

ELTAMATORE
versus
ENOCK JOHANNES MATORE

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 27 October 2015, 3, 17 and 19 November 2015

Civil Trial

T Ndoro, for the plaintiff
Defendant in person

MWAYERA J: The plaintiff and the defendant contracted a marriage in terms of the Marriages Act [*Chapter 5:11*] on 21 February 2003. The marriage union was blessed with two children both still minors at the time of the trial. The plaintiff instituted summons for divorce and ancillary issues on 3 May 2013. The defendant entered appearance to defend and filed subsequent pleading thereto. At pre-trial conference stage the parties agreed on;

1. Custody and access to the two minor children
2. Maintenance of the said minor children and
3. Division of their assets

As per their joint pre-trial conference minute the couple referred only one issue for determination at trial. The contentious issue referred for trial was whether or not the marriage between the parties had irretrievably broken down.

The plaintiff maintained that the marriage had broken down beyond reconciliation while the defendant on the other hand maintained that the marriage could still be salvaged and would only be terminated by divine intervention occasioning the death of anyone of the spouses. The plaintiff was the only witness in the plaintiff's case while the defendant was only witness in defendant's case.

Both the plaintiff and the defendant testified that in 2007 they migrated to go and work in

South Africa. The economic situation in South Africa was equally harsh just like what they had left at home in Zimbabwe. The couple, despite their qualifications could not secure jobs in line with their professional qualifications. The couple had financial constraints as well as financial differences both at the time they were in Zimbabwe and while living in South Africa. It was the plaintiff's unchallenged evidence that the defendant, when it came to the budget issues would put his immediate family last while he catered for his mother, siblings and cousins first. The defendant did not argue with this point but stressed help to others had to be done since it was his duty as a first born son. This scenario was apparently an irreconcilable difference in so far as the parties were not ready to adjust to accommodate each other. In fact the plaintiff was not happy that her salary would be surrendered to the mother in law. She further was not happy that the mother in law was in control of the couple's finances and daily life even movements. The plaintiff also outlined the harsh treatment she got from the defendant who was hot tempered as evidenced by the manner he addressed her during trial. According to the plaintiff at the time of trial the couple has not been staying together as husband and wife since 2010, for about 3 years. Although the defendant argued that they were staying normally as husband and wife his account could not stand given he did not even know the residential address of his wife at Kwekwe where she was staying and working at the time of trial.

The plaintiff stood her ground that she had lost all love and affection for the defendant. She emphasized that the differences, given the interference by the mother in law and that the defendant was not going to change, coupled with the loss of love and affection where a clear indication that the marriage had irretrievably broken down beyond reconciliation. The plaintiff urged the court to consider the period of separation and the insurmountable differences as factors indicative of an irretrievable breakdown of marriage. She literally pleaded with the defendant to let go of her as she was only married to him on paper and not in substance.

The defendant on the other hand acknowledged the differences. He insisted he was duty bound to honour his father and mother as expected by God. He, in a ranting manner in court pointed out to the plaintiff warning her to abide by rules since their marriage was just under attack from the devil. He insisted he loved his wife and that he took the vows he had taken on their wedding seriously since they were ordained by God and only God would dissolve the marriage. He did not see anything wrong in the interference from his mother and he stated that

he would continue to support the extended family.

As far as he is concerned the marriage was still normal and it was capable of being salvaged through prayer. The defendant, I must mention professed love for his wife while in clear contrast to love he displayed uncontrollable boisterous posture, agitation irrational and cruel stance. This was mainly in cross examination of the plaintiff.

Even during his own evidence in chief he contradicted himself by saying the marriage was capable of reconciliation while at the same time he agreed there were marital differences in their approach to marital issues. In fact given the negative criticism he gave to the plaintiff's parents and siblings about the "evil spirit of divorce" one wonders how he claimed being in love and claimed the plaintiff and himself were living a normal marriage relationship. The defendant did not impress the court as a candid man at all. He appeared bent on desire to frustrate the plaintiff by holding on to a non-existent marriage in substance. He struck me as a man with a hidden agenda as he angrily and forcefully sought to impose himself on the plaintiff under the umbrella of the biblical rules of Moses. Ironically his conduct of disregarding his immediate family needs and hurting his wife's feelings and needs are contrary to the biblical commandments he sought to rely on. Love by nature as is given in the bible is patient, kind and not cruel and or selfish.

The defendant envisaged the opposite of love as he claimed to love. The selective obedience to the biblical rules of marriage by the defendant exposed him as not genuine. He chose to pick a verse that the marriage vows would only be broken upon death and forget that such selective piking of verses amounts to rejection at the very basis of the bible. He ranted in court that the plaintiff should obey rules and forget that the relationship between husband and wife is meant to be symbolic obligation to obligation [as per some of the bible text recited]. Without give and take the covenant of marriage is irreprehensibly breached in God's eyes. The defendant got carried away and became too judgmental as he imputed evil spirits on the plaintiff. The bible, the defendant sought to rely on exposed him as he clearly was not prepared to iron out the differences with the plaintiff but proclaimed he loved her and the marriage was still intact. The marriage from God as he claimed "a sanctified one" would be characterized by the husband rendering to his wife affection and the wife likewise rendering affection; 1Corinthians [Chapter 7 v 3]. This clearly denotes willing wife and willing husband. If there is no love and one insists it

is the end, the question is on what basis would a court then order the parties to reconcile and continue to stay as husband and wife in a normal marriage relationship when one party is unwilling?

