

ALASTAIR WALTER POLLOCK SMITH
versus
ABIGAIL ROSALYNN SMITH

HIGH COURT OF ZIMBABWE
UCHENA J

HARARE, 23 February, 2, & 3 April 2013, 5 & 29 May 2014,
16 & 18 March 2015, 6, 22 & 29 May 2015, 9 June 2015,
28 January, 6 and 7 April 2016, and 22 September 2016

Civil Trial

T Mpfu, for the plaintiff
Mrs B. Mutetwa for the defendant

UCHENA JA: The plaintiff sued his wife the defendant seeking a decree of divorce and other ancillary orders. The parties were married on 5 October 1991 in Bulawayo. Their marriage was blessed with a son who has since attained the age of majority and obtained his first degree. He is staying with the defendant.

The defendant did not oppose the plaintiff's claim for a decree of divorce. She however sought the distribution of assets including their matrimonial home and maintenance. The parties found each other on the distribution of the movables and the matrimonial home. They sold the matrimonial home and used most of the proceeds to purchase a house which was registered in the name of the defendant and their son. The only outstanding issue is whether or not the defendant is entitled to post divorce maintenance and the quantum of such maintenance. She initially wanted to be paid maintenance in the sum of US\$8 000-00 per month. After their settlement on the issue of the matrimonial home she reduced her claim to US\$3 000-00 per month till she dies remarries or cohabits with another man. The plaintiff is not willing to pay her maintenance for life. He offered to pay maintenance in the sum of US\$1 000-00 per month for a year after the granting of a decree of divorce.

The plaintiff is a medical doctor. His income between January and December 2015 gave him an average income of US\$12 913-81 per month. His recent income between January 2016 and March 2016 averaged US\$10 868-00 per month. He is currently

maintaining the defendant in the sum of US\$3 000-00 per month and has previously maintained her at higher amounts as he would give her money whenever she made demands. It is common cause that US\$3 000-00 per month is a reasonable expenditure for both the plaintiff and the defendant. The plaintiff initially gave the impression that he lives inexpensively but when details of his expenditure were sought he said he lives on US\$3 000-00 per month over and above his mortgage bond repayments of US\$2 111-00 per month. He admitted that US\$3 000-00 per month is a reasonable monthly expense. He lives in an Apartment while the defendant lives in the house bought from the proceeds of the sale of the matrimonial home. She currently lives with their son while he lives alone.

It is now accepted that marriage is not a ticket for one to be maintained for life. A former spouse who is able to work must do so and maintain himself/herself. The defendant has a certified medical condition which prevents her from continuing with her business as a beautician. See exhibit 1 an affidavit by Dr A. J. Gunning, in particular paras 3 to 11 which gives details of the defendant's ailments. She suffers from haemoptysis (the coughing out of blood which the Dr said is increasing. She also suffers from "pulmonary emboli which refers to the presence of blood clots within the pulmonary arterial circulation and that condition requires lifelong anti-coagulation". She was diagnosed by Dr Frost to have "chronic sensory polyneuropathy and bilateral carpal tunnel syndrome". This means "the nerve endings in her lower legs do not function normally and she suffers abnormal sensations in the lower limbs comprising numbness, tingling and pain". This also affects her wrists, hands and fingers. She also suffers from type 2 diabetes for which there is no specific available therapy. She as from March 2012 has developed moderately severe oedema of both lower limbs. In addition to the above Dr Gunning also diagnosed that the defendant has "chronic lumbar spinal spondylodysthesis". He described it as a chronic arthritis of the lower spine a condition for which there is no known curative treatment. In paragraph 11 Dr Gunning said the defendant's condition "could very conceivably make it extremely difficult for her to stand for any length of time, and for which conditions there is no effective curative therapy" He in para 12 concluded by saying "It is therefore to my mind very credible, that any occupation or profession which she might seek to conduct, which involves standing for long periods of time, might be extremely difficult, perhaps impossible for her to endure".

