CONSTANTINO GUVEYA DOMINIC NYIKADZINO CHIWENGA
versus
MARY MUBAIWA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 27 January 2022 & 3 February 2022

Chamber application

Adv L Uriri, for the applicant
Ms B Mtetwa, for the respondent

TAGU J

Background facts

The applicant and the respondent are presently involved in proceedings before this court under HC 9837/19 in which the applicant in *casu* is "the plaintiff", while the respondent is "the defendant". In order to avoid confusion, and consistent with the citation of the parties in the main proceedings, I will refer to the parties as they are cited in those proceedings. Additionally, for completeness of the record, I mention that they were married in terms of an unregistered customary law union, which was terminated by the plaintiff on 24 November 2019 when he gave the defendant a divorce token called *"gupuro"* in the Shona language.

In her plea, filed of record on 14 January 2020, the defendant averred that her customary marriage was not terminated, and denied that the plaintiff gave her *"gupuro".* She added that she refused to take the *"gupuro"* as it was in the form of a US$100-00 note, which was no longer transactable currency in Zimbabwe. The plaintiff submitted that, at a pre-trial conference held on 30 October 2020 before Justice Tsanga, the parties agreed that the customary union was common cause. It is common cause that the defendant is unwell and unable to prosecute her defence to the lawsuit, the matter having been previously set down and postponed on account of her illness.

It is against this background that the applicant filed a chamber application on 24 November 2021 seeking judgment on a matter not in issue, namely, an order declaring the customary union to have terminated. Further, he asked the court to stand down the ancillary issues for determination at trial once the defendant was well disposed to prosecute her case in the main matter. The application was opposed. In her opposing affidavit, the defendant disputed that, at pre-trial conference, agreed that the question of the termination of the customary union between them was common cause. She persisted that there should not be a separation of the determination of her status and the consideration of the ancillary issues. She contended that, if the matter was dealt with in a piece meal manner, it would adversely affect her rights and those of the children. The defendant did not explain how such rights would be affected.

Analysis of the case

I am faced with two competing arguments, one pressing for the grant of an order declaring that the customary union ended on 24 November 2022, and another opposing the relief sought. The plaintiff contends that he gave the defendant a divorce token *("gupuro"),* thereby terminating the union between them in terms of African law and custom. On the other hand, the defendant denies that the *"gupuro"* given to her in United States currency, which she refused to accept as that currency could no longer be lawfully transacted in Zimbabwe.

It is pertinent to note that the defendant does not say that the customary union had not ended. On the contrary, she accepts that it had terminated, but blames the plaintiff for its demise. In this respect, her Claim in Reconvention is worth looking at, as she states (in paragraph 4):

> "The defendant further claims in reconvention that the plaintiff failed to follow proper customary law procedures to end the customary marriage and that, instead, the plaintiff sent A Sanyatwe to give her a United States 100 dollar bill, which she declined to accept on the basis that:
>
> (a) It is unlawful in Zimbabwe to transact in United States dollars; and
> (b) It was for the plaintiff to give her *"gupuro"* after following all proper customary protocol".

Further, I observe that in paragraph 2 of her Summary of Evidence, the defendant says:

> "She will testify that the demise of the customary marriage occurred at a time when she had spent many months supporting the plaintiff when his health continued to deteriorate".
>
> **[Emphasis supplied]**

It has also not escaped my attention that, in her prayer in the Claim in Reconvention (at page 28 of the Consolidated Bundle), the defendant inter alia seeks *"a dissolution of the parties' customary union".* One cannot be asking for such an order if not accepting that the union has ended. With the plaintiff seeking the kind of relief before the court, there can be no argument that both parties are agreed that the customary union has indeed terminated. The reason for such an outcome is irrelevant. It is the acceptance by the parties of that fact that is material to the resolution of the issue before me.

In other words, it is evident from both the Claim in Reconvention and the Plea that the defendant does not deny that the customary union came to an end. I note that in her own language, the union between the parties came to a *"demise"*. These are semantics which do not change anything. What is clear is that the parties agree on that the union is no more, but differ on the cause of that termination or demise. The date of termination given by the plaintiff has not been confirmed by the defendant, apart from averring that she did not accept the *"gupuro"* when it was tendered in United States current. Notwithstanding this, I cannot ignore the defendant's assertion that there was a demise of the customary union. Therefore, in considering this application and relief that the plaintiff seeks, I observe that while 24 November 2019 may not be taken definitively as date when the union ended, it is evident from the respective averments of the parties that the union ended before proceedings in HC 9837/19 were commenced. The next question which has to be answered is whether the defendant has established that she would suffer any prejudice if the customary union were to be declared terminated or as having come to an end.

