BERNADETTE MAKAYA
Versus
JAMES MAKAYA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 21, 22, 23 and 25 June 2004 and 27 October 2004

Divorce Action

Mr *Mujeyi*, for the plaintiff
Mr *Dondo*, for the defendant

MAVANGIRA J: The parties were married on 9 September 1977 at Bombay, India. The plaintiff instituted divorce proceedings on 2 July 1996. It is common cause between the parties that that marriage has irretrievably broken down and that there are no reasonable prospects of a restoration of a normal marriage relationship between them.

The parties' marriage was blessed with four children, only one of whom is still a minor.

In her declaration the plaintiff claims for:

"a) a decree of divorce;

b) an order granting her custody of the four minor children of the marriage;

c) an order dividing the assets of the parties in terms of section 7 of the Matrimonial Causes Act 1985 so that the plaintiff receive (sic) 50% in value thereof, such to include the property set out in paragraph 9 above;

d) maintenance for herself and the minor children of the marriage as set out in paragraph 10 above, and

e) costs of suit."

Paragraph 10 of the plaintiff's declaration states as follows:-

"10. It is just and equitable that the defendant be ordered to make the following payments by way of maintenance for the plaintiff and the minor children of the marriage.

a) Maintenance for the plaintiff in the sum of $300 000.00, such payments to continue until she dies or remarries.

b) Maintenance for each of the minor children of the marriage in the sum of $100 000.00 per child per month until each child attains the age of eighteen years or becomes self-supporting whichever is the later.

c) Payment of all educational costs for the four minor children at a private school until each child completes secondary education.

d) Payment of tertiary education for each minor child in the event of them showing an aptitude at an institution of high learning.

e) An order that the defendant maintain the plaintiff and the four minor children of the marriage on a duly recognised medical and dental scheme, and that he reimburses to the plaintiff, on demand, all shortfalls met by her in respect of medical and dental treatment, and prescription drugs, in respect of herself and the four minor children of the marriage.

f) An order that the maintenance set out in sub-paragraph a and b above be increased on 1st January of each year following the date of divorce by a percentage equal to the increase in the consumer index in Zimbabwe for the preceding twelve months."

In her evidence before the court, the plaintiff's claim emerged as a claim for 50% of the value of the matrimonial assets, custody of the one minor child, the other three having since attained majority and maintenance for herself and the minor child of the marriage in the form of a lump sum of $300 million.

The plaintiff listed the immovable matrimonial assets as:-

1. The matrimonial home at number 4 Larkholme Avenue, Sunridge, Harare.

2. A four bedroomed house in Kadoma at number 5 Five Avenue, Kadoma.

3. A four bedroomed house in Chegutu at number 5 Acacia Avenue, Chegutu.

4. Stands 1486 and 1126, Borrowdale Brooke, Harare.

5. Moorebridge Farm in Bindura.

She listed the movable matrimonial property in her further particulars for trial filed of record on 29 April 2002. She also listed therein items which she said she had sold in order to pay bills and to purchase food for herself and the children. She listed items that she said were removed from the matrimonial home by the defendant and had not been returned. She listed items that she said were stolen when the matrimonial home was broken into on two occasions in 1991. Curiously while the breakings and thefts occurred in 1991 the Police C.R. number is 19/09/2000 and "RRB 860 309. Date 4th July 2001."

The plaintiff contends that a fair and equitable distribution of the immovable property would be for her to be awarded the Sunridge, Kadoma and Chegutu properties while the defendant gets the Borrowdale Brooke property and the farm.

The plaintiff also claimed that the defendant should give her back her vehicle, a Mazda 626 registration number 567-949 K

The plaintiff's evidence was that her entitlement to 50% of the matrimonial assets' value emanates from the contributions she made, firstly when they were still in India, before and after marriage, when she supported the defendant in various ways including financially, morally, spiritually, materially and in the typing and research for his academic work and theses. She claimed that through her support, she changed and molded the defendant who was irresponsible, disorganised, lazy, poor and was also a drunkard, into the great success that he finally became. Furthermore, her brother gave them US$5 000.00 when they came to Zimbabwe. They used the money to set up home. She worked at various jobs throughout the marriage and contributed all her salary and all her effort, love and attention into the family; but most importantly, she gave the defendant four daughters.

