The plaintiff has remained resolute in his pursuit for divorce since he issued summons. He is entitled to the order he seeks.

In the result it is ordered that;

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor child Tatenda Chaziremunhu be awarded to the defendant with the plaintiff being granted access during every alternate school and public holidays.
3. That the plaintiff shall maintain the minor child Tatenda Chaziremunhu born on 14 March 2000, at the rate of US\$100-00 per month until she attains the age of majority or becomes self supporting whichever occurs earlier.
4. That the plaintiff shall maintain the defendant at the rate of US\$150-00 per month until she dies or remarries.
5. The parties' movable property be distributed in terms of paragraph 9 of the plaintiff's declaration.
6. Each party shall bear his or her own costs.

Both parties appeared in person.