The Law

The dissolution or annulment of marriage and consequences thereto are governed by the Matrimonial Causes Act [*Chapter 5:15*]. Section 5 (1) of the said Act is relevant. It reads:

“An appropriate court may grant a decree of divorce on grounds of irretrievable breakdown of marriage. If it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect for restoration of a normal marriage relationship between them”

Put differently where the court makes a finding that the marriage between the parties has broken down beyond patching or reconciliation such that there is no reasonable possibility of resuscitation of a normal marriage relationship the court ought to grant a decree of divorce. The notion of fault principle or who is to blame for the irretrievable break down is no longer the central consideration in deciding whether or not to grant divorce. The central question which falls for objective assessment by the court is whether or not the marriage has irretrievably broken down.

The sentiments of Makarau J (as she then was) in *Kumirai v Kumirai* 2006 (1) ZLR 13 are quite pertinent. She remarked,

“in view of the fact that the breakdown of a marriage irretrievably is objectively assessed by the court, invariably where the plaintiff insists on the day of trial that he or she is no longer desirous of continuing the relationship, the court cannot order the parties to remain married even if the defendant still has some affection for the plaintiff.”

The same view was expressed by Ndou J (as he then was) in *Muranda v Muranda* 2008 (2) ZLR 326 when he said:

“It is hardly impossible for a court to find that there is a reasonable prospect for reconciliation between the parties when one of them is determined to bring the marriage to an end.”

See also the case of *Joseph Chaziremunhu v Merlin Chaziremunhu* HH 147/13.

I wish to add my voice and echo the same sentiments. Clearly a marriage contract is an anomalous contract between two consenting parties. Once one of them seeks to resile from the contract which is of personal nature, it would be a futile exercise to seek to restore the contract more so where the plaintiff on oath gives evidence that she no longer wishes to be bound by the

marriage oath because of loss of love and affection for the defendant. Giving evidence on oath and insisting that the marriage has broken down beyond reconciliation by the plaintiff does a death knoll to the marriage. The insistence that the marriage has come to an end by the plaintiff is a clear indication that there is no intention on the part of the plaintiff to reconcile and continue with the marriage. Given the *sui generis* nature of the contract where the parties agree to have issues of emotions regulated by the Marriage Act, if a party to the contract insists the marriage has irretrievably broken down, no amount of force, persuasion or motivation can give a ray of life to the marriage. Insistence of loss of love and affection on oath by the plaintiff is evidence that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect for restoration of a normal marriage relationship. In the present case the plaintiff in an unwavering manner insisted that all love and affection for the defendant was lost. She maintained the stance that the couple has irreconcilable differences such that continuance of a normal marriage relationship was impossible. The defendant while accepting the differences were he prefers intervention in his domestic affairs by his mother and the plaintiff is not agreeable argued the marriage could still be salvaged by divine intervention.

The defendant did not personally offer a solution to the irreconcilable differences but insisted the marriage was still normal. The mode of talking in court clearly showed hostility between the parties which support that the parties have irreconcilable differences and that they are incompatible. The defendant sought to impose himself on the plaintiff under cover of biblical desire to be divorced by death. Self-imposition would not amount to marriage as envisaged by the law. The contract has to be between two consenting parties. Once the plaintiff insists on an end then it would defy logic to force her to love the defendant. In fact the defendant without any substantiation insisted the plaintiff loved him and that he in turn loved her. He alleged the plaintiff was possessed by a spirit of divorce and that he did not understand her. If that is accepted that the parties are incompatible, and that there is no marriage to talk of if they do not understand each other as would be expected of a normal marriage relationship then that is the end. Their marriage differences are not normal in that they are irreconcilable. The defendant is not prepared to accommodate the plaintiff in seeking financial priorities and the plaintiff is equally not prepared to have the mother in law run their domestic affairs and finances. The parties have not been living as husband and wife since about 2010. The defendant, without any indication of desire to

reconcile or rectify the anomalies insisted on having the marriage remain intact. I read the defendant to be an ingenuine man who insisted on marriage in form simply to fix the plaintiff. His basis of continuance of marriage being that he would pray to salvage the marriage. The plaintiff on the other hand impressed the court as a candid witness who had to no avail, on realising the marital difference tried to resolve the problem. She approached aunties and uncles and in-laws but the differences remained intact with no solution forthcoming. She then issued summons and insisted under oath she had lost all love and affection and that as far as she was concerned the marriage was over.

Upon considering the totality of the evidence before the court and having considered the law applicable I find no reason why the divorce as prayed for by the plaintiff should not be granted. There is no basis upon which this court can force the plaintiff to remain in love and in marriage to the defendant when clearly, from her stance in court, the issuance of summons and living apart from the defendant she is desirous of an end to the marriage. She signals without doubt, there is no more marriage. Even if it was to be accepted the defendant still harbors affection for her which is not the position given the clear conduct of the defendant of deceit under religious abuse umbrella, the court cannot force the plaintiff to remain in a marriage she wishes dissolved. The parties confirmed their agreement on custody, access, maintenance and proprietary rights per their joint pre-trial conference minute as such the terms of agreement will be incorporated as an order of this court.

Accordingly it is ordered that:

1. A decree of divorce be and is hereby granted.
2. The defendant is awarded the custody of the parties' minor children namely Marcell Tanaka Matore born 30 June 2003 and Shanice Kudzai Matore born 11 November 2008.
3. The plaintiff shall be entitled to exercise reasonable access to the parties' minor children during alternate school and public holidays and weekends by agreement.
4. The plaintiff shall provide the minor children with clothes and school uniforms.
5. Each party shall retain the immovable property as well as the household furniture and appliances currently in their respective possession.
6. Each party is to bear its own costs.

Ziumbe & Partners, plaintiff's legal practitioners