

LANGTON MAKONZA  
versus  
PEMBERAI ALICE VICTORIA MAKONZA (nee BIZABANI)

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, July 9, 2010 and 22 July 2010

*R. Nemaramba* for plaintiff  
*G. C. Chikumbirike*, for defendant.

CHITAKUNYE J. On 20 November 1998 the plaintiff and the defendant were joined together in holy matrimony by a Minister of religion in terms of the Marriages Act, [*Cap 5:11*]. It must have been a joyous occasion for the parties and their respective families and friends. Being a ceremony presided over by a minister of religion the usual religious vows to live with each other in sickness and in health ‘until death do us part’ may have been taken by the couple.

The marriage was blessed with 3 children.

As years went by, differences begun to emerge. The vows they had taken could no longer be upheld. Plaintiff found himself unable to continue with the marriage hence on 16 October 2007 he issued out summons for divorce against the defendant. The plaintiff alleged that the marriage had irretrievably broken down to such an extent that there is no possibility of the restoration of a normal marriage relationship between them.

The causes for the breakdown were outlined as:-

1. The defendant has treated plaintiff with such cruelty as is incompatible with the continuation of a normal marriage;
2. The defendant has improperly associated with other men unknown to the plaintiff;
3. The parties have lost love and affection for each other; and
4. The parties are incompatible and now want to lead separate lives. He claimed custody of the 3 minor children of the marriage. During the subsistence of the marriage they had acquired both movable and immovable property. He put forth his proposition of how best such property should be shared.

In her initial response the defendant denied that the marriage had irretrievably broken. She contended that she still loved the plaintiff as her husband. She further disputed the issue of custody of the children and distribution of matrimonial property.

At the pre- trial conference the parties agreed that defendant should be awarded custody of the 3 children with the plaintiff paying maintenance in terms of a maintenance order granted by the maintenance court in case no. M1219/07. The other issues remained unresolved.

When the parties appeared before me for trial on 21 June 2010, they had agreed on all the outstanding issues except the issue of the motor vehicles. Counsel for both parties tendered a document titled ‘consent order’ duly signed by the parties’ respective legal practitioners. That document reflected what the parties had agreed to as confirmed by their legal practitioners. Counsel submitted that the document be taken as the parties’ agreement on the dissolution of the marriage and the distribution of the matrimonial estate.

The parties having agreed on almost all the issues it remained for this court to decide on whether the marriage had irretrievably broken down or not and also on the distribution of the two motor vehicles that they had not agreed on, namely; the Mazda B1800 and the Opel Kadett.

Though the parties agreed that the marriage had irretrievably broken down it is for this court to be satisfied that the marriage has indeed broken down to that extent. It is only when court has been so satisfied that a decree of divorce may be granted.

Section 5 of the Matrimonial Causes Act, [*Cap 5:13*], herein after referred to as the Act, states that:-

- (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 factors or circumstances that court may consider are limitless. It is up to the party alleging to establish the circumstances and show that those circumstances make it impossible to continue with a normal marriage relationship. Section 5(2) confirms this by providing that:-

- “(2) Subject to subs (1), and without prejudice to any other facts or circumstances which may show the irretrievable break-down of a marriage, an appropriate court may have regard to the fact 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 plaintiff regards as incompatible with the continuation of a normal marriage relationship; or
- (c) the defendant has been sentenced by a competent court to imprisonment for a period of at least fifteen years or has, in terms of the law relating to criminal procedure, been declared to be a habitual criminal or has been sentenced to extended imprisonment and has, in accordance with such declaration or sentence, been detained in prison for a continuous period of, or for interrupted periods which in the aggregate amount to, at least five years, within the ten years immediately before the commencement of the divorce action ; or
- (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 may be, 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.”

In *casu* plaintiff alleged that:-

1. Defendant has treated plaintiff with such cruelty as is incompatible with the continuation of a normal marriage;
2. That defendant has improperly associated with other men unknown to plaintiff;
3. The parties have lost love and affection for each other and
4. The parties are incompatible and now want to lead separate lives.

In his *viva voce* evidence plaintiff alluded to his grounds for the break-down and to the fact that in those circumstances it is impossible for the continuation of a normal marriage relationship. He referred to some incidences of cruelty which he said epitomized the type of cruelty he suffered at the hands of defendant. At the end of his evidence on the break-down of the marriage it was clear that he had no intention whatsoever of restoring the normal marriage relationship.

The defendant did not say much except to admit that the marriage relationship has indeed broken down beyond resuscitation.

It was clear that the parties have grown further apart and were in no situation to revive the marriage. In the circumstances I was satisfied that the marriage had indeed irretrievably broken-down. A decree of divorce was the only route.

The issue of custody and maintenance was resolved in terms of the parties' 'consent order'.

The issue of distribution of the matrimonial property was also resolved serve for the motor vehicles.

Section 7 (1) of the Act provides that:-

“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) .....

In the exercise of the power to distribute the property s 7 (4) provides that:-

“In making an order in terms of subs (1) an appropriate court shall have regard to all the circumstances of the case, including the following-

- (a) the income –earning capacity , asset 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 has or 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 and child;
- (e) The direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) The value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) The duration of the marriage;

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 the children in the position they would have been in had a normal marriage relationship continued between the spouses.”

From the evidence by both the plaintiff and the defendant it was clear that the motor vehicles in question were acquired for the family by plaintiff. The motor vehicles were being

used for the benefit of the family. The contention was mostly on who is in need of which motor vehicle.

