ZVIKOMBORERO MLAMBO CHIPANGA
versus
TAFADZWA MAPFUMBA

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE; 22 July 2024 & 10 March 2025

Family Court – Divorce Action

T Pfigu, for the plaintiff
D Muchada, for the defendant

WAMAMBO J: This is a divorce action. The parties got married on 9 March 2014. Two children were born of the marriage namely Takunda Adriel Mlambo Chipanga (born 17 August 2014) and Mufaro Elnathan Mlambo Chipanga (born on 16 May 2017).

There is consensus between the parties that a decree of divorce should be granted. A close examination of the evidence from both parties reflects an acrimonious marriage which appears to have been fractured just after it started for various reasons.

Defendant seems to suggest that plaintiff is an authoritarian whose word is law. That plaintiff changed just close after the commencement of the marriage and became a workaholic who would sometimes stay up to 9pm with the children at his workplace.

Plaintiff's evidence was that he basically did everything for defendant and the children. He avers that he took the children for school run, fed and bathed them. He says he ferried plaintiff to and from work and bought groceries and paid the maid and speculates that plaintiff's salary was probably transmitted for her family members to enjoy.

There are allegations thrown by plaintiff that defendant used to assault the older child frequently and for no apparent reason. Defendant countered that plaintiff was generally emotionally abusive and indeed physically abusive as is reflected in Exhibit 6 to 8.

I am satisfied in the circumstances 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 relationship between them.

To that end I find that a decree of divorce should be granted.

The joint Pre-Trial Conference memorandum identified the issues for trial as the following: -

1.1 Whether or not the custody of the children should be granted to plaintiff or defendant.

1.2 Whether or not the defendant contributed to the acquisition of the immovable property known as subdivision C of Stand 241, 242, Avondale West of Lot 22 Block D of Avondale.

1.3 Whether or not the immovable property namely as subdivision C of Stand 241, 242 Avondale West Lot 22 Block D of Avondale constitutes matrimonial property for the purposes of distribution (sic).

1.4 If so whether or not the defendant is entitled to 40% share of the value of the immovable property".

It would seem that there was an unnecessary splitting of separate paragraphs as regards the Avondale property. For instance, the issue of direct contributions is placed in a separate paragraph. The issue of whether the property in question is matrimonial property is in a separate paragraph.

The Matrimonial Causes Act [*Chapter 5:13*] refers to such property as "assets of the spouses." See section 7 thereof.

The issue of direct contributions is but one of the many circumstances that a Curt must consider in the distribution of assets of the spouses. In terms of section 7(3) the Court may have regard to all the circumstances of the case, including the following: -

The circumstances enumerated extend from (a) to (g).

The issues being, before exploring whether or not plaintiff contributed to the acquisition of the Avondale House, it has to be an asset of the spouses to begin with.

That having been said, I will move to the first issue which is custody of the minor children.

The parties both clearly demonstrated their interest to be awarded custody of the two minor children. The children having been born in 2014 and 2017 are around 11 and 8 years old respectively. They are at very tender ages and are still vulnerable and sensitive.

Plaintiff justifies an award of custody to himself for the following reasons: -

He is a care giver who has seen to the children's upkeep, bathing them, taking them to and from school and exposing them to the internet at his work place. He also avers that he assisted the children with homework. At his church, the African Apostolic Church, mental and

moral support is extended to the members of the congregation. He has a six roomed house which he owns. Each child can have a separate bedroom and library. The children are used to the environment at and around his home, where there is a wide choice of schools to attend. He is authoritative and not an authoritarian. He testified that defendant used to assault the older child to the extent that she would come into the bedroom where he slept (before separation they slept in separate rooms for 6 months) and assault Takunda. She was however more affectionate towards Mufaro, the younger son. He took Takunda to the Social Welfare department and also enlisted the assistance of Childline Zimbabwe.

The plaintiff testified about an incident involving violence on his part. His version is that he saw periperi and salt on the bed which was between the base and the mattress and perplexed as to the location of periperi and salt in his bedroom instead of the kitchen he summoned defendant. Defendant was reluctant. He held her hand and, in her resistance, she was about to fall and he held her and, in the process, she sustained minor scratches on her throat.

