MUNETSI BLESSING MASEDEWE
versus
MANYARA MASEDEWE (nee MEYA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 16, 18 November 2016, 6 February 2017 and 23 November 2017

Matrimonial action

V Makuku for the plaintiff
Defendant in person

CHITAKUNYE J. In 1989 the plaintiff married the defendant in terms of customary law. On 1 October 1994 their marriage was solemnised in terms of the Marriage Act, [*Chapter 5:11*] at Harare.

The marriage was blessed with three children of which only one is still a minor having been born on 11 January 2006.

On 14 January 2012 the plaintiff sued the defendant for, *inter alia*, a decree of divorce, custody of the minor child and a distribution of the assets of the spouses in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The plaintiff alleged that the marriage relationship between the parties has irretrievably broken down to an extent that there are no prospects for the restoration of a normal marriage relationship between them in that:

a) The parties have not been staying together as husband and wife for quite some time;
b) The parties are no longer intimate and have lost love and affection for each other; and
c) The defendant drinks beer excessively.

The plaintiff alleged that during the subsistence of the marriage the parties acquired one immovable property, namely Stand number 8054 Nkulumane 1, Bulawayo and several household items. He proposed that each party be awarded a 50% share of the net proceeds from the sale of the immovable property. He also provided lists of how he wished the movable property to be distributed between the parties.

The plaintiff also claimed custody of the minor child with the defendant being accorded reasonable rights of access.

The defendant, in her plea as amended, did not categorically deny that the marriage relationship has irretrievably broken down. She however denied all allegations of improper conduct on her part. She instead said that it was the plaintiff who had improperly associated with other women and had moved out of the matrimonial home. In making such a defence the defendant did not refute the loss of love and affection alleged by the plaintiff or the fact that the parties have been on separation for quite some time (whatever that means).

As regards the distribution of assets of the spouses defendant contended that the plaintiff had left out 2 motor vehicles and these should be considered with her being awarded a Toyota Corolla and the plaintiff retaining a Mazda MPV vehicle.

On the immovable property the defendant's plea was to the effect that the property must not be sold for the rest of her life as she is now terminally ill.

The defendant sought custody of the minor child and maintenance for the child in the sum of US$500.00 per month, payment of the child's tuition fees and other education requirements until the child attains the age of 18 years. The defendant also sought maintenance for herself in the sum of US$1000.00 per month apparently till her demise.

On 22 October 2015 during a pre-trial conference, the parties agreed that:

a) The defendant have custody of the minor child;
b) The plaintiff shall have access to the minor child on the last two weeks of each school holiday;
c) The household goods (movable) be shared equally and parties shall file a list indicating the distribution;
d) The defendant be awarded the Mazda MPV motor vehicle.

The issues referred to trial were captured as follows:

a) Whether the marriage has irretrievably broken down?
b) How the matrimonial home should be distributed.

The plaintiff gave evidence after which the defendant testified. Though in the pre-trial conference minute it had been indicated that the plaintiff will call 2 witnesses and the defendant will call 5 witnesses, neither was able to call any other witness besides themselves. The defendant, despite a postponement of the trial to enable her to bring her witnesses, did not manage to bring any witness. Upon seeking clarification on the nature of the evidence to be given by her witnesses it was clear the expected evidence was not on the aspect of whether the

marriage had irretrievably broken down or on the distribution of the assets of the spouses. It was clear that none of the witnesses was relevant to the issues at hand. As a consequence the parties closed their respective cases.

The matter fell to be decided on the evidence adduced on the issues outlined above.

1. **Whether the marriage has irretrievably broken down**.

Section 5(1) of the Matrimonial Causes Act, [*Chapter 5:13*] provides that:

> " 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."