The defendant, in pleadings she has placed before the court, argues that she would be adversely affected if the issue of termination of the customary union was separated from the ancillary issues of custody of children, maintenance and distribution of assets. However, she not shown how dealing with the issues separately would harm or compromise the prosecution of her defence. In the context of marriage, the law in this country does not preclude this court from dealing with dissolution first and, thereafter, considering the distribution of assets and other ancillary issues. In this respect, section 7 (1) of the Matrimonial Causes Act is very clear on this, and provides inter alia that:

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity of a marriage, <u>or at any time thereafter</u>, an appropriate court may make an order with regard to –

(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one asset to the other;
(b) the payment of maintenance, whether by way of a lumpsum or by way of periodic payments, in favour of one or other of the spouses or of any children of the marriage".

[Emphasis supplied]

It is obvious from the construction of section 7 above that, the inclusion of *"or at any time thereafter"* was intended not to inhibit a court from dealing with and determining whether or not a marriage or a union has ended or terminated. Indeed, I can think of a few situations where adopting such a course may be desirable. One such situation, for instance, is where it is evident that the parties have agreed (expressly or tacitly) that the marriage or union has ended. The next scenario is where illness of a party is preventing a matter referred to trial from being heard but there is no real issue on whether or not the marriage or union still subsists. The final issue that comes to mind is, where the joinder of another (or other parties) might inevitably delay the hearing and determination of contested issues. In *casu*, I am satisfied that whether or not the customary union ended is not a live issue, and the defendant's own pleadings attest to this. Both parties agree that the union terminated or came to a demise. The concern of the defendant is, admittedly, one of prejudice that she perceives would accrue to her. She has alleged that adverse effects would ensue if the termination of the union was dealt with separately from the ancillary issues. Despite the onus of proof resting on her, she has failed to discharge it.

I will now turn to the issue of distribution of assets to examine if prejudice would result from dealing with that issue after a pronouncement has been made on the current status of the customary union. As far as I can see from the facts, no prejudice is apparent. The Matrimonial Causes Act in section 7 (4) gives the trial court guidance on the factors which must be taken into account when making an assets distribution order, which include the direct or indirect contributions by each party to family; the duration of the marriage and income-earning capacity, resources which each spouse and child is likely to have in the foreseeable future. With the Legislature having provided elaborate criteria to be followed when assets are distributed at the time of dissolution or thereafter, no prejudice has been demonstrated by the defendant.

It is important to underline that the principle of fault is no longer part of our law of divorce. Since it is not necessary to prove which spouse was at fault in causing the break-up of the union,

there is no link between distribution of the assets and dissolution of the union. Thus, the defendant has not provided a reason for arguing that the issues should not be separated.

Moving on to the issue of maintenance for either the defendant or children, the considerations are well established in our jurisdiction. Finally, the issue of custody does not present any court with insurmountable difficult as the best interests of the children are the paramount consideration. No cogent basis has been given for opposing the relief sought. In fact, the plaintiff would suffer prejudice if the determination of the status of the customary union was held back simply to suit the convenience of the defendant. That the trial has not taken off at the defendant's instance is public knowledge. Moreover, it is not clear when the trial will take place. The delay inevitably results in prejudice to the plaintiff.

Conclusion

As a result of the conclusions I have reached, I do not see anything that prevents me from granting the orders sought by the plaintiff. I now turn to the question of costs of suit. Generally, costs follow the result. The applicant has asked for costs on the ordinary scale, and I find no reason to deny him those costs. In addition, I wish to state that the rules of this court permit the granting of an order as prayed for or as varied. (See *Chiswa v Maxess Markerting (Pvt) Ltd & Ors* HH 116-20). While I am satisfied that the applicant has proven its case for a declarater, I will make some variations to the order in a way that gives effect to correctly reflect what is established by the facts or evidence availed to the court. In *Chiswa v Maxess Marketing (Pvt) Ltd & Ors* supra, KWENDA aptly made the point in the following words:

> "Where the court finds that underlying dispute comes out clearly in the applicant's papers but due to poor drafting, it has not been properly presented in the draft order, the court can in its discretion, amend the draft order".

It is on the basis of my brother judge's wisdom that I will grant the order sought as amended. The amended order does not detract or depart from the relief the plaintiff desires.

Disposition

In the result, I grant the following order:

1. The application is allowed with costs.

2. It is declared that, by the time proceedings in HC 9837/19 were instituted, the customary union between the parties had ceased to subsist.
3. The ancillary issues relating to custody, maintenance and the property rights of the parties are stood down for determination at trial, which shall be set down by the defendant as and when she is able to prosecute the matter.

Manase & Manase, applicant's legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners