

SHEPHERD HATITYE MASAWI
versus
MARGRET VEINNA MASAWI

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 24,26,27,28 MAY, 1 JUNE 2010 & 13 JANUARY 2011

Mr *Hwenhira*, for the plaintiff
K. *Gama*, for the defendant

GUVAVA J: The plaintiff in this matter issued summons out of this court claiming a decree of divorce, custody of the minor children of the marriage and other ancillary relief. Four issues were referred to trial in terms of a joint pre-trial Conference minute filed by the parties on 27 November 2008. The issues were agreed to as follows:

1. Whether the marriage has irretrievably broken down
2. Who amongst the parties should have custody of the minor children and who should have reasonable access to them?
3. In what way and/or in what sum should the non custodial parent contribute towards the minor children's maintenance?
4. What constitutes the parties' marital estate and how should it be distributed between the parties upon divorce?

At the commencement of the trial the defendant conceded that the marriage had irretrievably broken down. Therefore the only issues that remained for determination by the court related to the custody and maintenance of the minor children and division of the property.

The plaintiff testified that he married the defendant on 2 May 1987. The marriage between them has irretrievably broken down as they have lived apart from 2002 when the defendant went to work in the United Kingdom. He is of the view that the marriage can no longer be resuscitated. Three children were born out of the marriage. The eldest is a major and is living with the defendant and studying at a University in the United Kingdom. The two minors live with the plaintiff in Zimbabwe where they attend school, save for a brief period

in 2004 when they relocated to the United Kingdom but had to come back when the defendant fell ill.

On 13 August 2002 and during the subsistence of the marriage they purchased an immovable property being a certain piece of land situate in the District of Salisbury called stand 322 Vainona Township of Vainona measuring 4 164 square meters otherwise known as number 5 Otter Road, Vainona. The purchase price of the property was Z\$38 000 000 (thirty eight million dollars). The plaintiff stated that this amount included the transfer costs and the furniture which they took over from the previous owner. The plaintiff stated that in order to raise the purchase price the defendant sent 10 000 British pounds as her contribution towards the purchase price. He converted this money on the informal market at a rate of \$1 to Z\$1000 and obtained Z\$10 million. They sold a property which they owned in Marimba Park for Z\$20 million. The plaintiff paid Z\$11million from his earnings from buying and selling cars and took out a mortgage for \$5 million. The property is registered in the joint names of the parties. He suggested that upon divorce the property be retained until the youngest child attains the age of 18 where after it should be sold and the proceeds shared equally between the parties.

The plaintiff further testified that in May 2003 he purchased a Pajero motor vehicle from Japan. He bought the motor vehicle with no assistance from the defendant. He sold the motor vehicle in 2005 so that he could raise money to collect the children from the United Kingdom after their mother fell ill. With regards to the movable household goods he suggested that each party keep the items in their possession. It was his opinion that as the defendant had been living in the United Kingdom since 2002 she had acquired property there and therefore she should retain what she had acquired whilst he retained what had been accumulated in Zimbabwe.

He testified that he has looked after the children since his wife left for the United Kingdom. At the time the youngest child was 2 years and eight months old. He is now at Hartman House where he is doing grade seven. He would pay for them to fly to the United Kingdom to visit their mother during the holidays In 2004 it was agreed that the children should go to the United Kingdom to live with their mother. Unfortunately after they had been there for about a year the defendant fell seriously ill and they had to return to Zimbabwe. When the youngest child returned from the United Kingdom his school work was below average but he started picking up again and he has greatly improved his grades. He stated that

he was not happy with the educational standards in the United Kingdom and the issues of juvenile delinquency. He stated that he should retain custody of the minor children.

With respect to maintenance of the children he stated that he has maintained the children on his own. He pays US\$3,000 per term for school fees and US\$500 for uniforms. He buys groceries of US\$800 per month and the fuel bill is US\$200. The children are day scholars and have to be taken to school and back every day. T has finished high school and would like to go to university. The university fees are about US\$21,000 per year. The plaintiff stated that he wanted the defendant to contribute 50% of the fees and pay US \$2 500 as monthly maintenance for the two minor children. He stated that should custody be awarded to the defendant he would be happy to pay the same in terms of maintenance.