Subsection (2) thereof outlines some of the facts or circumstances a court may have regard to in determining whether a marriage has irretrievably broken-down or not. These include that:

> "(a) the parties have not lived together as husband and wife for a continuous period of at least twelve months immediately before the date of commencement of the divorce action; or
>
> (b) the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship; or
>
> (c) …..
>
> (d) the defendant has, during the subsistence of the marriage—
>
> (i) treated the plaintiff with such cruelty, mental or otherwise; or
>
> (ii) habitually subjected himself or herself, as the case maybe, to the influence of intoxicating liquor or drugs to such an extent;
>
> as is incompatible with the continuation of a normal marriage relationship; as proof of irretrievable break-down of the marriage."

These are not exhaustive as a plaintiff can still rely on other factors or circumstances to satisfy court that the marriage has irretrievably broken down. There are basically two aspects a plaintiff must prove to be successful, namely that:

(a) the relationship is not normal anymore; and

(b) there is no reasonable prospect of the restoration of a normal marriage relationship.

In *Kumirai* v *Kumirai* 2006(1) ZLR 132(H) at 136B-D MAKARAU J (as she then was) aptly noted that:

> "In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably, where the plaintiff insists 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 if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wished to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the marriage relationship since the promulgation of the Matrimonial Causes Act in 1985."

In *casu*, the plaintiff's evidence on the breakdown of the marriage was to the effect that:

Marital problems started soon after they got married. The defendant somehow changed from the woman he had known prior to marriage. She would go wherever she wanted without informing him as the husband. The defendant had no respect for him as her husband instead she treated him like one of the children in the house. Efforts to get counselling were to no avail.

Another source of conflict was that the defendant drinks beer to excess whilst the plaintiff does not drink beer. In her drinking escapades the defendant would on many occasions patronise shebeens and come home around 3am in a drunken stupor. He alluded to an instance when he was called to Nkulumane police station to collect the defendant and he found that the defendant was so drunk that she could not stand up on her own. On a number of occasions he called defendant's sister to assist in counselling the defendant to no avail. It was the plaintiff's evidence that when all effort at counselling by police, Pastors, relatives and others failed, as the defendant did not stop her beer drinking escapades, promiscuity, cruel and disrespectful conduct towards him, he just could not continue in the marriage. His own remonstration against the defendant's conduct was met with contempt. As a consequence of all this in the year 2008 he stopped sharing bed with defendant. As from that year they slept in separate rooms albeit under the same roof. He thus last was intimate with defendant in 2008.

The plaintiff further testified that in 2010 he relocated to Harare leaving the defendant in the matrimonial home in Bulawayo. Since that time he has not gone back to live under the same roof with defendant as he no longer has any love or affection for the defendant. The separation from bed has thus been since 2008 which is a period in excess of 12 months before the issuance of summons on 12 January 2012.

These are the circumstances from which the plaintiff argued that the marriage has irretrievably broken down.

In her cross-examination of the plaintiff and in her own evidence in chief the defendant did not deny the fact that the marriage was beset with problems some of which emanated from her beer drinking escapades. She confirmed the escapades when she said that it was not correct

that she patronised shebeens but the position was that she was involved in beer drinking clubs with others whereby they would go drinking beer at each other's residences. She did not deny coming home in drunken states on those occasions in the wee hours of the morning. She also did not deny the specific incidents when the plaintiff was summoned to the police station only to find her too drunk to stand up on her own. Equally defendant did not deny the numerous counselling sessions undertaken at the instance of the plaintiff by her sister, pastors, the police and other relatives.

Though at some point the defendant suggested that the plaintiff has a girlfriend hence this action, I did not hear her to seriously suggest that her conduct as depicted by the plaintiff could not have led to loss of love and affection. I also did not hear defendant to deny that before plaintiff left for Harare in 2010 the two had in fact stopped sharing bed.

The evidence as a whole clearly shows that the marriage relationship between plaintiff and defendant has irretrievably broken down. It is no longer a normal marriage relationship.

As regards prospects of restoration to a normal marriage relationship, the plaintiff's position was that he no longer has any love and affection for the defendant. The defendant on her own did not exhibit any signs of love and affection for the plaintiff. Her only worry was on the likelihood of losing the matrimonial house and having to find alternative shelter. Under cross examination the defendant conceded that the marriage relationship has irretrievably broken down. In the circumstances it is only proper that a decree of divorce be granted.

