CHRISPEN KADZIMU
versus
MEMORY KADZIMU (NEE MUWANDI)

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 and 14 July 2018 & 6 September 2018

Civil Trial

P Makombe, for the plaintiff
Defendant in person

MUREMBA J: The plaintiff and the defendant were married in terms of the Marriage Act [*Chapter 5:11*] at Mutare on 22 April 2006. Their marriage lasted 9 years before the institution of the divorce proceedings. 4 children were born out of the marriage and all of them are still minors. The plaintiff is domiciled in Zimbabwe thereby giving this court jurisdiction to deal with their divorce matter. The parties acquired both immovable and movable property during the subsistence of their marriage.

In issuing summons for divorce the plaintiff claimed the following:

a) A decree of divorce.
b) An order for division of the matrimonial assets.
c) A custody order.
d) Reasonable access order.
e) Maintenance order.
f) Order for costs of suit.

To their credit, the parties have agreed on how they will share the movable property. They have also agreed on custody of the minor children and access of the same. What remains outstanding is whether or not the marriage has irretrievably broken down to such an extent that

there are no reasonable prospects of restoration to its normal state. Other outstanding contentious issues are on the division of the immovable property, the maintenance order and the issue of costs of suit. However, there is an existing maintenance order under case number M130/16 at Mutare Magistrates Court whereby plaintiff is paying $140.00 for the 4 minor children to the defendant who has custody of the children.

I will deal with the contentious issues. During trial the plaintiff was the sole witness for his case and so was the defendant.

Whether or not the marriage has irretrievably broken down

It was the plaintiff's evidence that the marriage has irretrievably broken down in that he has lost love and affection for the defendant. They separated and stopped living together as husband and wife in August 2015. It was his evidence that the two of them are no longer compatible for the continuation of a normal marriage. He said that the defendant committed adultery with a neighbour one Ezekiel Dhliwayo who also happens to be his workmate. Both the plaintiff and Ezekiel Dhliwayo are prison officers in Mutare. The plaintiff stated that the defendant made a confession both to him and the pastor in August 2015 about her adulterous relationship saying that she and Ezekiel Dhliwayo had had one sexual encounter. The plaintiff said that he is unable to condone this. He said that from the time he moved out in August 2015, he only comes back home to see the children and that from the time he moved out the parties have never shared conjugal rights. The defendant whilst admitting that the plaintiff moved out in August 2015, said that whenever the plaintiff comes home to see the children they always share conjugal rights. She denied that she was involved in an adulterous relationship with Ezekiel Dhliwayo. The plaintiff who is currently not employed said that at the time she is said to have committed adultery she was working at Murambi Hospital, Mutare as a nurse aid. She would phone Ezekiel Dhliwayo who was working in town to give her a lift to Mutare Prison camp where they both stay. She said that she did not know how the adultery suspicions came up but she never confessed to them either to the plaintiff or to the pastor. The defendant who remained staying in the camp with the children when the plaintiff moved out said that the plaintiff comes to see the children every day because he reports for duty every day at Mutare remand prison. Asked why they have continued to live separately then, the defendant said that the plaintiff must be embarrassed to come back home

because of the shameful things he said when he left. She believes that their marriage can be restored.

It was also the plaintiff's evidence that during the marriage, the defendant used to engage in traditional practices which are contrary to his Christian beliefs. She would bring traditional herbs and concoctions into the home. He said that in August 2015 when the two of them went to talk with her parents about their marital problems she brought home 2 bottles, one with sea water and another with oil and in it there was a small white cloth wrapped on a stick. Both their first names were inscribed on the white cloth. The plaintiff said that he even went with her to the police at Mutare Central to report her. The defendant vehemently denied all these allegations saying that they were all a lie. There being no evidence and witnesses to corroborate the plaintiff's allegations of adultery and use of traditional herbs and concoctions l found it difficult to say who between the parties was telling the truth. It was just the plaintiff's word against the defendant's. The same also applied to the issue of sharing of conjugal rights. The plaintiff maintained that they last shared conjugal rights in 2015 before he moved out of the home whilst the defendant said that it was on the Monday preceding the commencement of trial on Wednesday 13 June 2018. Monday was 11 June 2018. Again it was the plaintiff's word against the defendant's word. This court could not tell who between the two was telling the truth. However, what remains a fact is that from the time the plaintiff moved out of the matrimonial home in Mutare Prison Camp in August 2015, he has not moved back although he continues to visit to see his children whenever he reports for duty, which the defendant said, is daily.