The defendant's version is rather different from that of the plaintiff on most issues. Her version is as follows: -

After the marriage plaintiff changed to a workaholic and was also resisting intimacy. By 2022 the marital situation had worsened, resulting in her seeking the intervention of a third party, which plaintiff spurned, saying that he would not allow an intruder into his marriage. She gave a lengthy version of how plaintiff abandoned her for four months when she was pregnant and called her a witch on occasion to the extent that one of the children asked her what a witch was.

She testified to plaintiff assaulting her in front of the children to the extent that she had to be hospitalised. The version given by plaintiff of the peri peri and salt and an accidental injury; she scoffed at as lies.

She obtained a non-contested protection order against the plaintiff. The protection order is Exhibit 7.

A previous conviction extract reflecting the name of plaintiff was also produced as Exhibit 6.

It reflects that plaintiff was convicted of physical abuse pursuant to Section 3(1) (a) of the Domestic Violence Act [Chapter 5:16] and sentenced to a $40 000 fine (presumably in Zimbabwean dollars) in default of payment 6 months imprisonment. In addition, 3 months imprisonment were suspended for 5 years on conditions of good behaviour.

The Constitution of Zimbabwe Amendment (No. 20) Act 2013 provides for the rights of children in section 81 as follows: -

"(1) Every child, that is to say every boy or girl under the age of eighteen years has the right –

a) To equal treatment before the law, including the right to be heard.

b) ……..

(2) A child's best interests are paramount in every matter concerning the child.

In *Frank Buyanga Sadiqi* v *Chantee Tatenda Muteswa* HH249/20

ZHOU J emphasized the concept of the best interests of the child as follows at p 8: -

"The best interests of the child" requirement enjoins this court as the upper guardian of all minor children to exercise its authority by giving priority to the interests of the child over the rights interests and entitlements of the parents. In the case of *Fletcher v Fletcher 1948 (1) SA 130* long before the advent of the democratic constitutions in both South Africa and Zimbabwe, the Appellate Division held that the most important consideration in matters of custody and access (and necessarily, guardianship) is not the rights of parents but the best interests of the child. The constitutional entrenchment of this test shows the importance the law attaches to it. HUNGWE J (as he then was) dealt with a case in *Dangarembizi v Hunda HH 447-18* where the marital status of the parents was raised as a ground of objecting to the granting of custody to the father At p 7 of the cyclostyled judgment the Learned Judge said:-

"There is considerable judicial opinion that deciding issues relating to guardianship, custody and access based on the birth status of the child belongs to a bygone era. The best interest of the child was the main criterion employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted and irrespective of whether or not the parents are unmarried, or lobola has been fully provided, applies to all disputes concerning children."

The Court above may have been dealing with slightly different circumstances to the present matter, but the resounding criterion as emphasized above is the best interests of the children. In my deliberations in this case, I will keep the key consideration and criterion as the best interests of the children.

The incident involving the parties culminating in a conviction of physical abuse per the Domestic Violence Act, as referred to earlier is a good starting point. The parties' versions differ considerably, I have considered both versions closely. The plaintiff's version is not believable for a number of reasons. Stopping a fall does not necessarily cause scratches on the throat. The same does not result in hospitalisation. The version itself shows violence on plaintiff's part. He admits that he pushed defendant which is an act of violence. Plaintiff apologised profusely to the Court and said words to the effect that he regrets the incident and calls his actions deplorable. To my mind that apology is not consistent with breaking a fall, but a realisation of the enormity of his violent actions. Defendant gives a more balanced version of her following plaintiff after he had strangely started bathing the children. Having

followed him she says she was attacked by plaintiff and had to get medical attention resulting in the Court case where plaintiff was convicted . It is instructive that medical attention and a conviction reflects that a physical assault occurred.

I find that plaintiff intentionally down played the severity of his actions that led to his conviction.

The assault according to defendant occurred in the presence of the minor children. This evidence was not countered or impugned. There was further evidence that the abuse soon extended to the children.

Evidence led by plaintiff was to the effect that defendant used to assault Takunda the older child. Besides his word of mouth which defendant called a lie there was no other evidence presented to support the allegations.