The plaintiff said she always typed application letters for jobs for the defendant. He was from a poor and uneducated family while she was from a wealthy, highly educated family. She paid his fees, exam fees, hostel fees and arranged for continued sponsorship for his studies. It was out of choice that she had not undertaken a degree course. She had rather concentrated on developing the defendant. She had followed the defendant across the sea leaving her family and friends in India because she loved him. The order that she seeks is thus commensurate with her contribution and input into the matrimony. Because of her age it is no longer easy to get any jobs. She is 52. She also said that while the defendant paid the mortgage bond, her money was used for all the family's other needs.

The defendant on the other hand, denied vehemently that he had been assisted by the plaintiff in the manner she claimed. He said that whilst he was engaged in degree work, she was a mere 'O' level graduate. Furthermore, he was on a Commonwealth Scholarship under which he got sponsorship which was four times as much as a lecturer's salary. He did not need any assistance from her. Rather, she was dependant on him. He had always been a bright student to the extent that he was promoted to proceed to Form 1 without having to do what was then known as Standard 6, then the pemultinate primary school level before one

could proceed to secondary school. He won many awards when he was still a student in then Rhodesia and continued to excel in India. He had not succeeded in embarking on a medical degree in India as such were reserved for students of Indian extract only. He thus had had to switch from sciences to the arts. He had not failed in medical school as claimed by the plaintiff who failed in her second year of nurse training in India.

The defendant said that after they came to Zimbabwe, whilst he worked and provided for the family, the plaintiff was never able to hold a job for long. The longest she was at one job was when she worked for Zimbank for a year. She was fired by the Headmaster of Kutama College for pilfering $1 000.00. She was always involved in squabbles with colleagues and employers because of her temperament. Even when she worked he never got to know what she did with her money. She had begged the police to arrest him on false charges of corruption and had been the star witness for the State in the ensuing prosecution of what had become the NOCZIM saga. Because of her conduct he has since 1999 been unable to secure employment anywhere. Before that, he had always been either the top man or the second in charge at all places that he worked. He had always had a good salary. The plaintiff never earned more than he did, as she claimed.

The defendant said that he is now surviving on a pension of $30 000.00 and rentals of $50 000 each from the Kadoma and Chegutu properties. He has developed the Borrowdale Brooke property with the assistance of one Doreen Charlie whom he referred to as his sister-in-law. He also said that he had a child with the said Doreen Charlie.

The defendant also said that the Sunridge property was purchased in 1983 for $23 000.00. He got a full bond for it from the Public Service Commission. The plaintiff was by then unco-operative otherwise she could have got a bond with a lower interest rate from her employers, Zimbank. He left the Public Service in 1984 or 1985. He was appointed Sales Manager for the Dairy Marketing Board in Harare where he remained until 31 August 1989.

In Kadoma, the defendant said, he set up a typing shop for the plaintiff at Sam Levy's Village. A year later in July 1989, he got the NOCZIM job. He let the plaintiff keep the Kadoma office open and set up for her a stationary shop in Harare at No. 2 Chequers Court. The shop was for the selling of books and stationery,

photocopying, bookbinding and printing. She never disclosed how much she was making from these businesses.

The defendant said he bought the two stands in Kadoma and Chegutu in 1987 for $4 000.00 each. The plaintiff did not contribute to their purchase. He developed them single handedly without any assistance by the plaintiff. He continued to support her business including giving her one tank of petrol per week. She never bought stationery for the children's school needs despite having a stationery shop. She always gave him a list of the children's stationery requirements which he always bought. It took him two years to complete developing the Kadoma and Chegutu properties. He values them at $500 000 000.00 each. He moulded the bricks himself and made the window and doorframes as he had a welding machine which the plaintiff has since sold. He also values the Sunridge property at $500 000 000.00. He also values the Borrowdale Brook house at the same value of $500 000 000.00.

