

REBECCA SVINURAI  
versus  
LENARD SHOSHORE

HIGH COURT OF ZIMBABWE  
ZISENGWE J.  
MASVINGO, 16 November, 2023  
Date of Judgment 24 April 2024

### **Civil Trial- Divorce**

F. Chirairo, for the Plaintiff

C. Ndlovu, for the Defendant

ZISENGWE J: This is an action for divorce and ancillary relief. The parties are married in terms of the marriage Act, [*Chapter 5:11*] (Now the Marriage, Act [*Chapter 5:17*], which marriage was solemnised on 19 January 2007. Not only are the parties resigned to the fact that their marriage has irretrievably broken down and therefore should be dissolved, but they also agree on the distribution of the bulk of their assets as between them. They however remain poles apart on two outstanding issues namely:

- a) The custody of their child Kudzaishe Magande (born on 9 August 2010) who, of their three children, is still a minor
- b) The distribution of the proceeds of the sale of a Nissan Tiida Motor Vehicle.

It is the resolution of these two issues that this relatively short judgment is almost entirely devoted to.

### **Custody of Kudzaishe**

Kudzaishe is a boy of 13 years of age. At the time that evidence was led, he was doing grade seven at a local primary, school in Masvingo. In all probability he is now doing form 1. Pertinently, it is common cause that he has been staying with the defendant for the past two years. He opted to stay with his father in the wake of the separation of his parents. It is also important to note that in the summons, the plaintiff specifically prayed that custody of this child be awarded to the defendant. Ironically, at that stage the defendant doubted the paternity of the children and insisted on a DNA test being conducted to determine the same. This, according to the parties, was duly done and the defendant's paternity of the children was confirmed.

The plaintiff only made an about turn at pre-trial conference (PTC) stage and started claiming that custody of Kudzaishe be awarded to her. There was no formal application for the amendment of her declaration to that effect.

In her evidence the plaintiff explained her sudden change on the apparent deterioration of Kudzaishe's academic performance. She attributes the same to lack of proper supervision on the part of the defendant. In the latter regard she claims the child is always roaming the streets. She indicated that on a number of occasions she has come across the child wandering about at a shopping centre some considerable distance from where the defendant resides. She therefore fears that if this continues, the child runs the risk of exposure to contaminating influence. She further indicated that as a teacher, she is in a good position to offer proper guidance to the child.

Although she did not say so on terms, the plaintiff hinted that she is not comfortable with the child being raised by a stepmother, now that the defendant is "married" to someone else. She prefers the child growing up together with its two elder brothers.

She would confirm under cross examination that initially the child was with her but that he (i.e. the child) insisted on going to stay with the defendant. She also conceded that the child has since properly bonded with the defendant. Her explanation for the child fleeing from her to stay with the defendant was that he (i.e. the child) panicked when the defendant threatened to withdraw his support of the children. Further, she testified that the child was averse to the possibility of staying with the plaintiff at a rural school where she teaches.

She vehemently denied that her belated attempt at being awarded custody of the child was based on her desire to get maintenance for the child.

For his part, the defendant insisted on the custody of the child being awarded to him. He testified in this regard that the child has unquestionably demonstrated its preference. According to him Kudzaishe has done so by practically fleeing from the plaintiff to come and stay with him and resolving never to go back to the plaintiff. He denied that he ever threatened to withhold his support for the children.

He also completely denied that the child's performance has plummeted or that the child roams around business centres. He further testified that in any event he intends to enrol the child at boarding school. He indicated that the plaintiff could always have access to the child during school holidays. He confirmed that he has since "bonded" well with the child and would like that to continue.

In a contest for the custody of a minor child, the best interests of the child are paramount. The interest of the child is in the words of Schreiner JA in *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 143, the main or paramount consideration or guiding principle to which the rights of the parties have to yield. I need not clutter this judgment with expositions on the doctrine of the best interests of the child on matters related to children as this is well trodden ground. It suffices to say the best interests of the minor child are to be considered in the widest sense. It is not only the physical well-being nor merely the material welfare but the minor's interests generally and in all respects including economic, social, moral and religious considerations as well as affection. The celebrated case of *McCall v McCall* 1994 (3) SA 201 (C) at 204-205 provides a useful guideline of the factors, though not exhaustive when determining the best interests of the child. The court said:

"In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status *quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same-sex matching; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned."

