

ENOCK MSIMANGA**Versus****PATRICIA MSIMANGA (NEE NCUBE)**IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16, 17 AND 25 JANUARY 2007*N Mathonsi*, for plaintiff
J Sibanda, for the defendantTrial Cause

NDOU J: The plaintiff issued out summons for divorce with ancillary relief. The defendant opposed the divorce vehemently and her case is that the marriage has not irretrievably broken down. That the defendant still loves the plaintiff is beyond dispute. On the other hand, the plaintiff has lost love and affection for her as the facts hereunder will illustrate. The parties are domiciled in Zimbabwe, this is common cause. The parties were married to each other on 7 September 1990 at Bulawayo Magistrates' Court in terms of the Marriage Act [Chapter 37], now [Chapter 5:11] and the marriage still subsists. There are three children of the marriage. Two of the children have attained majority age leaving N. [born[day/month] 1993] as the only minor child subject to these proceedings. Most of the evidence led during the trial is common cause and I propose to highlight the evidence relevant to the breakdown of the marriage. The defendant harboured suspicion of illicit relationship between her husband and various female domestic workers that the parties employed from time to time. This suspicion spread over to the plaintiff's work place and church. The plaintiff, to date, considers these suspicions as being unwarranted and cruel. There is no doubt that these suspicions, proven or not affected their love life. The defendant was, and is convinced that the plaintiff was involved in

extra-marital affairs. There were several attempts to resolve the parties' differences via the

extended family structure but all these came to naught. In the end, the plaintiff moved out of the matrimonial home on 4 December 2004 and to date has not gone back to reside in the matrimonial home. He, however, indulged in a sexual act with the defendant in March 2006 under contested circumstances. Briefly, the plaintiff came to the matrimonial home looking for some documents. He was permitted by the defendant to enter the bedroom for this purpose. Whilst inside, the defendant followed and under unclear circumstances they ended up holding each other and one thing led to another resulting in the sexual act. Plaintiff, on the one hand, says this is a forlorn and isolated incident which occurred over one year and five months after their separation and was never repeated in the ten months thereafter. He says not much weight should be attached to this incident in the determination of whether the marriage has broken down. The defendant, on the other hand, says this is an indication that there are prospects of restoration of a normal marriage.

In her unchallenged testimony the defendant said that the plaintiff is now living in adultery and sin with another woman from his home area. She, however, does not regard this illicit relationship as a threat to their marriage as she feels, with time, the plaintiff will come back. It is for this reason that she is not prepared at all to discuss the issue of the distribution of the assets despite advice to the contrary. She has decided not to entertain the ancillary relief at all because she is oozing with confidence that despite all the above-mentioned challenges to the marriage, the prospects of a normal marriage are still real. She is also motivated in her stance by her Pentecostal religious beliefs and believes, whatever the obstacles, her prayers will be answered. All this is indicative of noble intentions on her part to save the

marriage. Loving one's husband and praying hard to save the marriage is a very good thing to do on the part of a wife. But where, as is the case here, the husband no longer loves her, and prayer has failed to elicit any immediate positive response, the court cannot come to her assistance. The court cannot make her husband to love her. No matter how sympathetic the court maybe, that is

not within its competence to do so. After all, it takes two to love one another and enjoy a successful marriage. With these facts in mind, has the marriage between the parties irretrievably broken down? It is trite that a court of law has no choice if the presence of a ground for divorce has been objectively proved, it has to grant the divorce – *Schwartz v Schwartz* 1984(4) SA 467 (A) at 473; *Levy v Levy* 1991(3) SA 614 (A) and *Introduction to Family Law*, P J Visser and J M Potgieter at p 141-3. There are two characteristics of irretrievable breakdown of marriage:

- a) the marriage relationship is not normal any more; and
- b) there is no reasonable prospect of the restoration of a normal marriage relationship.