It was also the defendant's evidence that since her institution of these divorce proceedings, plaintiff's mental or psychological problem which was manifest when they were still living together in the matrimonial home, has deteriorated with time. She would deliberately destroy matrimonial property which property the defendant used to repair at his own cost until he refused to do so. She attended at Petra Clinic and at Connect which he described as a psychological clinic.

The defendant denied owning Moorbridge Farm which he said is owned by one Joseph Makaya, a distant relation of his. The defendant said he acquired the Borrowdale Brooke property long after they had separated. He acquired it around 1997 and started developing it in October 2001 with the help of Doreen Charlie and with no contribution whatsoever from the plaintiff. He had opted to leave the plaintiff and the children in the matrimonial home and was himself in dire need of a house. He used his terminal benefits to develop the stand. He said he used money received from the sale of one stand to develop this stand. He also said that the plaintiff had stolen altogether $600 000.00 of his terminal benefits from NOCZIM. He agreed that he had in fact bought two stands in Borrowdale Brooke but had sold the other in order to pay for the plaintiff's upkeep. It was from that money and from the rentals from Chegutu and Kadoma that he paid for the

plaintiff's upkeep.

The defendant said that he lost his job on 31 December 2000. He registered a trust on 1 September 2003, whose assets include the Kadoma and Chegutu properties, for the benefit of his children especially after his loss of employment. He said that the plaintiff can have the matrimonial home. He said that there is no basis for the plaintiff's claim of $300 000.00 for maintenance. In any event, he is in the same predicament that she says she is in, that is, difficulty in securing employment due to advanced age. He cannot afford the said amount. He is not sure if the Kadoma and the Chegutu properties have been transferred into the name of the trust but hopes that they have.

It was put to the defendant that he had, well knowing that this case was pending before the courts, in which a decision would be made about those matrimonial assets, deliberately taken the decision and proceeded to donate these properties to a trust without informing the plaintiff. Furthermore, that the plaintiff got to hear about it for the first time when she was being cross-examined by the defendant's counsel. The defendant said in response that the question was irrelevant and in any event, the trust was formed in good faith. He agreed that two of the four children who are beneficiaries under the trust are his children with the plaintiff and the other two are Doreen Charlies' children whom he has taken to be his.

In *Ncube v Ncube* 1993(1) ZLR KORSAH JA said at pages 41B to 42D

> "It is true that the provisions (of section 7(3) of the Matrimonial Causes Act, then Act No. 33 of 1985) make reference to a division of assets having regard to the conduct of the parties, but as LORD DENNING MR explained in *Wachtel v Wachtel* [1973] 1 All ER 829 (CA), when the parties come to an agreement that their marriage has irretrievably broken down, what place has conduct in it? The proper approach to adopt is to accept that both parties have contributed to the breakdown and then to get on with the distribution of the assets on that basis. To invite a court to take cognisance of who was responsible for the breakdown after such an agreement, as the appellant requested of the trial court, is to resurrect the old spectre of guilt and innocence and drag the judge "to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days."

If that was the intention of Parliament then the concept of the irretrievable breakdown of the marriage in s 5 of the Act is shorn of almost all meaning. For as the learned MASTER OF THE ROLLS observed at 835h-836b of the report, *supra*, of a similar provision in the United Kingdom:

> "It has been suggested that there should be a 'discount' or 'reduction' in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation… There will be many cases in which a wife (although once considered guilty or blameworthy) will have earned for the home and looked after the family for very many years. Is she also to be deprived of the benefit otherwise to be accorded to her by s 5(1)(f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life."

I am of the view that once the parties finally consented to the dissolution of their marriage on the ground of irretrievable breakdown, and their mutual recriminations appeared to counter-balance each other, and the conduct of one was not more gross than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would otherwise be a fair and just apportionment of the assets of the spouses.