2. How should the matrimonial home, stand no. 8054 Nkulumane 1, Bulawayo, be distributed?

At the dissolution of a marriage an appropriate court is empowered to deal with the property rights and interests of the spouses in terms of the law. In this regard section 7 of the Matrimonial Causes Act [*Chapter 5:13*] provides that:

> "(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, 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 spouse to the other;
> (b) the payment of maintenance ,whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage."

The only assets excluded from being considered for apportionment or distribution are assets acquired by a spouse by inheritance, or by custom are meant to be for that spouse personally or in any manner which has sentimental value to the spouse concerned. The onus is upon a spouse claiming exclusion of any assets to show that the assets fall under the category

for exclusion in terms of s 7(3) of the Act. All other assets that belong to the spouses individually or jointly must be placed on the table for consideration.

In the determination of how best to apportion or distribute the assets, court is enjoined to consider all the circumstances of the case. In this regard s 7 (4) (a) to (g) outlines some of the factors that must be considered and concludes by stating that:

> "…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 *Ncube* v *Ncube* 1993 (1)ZLR 39 (SC)at 42B-D in considering the meaning of the phrase "assets of the spouses" in s 7 of the Matrimonial Causes Act, KORSAH JA aptly opined that:

> "I take the phrase 'assets of the spouses' to include all such property as a spouse was possessed of at the time of the distribution, and not only what was acquired by one or the other or both the parties during the subsistence of the marriage, save such assets which are proved to the satisfaction of the court to have been acquired by a spouse, whether before or during the marriage-
> (a) by way of inheritance; or
> (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
> (c) in any manner or which have particular sentimental value to the spouse."

In *Gonye* v *Gonye* 2009(1) ZLR 232(SC) at 237B-D MALABA JA (as he then was) expounded on the above terms as follows:

> "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 separated should be excluded from the division, apportionment or distribution exercise. The concept 'the assets 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, apportionment or distribution of such assets."

The approach to take in the distribution of 'assets of the spouses' as described above, has been alluded to in a number of cases. In *Takafuma* v *Takafuma* 1994 (2) ZLR103 (S) MCNALLY JA, after stating the effect of registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 20:05*] as conveying real rights upon those in whose name the property is registered, at 106B-E opined that:

> "The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term 'his',

> 'hers', and 'theirs'. Then it will concentrate on the third lot marked 'theirs'. It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked 'his', plus the appropriate share of the items marked 'theirs'. And the same to the wife. That is the first stage.
> Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, 'as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses …in the position they would have been in had a normal marriage relationship continued ….'
> Only at that stage , I would suggest, should the court consider taking away from one or other of the spouses something which is actually 'his' or 'hers'."

The 'considerable discretion' to be exercised by a court was illustrated in *Gonye* v *Gonye* (*supra*) wherein at p 236H-237A MALABA JA (as he then was) aptly opined that:

> "It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment 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, apportionment or distribution of 'assets of the spouses including an order that any assets be transferred from one spouse to the other.' The rights claimed by the spouses under section 7(1) of the Act are dependent upon the exercise by the court of the broad discretion."

It must always be borne in mind that the overall objective of the exercise is to place the spouses in the position they would have been in had a normal marriage relationship continued between the parties hence court is required to consider all the circumstances of the case.

In *casu,* it was common cause that the immovable Matrimonial Property is registered in the joint names of the parties; it is thus 'theirs'.

In *Kanoyangwa* v *Kanoyangwa* 2011 (1) ZLR 90 (H) court held, *inter alia*, that:

> "Where the immovable property is registered in the joint names of the spouses, this fact must be recognised as a starting point, because where a property is registered in joint names the presumption is that it is held in equal shares unless proved otherwise. In order to take a spouse's share and transfer it to the other, there ought to be some solid ground for so doing."