In order to determine whether irretrievable breakdown of the marriage is present, I have to take note of the background and history of the relationship i.e. an objective investigation and the attitudes of the parties at the time of the divorce action, i.e. the subjective investigation – *Schwartz v Schwartz, supra*, at 475. As far as the subjective enquiry is concerned, it can be accepted that a normal marriage relationship no longer exists (i.e. the breakdown) when one of the spouses no longer desires to maintain a marriage relationship with the other spouse – *Swart v Swart* 1980 (4) SA 364 (O) at 368 and *Coetzee v Coetzee* 1991 (4) SA 702 (C). In this case, the plaintiff

has made this subjective decision by word of mouth and by conduct. This subjective decision by the plaintiff is an indication of marriage breakdown, but not necessarily of an irretrievable breakdown. The next enquiry I have to embark on is the examination of the reasons advanced by the plaintiff for divorce in objective manner – *Swart v Swart, supra* and *Coetzee v Coetzee, supra*. I now proceed to examine the irretrievability of the breakdown in this case. The plaintiff has, as alluded to above, shown a determination and a firm desire to bring the marriage to an end. In reality it is hardly possible for a court of law to find that there is a reasonable prospect of reconciliation between the parties when one of them is determined to bring

the marriage to an end – *Swart v Swart, supra, Levy v Levy, supra, and Smit v Smit* 1982(4) SA 34 (O) and *Singh v Singh* 1983(1) SA 781(C). In addition to the expressed firm desire to terminate the marriage relationship the plaintiff has moved out of the matrimonial home and has remained absent for a period in excess of two years. This is a relevant factor in terms of section 5(2)(a) of the Matrimonial Causes Act [Chapter 5:13]. Save for the above-mentioned one incident in March 2006, the parties no longer have a sexual relationship. The defendant is extremely jealous. In all, there is a serious violation of the consortium i.e. *inter alia* loyalty, love, affection, comfort, mutual services and sexual intercourse which characterise a normal marriage relationship – *Naidoo v Naidoo* 1985 (1) SA 366 (T). One understands that the defendant loves the plaintiff very much. This fact is admirable but this court cannot come to her aid to get her reciprocal love from her husband who has deserted the matrimonial home and set up another home with another woman. I also understand where she is coming from when listening to her testimony. She was a virgin when she met the plaintiff. It is the plaintiff who deflowered her. She has had only one lover i.e. the plaintiff. The plaintiff is the only man she has had sexual relations with. This is commendable. But, much as the defendant holds to the contrary, this is a marriage not made in heaven but on earth. It is subject to human weakness and challenges like any other. The challenges in this marriage are enormous. There is no prospect of the restoration of a normal marriage relationship. The defendant has to accept this unfortunate termination of her marriage relationship and move on with her life. That is not what she desires but it is unfortunately the best option left. It is painful but this is the reality of her marriage relationship. Plainly, it is time for a clean break.

Accordingly, I find that the marriage between the parties has irretrievably broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship. The only issue left for determination is division of the matrimonial assets. Although

the defendant declined to testify on this issue, I, agree, with her legal practitioner that I should nevertheless exercise my discretion in terms of section 7 of the Matrimonial Causes Act. Further, the plaintiff is only claiming a few assets and offering the bulk to the defendant. The matrimonial house, being number 15295 Nkulumane 12, Bulawayo is registered in the joint names of the parties and as such, each one is usually entitled to half thereof – *Takapfuma v Takapfuma* 1994(2) ZLR 103 (S) at 105H-106A. There is no evidence to establish the contrary position. As far as the rural home and assets there I find that as the defendant is being awarded most of the movable assets, those should be awarded to the plaintiff.

Accordingly, it is hereby ordered as follows:-

1. A decree of divorce be granted.
2. The custody of the minor child of the marriage Nkosikhona Msimanga born on 8 June 1993 is granted to the defendant with the plaintiff enjoying reasonable access to the minor.
3. It is ordered that the plaintiff contributes towards the maintenance of the said minor child at the rate of \$15 000 per month until the minor child attains the age of 18 years or becomes self supporting whichever occurs first.
4. 4.1 It is ordered that the plaintiff be awarded the following

movable assets:

a bedroom suite;

a room divider; and

a hi-fi (radio)

4.2 It is ordered that the rest of the movable assets in paragraph 9 of the declaration be awarded to the defendant.

5. It is ordered that the matrimonial home, being number 15295 Nkulumane 12,

Bulawayo be sold to best advantage and the proceeds thereof shared equally between the parties. The defendant is granted an option to buy out the plaintiff within three(3) months of this order, failing which, the property be sold through a reputable estate agent, and distributed in the manner highlighted in the preceding sentence.

6. Each party shall pay its own costs.

Coghlan and Welsh, plaintiff's legal practitioners

Job Sibanda & Associates, defendant's legal practitioners