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versus
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HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 17, 18 March and 2 April 2008.

CIVIL TRIAL

G H Muzondo for plaintiff;
Defendant in person.

MAKARAU JP: The plaintiff and the defendant were married at Harare on 5 September 1998. Two daughters were born of the marriage. These were born in 2001 and 2004 respectively.

On 31 January 2007, the plaintiff issued summons praying for a decree of divorce to issue on the grounds that his relationship with the defendant had broken down to such an extent that there is no possibility of reconciliation. In the main, the plaintiff lamented the fact that he had been denied conjugal rights by the defendant for a period in excess of three years.

The action was defended and after the pleadings in the matter had closed, the parties appeared before a judge in chambers for a pre-trial conference on more than one occasion. During the discussions under the guidance of the judge at the pre-trial conference, the parties managed to agree that it was in the best interests of the minor children that their custody be awarded to the mother upon divorce with the plaintiff enjoying reasonable rights of access to the children. The parties also agreed in the main as to how to apportion the movable assets they jointly acquired during the subsistence of the marriage. They also agreed that the immovable property in Ruwa, being a vacant stand, be registered in the names of the minor children. The defendant however did not agree that her marriage to the plaintiff had broken down to such an extent that reconciliation is impossible. She averred that with proper counseling, the parties could resume a normal married life. It was this sole issue that the judge presiding over the pre- trial conference referred to trial.

At the trial of the matter, the plaintiff testified as to the frustrations he has endured during the subsistence of the marriage in exercising conjugal rights with the defendant. The record is replete with the minute details of how each attempt at intercourse was not satisfactory for him

and left him frustrated. He further testified as to how in an effort to enhance their intimacy, he procured an adult DVD on one occasion and on another, he purchased for the defendant a lubricant to ease things for her. All this came to naught.

Realizing that they had a real problem in their marriage, the parties were counseled by a married couple who arranged counseling sessions for them. This appears to have been professional counseling. The problem persisted. Relatives tried to talk to them and still the plaintiff felt frustrated by what he perceived as the defendant's failure to perform her side of the bargain in the marriage. He then resolved to terminate the marriage and caused summons to be issued in the matter.

Under cross examination, the plaintiff explained how the two daughters they have were born in the marriage which he had described as unfulfilling. The record again carries the minute details of how, according to the plaintiff, the second daughter was conceived. It is not necessary for the purpose of this judgment that I repeat the graphic evidence that was led in this regard.

In my view, the plaintiff gave his evidence well. His frustrations were almost palpable as he testified. He is an articulate young man who impressed me as being honest and fair.

The defendant is equally articulate and very earnest. She testified in defence of her marriage to the plaintiff. It is clear that she values her marriage and is still affectionate towards the plaintiff. She is a devout Christian who believes in the sanctity of marriages.

Her evidence was to the effect that the marriage has not broken down irretrievably as she still loves the plaintiff. She denied the allegation that she had denied the plaintiff conjugal rights and was of the view that the problems they are facing are capable of solution. She further testified as to how the plaintiff walked out of some of the counseling sessions they were undergoing and failed to turn up for others.

In my view, the facts of this matter are largely common cause. The parties have had some problems in their marriage. The problems are not freshly occurring or transient. The parties have debated the issue before between themselves and in the company of others. Some of the questions that the defendant put to the plaintiff in cross-examination were put to him prior and in other *fora.* They have sought counseling on the issue and this has not yielded the desired result. She at one time sought medical treatment and again it did not assist the parties in enhancing their intimacy. It may be well true as she says that the problem on her part is psychological and will require psychological intervention.

The issue that falls for my determination is whether in light of the evidence before me I am satisfied that the marriage between the parties has broken down irretrievably and that a decree of divorce should issue. In determining this matter, I have sought guidance from the provisions of section 5 of the Matrimonial Causes Act [Chapter 5.13] which provides that:

"(1) An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the 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 of the restoration of a normal marriage relationship between them."

It is the settled position at law as recognized by this court that this section vests wide discretion in the appropriate court seized with a divorce matter to either grant the divorce or postpone the hearing of the matter to give the marriage another chance where the court is of the view that this is the appropriate approach to take. (See *Chiviya v Chiviya* 1995 (1) ZLR 210 (H), *Kangai v Kangai* HH 52/07 and *Mashonganyika v Mashonganyika* HH 10/08).

The introduction of the concept of irretrievable breakdown of marriage in 1985 was to move away from the fault or matrimonial offence principle to an objective assessment of the state of the marriage by the appropriate court. It is my considered view that once one party to the marriage has expressed an intention to end the marriage and remains of that view at the time of the hearing of the matter, in the absence of any evidence to show that he or she may have changed their mind between the issuance of summons and the hearing of the matter, the court will be hard pressed to order the parties to reconsider their positions. It takes two to tango.

