

ORDERLY MASHONGANYIKA  
versus  
MEMORY MASHONGANYIKA

HIGH COURT OF ZIMBABWE  
GUVAVA J  
HARARE, 13 and 17 September 2007 and 28 February 2008

**Family Law Court**

Ms *Chinwada*, for the plaintiff  
Ms *Takawadiyi*, for the defendant

GUVAVA J: The plaintiff issued summons out of this court on 13 March 2006 claiming a decree of divorce and division of the parties' matrimonial assets. At the commencement of the proceedings the party's legal practitioners advised that all the other issues had been resolved as between the parties and that the only outstanding issue was that of the distribution of their matrimonial home. However during the course of the proceedings the issue of whether or not the marriage had irretrievably broken down arose. It seems to me that this issue must be determined first before the court can deal with the other ancillary issues.

The plaintiff gave evidence and stated that he resides at number 55103 Close, Budiriro 3. He married the defendant in accordance with customary law in 1984 and registered the marriage in 1987. They have three children two of whom are still minors. He stated that the marriage has irretrievably broken down and there are no prospects of a reconciliation between them. The plaintiff in his pleadings stated that the defendant had associated with other men which association he considers incompatible with the continuation of a normal marriage. He also stated that defendant had failed to show proper love and affection and that they had not had conjugal rights for a period in excess of two years.

The defendant testified that she has been staying together with the plaintiff since they got married. She stated that they have been sharing the same bedroom and sharing conjugal rights until the notice of set down for this matter was served upon her two weeks before the hearing. She stated that she continued to have sexual relations with the plaintiff even after he issued summons against her because she hoped that the marriage would continue. In cross

examination she denied that the marriage had broken down as they were doing everything that a married couple does. She stated that she cooks plaintiff's food and that of the family and does all his laundry. She stated that they had not gone for any counseling as there was nothing amiss in the marriage relationship. She stated further that the plaintiff had only issued summons because he wanted to sell the house and get some money.

The Matrimonial Causes Act [*Chapter 5:13*] (the Act) provides that a court may grant a decree of divorce where it is satisfied that the marriage has irretrievably broken down. Section 4 of the Act provides for the grounds of divorce as follows:

“A marriage may be dissolved by a decree of divorce by an appropriate court only on the grounds of:

- (a) irretrievable breakdown of the marriage as contemplated by s 5; or
- (b) .....

Section 5 of the Act provides as follows:

- (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.
- (2) Subject to subsection (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 the 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 date of 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.
- (3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation.
- (4) Where proceedings have been postponed in terms of subsection (3), they may be resumed, with leave of the court, before any other presiding officer or judge of the court.

It seems to me that the parties in this matter have sought a divorce in terms of s 4 (a) of the Act. In determining whether or not a marriage has irretrievably broken down a court is guided by s 5 of the Act. The test as set out in s 5 in my view is whether the marriage between the parties has broken down to such an extent that there is no reasonable prospect of reconciliation between the parties. It is clear from a reading of that section that the grant of a divorce is entirely at the discretion of the court. In the case of *Chiviya v Chiviya* 1995 (1) ZLR 210 at 213D – F, ROBINSON J stated as follows:

“At the outset, it is crucial to highlight that the grant of a divorce under the matrimonial causes Act 33 of 1985 lies entirely within the discretion of the appropriate court, as defined (hereinafter referred to as “the Court”). If one examines s 5(1) of the Act, it will be noted that the subsection provides that the court may (not shall) grant a decree of divorce on the grounds of irretrievable breakdown of the marriage if it is satisfied that the marriage relationship has broken down to such an extent that there are no reasonable prospects of a restoration of a normal marriage relationship between them.”

In other words a decree of divorce is not obtained on demand. The court has to satisfy itself on examination of all the evidence placed before it firstly, that the marriage has indeed broken down and secondly that there are no prospects of reconciliation between the parties.

In my view the plaintiff’s decision to issue summons shows that there are problems in the marriage. However an examination of the evidence before me raises considerable doubt as to whether the marriage has broken down irretrievably. It was not in dispute that up until two weeks before the hearing of this matter the plaintiff and the defendant were living under the same roof, sharing the same bed and according to the defendant, having sexual relations. Although the sexual relations were denied by the plaintiff the evidence weighed heavily in favor of the defendant’s version. Her undisputed evidence was that they had no maid and she would do everything for the defendant. She would cook his food, do his laundry and share his bed. In effect the parties, up until the hearing, were living together as a family. The defendant’s evidence in cross examination was quite telling when she stated that she had not sought any counseling because everything was normal.

I believed the defendant as her evidence had a ring of truth. The plaintiff actually looked quite sheepish when the defendant told the court that they were still having sexual relations. I have no hesitation in accepting the defendant’s story in this regard.

It seems to me that these fact show that although the marriage may have broken down it is not incapable of resuscitation if the parties receive counseling or perhaps just an opportunity to reflect on the best course of action to take. A decree of divorce brings finality to a family union. It affects everyone from the parties themselves to their minor children. It is not an order which the court will give lightly. The court should not be seen to break up families where there is evidence that the marriage can still subsist. It will only grant a decree of divorce if there is clear evidence that there are no prospects that the parties will reconcile. I did not find this to be the position in this case.

When faced with such a situation, s 5 (3) of the Act gives the court the option, in the exercise of its discretion, to either dismiss the claim before it or to postpone the matter for a specific period to enable the parties to attempt a reconciliation. The provision provides as follows:

“(3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt reconciliation.”

It seems to me that this provision allows the court to stop a matter at any stage so as to allow the parties to be afforded an opportunity to reconcile. This is clearly in accordance with the courts discretion to decline to grant a decree of divorce where there is a reasonable possibility that the parties may reconcile or for other reasons.

In my view postponing this matter for a specific period would be the best course to follow in this case as it will give the parties an opportunity to reflect on the best course of action to take. In the event that the parties fail to reconcile they may come back to the court in accordance with s 5 (4) of the Act and the proceedings may be resumed.

In the result, I make the following order:

1. This matter is postponed for a period of 12 months to enable the parties to attempt reconciliation through marriage counsel, treatment or reflection.
2. There shall be no order as to costs.

*O. Matizanadzo & Associates*, plaintiff’s legal practitioner  
*P. Takawadiyi & Associates*, defendant’s legal practitioner