In cross examination it was put to the plaintiff that the free rate of exchange in July 2002 was US\$1 to Z\$1 400 and not Z\$1000 which he said he had exchanged the money. He denied that that was the exchange rate. He also denied that the defendant had sent him a further 3000 pounds in August 2002. He stated that although he did not dispute that the money was withdrawn from her bank account he does not know what she used the money for. He however could not explain why the defendant had withdrawn the money a few days after signing the agreement of sale. He denied that she had contributed towards the construction of a wall around the property. He stated that it had only cost Z\$1,8 million. He also conceded that although the defendant had made a withdrawal of 5,823 pounds from her account he did not know how she had used the money.

The plaintiff admitted that he had been involved in an adulterous relationship but said it was now over. When it was put to him that his youngest child had written a wish list in his school book and wished his parents could get back together and his father stop cheating on his mother he stated that he knew nothing about it. He nevertheless denied that this made him an unfit parent to have custody of the children.

When questioned by the court he stated that he was in a position to pay out the defendant her share of the immovable property if he was given an opportunity to do so. He also stated that he was happy to share the moveable property as they had agreed prior to the commencement of the trial.

The plaintiff, in my view, was not an honest witness. He tried to paint the defendant as an uncaring mother who did nothing for the wellbeing of the family and yet documentary proof produced by the defendant showed that she would bring home substantial sums of

money. He also tried to portray defendant as someone who just abandoned the family when the youngest child was still a baby and yet it was apparent from all the evidence before me that the parties had agreed to the arrangement on the understanding that it was for the best interest of the family. He also did not disclose that in accordance with the terms of his benefits with his former employer, Air Zimbabwe, his family could fly to the United Kingdom for free for up to three times a year. This was the benefit he utilized whenever they traveled to the United Kingdom. I thus did not believe him when he stated that he would single handedly foot the travel bill in order for the children to visit their mother.

The plaintiff's evidence in relation to his contributions towards the purchase price of the immovable property did not ring true. Indeed a mathematical calculation of the money according to his evidence would end up with a surplus amount. He stated that he contributed Z\$11 million, the defendant paid Z\$10 million and the proceeds of Z\$20 million from the proceeds of the Marimba Park house all went to the purchase price of the house. He also took out a loan of Z\$5 million for transfer fees. Thus the total amount raised was Z\$46 million when the purchase price was only Z\$38 million.

Throughout his evidence and cross examination he insisted that he wanted to retain all the moveable property which they acquired in Zimbabwe. It was only when he was questioned by the court that he stated that they could share the movables in accordance with the agreement that they had reached prior to the commencement of the trial.

The defendant testified that she was residing with her mother in Kambuzuma during her stay in Zimbabwe. She was agreed that the marriage between her and the plaintiff had broken down as they have not lived together as husband and wife since 2006. She has three children with the plaintiff. The eldest son is at university in England and lives with her. She testified that she loved her children and wanted custody of the two minors. She left for London when her youngest son was 2 years and 8 months old. She had agreed with her husband, the plaintiff, that they wanted a better life for their family. She could not go with the children because she was going to look for employment. When she had settled down the children did follow her but she unfortunately fell ill and they had to return a year later. She produced as an exhibit an exercise book that belonged to her youngest son. She stated that her son gave her the book when he came to visit her for Christmas in December 2006. At page 11 of the book he had written what he called "My Christmas Wish" In the story he stated that he

wished that his mother and father would get back together and his father would stop cheating on his mother. She stated that the story showed that the child was not happy with his father. The defendant testified that although she was not employed she had permanent residence in the United Kingdom and had secured a council flat where she could live with the minor children. She produced the lease agreement as proof of residence and medical aid cards in the children's names for their treatment in England. She also opened bank accounts for the children and stated that a social worker was assisting in securing a place for school for the youngest child. She also told the court that the plaintiff was employed by air Zimbabwe until 2009 when he was retrenched. He was however given a package which allows him and his family to continue to fly all on the airline for free. The children have therefore been flying to and from the United Kingdom at no cost.