It is a fact that after work the plaintiff goes back to where he stays outside the prison camp, with a senior workmate who offered him a room. His contribution is $20.00 per month and this goes towards electricity. It has been two years eight months now. In such a scenario where the plaintiff insists that he has lost love and affection and has not reconsidered his position from the time he moved out and issued summons for divorce up to the time trial commenced, the onus is on the defendant to show that there are prospects of reconciliation and restoration of a normal marriage between the parties. See *G* v *G* 2008 (1) ZLR 254 (H) and also *Kumirai* v *Kumirai* 2006 (1) ZLR 134 (H). In *casu* despite the fact that the plaintiff has remained single, is staying by himself in a one room which he shares with a workmate, having left the prison camp house which he is entitled to on the basis of him being the employee and is living on a very tight budget paying

maintenance for his 4 minor children, he has not reconsidered his position. He has not considered moving back with the plaintiff and the children whom he loves dearly which is evidenced by his daily visits to see them. There are enormous benefits to be reaped by moving back with the plaintiff and the children. Besides, this house is his entitlement since he is the one who is employed by the Zimbabwe Prison Services. Moving back will enable the parties to bring up their children together, they will use their financial resources together and have the maintenance order cancelled. This will work to the best advantage of the parties and their children. However, despite all this, the plaintiff remains adamant that he has lost love and affection for the defendant.

In terms of s 4 of the Matrimonial Causes Act [*Chapter 5:13*] there are 2 grounds for divorce, firstly, if the marriage has irretrievably broken down. Secondly, if one of the parties has an incurable mental illness or has continuous unconsciousness. In *casu*, the plaintiff alleges that the marriage has irretrievably broken down. A marriage which has irretrievably broken down has 2 characteristics. Firstly, the marriage relationship is not normal anymore. Secondly, there is no reasonable prospect of the restoration of a normal marriage relationship between the parties. See s 4 of the Matrimonial Causes Act [*Chapter 5:13*] and *Murada* v *Murada* 2008 (2) ZLR 236 (H). In a case where one spouse or party desires to end the marriage and has given his reasons and his actions show that he has indeed lost love and affection, if the defendant fails to discharge the onus on her of showing that there is a reasonable prospect of a reconciliation, it is not possible for the court to say that there are prospects of a reconciliation. In *casu* this is the situation this court is faced with. The defendant was unable to give a convincing explanation why the plaintiff is not moving back with her and the children for all this while if he still loves her and they are still sharing conjugal rights as she says.

In view of the foregoing I will grant a decree of divorce.

Custody, access and maintenance

The parties agreed that the defendant will have custody of the children whilst the plaintiff will have access rights every first two weeks of every school holiday. Currently, there is an existing maintenance order for the children in the Magistrates Court wherein the plaintiff is paying $140.00 *per* month for all of them. No breakdown of that amount was given. In his summons the plaintiff offered to increase the amount to $150.00 for all the children. In her plea, the defendant averred

that $150.00 is too little and said that an amount of $300 *per* month with the plaintiff being ordered to pay school fees every term will be appropriate.

From the evidence of the parties it was clear that the amount being demanded by the defendant is unsustainable for the following reasons. The plaintiff is a civil servant, a prison officer earning a gross salary of $304.00 and allowances of $244 remaining with a net salary of $299.35 per month after deductions which include medical aid cover, funeral policies, pension and a loan repayment of $129.78. From the net of $299.35 he pays maintenance of $140 to the defendant for the 4 children. That leaves him with a balance of US$159.35. From that amount he has to budget for the children's school fees, uniforms, stationery, clothes and for his own food, his own clothes and electricity. He said his monthly breakdown is as follows:

School fees	$118.75
School uniform	$33.00
School stationery	$15.00
Children's clothes	$12.00
Food for plaintiff	$30.00
Electricity for plaintiff	$20.00
Clothes for plaintiff	$4.00
	$342.75

The defendant did not dispute that over and above paying maintenance the plaintiff is the one who pays school fees, uniforms and stationery for the children. The plaintiff is the sole breadwinner since the defendant is not employed. All the 4 minor children are in school with the first born twins doing Form 1 at different schools. Shalom's fees is $150 per term while Shiloh pays $90 per term. Shammah who is in Grade 3 pays $75.00 per term and Ebenezer who is in Grade 0 pays $120 per term. The defendant did not dispute these fees amounts. The plaintiff said that it is on the basis of these fees that he budgets $118.75 per month, $33 for the uniforms, $15 for stationery and $12 for their clothes to enable him to buy them clothes twice a year. The plaintiff said that his expenses far exceed his income and as such he survives on loans. He produced his bank statement for the period 19 March 2018 to 12 June 2018 showing that he is repaying a loan at the rate of about $104 per month which loan he said he took in April 2017. This is over and above the $129.78 loan deduction already appearing on his pay slip. He said that whenever a

financial need arises he takes out a loan in order to cater for the family. He said that he took the the latest loan in December 2017 in order to cater for form one preparations for the twins. He said on the other hand the plaintiff makes no financial contribution at all for the upkeep of the family.