While the children were originally used to the Avondale home, since the defendant left with them to set up in Westlea, they are now accustomed to the new environment. The defendant from the evidence tendered appears to be a victim of domestic violence. That domestic violence permeated to the children in many ways among them, direct assaults on the children themselves, her being assaulted and insulted in front of the children. The decision for defendant to file a protection order and leave with the children appears to have been a cry for help for herself and the minor children.

The accommodation facilities for both parties seem ideal for the children. Being driven by the father to school and being driven by a school shuttle though slightly different is not enough to sway me that the father is a better custodian.

I find plaintiff to be given to violence in the circumstances of the case. Such an environment is not ideal for anyone, let alone the minor children. The past behaviour of plaintiff staying with the children at work up to 9 p.m. is not in the best interests of the children. Both parties are gainfully employed.

The children are still at very tender ages. I am of the view that they need continuity and stability. Whatever ripples may have been there need to be addressed in the children's best interests.

I am of the view that the mother of the children, has the best interests of the children at heart. The violent behaviour of plaintiff is not in the best interests of the children.

I find in the circumstances that custody of the minor children be granted to the defendant. Flowing from custody emerge the issues of maintenance and access.

The plaintiff is a general manager at his workplace. His salary was not disclosed. The defendant is employed by the City of Harare in the Finance Department and has been so employed since 08 February 2009. (Exhibit 8 speaks to the issues of defendant's employment and benefits).

The issue of maintenance is dealt with rather obliquely by the defendant. In the closing submissions in paragraphs 5 – 8 defendant suggests that by asking a question to clarify on custody and maintenance the Court meant the issues were *res judicata.* That is a serious misunderstanding. The parties filed a joint Pre-Trial Conference memorandum that reflects that the issues of custody is an issue for determination. There is no order relating to custody that was produced before me. The matter thus cannot be *res judicata*.

There is again no order of maintenance, that has been placed before me. The parties however in their joint Pre-Trial Conference memorandum aver as follows at paragraph 2.2 of the agreed facts.

"2.2 That plaintiff will continue paying maintenance of US 250.00 as per the existing maintenance order under M423/23.

It is unclear whether this entails an interim maintenance order pending the divorce action. It would appear to be so considering at that stage and up to the conclusion of the trial the parties did not agree on who should be awarded custody. There is nowhere in the pleadings however that an order of custody was related to nor was one produced before me.

At the least it is mischievous to suggest that the issue of custody was already decided and that this Court related to same as given in the defendant's closing submissions.

The couching of paragraph 2.2 of the joint Pre-Trial Conference minute is vague in any case. There are two children involved in this case. There are two children involved in this case. Is the US$250 in relation to one child or both children. Surely the needs of the children with a two-year difference and different personal needs and circumstances cannot be the same.

If there is such an order as referred to it was not placed before me. I will thus consider the issue of the quantum of maintenance.

The plaintiff's claim for maintenance in the declaration is for a monthly contribution of $80 000 ZWL, 30% of school fees and school related expenses and 50% towards the children's medical aid. Further that plaintiff contributes 70% of the school fees and school related expenses and 50% of the medical aid.

In defendant's plea she claims that plaintiff pays US $ 400 or its Zimbabwean dollar equivalent at the prevailing rate per month. This would amount to US700 per child per month. Further defendant claimed 25% of school fees from defendant and 50% towards medical aid.

A reading of the above reflects that the parties are agreed on both contributing 50% towards medical aid. Plaintiff has offered to pay 70% of the school fees and school related expenses. I will in the circumstances hold him to his offer and accede to each party contributing 50% of the medical expenses of the children.

A close examination of the closing submissions reflects that defendant does not speak to the quantum of maintenance she proposes therein.

I note that since the separation defendant has been catering for the children's needs mostly on her own in the absence of plaintiff.

In the circumstances considering the maintenance plaintiff sought from the defendant and the quantum defendant seeks from plaintiff that maintenance in the sum of US$250 for Takunda and US$200 for Mufaro are justified amounts of maintenance plaintiff should contribute.

I move to the issue of access. Plaintiff suggested that the access he is currently exercising is insufficient and he requires 15 days.