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 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 and which have particular sentimental value to the spouse" s 7(2)""

In *Takafuma v Takafuma* 1994(2) ZLR 103(s) McNALLY JA said at p 106 E-F:

> "In the present case there is no question of penalising one or other of the parties 'having regard to their conduct'. Each party blamed the other for the failure of the marriage, and the court, quite properly, did not go into the matter. It was satisfied that the marriage had broken down irretrievably, and did not apportion blame. So that criteria was not applicable, and was rightly not applied. Compare *Hughes v Hughes s* 207/92."

In *Marimba v Marimba*, 1999(1) ZLR 87(H) GILLESPIE. J at pp 91G to 93A stated:

"... once evidence establishes the irretrievable breakdown of the marriage, then it is neither helpful nor proper to enquire further into whether those grounds constitute misconduct by, or disclose the fault of, either party unless the existence of misconduct is relevant to some issue other than grounds for divorce.

For instance, the alleged misconduct of one or other party might be advanced in support of the proposition that that party is not fit to be a custodian of minors. Reluctant as the courts are to delve into the general

issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of children.

The related principle is more difficult to formulate when it is suggested that the conduct of a party is such that it should have a bearing on a property distribution order. Mindful of the move away from the fault system of divorce,[1] judges in this jurisdiction have set their faces against any invitation to delve into the "minutiae of ancient domestic grievances".[2] They have declined to permit counsel "to resurrect the old spectre of guilt and innocence and drag the judge to hear their mutual recriminations and go into their petty squabbles of days on end, as he used to do in the old days".[3] And rightly so.

Nevertheless, the relevant legislation specifically preserves the potential relevance of marital misbehaviour to the question of a division of property. The court is enjoined to -

> "endeavour 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 ..."[4]

The difficulty has come in attempting to define when it would be unjust to permit the misconduct of a spouse to influence an order apportioning the marital estate or for maintenance.

Hence judges, in this jurisdiction and in others with similar legislation, while emphasising the reserve and caution that must affect any decision to permit the misconduct of a spouse to affect an apportionment on the grounds of misconduct, have been bound to acknowledge that such a decision may in a proper case be reached. Frequently cited to this effect is a *dictum* of LORD DENNING who referred to -

> "a residue of cases where the conduct of one of the parties is ... 'both obvious and gross' so much so that to order one party to support another whose conduct falls into this category is

1 Effected by the enactment of the Matrimonial Causes Act [*Chapter 5:13*]
2 *Cf* GIBSON J in *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 239C.
3 *Per* KORSAH JA in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 41C.
4 Section 7(3)

repugnant to anyone's sense of justice."[5]

Although this passage specifically refers to maintenance, the learned judge was certainly not laying down a rule that only a maintenance order may be effected by misconduct. This is merely an example to illustrate the true thrust of his point that in relatively rare cases the degree of misconduct of one party to a marriage is such that it would be unjust to make an order in respect of property or maintenance while excluding this misconduct from consideration."

In my view the evidence placed before this court establishes the irretrievable breakdown of the parties' marriage of some 27 years.

GILLESPIE J continued thus at page 93 D to (citing *Ncube v Ncube supra*):

"... The overall word of caution has been given that where the parties' 'mutual recriminations appeared to counter-balance each other, and the conduct of one was not more greater than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would otherwise be a fair and just apportionment of the assets of the spouses'. A 93 G:

"... The aim is expressly to place the parties in the position they would have been had a normal marriage relationship persisted." And further:

"... It may generally be said, however, that it is never just to penalise a person for an unhappy marriage. Only serious cases of predominantly one-sided misbehaviour will be permitted to influence the order that would otherwise have been made on considerations excluding the question of misconduct." (94B)

That this was an unhappy marriage also appears to be clearly shown by the evidence before the court. For almost 20 years the parties lived together as husband and wife. It also appears that the parties can safely be treated as equal and co-participants in the building up of the marital estate. Although the defendant claimed that the plaintiff's contribution was very minimal if not non-

5 *Wachtel v Wachtel* [1973] 1 All ER 829 (CA) at 835.

existent, it is also clear that she had for some time to take care of the family without any contribution from the defendant, or with minimal maintenance. I see no reason to deny the plaintiff the 50% in value of the matrimonial assets that she claims.