In *casu,* the plaintiff's evidence was to the effect that he acquired the property without defendant's direct contribution. He obtained a financial loan from his employer which he used to purchase and develop the property. Despite being the one who purchased the property he registered the property in the joint names of the parties. In the circumstances he wished each party to be awarded a 50% share in the property and for the property to be sold with each party being given a 50% share of the net proceeds.

The defendant's contention was to the effect that the Matrimonial house is the only dwelling for the defendant and the minor child and so it should not be sold. She thus did not contest the manner in which it was acquired. Her only issue was on the plaintiff's prayer for the property to be sold so that each party is given their 50%share of the net proceeds. She also

contended that if plaintiff insists on selling the property, then the property be sold only when their youngest child Billie has attained the age of 18 years. This would enable defendant and the minor child to have shelter between now and then. In a bid to justify her position defendant alluded to the fact that she has been diagnosed HIV positive and, in her pessimistic thinking, by the time Billie turns 18 years she will have died and so the property can then be sold.

From the evidence by the parties there was nothing justifying the altering of the parties' shares in the property from that assumed under joint ownership which was also the sharing ratio suggested by the plaintiff. Thus the division will be as per plaintiff's offer of 50:50. As neither party expressed capacity or willingness to buy out the other it follows that the property will have to be sold and the parties share the net proceeds.

The contentious issue was on the timing of the disposal of the matrimonial property so that each party realises their share of the net proceeds.

Though the defendant seemed very much concerned about her health in justifying the need for a delay in the disposal of the property, the aspect of shelter for the minor child should not be overlooked. If the issues were to be decided on the parties own needs not much would sway this court against plaintiff's desire. It is my view that the circumstances of the case including the conduct and personal needs of the parties would have justified an early disposal of the property so that each party is able to plan their future and move out with their respective share.

However this court as upper guardian of minor children cannot ignore the interest of the minor children upon the dissolution of a marriage. It is thus incumbent upon all parties in such matrimonial proceedings to always testify on the provisions including future accommodation and welfare needs of the minor children irrespective of which parent is granted custody. Minor children should not be made to bear the brunt of their parent's failure to continue in their marriage by being rendered destitute or homeless. Adequate provisions must be made for the minor children. This may include provision for rented accommodation or such other suitable measures such that the child is not unduly impacted by the dissolution of the marriage. In short sight should not be lost of what would be in the best interest of the child in the peculiar circumstances of each case.

As aptly noted by TSANGA J in *Katsamba* v *Katsamba* 2014 (1) ZLR 187 (H) at 195G-H:

> "The best interests of the child, as a principle, permeates our laws as they relate to children. Our new constitution specifically incorporates children's rights within the thematic framework

> of the three pillars of protection, provision and participation that characterises the UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions on children's rights is a clear indication of the role that the observation of children's rights is expected to have in building a just society."

Further it is apposite to note that The African Charter on the Rights and Welfare of the Child, to which Zimbabwe is a party, reiterates the principle of the best interest of the child as a primary consideration in all actions concerning the child. In instances of dissolution of a marriage article 18 of that charter calls for protection measures to be put in place for the protection of the child. A child must thus be provided for adequately and must be protected from being rendered homeless or destitute. It is thus imperative for court to consider the measures that divorcing parents have put in place for the protection, provision and participation of the minor children post divorce.

In *Martin Simbai Mazorodze* v *Slyvia Mazorodze* HH 245/11, court was faced with a similar issue of deciding when the only immovable property was to be sold. In deciding to order an early disposal of the property, at p 7 of the cyclostyled judgment, the MAWADZE J stated that:

> "The defendant's position is informed by her concern for the welfare of the three children in her custody (including the illegitimate child). I am however of the view that the maintenance order granted would cater for the needs of the children in respect of their accommodation. This is a proper case where the parties should simply have a "clean break" to ensure the parties will not remain tied together for many years in view of the reason for the breakdown of the marriage."

