

FADZAI MPOFU
versus
LINDA MARIA MPOFU (NEE MWENYEHELI)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 27 May & 7 June & 10 October 2024

Civil Trial

B Nyamwanza, for the plaintiff
M Maphosa, for the defendant

MAXWELL J:

The plaintiff and the defendant (the parties) married each other in terms of the then Marriage Act [*Chapter 5:11*] now the Marriages Act [*Chapter 5:17*] on 16 of January 2016. No child was born out of the marriage. During the subsistence of the marriage, no immovable property was acquired. The movable property acquired is termed to be not of substance.

On 11 May 2020, plaintiff issued out summons claiming a decree of divorce and ancillary remedies. He stated that the marriage relationship between the parties has irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship. The reasons for that averment are given as;

- (a) The plaintiff and the defendant have irreconcilable differences which are incapable of resolution;
- (b) The parties have lost love and affection for each other; and
- (c) The parties have not been living together as husband and wife for a continuous period in excess of twelve months.

Plaintiff prayed for a decree of divorce and that each party maintains itself upon divorce and bears its own costs of suit.

Defendant gave notice of entering appearance to defend. In her plea she disputed that the marriage had broken down irretrievably. She alleged that the parties have been progressively working out their differences to such an extent that as of December 2020 they had been exercising their respective conjugal rights. She submitted that the exercising of the conjugal rights and the general circumstances in which they were exercised is inconsistent with the loss of love and affection as alleged. She further submitted that both parties have a duty to reciprocally maintain each other. She prayed for the dismissal of the matter.

After an exchange of pleadings, a Joint Pre-Trial Conference was held in which the sole issue referred to trial was;

“Whether or not the defendant is entitled to spousal maintenance after divorce or whether she should maintain herself.”

Up to the date of filing the Join Pre-Trial Conference Minutes, defendant was legally represented. At the commencement of the trial on 27 May 2024, defendant appeared in person. She indicated that the matter should proceed in the absence of her practitioner.

TRIAL

Plaintiff was the first to testify. He disputed that defendant was entitled to maintenance. He submitted that she was able to take care of herself as she is employed in Dubai. He stated that he was not in a position to pay maintenance as he has a lot of liabilities, credit card debts and personal loans. He further stated that defendant has been staying on her own for the past 4 years. That was his case.

Defendant testified. She indicated that she was not aware of what transpired at the Pre-Trial Conference and what her lawyers presented. She suffers from epilepsy which the doctor said was due to stress from the divorce proceedings. She indicated that she left her career here in Zimbabwe to adjust to her marriage and move to Dubai. She became dependent on the plaintiff. Even after the plaintiff left the matrimonial home, he would come back, be intimate with her and give her money for her daily needs as her salary was not enough to cover everything. She stated that at the commencement of their marriage, she was the one funding everything. She stated that she was employed whilst plaintiff was on attachment. Further that she changed her career to fit his lifestyle. She submitted that plaintiff ought to maintain her post-divorce for four years as she had borne the couple’s financial burden at the initial period of their life together. Defendant’s

health condition caused the matter to be adjourned as the cross-examination was proceeding. She had to be rushed to hospital.

On 28 May 2024 her erstwhile legal practitioners wrote indicating her request for a postponement and that they were retained merely to attend to ancillary issues, not the trial itself. On 29 May 2024 the erstwhile legal practitioners renounced agency and on 31 May 2024 defendant's current legal practitioners assumed agency. The matter resumed on 7 July 2024. Counsel for defendant requested on indulgence to lead evidence in chief which I granted. Counsel indicated that defendant is no longer pursuing the issue of maintenance.

During the defence case the defendant revealed that she did not understand why the matter was limited to the issue of post divorce spousal maintenance. She argued that her position has always been that there is a chance for reconciliation and that it is premature to conclude that her marriage relationship with the plaintiff has broken down irretrievably. As a result, after the parties filed closing submissions, I invited them to consider the import and applicability of s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*] which states;

“If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.”

The court's invitation was answered by a renunciation of agency from the defendant's legal practitioners. Plaintiff's legal practitioners made submissions urging the court to focus on the issue that was referred to trial only.

WHETHER OR NOT TO INVOKE SECTION 5(3) OF THIS MATRIMONIAL CAUSES ACT
[*CHAPTER 5:13*]

Defendant's evidence under oath was that the plaintiff's actions are not in line with his words. She was of the view that if he did not love her anymore, he would not be visiting her. She stated that she had reached out to church elders and family members trying to save the marriage and in her view plaintiff probably got upset by that. She also stated that no conclusion was reached on the issues presented to the church elders. I was of the view that a basis had been laid for the application of s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*]. Regrettably there was no input from counsel for the defendant.

Plaintiff insisted on the matter proceeding in terms of the issue referred to trial during the pre-trial conference stage. He pointed out that these proceedings have taken four years since the

issuance of summons and if there was a possibility of reconciliation or salvaging the marriage, the parties would have done so within the four year period. I am persuaded to agree with the plaintiff. The main reason defendant seemed to be arguing in favour of a possibility of reconciliation was the fact that the parties continued to have sexual relations here and there. However, this is a fact that was stated and recorded in the Round Table Conference Minutes. The Conference was held on 13 July 2023, signed and filed on 18 July 2023. In para 5 thereof it is recorded that;

“5. The defendant further confirmed that they have not been living together as husband and wife 2020 (sic) but however, they would sometimes have sex whilst living separately.”

As argued by counsel for the plaintiff, sexual intercourse does not mean that a marriage is on going. Not only married people have sexual intercourse, even divorced or divorcing people can.

I therefore find that plaintiff’s insistence on the matter proceeding to finality is an indication that to him the sexual intercourse was not signifying a reconciliation. There is therefore no basis for having recourse to s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*].

THE ISSUE REFERRED TO TRIAL

In accordance with r 49(10)(b) the issue for trial was limited to only dealing with whether or not post divorce spousal maintenance was necessary. A Joint Pre-Trial Conference Minute is usually prepared by the plaintiff’s legal practitioners and shared with the defendant’s legal practitioners. If they agreed on the contents they sign it and file it with the Registrar of this court. The Judge who will preside over the trial gets a summarized idea of the matter and the issues that must be dealt with at trial. The minute is binding upon the parties.

Defendant was legally represented at the time the Pre-Trial Conference was held. Her erstwhile legal practitioners signed the minute on her behalf. It is trite that a trial court’s mandate in civil proceedings is determined by the issues referred to trial. Only one issue was referred to trial before me, that is the issue of post divorce spousal maintenance. It therefore follows that once the defendant abandoned the issue of post divorce spousal maintenance, the issue before me became unopposed. Resultantly the prayer in the plaintiff’s summons stood uncontested by the time the trial was concluded.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Each party is to maintain itself upon divorce.
3. Each party is to bear its own costs of suit.

Nyamwanza Legal Practice, plaintiff's legal practitioners