The defendant was in agreement that the plaintiff makes sure that the children's school fees are paid on time and there are no fees arrears at all. The plaintiff said that although he is an electrician in the prison services, he cannot do extra jobs to earn extra income because he is not allowed to do so. The defendant vehemently disputed this saying that the plaintiff is always doing extra jobs to supplement his income, but she did not furnish any proof to this effect. In addition, she also furnished no proof of what he earns as extra income. It was the plaintiff's contention that he struggles to pay the maintenance of $140.00 per month, but he ensures that he pays it to avoid being prosecuted and sent to prison. He said that he cannot manage any increase at the moment because he will finish repaying his first loan in September 2019. Evidence led by both parties also showed that the plaintiff struggles to buy the children's clothes. He said that it is because he is constrained financially as he earns little. He said that although he struggles to buy the clothes, he eventually buys what the children ask for when he gets the money. With this, the defendant said that she now wanted the money increased to $200 instead of $300 per month she was initially claiming. She said that she was insisting on the money being increased from $140 the plaintiff is currently paying because the plaintiff is not adequately providing for the children's clothes. The plaintiff stated that he cannot afford the increase and that will put him at a high risk of failing to provide for the children's school fees, uniforms and stationery. He said that he does not want to compromise his children's school needs. The defendant said that she buys clothes for resale and realises $50 per month. She said that her request that the maintenance order be increased to $200 was based on the fact that the $60 increase will enable her to buy clothes for the children. This demand is without merit considering that as it is the plaintiff is struggling to meet all the children's financial requirements single handedly. The defendant despite earning about $50.00 per month from her informal job is making no financial contribution towards the upkeep of the children yet in terms of the maintenance law she should also be contributing towards the maintenance of the children. Given the plaintiff's present financial earnings and obligations it is not warranted to award an increase to the existing maintenance amount. The offer to increase the amount to $150 which the plaintiff initially made in the summons will be of no consequence. Moreover, I would

not know how to apportion it to the children as the parties never gave me a break down of the $140.00. It was not made known to this court how much each child is earning from the $140.00. A breakdown of this amount would have made this court know what each child is being paid. It is pertinent to note that the defendant stated that she last went to the magistrates court in March 2018 for a variation upwards but the court refused to vary the order saying that the plaintiff was still servicing the loans he acquired. In the present case the defendant ended up agreeing under cross examination that it is unreasonable to vary the amount of $140.00 under the present circumstances. In the result, the existing maintenance order in the Magistrates Court under case number M130/16 shall continue to govern the parties as may be varied from time to time. The parties can always approach the maintenance court for variation if need arises or if circumstances change.

Distribution of immovable property

In his summons the plaintiff made no mention of the existence of any immovable property that the parties had between them. However, in her plea, the defendant said that the parties have 2 immovable properties: a stand in Gimboki area in Mutare and a stand in Hobhouse Township in Mutare being stand number 4864.

For parties married under general law in terms of the Marriage Act [*Chapter 5:11*] devolution of the matrimonial estate upon divorce is governed by s 7 (1) (a) of the Matrimonial Causes Act. In distributing the property the court may make an order that an asset be transferred from one spouse to the other. In making awards of the property the court is enjoined to consider factors set out in subsection 4 of s 7. These factors include the income earning capacity of the spouses, assets and other financial resources which each spouse and child is likely to have in future, financial needs and obligations of each spouse in the foreseeable future, the standard of living of the family, the age and physical wellbeing of each spouse; direct and indirect contribution by each spouse to the family including looking after the house and caring for the family and any other domestic duties and the duration of the marriage. In making the award the court is given a very wide discretion so as to enable it to make an equitable distribution between the parties. See *Hatendi* v *Hatendi* 2001 (2) ZLR 530 (S).

