

PHILIP DZENGA

Versus

PRIMROSE DZENGA (NEE PHIRI)

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 15 & 16 SEPTEMBER 2016 AND 22 JUNE 2017

Civil Trial

L. Mcijo for the plaintiff

Defendant in person

TAKUVA J: This is a divorce action in which the main dispute for resolution is whether or not the marriage has irretrievably broken down. There are minor disputes relating to ancillary relief claimed by both parties.

Plaintiff and defendant were married in Bulawayo on 11 December 2010. Their marriage was solemnized in terms of Marriages Act (Chapter 5:11). There are no children to the marriage. However, during the subsistence of the marriage, the parties acquired both movable and immovable property.

Following some disagreements, plaintiff issued summons claiming:

- (a) a decree of divorce;
- (b) distribution of the matrimonial assets;
- (c) that each party bears its own costs.

According to the plaintiff the marriage has irretrievably broken down with no prospects of restoring it to a normal marriage relationship due to the following reasons:

- “(i) The defendant improperly associates with other men, conduct that the plaintiff finds incompatible with the continuance of a normal marriage relationship.

- (ii) The defendant verbally and psychologically abuses the plaintiff to the extent of threatening to kill the plaintiff and labeling him sterile and unable to bear children.
- (iii) The defendant denies the plaintiff his conjugal rights and the parties have ceased staying together as husband and wife since May 2014.
- (iv) The plaintiff has lost all love and affection for the defendant as a result of the above.”

During the subsistence of the marriage the parties acquired the following property:

1. Stand number 491 Emganwini, Bulawayo (a vacant stand)
2. Mazda Bongo registration number ACL 6472
3. Nissan Caravan registration number AAZ 7839
4. Wardrobe
5. Kelvinator 4 plate stove
6. Kelvinator double door upright fridge
7. Sofas
8. Lenovo Laptop
9. 1 double bed
10. 2 x sewing machines

Plaintiff submitted that it would be just and equitable if the above listed assets were distributed as follows;

Plaintiff

- (a) Half share in stand number 491 Emganwini with each party having the right to buy each other out within three months of the divorce, failure of which the stand shall be sold to best advantage and the proceeds shared equally between the parties
- (b) Nissan Caravan registration number AAZ 7839
- (c) Kelvinator double door upright fridge
- (d) Sofas
- (e) Lenovo Laptop

Defendant

- (a) Half share in stand number 491 Emganwini with each party having the right to buy each other out within three months of the divorce, failure of which the stand shall be sold to best advantage and the proceeds shared equally between the parties.
- (b) Mazda Bongo registration number ACL 6472
- (c) Wardrobe
- (d) Kelvinator 4 plate stove
- (e) Bed
- (f) 2 x sewing machines

Defendant entered appearance to defend and subsequently filed her plea wherein she admitted that although the marriage had irretrievably broken, it was not for the stated reasons but because plaintiff had improperly associated with another woman that he is currently living with. She proposed that the matrimonial property be distributed as follows;

- 1. The two motor vehicles be sold and proceeds shared equally between the parties
- 2. Movable assets be shared in the following manner:

Plaintiff

- 1. Wardrobe
- 2. Kelvinator 4 plate stove
- 3. Bed

Defendant

- 1. Kelvinator double door fridge
- 2. Lounge suit

She agreed with the plaintiff's proposal on how to share the immovable property.

At the pre-trial conference, only two issues were referred to trial namely:

- (a) Whether or not the marriage between the parties has irretrievably broken down?
- (b) What is an equitable distribution of the matrimonial property?

At the hearing, plaintiff gave evidence and explained why he believed that the marriage had irretrievably broken down. He pointed out that defendant denied him conjugal rights from 2011 up to 25 May 2014 when he left the matrimonial home. Also he stated that defendant would continuously harass and assault him. At one time he saw inappropriate messages in defendant's phone which made him conclude that defendant was having extra-marital affairs with other men. Defendant would at times assault him in public and one such incident occurred outside the maintenance court over defendant's dissatisfaction with the outcome of a maintenance case. Plaintiff reported a case of domestic violence under CR 138/09/14.