See also *Coumbis v Coumbis & Anor* SC-130-21

In the present case the belated claim by the plaintiffs that the best interests of the child are better served by awarding sole custody to her rings hollow. Not only was she content for the past two years with the defendant having custody of the child, but she also voluntarily offered in her summons that defendant retains such custody. That was not by accident, it was a tacit acceptance by the plaintiff that the child is in good hands with the defendant.

She now wants to suggest that the child's school performance has dipped and that the child has now taken the habit of roaming aimlessly at shopping centres and places of adult entertainment, however, this begs the question of precisely when she became aware of this. If it was before the institution of the summons, then she would have been expected to bring this to the attention of the defendant. She did not. She would also have been expected and to pray for the child's custody in

her summons. If it was after the institution of the summons, she would surely have sought an amendment of her declaration and prayer to reflect her new attitude towards custody.

Related to the above is the question of the emotional bonding between the defendant and the minor child. Uprooting the child from an environment of emotional comfort and transplanting he in an environment where he has vowed never to return can be damaging and traumatic for the child. This would be inimical to the principle of the best interests of the child. The continuity of a minor child's surrounding conditions is an important consideration. The words of Ramsbottom J in *Gordon v Gordon* 1953 (2) SA 41 (W) at 48 are apposite, he said:

“Nothing could be worse than that the child be used as a shuttlecock between the parents. A child requires a sense of security more than anything else.”

The defendant assured the court that he was to enrol the child in a boarding school. If in the intervening period the defendant has stood by his word (and there is no reason to disbelieve him considering that his older two sons attended boarding school) then the plaintiff's fears have already been addressed. The danger of unnecessary roaming has now been averted and the hopefully the alleged plummeting grades will be equally addressed.

#### **Proceeds from the sale of the TILDA Motor vehicle.**

The plaintiff's prayer is for an award of half share of the sale of this vehicle. Prior to its sale the said motor vehicle belonged to the defendant. The motor defendant sold the motor vehicle for US\$1950 and the plaintiff therefore seeks that she be awarded US\$950. She testified that though the motor vehicle belonged to the defendant she was the one who ordinarily used it and its sale disadvantaged her.

According to her when the defendant sold the motor vehicle, he informed her about it whereupon she registered her unhappiness with that. They however reached a compromise wherein he would retain the proceeds of that sale on condition that another motor vehicle would be procured for her use.

The defendant's position which plaintiff disputed was that he used proceeds of the sale of the Motor Vehicle to fund for the family. This was at the act the height of the COVID-19 pandemic. In reputation of this position, the plaintiff insisted firstly that it was never agreed that

the proceeds of the sale of the motor vehicle be used for that purpose and secondly according to her the family had sufficient a sufficient stock of food.

It is common cause that the TIIDA motor vehicle was involved in an accident prior to its disposal though the extent of the damage is disputed as between the parties. Also disputed is the date of the sale of the motor vehicle.

Marriages in Zimbabwe are out of community of property. Save for instances of joint ownership, spouses own the property in their individual capacities. They are at liberty to dispose of that property as they deem fit. They are only precluded from doing so if it can be shown that such disposal is designed to undermine the other spouse's rights in pending litigation between them. See *Muzanenhamo & Another v Katanga & Others* 1991 (1) ZLR 182 (SC) where the following was said:

“But I do not believe that a wife can raise such a claim just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset “at undervalue to a scoundrel, the accomplice of the husband” (*Chhokar v Chhokar* 1984 FLR 313), or that in some way he is attempting to defeat her just rights. In England, under their far more complex and comprehensive legislation, the test is “Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?” If the answer is “no” as it must be here, the court will not stop the disposition.”

In the present matter there is no evidence to suggest that the disposal by the defendant of the TILDA motor vehicle was designedly to prejudice the plaintiff in this or other matter. To the contrary, there is no evidence to show that defendant was bona fide in such disposal. The evidence by the defendant, which evidence I found credible was that he sold the motor vehicle to meet the family's food and other needs during the national lockdown induced by the COVID-19 pandemic.

Surely if the defendant was held bent to prejudice the plaintiff, he would not have chosen to dispose one of their least valuable assets. He could have disposed, say of their two immovable assets.