It is apparent that court considered that the maintenance order to be awarded would take into account the need for accommodation for the children. Thus after dissolution the custodian parent would be able to secure accommodation, most likely rented, for the children and her. The other consideration alluded to was the conduct of the defendant which led to the breakdown of the marriage and to a situation whereby the parties could just not countenance each other. The acidic relationship between the parties was not conducive to a delay in the disposal of the property.

In *Katsamba* v *Katsamba* (*supra*), court had a similar issue to determine the timing of the sale of the only matrimonial house. In deciding on the issue court alluded to the fact that the non custodian parent had not been honouring the maintenance order such that the custodian parent had to seek other means to provide for the children. Thus the non custodian parent's argument that the maintenance and the share of the net proceeds would be adequate to provide shelter for the children could not sway court to grant an order in his favour. Clearly the non

custodian parent had not exhibited himself as a responsible parent. It was in these circumstances that court ruled that what would be in the best interest of the children was for the property to be sold when the youngest of the children attained the age of 18 years or became self supporting whichever was earlier.

In *casu,* the plaintiff has been paying maintenance apparently without fail. Besides the monetary sum for maintenance the plaintiff was also ordered to provide for the school fees and other school requirements for the child. Unlike in the *Mazorodze* v *Mazorodze* case where court was also to determine the quantum of maintenance, in this case, the parties agreed that the existing maintenance order in M809/2012 should continue post divorce. It is clear that in determining the quantum of maintenance that court did not consider the issue of accommodation as defendant and the child have been occupying the matrimonial home. The requirement to secure accommodation post divorce will thus be an extra burden on the custodian parent. The plaintiff in his evidence and in the closing submissions did not allude to any provisions made for the minor child's accommodation. He simply argued that the defendant will use proceeds from the sale of the house to secure her own accommodation and the child will stay with her wherever she will be. That, in my view was inconsiderate of the child's best interests. It was not shown that the 50% share of the net proceeds will be adequate for defendant to purchase another immovable property.

In the circumstances I am of the view that it will not be in the best interests of the minor child for the property to be disposed off now. Instead the property will be retained till she attains the age of 18 years or becomes self supporting whichever is earlier. It is however important to note that the retention is purely to provide shelter for the child. In that vein, it is appropriate to require that out of the 10 rooms, some of which defendant has been leasing out to her benefit despite being in receipt of maintenance for herself and the child, rentals from some of the rooms should accrue to the benefit of the plaintiff in lieu of part of his share in the property. As both parties have a duty to provide shelter to the minor child it will not be rentals from 5 rooms but only three of the rooms. The defendant and the child can utilise the rest of the rooms.

The plaintiff in his evidence conceded that defendant be awarded all the household goods currently in the matrimonial house and a Mazda MPV motor vehicle.

Accordingly it is hereby ordered that:

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

2. The defendant be and is hereby awarded custody of the minor child, namely Billie Hope Masedewe (born on 11th January 2006).
3. The plaintiff shall have reasonable rights of access to the minor child on the last two weeks of each school holiday.
4. The plaintiff shall pay maintenance in terms of the existing maintenance order in M809/2012 subject to any variation which may be made by the maintenance court.
5. The defendant is hereby awarded all the household goods currently in the matrimonial Stand No. 8054 Nkulumane 1, Bulawayo and the Mazda MPV motor vehicle as her sole and exclusive property.
6. The plaintiff be and is hereby awarded a 50% share in the immovable property namely number 8054 Nkulumane 1. Bulawayo with the defendant being awarded the other 50% share.
7. The property shall be sold to best advantage by an estate agent mutually agreed by the parties within 60 days after the minor child shall have turned 18years or become self-supporting whichever is earlier.
8. Should the parties fail to agree on a selling agent, one shall be appointed for them by the Registrar of the High Court from his list of independent estate agents.
9. The plaintiff shall be entitled to receive rentals for 3 rooms for the period prior to the property being sold.
10. The parties shall each be given 50% share of the net proceeds from the sale.
11. Each party shall bear their own costs of suit.

Makuku Law Firm, plaintiff's legal practitioners.