The plaintiff's evidence was to the effect that from the time of purchase the B1800 motor vehicle was intended for his use. The Opel Kadett was for defendant's personal use and for ferrying children to and from school. He also said that these two motor vehicles were the only motor vehicles he owned. The Nissan Hardbody defendant had alluded to was involved in a road traffic accident and was declared a write off. The only motor vehicles available are therefore the B1800 and the Opel Kadett. As he was the one who had always been using the B1800 he should be awarded that motor vehicle whilst defendant is awarded the Opel Kadett which car she has always been using. When asked about the motor vehicle he had been using since separation, plaintiff said that is a motor vehicle provided by his employer on a temporal basis. It however became clear that by virtue of his employment defendant is entitled to be provided with a motor vehicle by his employer as a condition of service. Things being equal he would be entitled to purchase that motor vehicle at the end of five years from the date of its issuance.

The defendant's evidence on the motor vehicles was to the effect that she needed the B1800 motor vehicle for her personal use and for ferrying children to and from school. She indicated that the Opel Kadett was bought as a hedge against inflation and not that it was bought for her personal use. She however acknowledges to have used it for personal use and for ferrying children to school. She also said that the Opel Kadett broke down and, due to its old age and state, is not a reliable motor vehicle. She needed a reliable motor vehicle to ferry children to school. She further testified that she has in fact been using the B1800 to ferry children to and from school.

When asked about a motor vehicle which plaintiff said she was using and not the B1800 defendant said that on occasions she has used the motor vehicle. That motor is not hers. It is for her boss who is involved in an HIV programme at her work place. The only reliable motor vehicle she would have is the B1800. When the plaintiff's offer to have the Opel Kadett repaired at his expense was put to her defendant said that it would still not be reliable due to its old age.

The evidence by the two was essentially a battle for the B1800. It is my view that the issue can be resolved by referring to s 7(4) (a) –(c) as the primary considerations in this case with other considerations as ancillary. Whilst the plaintiff may have been the one in regular

use of the B1800 whilst he lived with his family, since his departure from the matrimonial home, about 3 years ago, he has not used it as it remained at the family home. He never the less has been able to survive without evident hardships. For the past 3 years the B1800 has been at the family home where defendant said she has been using it.

It was clear from the evidence adduced that of the two parties, plaintiff has better income earning capacity and is better positioned to find another motor vehicle. The basic needs of the spouses now and in the near future are in favor of defendant retaining a more reliable motor vehicle. I am of the view that defendant has a greater need for the more reliable motor vehicle especially that she needs to ferry children to and from school than plaintiff. The plaintiff may have the Opel Kadett and decide on what to do with it if it is as dysfunctional as defendant said or if it is repairable as plaintiff contended.

As the parties had agreed on all other issues those will be incorporated as part of this order

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.
2. The defendant is awarded custody of the minor children namely;
  - (i) Colleen Tanyaradzwa Makonza, born on the 1<sup>st</sup> April 1999;
  - (ii) Tawananyasha Langton Junior Makonza, born on the 5th April 2004;
  - (iii) Tinomudaishe Lillian Lora Makonza, born on the 5<sup>th</sup> May 2006.
3. The plaintiff shall have access to the minor children on:-
  - (i) Alternate weekends from Friday 5:00 pm to 5:00 pm on Sunday;
  - (ii) Alternate weeks of each school holiday, commencing the first day, after the term ends with access, during that first week being exercised by the plaintiff, provided however, that these periods can be altered by the parties by prior arrangement.
  - (iii) Every alternate public holiday, that is to say, the first holiday in this case being New Year's Day, followed by the other holidays during the year, which is Good Friday, Easter Holiday, Independence Day, Labour Day Africa Freedom Day, Heroes Day, Armed Forces Day, Unity Day, Christmas Day and Boxing Day.
4. None of the minor children shall be removed from Zimbabwe without the prior written consent of either parent, which consent shall not be unreasonably refused.
5. The plaintiff shall pay maintenance in terms of case No. M1219/07, provided however that maintenance relating to one minor child, (the subject matter of a paternity dispute, in Case No: M1219/07 that is: Tawananyasha Langton Junior Makonza, shall remain suspended until such time as the issues in that case have been cleared.

6. In consideration of the minor children's welfare, the parties have agreed that the plaintiff shall be entitled to 45% of the value of the immovable property, namely Stand No. 61 Alfred Road, Greendale, Harare, and 55% to the defendant and the minor children, after its valuation by a qualified valuer agreed to by both parties' legal practitioners, or in the event of disagreement on the identity of the valuer, such valuer shall be appointed by the registrar of the High Court (at the joint instance of the parties' Legal Practitioners) within thirty(30) days of the date of this order. In the event of the evaluation being undertaken, defendant shall effect full payment of the plaintiff's entitlement, within three (3) months of the delivery of the Valuation report, on either parties Legal Practitioners and the Registrar of the high court, proof of which shall be done by a certificate of service, by plaintiff's Legal Practitioners on the defendants legal practitioners and the Registrar of the High court, failing payment within the aforesaid period, the property shall be put for sale to best advantage and the proceeds shared as to 45% for the plaintiff and 55% for the defendant and the minor children.
7. The movable property shall be shared as follows:
  - (1) The plaintiff is awarded the following as his sole and exclusive property:
    - Opel Kadett motor vehicle registration no.535-710S;
    - Desk fan
    - Video Cassette Recorder
    - Refrigerator
    - 3 Plate stove
  - (2) The defendant is hereby awarded the following as her sole and exclusive property
    - Mazda B1800 motor vehicle registration no. AAK 7389
    - All house hold movable property except those items specifically awarded to the plaintiff in clause 7 (1) above.
8. Each party to pay their own costs.

*Karuwa & Associates*, plaintiff's legal practitioners.

*Chikumbirike & Associates*, defendant's legal practitioners.