Secondly, if defendant's intention was to prejudice the plaintiffs as she claims, he would not have played open cards with her as plaintiff testified, he did. After disposing of the motor vehicle, he informed her accordingly whereupon according to plaintiff, the two of them agreed that

the defendant would retain the proceeds thereof subject to another motor vehicle be procured for her to substitute the one that was sold.

Thirdly the motor vehicle was sold only after it had been damaged in an accident. This lends credence to the defendant's version that the sale was not *mala fide* let alone calculated to frustrate the plaintiff's rights or future claims.

The defendant in the circumstances outlined above was not only entitled to dispose of that asset, but also to retain or use the money as he so wished. He did not require the concurrence of the plaintiff nor was he obliged to share the proceeds thereof. In any event I am satisfied from the evidence that the defendant used the proceeds in the manner he claims he did, namely to cater for the family's needs during the COVID-19 pandemic. The claim for a half share of the proceeds of the sale of the NISSAN TIIDA motor vehicle lacks merit and stands to be dismissed.

### **Costs**

The parties are in agreement that each party should bear its own costs.

Accordingly, the following is an order which incorporates all the issues including those agreed at various stages of the proceedings.

### **IT IS HEREBY ORDERED THAT**

1. A decree of divorce be and is hereby granted.
2. The sole Custody of one minor child **KUDZAI SHE MAGANDE** (born on 9 August 2010) is hereby awarded to the defendant.
  - 2.1 The plaintiff to have access to the minor child **KUDZAI SHE MAGANDE** every alternate school holiday
  - 2.2 There shall be no order of contributory maintenance by the plaintiff.
3. **The sharing of immovable assets**
  - 3.1 Stand No. 1964 Mboroma Street, Mucheke D, Masvingo registered in defendant's name: Each party is awarded 50% share of the value of the property subject to the following terms:
    - a) The agreed value of the property is US\$25 000 (twenty five thousand United States of America dollars).

b) The defendant to buy out the plaintiff share of US\$12 500 (twelve thousand five hundred United States of America dollars) within thirty (30) days of this order.

3.2 Stand No. 1846 Clipsham views, Masvingo registered in the defendant's name:

Each party is hereby awarded 50% share of the value of this property subject to the following terms and conditions:

a) The agreed value of the property is US\$22 000 (twenty-two thousand United States of America dollars)

b) The defendant to buy out the plaintiff's half share of the value of the property that is US\$11 000 (eleven thousand United States of America dollars) within 30 days of this order

#### **4. Sharing of movable items**

4.1 The plaintiff's claim for a share of the proceeds of the sale of the NISSAN TIIDA motor vehicle is hereby dismissed.

4.2 The Toyota Granvia Motor Vehicle:

a) Each party is hereby awarded 50% of the value of the motor vehicle subject to the following terms and conditions.

(i) The value of the motor vehicle is US\$4 000 (Four thousand United States of America dollars)

(ii) The defendant to buy out the plaintiff's half share of the value of the motor vehicle, that is to say US\$2000 (two thousand United States of America dollars) within three months of this order.

5. In the event that the event of the defendant failing to buy out the plaintiff as ordered under paragraphs 2, 3 and 4, the property in question to be sold by private treaty to the best advantage of the parties and the proceeds shared equally.

#### **6. Household goods**

6.1 The following items are hereby awarded to the plaintiff:

(i) A four plate stove

(ii) A microwave oven

(iii) Pots, pans and cutlery



- (iv) A Capri deep freezer
- (v) A four-piece lounge suit
- (vi) A 54-inch colour television set
- (vii) A DSTV decoder
- (viii) A Satellite dish
- (ix) One double bed
- (x) A shoe rack
- (xi) Blankets and Linen

6.2 The defendant is hereby awarded the following items

- (i) A kitchen unit
- (ii) A 5kg gas cylinder
- (iii) An upright defy refrigerator
- (iv) A six-seater wooden table
- (v) A small wooden table
- (vi) A Tv stand
- (vii) An open view decoder
- (viii) A small carpet
- (ix) A double bed
- (x) A double bed mattress
- (xi) A three-door wooden wardrobe
- (xii) A book shelf
- (xiii) A table
- (xiv) Two radio speakers
- (xv) A two-door wooden wardrobe

7. Each party to bear its own costs.

*Chirairo & Associates, the plaintiffs Legal practitioners  
Ndlovu &Hwacha; the defendants's legal Practitioners.*