

SHINGIRAI PHILIP KATSANDE
versus
ANGELINE KATSANDE (nee NYAHWEMA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 19 February, 2015

Divorce action

Plaintiff in person
B. Mtetwa, for defendant

CHITAKUNYE J: The plaintiff and defendant were married on 18 December 1993 at Harare in terms of the Marriages Act, [*Chapter 5:11*]. The marriage still subsists. Their marriage was blessed with four children.

On 27 September 2007, the plaintiff issued summons out of this court seeking a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there is no reasonable prospect of restoration to a normal marriage relationship in that:-

1. The plaintiff has lost all love and affection for the defendant;
2. The parties have lived separate lives for most part of their marriage but formally separated in December 2005 and have not lived as man and wife ever since.

The plaintiff thus sought an order for:-

1. For a decree of divorce;
2. That defendant be awarded custody of the minor children of the marriage with plaintiff enjoying rights of access by prior arrangement with defendant.
3. That issues of maintenance be dealt with by the Magistrate Court; and
4. That issues of movable and immovable property should not arise as parties had agreed that their property would be acquired out of community.

The defendant in her plea conceded that the marriage has irretrievably broken down and so a decree of divorce should be granted. She accepted to be awarded custody of the minor children. She however denied that the property should not be dealt with. In her counter-claim defendant contended that there should be a division and distribution of assets of the

spouses as per her counter-claim and that maintenance be determined by this court.

At a pre-trial conference held on 19 October 2012 the parties agreed that:-

1. That the marriage has irretrievably broken down and that there are no reasonable prospects for the restoration of a normal marriage relationship as between the parties.
2. Subject to provisions of paragraph 2.1 below, the plaintiff shall be solely responsible for the payment of school fees in respect of all the minor children, namely:-
 - a) Gertrude Katsande, born on the 4th June 1996;
 - b) Ruth Katsande, born on the 22nd September, 1998;
 - c) Philip Katsande, born on the 25th September 2002; and
 - d) Wilson Katsande, born on the 7th February, 2005.
- 2.1 The school fees payable by the plaintiff shall be pegged to fees charged at the Dominican Convent, Harare, at any given time.
- 2.2 In the event that the children are enrolled at a school whose fees exceed those of Dominican Convent, Harare, the defendant shall be responsible for such excess.
3. That the defendant shall be responsible for the day to day needs of the minor children.
4. That the defendant shall have custody of all the minor children of the marriage with the plaintiff having reasonable rights of access on alternate weekends, half of each school holiday and on alternate public holidays.

The issues referred to trial comprised:

1. Who caused the breakdown of the marriage by his/her conduct?
2. If he/she did, does such conduct constitute gross marital misconduct deserving of censure in the distribution of the matrimonial assets?
3. What constitutes assets of the marriage?
 - 3.1 Has the plaintiff registered matrimonial assets in the names of third parties? If he has, does this constitute gross marital misconduct deserving of censure?
 - 3.2 What would constitute fair and equitable distribution of the parties' assets, taking into account the parties' conduct, direct and indirect contributions, their needs including the children's needs?
4. What would be a just order of costs?

The plaintiff gave evidence after which the defendant gave evidence. The defendant called one witness in support of her case, a Mrs Dhora Muyengwa.

Though at the beginning of the trial a lot seemed at stake in the sense of being

disputed, as the trial progressed important concessions were made such that only one or two issues remained contentious.

From the evidence adduced it was common cause that the parties' marriage was essentially an unhappy one. The marriage was characterised by such problems as impotence on the part of plaintiff thus culminating in frustrations between the parties, an unsettled lifestyle as plaintiff moved regularly by virtue of his job and also in changing employment. Due to the strained relationship defendant was on a number of occasions sent back to her parents' home only to be enticed back to the plaintiff. The marriage life as told by the parties makes sad reading. Naturally this affected their working life as the defendant would resign from her employment to join her husband where he will have moved to only to enjoy family life for a brief period before the usual problems between them resurfaced.

The parties eventually separated for good in February 2006 with the defendant being taken back to her parents' home again and never to come back as had become the norm. The parties have thus not lived together as man and wife since February 2006. The defendant has been at her parents' home with the youngest child. I am thus convinced that the marriage has indeed irretrievably broken down with no prospects of restoration to a normal marriage relationship. A decree of divorce should thus be granted.