Defendant suggests that plaintiff should exercise access to the children every last weekend of the month and a week during holiday.

The plaintiff appeared bent on gaining custody of the minor children that he did not have regard to the fact that the Court still had to determine whether or not he should be granted custody. He thus sketchily dealt with the issue of access.

The only suggestion on access comes from the defendant. Considering defendant has been granted custody and will be residing with children, she will have sufficient time to bond with them. One weekend per month sounds insufficient for a father to access his children, which his faults aside he seems to have genuine love for. Sharing access to the children is but a necessary result of the divorce. The defendant cannot be closed off to access his children in a meaningful way. A weekend per month or one week during the holidays. I find that plaintiff should be granted access for the last two weekends of every month and for half of the school holidays appears insufficient.

I move to the issue of the subdivision of stand 241, 242 Avondale West, Lot 22 Block D of Avondale (hereinafter referred to as the home).

The parties have been married since 2014 and have been residing at the home up to the time of their separation when defendant left the home and set up residence in Westlea. Plaintiff avers that he bought the house before the marriage and that defendant contributed nothing to the acquisition of home and should not get a share.

In a bid to bolster his case plaintiff produced Exhibits 2, 3 and 15.

Exhibit 2 is a deed of sale reflecting that plaintiff purchased the home for US 75 000.00 from the Loewesons. The deed reflects that the purchase price was to be paid by a deposit of US$10 000 on signature of the deed and the balance payable for not less than US400 per month and the balance to be paid not later than 31 August 2020.

Exhibit 3 contains receipts of payments made by plaintiff.

Exhibit 5 is a deed of transfer in favour of the plaintiff. Defendant testified that plaintiff lied to her that the home was rented. She said that she would bring her salary home and discuss with plaintiff how to use her salary and he would tell him to use it for household needs. She testified that plaintiff's claim that all household chores were done by the maid was not true. Defendant was correct in a particular respect, that is that the house forms property of the spouses, no matter plaintiff entered into a deed of sale before their marriage and started making purchase of the house on his own. The deed of transfer however was executed in 2018 when the parties had been married for about 4 years. I also note that 2 years after the marriage in 2016 payment towards the home in the sum of US 75 000 was fully paid.

In *Tapera v Tapera HH 513/23* MUCHAWA J at p 8 had this to say:

"At law the question as to what property falls for distribution was already traversed in the case of *Gonye v Gonye SC 15/09* as follows: -

> "It is important to note that a Court has an extremely wide discretion to exercise regarding the granting of an order for the division appointment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the Court may make an order with regard to the division appointment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.
>
> The terms used are the assets of the spouses and not matrimonial property. It is important to bear in mind the concept used because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept asset of the spouses is clearly intended to have assets owned by the spouses individually his or hers or jointly (theirs) at the time of the dissolution of the marriage

by the Court considered when an order is made with regard to the division appointment or distribution of such assets".

Section 7(4) of the Matrimonial Causes Act [Chapter 5:13] enumerates some of the factors to be considered in the exercise of the Court's discretion.

The *Tapera vs Tapera* case (supra) the Learned Judge proceeded as follows at page ……

> "It is clear from the above that the proper question should not be whether the house is a matrimonial home, but whether it is an asset of the parties subject to distribution in terms of s 7(4) of the Matrimonial Causes Act Chapter 5:13. The fact that the house was acquired before the marriage is just one of the many factors to be considered in the Court's exercise of discretion.
> The property is not excluded from consideration just because the plaintiff bought it in 2014 and did most of the developments before marriage".

In this case I am cognisant that the parties married in 2014. Plaintiff started paying for the home in 2010 up to 2016. By the time the parties married plaintiff had paid a substantial amount. The parties separated in 2019.

Although somewhat hesitantly defendant suggested she contributed to the acquisition of the home, she proffered no such evidence. She could not even come up with a figure of her contributions. Both parties are in gainful employment. The parties in terms of the findings I have made on maintenance, school fees and medical paid will contribute significantly to the upkeep of the children. The defendant is already carrying on a comfortable lifestyle in a house in Westlea. The status of the house was not disclosed by her. What she did disclose however is that the house she is now residing at has more space than the Avondale home. From the tenor of her evidence her standard of living has not shifted much from that when she was residing with and as plaintiff's wife.