The question then is, what are the matrimonial assets to be distributed between the parties? It is immediately noted that there is no evidence before this court that the defendant owns Moorebridge Farm, as claimed by the plaintiff. The defendant himself denies owning the said farm. That cannot therefore be dealt with as part the matrimonial assets.

The immovable properties acquired during the subsistence of this marriage are thus the other four properties already listed above, earlier in this judgement. The defendant agreed that the Sunridge matrimonial home be awarded to the plaintiff. It will be so ordered. He developed the Borrowdale Brooke property with the assistance of Doreen Charlie and with no contribution by the plaintiff. It will be awarded to him. He values the Kadoma and Chegutu properties which he says were acquired in 1987 and were developed over a two year period, at $500 000 000.00 each. He places the same value on the Sunridge and Borrowdale Brooke properties respectively. The Kadoma and Chegutu properties will thus each be awarded to the respective parties. The defendant only has himself to blame for donating the properties to a trust well aware and inspite of these pending proceedings. He will have to take the necessary steps to ensure compliance with this court's order.

Both counsel were asked by the court when judgment was reserved, to furnish the court with the proper descriptions of the immovable properties as they appear on the title deeds. They have not done so.

There is only one minor child of the marriage, the others having since attained majority. From the time when the defendant left the matrimonial home, the said child has been in the custody of the plaintiff. No compelling reasons have been placed before me to show that the said minor child's interests would best be served by her custody being awarded to the defendant. If the plaintiff was not a suitable parent to have custody of her, then the defendant would surely not have left the child and for so long, with the plaintiff without taking any remedial steps about the issue. Custody of C. will thus be awarded to the plaintiff whilst the

defendant will have reasonable access to her.

The defendant will also maintain the minor child. The defendant's closing submissions show that he is agreeable to such an order. No order of maintenance will however be made in favour of the plaintiff in view of the award to her of one of the out of Harare properties. Furthermore, the defendant, like the plaintiff is not gainfully employed.

In her further particulars for trial, the plaintiff averred that the defendant had later claimed that the vehicle, a Mazda 626, registration number 567-949K was stolen. This was not disputed as an untruth. I thus do not see how an order can be made in relation to such an item. With regard to movable property, it appears that it would be practical just and equitable to grant to each party the property in their respective possession and control.

In my view each party will have to bear its own costs in the circumstances as discussed above.

IT IS ORDERED:

1. That a decree of divorce shall issue.
2. That custody of the minor child C.M. be and is hereby awarded to the plaintiff.
3. That the defendant shall be entitled to reasonable access to the minor child. The defendant may exercise such access to the minor child as the plaintiff may consent to after having been given reasonable notice by the defendant.
4. That the defendant shall contribute to the maintenance of the minor child:
    a) by paying to the plaintiff the sum of $300 000.00 monthly, the first payment for the month of November 2004 to be made forthwith and subsequent payments to be made on the first day of each succeeding month; and
    b) by paying half of all school fees, including for tertiary education, for the said minor child.
5. That the assets of the parties shall be divided as follows:
    a) Each party shall retain as his or her exclusive property, all movable items that are in his or her possession respectively.

b) That the plaintiff is awarded as her property, the matrimonial home, number 4 Larkholme Avenue, Sunridge, Harare

c) That the plaintiff is awarded as her property Number 5 Five Avenue, Kadoma.

d) That the defendant is awarded as his property the Borrowdale Brooke property.

e) That the defendant is awarded as his property, number 5 Acacia Avenue, Chegutu.

6. Each party shall pay its own costs.