The defendant's condition is apparent over and above being medically certified. She had to be allowed to lead her evidence while seated because it had been accepted by the court and the plaintiff's counsel that she could not do so while standing in the witness stand. The

plaintiff had while on a journey to their son's graduation, arranged for her to be assisted to move from the plane to where they could board transport from the airport. See exhibit 2 in which the plaintiff said; "She can walk but has severe arthritis of her knees and back and cannot do long distances and certainly cannot manage all the luggage that she is carrying. I have booked the meet and assist but she remains worried that she will not be able to manage the express even with help. Is there anything else that I could arrange to make her journey less stressful and easier?" This confirms the plaintiff's acceptance of the defendant's condition as described by Dr Gunning, and the plaintiff's personal knowledge of the defendant's condition.

It is common cause that she had since 2003 stopped running her business because of ill health. It is therefore insincere for the plaintiff to now stand in the witness stand and say she can on divorce resume that business and, support herself.

The plaintiff further alleged that the defendant has an income from rentals paid to her late father's estate. The estate has not been wound up. It is therefore premature for the plaintiff to rely on such income. No evidence was led from the Executor as to how much is being paid to the defendant. The defendant said on being wound up, the estate will be shared between her and her brother. It is not yet known how it will eventually be wound up. It is not known whether or not there will be anything to share. The plaintiff can await the winding up of the estate and seek a variation of the maintenance he has to pay to the plaintiff. The evidence led from an investigator hired by the plaintiff is not conclusive.

The facts found proved are;

1. The plaintiff is currently maintaining the defendant at US\$3 000-00 per month.
2. He earned an average of US\$12 923-81 per month in 2015 and an average of US\$10 868-00 per month, between January and March this year.
3. That salary is well able to maintain him and the defendant at US\$3 000-00 each per month.
4. It leaves him a balance of between US\$2 868-00 to US\$4 913-00 per month from which he can save for the future.
5. His current means therefore enables him to continue maintaining the defendant at US\$3 000-00 as he is currently doing. He has been able to do so and more since their separation.

6. The defendant is not the type of spouse who should be weaned off from her former husband on divorce. Her medical condition qualifies her for maintenance till death or when she remarries or cohabits with another man.
7. That the defendant's father's estate is still to be wound up. If the defendant's means improves from what she will get from it the plaintiff can seek variation.
8. The plaintiff's fear that his means may come down and make him unable to maintain the defendant at US\$3 000-00 per month is not a bar to his maintaining her at that rate till the arrival of that eventuality, which would entitle him to seek variation of the maintenance order.
9. Their son has acquired his first degree and is currently staying with the defendant. This increases the defendant's expenses. The possibility of his going for further education does not presently disentitle the defendant from the maintenance she seeks. If those changes come they can only be relevant in an application for variation. This also applies to the possibility of the plaintiff having to pay fees for their son's further studies.

I am therefore satisfied that on the present facts the plaintiff is well able to maintain the defendant at US\$3 000-00 per month. He has been doing so and his means enables him to continue doing so. I do not accept Mr *Mpofu*'s submissions that the plaintiff is not able to maintain the defendant at US\$ 3 000-00 per month or that the defendant can work and support herself. The plaintiff in his evidence accepted that she is of ill health and that condition caused her to stop working during their marriage. The doctor's report tendered as an exhibit clearly establishes that she is of ill health and cannot work. A spouse who may if in good health be expected to work and earn his or her own money and support himself / herself is entitled to maintenance if the evidence placed before the court establishes that his or her condition does not permit him/her to do so. His or her condition entitles him or her to permanent maintenance which according to Manyarara JA in the case of *Chiomba v Chiomba* 1992 (2) ZLR 198 is reserved for an elderly spouse who is too old to work. A spouse who is too ill to work is like the spouse who is too old to work entitled to permanent maintenance.

I therefore agree with the submissions made by Mrs *Mtetwa* that the plaintiff is able to maintain the defendant at US\$3 000-00 per month and that the defendant's condition entitles her to maintenance until she dies remarries or cohabits with another man.

On the issue of costs the defendant's claim for maintenance succeeded. The costs should therefore follow the result.

I therefore make the following order;

1. A decree of divorce be and is hereby granted.
2. The plaintiff shall maintain the defendant in the sum of US\$3 000-00 per month until she dies remarries or co-habits with another man.
3. The plaintiff shall pay the defendant's costs of suit.

Atherstone & Cook, plaintiff's legal practitioners
Mtewa & Nyambirai, defendant's legal practitioners