The defendant confirmed that she and the plaintiff had agreed on the distribution of their movable property. She produced by consent exhibit 11 which shows how their property should be shared. Thus the only dispute between the parties related to the immovable property. The defendant told the court that she had given the plaintiff 10 000 pounds. She produced a document which she downloaded from the internet which showed the exchange rates as at July 2002. The defendant urged the court to accept the rate on this document as opposed to the rate which the plaintiff had said he changed the money. In August 2002 she sent a further sum of 3000 pounds towards the purchase price of the property. The defendant testified that in November of 2002 she sent a further amount of 5,823,94 pounds to assist with renovations on the property. A wall was erected around the property and a new leather lounge suit purchased. They put in tiles in the swimming pool and relocated the gazebo from the tennis court to the swimming pool.

The defendant stated that from her calculations she had paid the full purchase price for the immovable property without the assistance of the plaintiff and she was thus entitled to a 90% share. She stated that if she were to be given a period of six months she would be able to pay him out.

In cross examination the defendant maintained that the plaintiff did not contribute at all towards the purchase price of the immovable property. She was adamant that the black market rate upon which they changed their money was set by government. She stood firm in her evidence that she had sent further amounts to the plaintiff towards the purchasing and renovations of the house.

I found the defendant to be a good witness who was fair and gave credit where it was due. She conceded that the plaintiff had done a great job of looking after their children in her absence. She seemed to me to be a loving and caring mother to whom fate had unfortunately dealt a nasty blow. Had she not fallen ill in 2004 she could have been with all her children now.

With regards to her evidence in relation to her contributions towards the purchase price of the house it was apparent that she had no real knowledge about the rates of exchange and had left the financial responsibility in the hands of the plaintiff. Whilst there was clear evidence that she had withdrawn various sums of money from her bank account in the United Kingdom there was no real link between the withdrawal and how the money was subsequently used.

MEETING WITH MINOR CHILDREN

I had an opportunity to meet with the two minor children of this union. It was clear that the children were well adjusted and well looked after. They were well mannered and articulate. Whilst I cannot disclose what we discussed during the meeting it was apparent to me that the children love both their parents very much and if they had a choice in the matter would want their parents to remain together. T who was about to turn 18 in a couple of months oozed with confidence and showed that he was ready to go to university. The same could not be said of the younger child who seemed a bit more withdrawn.

CUSTODY AND MAINTENANCE OF THE MINOR CHILDREN

The issue of custody was relevant only as far as the youngest child was concerned. T at the time of the hearing was doing his upper 6th form and was looking forward to going to university. He turned 18 on 13 August 2010. The question of his custody was never in issue during the trial as it was accepted that he would turn 18 during the course of the year and thereafter decide where he wanted to go and live and study.

Both parents want custody of N the youngest child. It is trite that in any case where the court is asked to determine the issue of custody the court is enjoined to consider the best interests of the child. In the case of *Zvorwadza v Zvorwadza* 1996 (1) ZLR 404 it was held that the court must take into account the following factors in determining the best interests of the children; age, health, educational and religious needs, social and financial position of each

parent, sex of the child and parents' character and past behavior towards the children. I will take these factors into consideration in determining this case. N is only 13 years old. He has just completed his grade seven and is going to high school. He has lived with his father all his life. He is doing well at school and will probably get a place for form 1 at St Georges College. He is a young boy going into puberty. He needs the support and guidance of his father but he also needs the love and nurturing of his mother. An examination of N's notebook which was produced as exhibit 11 shows that he is a lovely young boy who loves both his parents. The book shows that his father is loving and caring and has done everything in his power to ensure that his children have the best in life. He looked after N when he was a baby and made all the arrangements for the children to visit their mother during school holidays. Whilst the plaintiff stated in his evidence that the defendant had abandoned the family it is apparent that the decision for her to go and look for employment in the United Kingdom was a family decision and for a while things had worked out as planned.