In *casu,* as stated elsewhere above, the parties have genuine problems that have persisted for at least 3 years. Counseling to date has not assisted in resolving their problems. It is therefore idle in my view on the part of the court to postpone the matter to enable the parties to seek further counseling in the matter.

The parties separated in July 2007. He has not been back. Since he departed from the matrimonial home, there is no evidence that the parties attempted to resolve their problem or that they took any active steps in coming together again as husband and wife. It is in my view again idle for the court to believe that what the parties in this matter require is more time to reconsider their respective positions. The facts of this matter are in my view to be contrasted with the facts in *Mashonganyika v Mashonganyika* (supra) where the parties were sharing board and bed, including affording each other conjugal rights well up to a fortnight before the date of the hearing. Rather than showing incompatibility, the parties in that case showed that they could continue as husband and wife were for some time and the plaintiff only changed

their daily routines because the matter had been set down for hearing. If the matter had taken long before being set down, it is easy to imagine that normal marriage relations would have continued between the parties. It is not cynical in the least to suggest that normal marriage relations between the two were interrupted by the set down of the matter.

Courts will not grant divorces lightly. Divorces change one's status at law and socially. Where the parties have children, a divorce has the effect of separating the children from one of their parents save for regulated periods of access by the non- custodian parent. Generally, a divorce has the effect of impoverishing the divorcing couple as it parcels out jointly held assets into two separate estates, each estate obviously becoming less in worth than the jointly held estate. Thus, where there is evidence that a marriage can be salvaged, or where the justice of the case demands, the court will exercise its discretion against granting a decree of divorce. Neither of these two aspects appears to me to characterize the matter before me.

Equally important in my view is to note that while courts will not lightly grant a decree of divorce, defendants who argue that their marriages to plaintiffs have not broken down irretrievably have the duty to place before the court evidence tending to show that there are prospects of reconciliation and that the plaintiff has been responding well to overtures of reconciliation. The court cannot act on the mere belief of one of the parties that the marriage will someday blossom into its former vibrancy and passion.

The parties agreed on how to share their assets in the event of a divorce. I shall give effect to this agreement in the divorce order that I issue. Regarding the immovable property, the parties agreed that it be registered in the joint names of the parties two children as their property but that in the interim and for the purposes of securing funds to develop the vacant stand, that it be registered in the name of the defendant.

The defendant prayed for maintenance for herself and the minor children. She is a Bachelor of Science graduate who is gainfully employed. In praying for maintenance for herself, the defendant argued that since the plaintiff is the one who has decided to terminate the relationship, he should be compelled by law to maintain her and the minor children at a standard of living higher than they were used to during the subsistence of the marriage.

"A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her

time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance. See *Chiomba v Chiomba*. 1992 (2) ZLR 197"

The above are the remarks of GOWORA J in *Kangai v Kangai* (supra). I associate myself with the remarks as representing the approach of this court to the issue of maintenance for the divorced wife.

On the basis of the above, the defendant, being gainfully employed, is not entitled to maintenance from the plaintiff.

Regarding the maintenance of the minor children, the parties have agreed as between them that the contribution of the plaintiff be in kind and that he provides at least 60 % of the monthly needs of the children. I will not make an order to this effect as such an order will not be difficult in policing but in enforcing as well. I will leave it open to the defendant to approach an appropriate maintenance court should she find the arrangement unworkable in future.

In the result, I make the following order:

1. A decree of divorce is hereby issued.
2. Custody of the two minor children is hereby awarded to the defendant with the plaintiff enjoying reasonable rights of access.
3. The plaintiff shall be awarded as his sole and absolute property the following:
   3.1.1x refrigerator
   3.2.1x DVD player
   3.3.1x satellite dish and decorder
   3.4.1x two plate stove
   3.5.1x bed and mattress
   3.6.1x 21 inch LG color television set.
4. The defendant is hereby awarded as her sole and absolute property the following:
   4.1. 1x 4 plate cooker
   4.2. 1x deep freezer
   4.3. 1x lounge suite
   4.4. 1x 21 inch Phillips television set
   4.5. 1x radio cassette player

4.6. 1x carpet.

5. The immovable property known as stand 27 Ruwa, is hereby awarded in equal and undivided shares to Vongai (born 21 March 2001) and Vimbai (born 22 July 2004).
6. Until the younger child attains majority, the immovable property shall be registered in the name of the defendant who shall hold the property in trust and to the extent that she is capable, shall develop the property for the benefit of the minor children.
7. Each party shall bear its own costs.

Madzivanzira, Gama and Associates, plaintiff's legal practitioners.