In casu, the evidence that emerged during trial was to the following effect. The two stands which the defendant mentioned in the pleadings were acquired during the subsistence of the marriage. The resources for the acquisition of the two stands were loans which were taken by the

plaintiff and these loans were serviced by him without any assistance from the defendant. It is not disputed that the plaintiff disposed of Stand 4864 Hobhouse Township, Mutare on 25 August 2015, a month before he instituted the present divorce proceedings. It is not clear whether he sold it before or after he had moved out of the matrimonial home, but he moved out in August 2015. The plaintiff said that he sold the stand for $4500.00 as evidenced by the agreement of sale which he produced as an exhibit. He offered to pay to the defendant $2000 in 18 months as her share although she had never contributed directly to its acquisition. He also indicated that he sold the stand in a bid to meet some financial obligations towards the family. In response the defendant did not dispute that the stand was sold for $4500 and that she did not make any financial contribution to its acquisition. She argued that she never got to see how the plaintiff used the money he realised from the sale of this stand. She said that she wants
US$2 500.00 as her share and she wants the money paid in 6 months.

In respect of the stand in Gimboki Area, Mutare the defendant said that he sold this stand after the divorce proceedings had commenced without the knowledge of the defendant and his own lawyer because he had bought this stand from a co-operative society from someone who had been paying subscriptions towards the stand. He said that when he learnt of double allocations, he abandoned payment of the subscriptions after paying $1000.00. Later on he met someone who was desperate for a stand in Gimboki. He told him about the status of this stand and this person agreed to buy it. They agreed that this buyer would refund him the $1000.00 he had paid and pursue the stand. The plaintiff said that from the US$1000.00 he got, he is willing to pay the defendant $400.00 as her share considering that she had again not made any financial contribution towards its acquisition. He said that this was a 220 m^2 stand in an un-serviced area and he had not yet acquired ownership rights. The defendant did not dispute anything about the sale of the stand including the proceeds realised. She however refused a share of $400.00 demanding that she be awarded $500.00 as her half share. She said that there was a time she was employed as a nurse aid at Murambi hospital and was earning $100.00 per month. She said that she thus contributed indirectly towards the acquisition of the stand by buying food for the family.

It was clear from the evidence led by both parties that for the better part of the marriage the plaintiff was the sole breadwinner. The defendant was employed for a short period as a nurse aid earning $100/month which was less than what the plaintiff was earning. It is not disputed that

the plaintiff carried the burden of meeting the bulk of the family's financial obligations and needs. He took out loans to buy the stands and he later disposed of the stands. The defendant largely contributed indirectly by looking after the house and the family and doing all other domestic duties. Her indirect contribution cannot by any means be said to be equal to the plaintiff's direct contributions. She cannot therefore claim a share equal or higher than the plaintiff's share. Moreover, when the stands were sold she together with the children benefitted because even if the plaintiff did not declare the proceeds, he has been single handedly providing for the family financially without any contribution from her. For years the defendant has not had any financial obligations towards the family. I find the plaintiff's offers of $2000.00 and $400.00 for the two stands very generous. I will order him to pay to the defendant those amounts. I will also grant him time to raise the money as *per* his request in view of the heavy financial obligations he has.

Conclusion

In the result, it be and is hereby ordered that:

1. A decree of divorce is granted.
2. Custody of the minor children namely: Shalom Kadzimu (Born 26th November 2004), Shiloh Kadzimu (Born 26 November 2004), Shammah Kadzimu (Born 4th October 2009 and Ebenezer Kadzimu (Born 1st September 2012 is awarded to the defendant with plaintiff having access to the said minor children the first two (2) weeks of every school holiday.
3. Maintenance for the minor children shall be regulated by the order of the maintenance court at Mutare under case number M130/16, as varied from time to time.
4. The plaintiff is awarded the following movable property: 1 bed; 1 wardrobe; table with 6 chairs; 2 door upright fridge and 1 DVD player.
5. The defendant is awarded the following movable: 1 bed and linen; household utensils; 1 television; 1 lounge suite; 1 DSTV decoder; 2 DVD players and 1 satellite dish.
6. That plaintiff shall pay $2000.00 as defendant's share of stand number 4864 Hobhouse Township, Mutare and this amount shall be paid within 18 months from the date of this judgment.
7. That plaintiff shall pay $400.00 to the defendant as her share of a stand in Gimboki, Mutare which amount shall be paid within 6 months from the date of this judgment.

8. Each party shall bear its own costs.

Makombe & Associates, plaintiff's legal practitioners