The defendant has already helped herself to some of the spouses' asset in the form of beds, a stove, drawers, deep freezer, blankets. In her testimony she said that she believed the property was hers.

Plaintiff testified that defendant most probably spent her salary on her relatives as she made no significant or known contributions to the household. Defendant says she bought groceries and the children's clothes.

Between the exaggerations that usually beset parties embroiled in acrimonions divorces. I am inclined to believe plaintiff that defendant's direct contributions to the family were minimal. Plaintiff may have lied about renting the property but that on its own, means he was virtually paying the monthly instalments virtually on his own. If there was any contribution from defendant it must have been minimal.

I got the distinct impression that defendant is one of those married persons who leave everything financial to the other partner.

Defendant's contribution is being a wife and a mother to the children. I do not believe plaintiff when he says she contributed nothing at all. In practical terms she could not possibly got to work and contribute nothing in financial terms. As I found earlier even this was at a very minimal level.

I am mindful that the marriage was entered into in 2014. However, the road from executing the marriage certificate to the time defendant left the home was mostly a thorny pathway to walk for both parties.

Plaintiff proposes that defendant be awarded a monetary consideration for her minimal contribution. Defendant stuck to her proposition of 40% of the value of the home.

The parties were married in 2014 but separated in 2019. In reality they lived as man and wife for 5 years.

The plaintiff entered into an agreement of sale for the home in 2010. By 2016 he had completed paying for the home. The defendant, if she made any contributions at all would have made same between March 2014 to June 2016 which is just over two years. By the time of the marriage plaintiff had already paid, an amount very close to the full sale price.

The outstanding amount at the time the parties married was from a rough calculation in the vicinity of US$10000. I am mindful that other amounts relating to capital gains and other payments to Wilmot and Bennet are not accounted for here.

For equity's sale I will stretch it and say defendant paid half of the $10 000 that was the balance after the marriage.

I am not convinced that defendant deserves 40% of the value of the house.

If defendant paid any amounts towards the acquisition of the home through buying groceries and children's clothes and I take it that she thus paid half of the balance, her contribution would be $5000.00.

Defendant has already taken property before distribution by the Court at the dissolution of the marriage and I will consider that she has already reaped a benefit prematurely I have also considered defendant's indirect contribution as a wife and mother to the children. To that extent I find that she is entitled to US 7000.00. The home remains the sole and property of the plaintiff for the reasons given above. I accordingly order as follows: -

1. A decree of divorce be and is hereby granted.

2. The custody of the minor children Takunda Adriel Mlambo-Chipanga (born on 17 August 2014) and Mufaro Elnathan Mlambo-Chipanga (born on 16 May 2017) be and is hereby awarded to the defendant.
3. The plaintiff shall exercise his rights of access to the said minor children every last two weekends of every month and during the last half of each school holiday.

4.1 The plaintiff shall pay maintenance for Takunda Adriel (born on 17 August 2014) in the amount of US 250.00 per month until the said minor child attains the age of 18 years or becomes self-supporting whichever occurs earlier.

4.2 The plaintiff shall pay maintenance for Mufaro Elnathan (born on 16 May 2017) in the amount of US 200.00 per month until the said minor child attains the age of 18 years or becomes self-supporting whichever occurs earlier.

5. The plaintiff shall pay 70% of each of the minor children's school fees and school related expenses and defendant shall pay 30% of each of the said minor children's school fees and school related expenses.
6. The plaintiff and defendant shall contribute towards the said minor children's medical in the ratio of 50% each.
7. The property known as subdivision C of Stand 241, 242 Avondale West, Lot 22 of Block D of Avondale shall be the sole and exclusive property of the plaintiff.
8. The plaintiff shall pay US 7000.00 to the defendant within 90 days of this order as compensation for her contribution towards the acquisition of the immovable property described in paragraph 7 above.
9. That each party pays its own costs.

T Pfigu Attorneys, Plaintiff's legal Practitioners
Maguchu & Muchada Attorneys, Defendant's legal Practitioners