There can however be no doubt that N misses the love and care of his mother. It was argued by the plaintiff that she would not be a good custodian of the minor child because she is of ill health and she is not employed. The defendant struck me as a responsible person who has the best interests of her children at heart. She told the court that she is well on the road to recovery and hopes to be back at work soon. She has secured accommodation for herself and the child in the United Kingdom and has also secured permanent residence status for them. The defendant submitted that the plaintiff had been involved in adulterous relationships. She argued that on this basis the plaintiff should be denied custody. It was apparent from the excerpt that N wrote in his exercise book in November 2006 that he knew that his father was cheating on his mother. It must have affected him quite badly for him to have expressed it in the manner he did in his school book. The adultery itself is not denied and was explained by the plaintiff as the fact that he is a man of the flesh. This will obviously continue to adversely affect him well into his adult life.

Having considered the above factors I am of the view that the best interests of N at this time would be best served by awarding his custody to his mother. The circumstances of their family life have changed. His older brother who has always been there with him will be leaving for university. It was the defendant's evidence while she is still not back at work she was recovering and hoped to start work soon. To sustain herself she was on government benefits which will be sufficient to look after her and the minor child. I am satisfied that she

had made all the necessary arrangements for the accommodation and schooling for the minor child.

The defendant claimed maintenance for the minor child in the sum of 250 pounds per month per child. The plaintiff had offered an amount up to US\$3 000 per month for the two minor children. The defendant however cannot be awarded more than what she has claimed in her summons. The plaintiff can however make any further sums of money he can afford for the comfort and well being of his son. As there was no amendment to the claim the court can only make and award in the sum of 250 pounds per month for the minor child.

MATRIMONIAL PROPERTY

The plaintiff and the defendant were both agreed on how they would share their movable assets. The bone of contention remained with regards to how the immovable property should be shared. The plaintiff argued that he is entitled to 50 % share of the property as he not only contributed towards the purchase price but he is also a registered owner. The defendant on the other hand submitted that she should get 90% of the property as she paid the whole purchase price of the property.

It is now settled that in order for the court to achieve an equitable distribution it must take into account all the factors that are set out in s 7 (4) of the Matrimonial Causes Act. In making the award the court must endeavor to place the parties in the position they would have been had the marriage continued. In *Shenje v Shenje* 2001 (2) ZLR 160 (H) GILLESPIE J stated that the court must consider all the factors set out in section 7 (4) of the Matrimonial Causes Act. He stated as follows at p 163 of the judgment:

"The factors listed in the subsection deserve a fresh comment. One might form the impression from the decisions of the court that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognize that the legislative intent and the objective of the courts, is more weighed in favour of ensuring that the parties needs are met rather than that their contributions are recouped."

The evidence led during the trial related to the amount contributed by each party towards the purchase and development of the matrimonial home. Whilst there was very little dispute with regards the amount the defendant sent from the United Kingdom towards the

purchase of the property the dispute centered largely in regard to the exchange rate which was used to change the money from pounds to Zimbabwean dollars. The court is faced with a real challenge as the parties both accept that the money was exchanged illegally using the black market rate. Being an illegal rate there is no documentation which sets out the actual rate of exchange. The problem is also compounded by the fact that such transactions are carried out on a willing buyer and willing seller basis after negotiating the rate of exchange. As the transaction is illegal nothing is written down and therefore it is impossible to ascertain what the actual rate used was for the transaction.

The defendant sought to persuade the court to use a document which she had downloaded from the internet which set out the rate of exchange on the black market at that time. It was her belief that the document had emanated from government. However an examination of the document shows that it is not an official document but an article which was prepared by an individual quoting the Governor of the Reserve Bank. The rate of exchange on the document which she asked the court to accept is an illegal rate which is not recognized by the laws of this country. I thus had difficulties in accepting the document as proof of the exchange rate between the Zimbabwe dollar and the American dollar at the relevant time it would mean an acceptance by the court of the black market rate.

It was apparent to me during the trial that both parties contributed towards the acquisition of the immovable property. The actual contribution in monetary terms cannot be ascertained as the values were converted using an illegal rate. The plaintiff and the defendant are however both registered owners of the property. The defendant's submission that she should be awarded 90% of the property has therefore not been proved. In any event even if she had contributed a bigger amount financially the court is enjoined to consider all other factors set out in s 7 (4) of the Act when it comes to making an equitable distribution. The plaintiffs' indirect contributions in almost single handedly raising their three children cannot be overlooked. The youngest child was only 2years and 8 months when the defendant left for the United Kingdom. This in itself would tilt the balance in the plaintiff's claim.