Finally, plaintiff stated that he engaged the services of marriage counselors from their church, the Chaplin and other community leaders in a bid to save their marriage. Unfortunately these efforts came to nothing because defendant refused to follow the advice they received and ended up refusing to attend these sessions all together. He admitted that on 11 November 2014, defendant lured him to a hotel in town where she had booked a room and they had sexual intercourse once. However he denied that they reconciled their differences after this incident. He maintained his position that he has lost all love and affection for the defendant and is no longer willing to remain in this marriage relationship with the defendant. Plaintiff did not call any other witnesses.

Defendant gave evidence to the effect that she still loves plaintiff despite the fact that plaintiff has committed adultery and continues to assault her to the extent that she would miscarry. She said that between 2014 and 2016, plaintiff would visit her at home and they would have sexual intercourse after plaintiff assured her that he still loved her. She denied assaulting plaintiff and alleged instead that she was the victim of these assaults. Further she denied attending any counseling sessions, but indicated that plaintiff offered to reconcile with her relatives.

The law

The power of the court to grant divorce is to be found in section 5 of the Matrimonial Causes Act (Chapter 5:13) (The Act) which states;

“5. Irretrievable breakdown

- (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.”

The term “irretrievable break down” is undefined. However, there are certain factors that a court may have regard to in deciding whether or not the marriage has irretrievably broken down. See s 5 (2) of the Act. These factors are however not exhaustive.

In *Kumirai vs Kumirai* 2006 (1) ZLR 134 (H) it was held per MAKARAU J (as she then was) that “the irretrievable breakdown of a marriage is objectively assessed by the court. Invariably where the plaintiff persists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. To satisfy the court that the marriage still has some life in it, the party has to adduce evidence to the effect that, after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife ... If the court is satisfied on the evidence that the marriage can be restored, it will simply decline to grant the divorce.”

In casu, plaintiff’s evidence shows clearly that he no longer wants to remain in the marriage relationship with the defendant. The evidence of numerous fights and unsuccessful counseling is indicative of a lifeless marriage. It is certainly not enough to save the marriage that the parties intermittently engaged in sexual intercourse. I say so because the defendant argued that the parties had reconciled as evidenced by sporadic acts of sexual intercourse. On its own, this factor is insufficient to show that the marriage has prospects of mending.

On the basis of the above, I find that the plaintiff has shown that the marriage has irretrievably broken down and a decree of divorce shall be issued. As regards the sharing of property, section 7 (4) of the Act is opposite. It states:

- “(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case including-
- (a) The income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
 - (b) The financial needs, obligations and responsibilities which each spouse and child is likely to have in the foreseeable future;
 - (c) The standard of living of the family including the manner in which any child was being educated or trained or expected to be educated or trained;
 - (d) The age and physical and mental condition of each spouse or child;
 - (e) ...
 - (f) ...

And in so doing the court shall endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

In the present case both parties are agreed that their immovable and movable property be shared equally between them. The sole bone of contention seems to be who gets which motor vehicle and what items of furniture.

Accordingly, it is hereby ordered that:

1. A decree of divorce be and is hereby granted;
2. The plaintiff retains the following property as his sole and absolute property:
 - (a) Half share in stand number 491 Emganwini with each party having the right to buy each other out within three months of the divorce, failure of which the stand shall be sold to best advantage and the proceeds shared equally between the parties.
 - (b) Half share in Mazda Bongo registration number ACL 6472
 - (c) Half share in Nissan Caravan registration number AAZ 7839
 - (d) Wardrobe
 - (e) Kelvinator 4 plate stove

- (f) Lenovo laptop
3. The defendant retains the following as her sole and absolute property:
 - (a) Half share in stand number 491 Emganwini with each party having the right to buy each other out within three months of the divorce, failure of which the stand shall be sold to best advantage and the proceeds shared equally between the parties.
 - (b) Half share in Mazda Bongo registration number ACL 6472
 - (c) Half share in Nissan Caravan registration number AAZ 7839
 - (d) Kelvinator double door fridge
 - (e) Lounge suit
 - (f) 2 x sewing machines
 4. The motor vehicles mentioned above shall be sold to best advantage of the parties.
 5. The immovable property shall be valued by a registered estate agent agreed to by both parties.
 6. In the event that the parties fail to agree on an estate agent, the Registrar shall appoint an estate agent from the list of valuers to conduct an evaluation of the property upon request by either party.
 7. The cost of evaluation shall be shared equally between the parties.
 8. Each party shall bear its own costs of suit.

Mcijo, Dube & Partners, plaintiff's legal practitioners