In terms of s 7(1) of the Matrimonial Causes Act, [*Chapter 5:13*] in granting a decree of divorce this court is empowered to make an order in regard to the division, apportionment or distribution of assets of the spouses, including an order that any asset be transferred from one spouse to the other and to make an order with regard to the payment of maintenance in favour of one or other of the spouses or child of the marriage.

Subsection 7 (4) of the Act enjoins court to have regard to all the circumstances of the case in determining the issues in subs (1). Some of the factors are outlined in s 7(4) (a) to (g).

These encompass the needs and expectations of the spouses and children and also the duration of the marriage. The subsection goes on to state that-

“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.”

I believe that it was in an endeavour to achieve the above that parties settled a number of issues at the pre-trial conference. Unfortunately, as at the time of trial the plaintiff had not been complying with some of the agreed terms.

Under cross examination the plaintiff conceded that he was bound by the rate of

payment for the children's education as agreed at the pre-trial conference which was pegged at the fees charged by Dominican Convent in Harare. He thus should comply with this by reimbursing the defendant all the amounts she paid which were for his account from the date of the pre-trial conference as per their agreement.

On the issue of movables the plaintiff conceded that defendant should provide him with the list of items she wanted and she should get these. The list was provided. On the motor vehicles after a protracted cross examination the plaintiff offered to buy defendant a motor vehicle worth USD7000- 00. The defendant indicated that in view of the history of plaintiff's default on what he would have agreed to she would rather she was given the money and after buying the vehicle she would provide the receipt as proof of the price paid This was to be done by 31st December 2014. It is my view that the defendant's suggestion is the most welcome as she will be the owner of the motor vehicle and so must be given the opportunity to buy a car of her choice as long as it is within the sum provided.

The remaining contentious issue pertained to whether or not the parties acquired any immovable property and, if so, how such should be shared. The plaintiff alleged that the parties never acquired any immovable property and so there is nothing to share. The defendant on the other hand contended that the plaintiff acquired three immovable properties but he registered the properties in the names of third parties. These comprised Flat 315, Chinamano Heights, Harare; No. 6 Angela Close, Chisipite, Harare and Stand 373 Uplands Township, Waterfalls, Harare.

The defendant contended that the flat was bought by her husband whilst they were in the United Kingdom. She was surprised when she came to live in the flat to find that it had been registered in plaintiff's sister's name, a Mrs. Majaji. She nevertheless lived in the flat without paying any rentals. After some time the plaintiff told her they were to move to no. 6 Angela Close, Chisipite, Harare. She also believed this property had been bought by her husband whilst they were in the United Kingdom. In this regard she had heard plaintiff talking about it and had in fact seen the plaintiff with documents pertaining to the purchase of this property. As is common cause this property was registered in the name of the plaintiff's mother. The defendant again said when they were about to move to this house she is the one who went and gave notice to the tenants who were in the house. To her knowledge the plaintiff's mother could not have the money to purchase that property. She also disputed the plaintiff's assertion that his other siblings paid for the house in addition to what the mother

had paid. In any event the mother resided in the rural areas. It was not disputed that it is only the plaintiff who has resided in this house since they moved in and no other sibling.

In spite of having indicated that he would call oral evidence and tender documentary evidence on how this house was acquired, the plaintiff did not do so. It thus remained his unsubstantiated word that the house was bought by his mother from her inheritance and contributions from plaintiff's siblings in the United Kingdom. I am inclined to believe the defendant's version that it is the plaintiff who bought this house and opted to register it in his mother's name for his own convenience.

The evidence on Stand 373, Midlands Township 3 of Uplands sub-division of A of Waterfalls, exposed the plaintiff as not credible at all. The plaintiff alleged that the property was acquired by Python Security; a company of which he is not part of. This company was formed by his brother Zivanai Emmanuel Katsande and his sister Angela Majaji (nee Katsande). In this regard when the agreement of sale was entered into Zivanai was not present and so he asked the defendant to sign the document. In his summary of evidence he indicated he will tender documentary evidence to prove this point. Unfortunately in his *viva voce* evidence such documentary evidence was not forthcoming despite the fact that up to the close of plaintiff's case he was legally represented. When confronted with the agreement of sale under cross examination the plaintiff could not explain away the fact that the agreement of sale cites the defendant as the purchaser represented by Zivanai Emmanuel Katsande. Thus according to this agreement Zivanai was present and not as the plaintiff had stated that Zivanai was not present hence the defendant signed the document. The company which the plaintiff said was in fact the purchaser is nowhere stated in that agreement of sale. If the property was being bought by the company surely such should have been stated. The plaintiff could not explain why Zivanai Katsande, as owner of Python Security Company, could make the mistake of endorsing defendant as purchaser of the property when the true purchaser was his company. As it is even the seller Mrs Muyengwa professed ignorance of Python Security being the purchaser. She categorically stated in her evidence that the purchaser was the defendant as is amply stated on the document.

The plaintiff referred to a deed of cession as proof that the property belonged to the company. The circumstance under which that deed of cession was signed by defendant was clearly explained by defendant in her evidence. She alluded to the fact of being forced by plaintiff to sign the document. It is apparent that the plaintiff knew that the property had been

bought in the defendant's name hence the need for defendant to cede her rights and interest in the property to Python Security Company.

The deed of cession was only entered into on the 28th February 2005 whereas the agreement of sale had been entered into on 19th November 2002. If at all a mistake had been made in reflecting defendant as purchaser instead of Python Security, one would expect such a mistake to have been corrected much earlier. As the plaintiff conceded under cross examination the so called deed of cession is a fake document not reflecting the truth on the purchaser of the property. What is apparent to me is that the plaintiff would use any means to deny defendant a share in the immovable property.

As with evidence on other properties, the plaintiff had intimated that Zivanai would be called to testify on the purchase of this property but he was never called. So it remained the plaintiff's story against the defendant and the seller's story. I am again inclined to believe the defendant's version as she was consistent and steadfast in her evidence.

From the tenure of the evidence by the parties I got the distinct impression that it is true that plaintiff had been very secretive about his transactions and it is probable he did not want his wife to know about his acquisitions. Unfortunately for him he could not successfully hide away the Uplands property.

I am of the view that the Uplands property be awarded to defendant. The plaintiff conceded as much on this point under cross examination.

The defendant contended that the plaintiff committed acts of gross marital misconduct throughout the marriage and so should be penalised by awarding costs against plaintiff on a higher scale.

After a careful analysis of the evidence before me I am of the view that the marriage in question was bereft of the bliss normally expected in a marriage. The plaintiff's conduct did not help matters at all. He appeared intent on denying the defendant an equitable distribution of family assets only to give in after cross examination. Even on aspects to do with children's school fees he posed unnecessary difficulties by deliberately not complying with what the parties had agreed to. I do agree with counsel for the defendant that the plaintiff's conduct as a whole in these proceedings calls for censure by an award of costs on a higher scale. The plaintiff's desire to simply be difficult is also evident from his closing submissions where he tried to bring in material that was either not placed before this court or recanting previously uncontested or conceded issues. His attitude had been one of being

obstructive in the achievement of justice as between the parties.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children of the marriage be and is hereby awarded to defendant with plaintiff having reasonable rights of access on alternate weekends, half of each school holiday and on alternate public holidays.
3. Subject to clause 3.1 below, the plaintiff shall be solely responsible for the payment of school fees in respect of all the minor children;
 - 3.1 The school fees payable by the plaintiff shall be pegged to fees charged at the Dominican Convent, Harare at any given time.
 - 3.2 In the event that the children are enrolled at a school whose fees exceed those of the Dominican Convent, Harare, the Defendant shall be responsible for such excess.
 - 3.3 The plaintiff is hereby ordered to comply with the above order on payment of school fees by reimbursing defendant all the amounts she paid which were for his account as from the date of the pre-trial conference when such agreement was reached. Such reimbursement shall be at the rate of 1000 United States dollars per month with effect from 31st March 2015 if such has not already commenced.
4. The defendant shall be responsible for the day to day needs of the minor children.
5. Movable property.
 - 5.1 The defendant is hereby awarded the movable property listed in a list supplied to plaintiff. The property must be delivered to defendant within 7 days from the date of this order.
 - 5.2 The plaintiff shall pay to defendant a sum of seven thousand (7000-00) United States dollars for the purchase of a motor vehicle. If this sum has not been paid by the 31st December 2014, as agreed by the parties, plaintiff shall be given a period of two months from the date of this order to make the payment.
6. Immovable property
Defendant is hereby awarded Stand 373 Midlands Township 3 of Uplands sub-division of A of Waterfalls as her sole and exclusive property. The plaintiff shall bear the necessary costs of transfer of the property from the seller to the defendant within 7 days from date of demand.
7. The plaintiff shall pay costs of suit on an attorney – client scale.

Mtewa & Nyambirai, defendant's legal practitioners