The parties both need to make a fresh start in their lives. The defendant is based in the United Kingdom and the plaintiff lives in Zimbabwe. I have awarded custody of the minor child to the defendant which means that the plaintiff's claim to remain in the house until the youngest child attains the age of eighteen years no longer has any basis as it was premised on custody of the minor child being awarded to him. The defendant has never lived in the

matrimonial property apart from the visits she made. She has already found accommodation for herself and the child in the United Kingdom. The plaintiff will have to purchase some other property if the property is sold.

In trying to place the parties in the position they would both have been had the marriage continued I have taken into account that during the course of the marriage they both owned the property in equal shares.(see *Takafuma v Takafuma* 1994 (2) ZLR 103) Thus having taken into account the factors as set out in s 7 of the Matrimonial Causes Act it is my view that an award of 50% share to the plaintiff would meet the justices of the case. The plaintiff indicated that he would be in a position to buy out the defendants share if he is given an opportunity to do so. I will thus in the order that I make grant plaintiff the first option to purchase the property. If he does not do so within the time allotted to him the defendant can then also get a chance to buy out the plaintiff. I have given the plaintiff the right to the first option because he is based in Zimbabwe and that is the house he has always lived in. The defendant on the other hand lives elsewhere and does not intend to live in the house apart from the occasional visit.

The parties in this case made no claims for costs. In the order that I will make I will thus not make an order for costs.

In the result I make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the minor child N (born 28 November 1997) is hereby awarded to the defendant.
3. The plaintiff shall pay maintenance in the sum of 250 pounds per month until the child attains the age of 18 or becomes self supporting whichever occurs first.
4. The plaintiff is awarded reasonable access to the minor child in consultation with the defendant.
5. The plaintiff is awarded the movable property set out in annexure "A".
6. The defendant is awarded the movable property set out in annexure "B".
7. The immovable property being certain piece of land situate in the District of Salisbury called stand 322 Vainona Township of Vainona measuring 4 164 square meters otherwise known as number 5 Otter Road Vainona Harare is hereby awarded to the parties in equal shares.

- a) The plaintiff is granted the right of first option to purchase the defendants 50% share.
 - b) The property shall be valued by a registered estate agent appointed by the Master of the High court from his list of valuers within 30 days of this order.
 - c) The plaintiff shall pay the defendant her share of the property within 90 days of service of the valuation report.
 - d) The cost of the valuation of the properties shall be met by both parties equally.
8. In the event that the plaintiff fails to pay out the defendant her share of the property as set out in para 7 of this order the defendant shall immediately after the 90 day period have the right to buy out the plaintiff of his half share.
9. If the defendant fails to buy out the plaintiff within a period of 30 days from the date when her right becomes due the property shall be sold at best advantage and the parties shall be awarded 50% share of the net proceeds.
10. There shall be no order as to costs.

Chinogwenya & Zhangazha, plaintiff's legal practitioners
Madzivanzira, Gama & Associates, defendant's legal practitioners

ANNEXURE "A"

1. GREY/BLUE 3 PIECE SOFAS
2. SIDE TABLES WITH GLASS TOPS
3. 1 CENTRE TABLE
4. 1 ROCKING CHAIR
5. ALL DETACHABLE ITEMS IN MAIN BEDROOM
6. 4 BRAAI FORKS
7. ALL DETACHABLE ITEMS IN BREAKFAST ROOM
8. 1 WASHING MACHINE

ANNEXURE "B"

1. TAN 4 PIECE LEATHER SOFAS
2. 1 SPRAY OF ARTIFICIAL LEAVES
3. DINNING ROOM SUITE
4. ARTIFICIAL PLANT /FLOWER
5. ALL LISTED ITEMS IN 2ND AND 3RD BEDROOM
6. DOUBLE DOOR DEFY FRIDGE
7. PLASTIC VEGETABLE RACK
8. 1 DEEP FREEZER