BRIGHTON MURISA
versus
CATHERINE MURISA

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 10, 19 January & 3 February 2011

E. Dzoro, for the plaintiff
Defendant in person

GUVAVA J: "Till death do us part" These are the vows that the parties made during their marriage on 2 August 2003. These are the vows which the defendant has clung to throughout the trial and has refused to consent to divorce even where all the evidence led during the trial, including her own evidence, leads one to the inescapable conclusion that the marriage had irretrievably broken down.

The plaintiff issued summons out of this court on 10 June 2010 seeking a decree of divorce. He also prayed that custody of their minor child be awarded to the defendant whilst he is granted reasonable rights of access. He also undertook to pay the minor child's school fees and all school requirements until she attains the age of majority. This proposition was acceptable to the defendant and the sole issue that was referred to trial at Pre- Trial Conference was whether or not the marriage had irretrievably broken down.

The facts of this matter are essentially common cause. The parties married before a Minister of Religion at Abundance Global Ministries on 2 August 2003 in Harare. They have one minor child Shallom Murisa who was born on 28 April 2005. The child is presently at a boarding school in Harare where she started grade one at the beginning of this month.

The problems between the parties started in December 2008. By January 2009 things came to a head. In mid January 2009, after she suffered a miscarriage, the defendant was admitted into hospital. Instead of taking the defendant to hospital the plaintiff chose to go to Mutare with his friends. When the defendant was discharged from hospital she found that the plaintiff had moved out of the matrimonial home with their minor child. Efforts were made through relatives on both sides to reconcile the parties at that stage to no avail. The parties have not lived together as husband and wife since that time.

The plaintiff in his evidence stated that he had lost all love and affection for the defendant and he had no desire to reconcile with her. When he moved out of the matrimonial home their relationship had become strained and there was little or no communication between them. The plaintiff told the court that he does not even know where the defendant resides. He stated that it would be foolhardy for him to try and reconcile with the defendant after two years in view of the HIV and AIDS pandemic as they have both been living separate lives. There is no love lost between the defendant and his relatives and no one wants to get involved in their dispute any more.

The defendant testified that she had vowed to love the plaintiff until death. It was her evidence that she could not break the vows that she had made in church. Although the plaintiff moved out and is living with another woman she still loves him and thinks that given time they may become reconciled. She testified that she had made every effort to reconcile with the plaintiff to no avail. He is never at home and his phone is not reachable.

It is trite that divorce is granted at the discretion of the court in instances where it is satisfied that the marriage has irretrievably broken down. This wide discretion which is held by the court was discussed by Robinson J in the case of *Chiviya v Chiviya* 1995 (1) ZLR 210. The relevant section in the Matrimonial Causes Act [*Cap 5:13*] upon which the discretion is based provides as follows:

5 Irretrievable break-down

(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.

It is apparent from s 5 (1) of the Act that the decision to grant divorce is based on the acceptance, by an appropriate court, that the marriage has reached "such a state of disintegration that there is no reasonable prospect of a restoration of a normal marriage relationship" (The South African Law of Husband Wife 5th edition by HR Hahlo at page 333.) The principle of irretrievable breakdown was introduced into our law on 17 February 1986 with the promulgation of the Matrimonial Causes Act. Prior to the coming into operation of this Act, divorce was granted on the basis of fault. A party coming to court seeking a decree of divorce had to show that the defendant had wronged them upon proof of well established grounds. Thus a plaintiff could only be granted divorce if they proved any one of the grounds for divorce. The concept of irretrievable breakdown does not consider fault as the cause of the breakdown of the marriage is immaterial. (See *Kruger v Kruger* 1980 (3) SA 283) The reason for the breakdown may be based on the old common law grounds of divorce such as malicious desertion, refusal of conjugal rights, cruelty addiction to drugs or alcohol by the defendant which makes life intolerable for the plaintiff. It may also be based on plaintiff's own misconduct. It may simply be that the plaintiff has fallen out of love with the defendant. The court is thus concerned with ascertaining whether or not there is a reasonable possibility that the parties before it may reconcile. The court is guided in the exercise of its discretion by the provisions set out in s 5 (2) of the Matrimonial Causes Act in determining whether or not the marriage has irretrievably broken down.

Section 5 (2) (a) of the Act states that where the parties have not lived together for a continuous period of at least 12 months before the date of commencement of the divorce proceedings the court may find that the marriage has irretrievably broken down. From the evidence led during this trial it was common cause that the parties have not lived together since January 2009. This is a period in excess of two years. Divorce proceedings were instituted 18 months after their separation in June 2010. On the basis of these facts alone the plaintiff has shown that the marriage has irretrievably broken down.

There was however further evidence that corroborated the extent of the breakdown of the marriage. The defendant in January 2009 needed to be hospitalized. It was her evidence that she had to go to hospital on her own even though plaintiff was aware that she was to be hospitalized. He did not visit her and in fact went to Mutare with his friends. When she came out of hospital the plaintiff had moved out of the matrimonial home with the minor child.

Although the plaintiff denies that he was aware of the defendants impending hospitalization it is my view that it is unnecessary for this court determine whether or not he did know. The course of events are important as they show either that the plaintiff knew and didn't care or that the parties were not communicating to such an extent that one could go to hospital for admission without the knowledge of the other. In my view these facts show that at the time the marriage was under severe strain. The fact that when defendant returned from the hospital the plaintiff had moved out of the home with the minor child merely reinforces the problems that was in existence. Even if the court were to accept the defendants version of events it is my view that it serves to merely highlight vividly the breakdown which she so strenuously denies.

The plaintiff told the court that he no longer loved the defendant and had no desire to reconcile with her. Indeed this fact is corroborated by the defendant who stated that the plaintiff has deliberately made himself unavailable from the time he moved out to this day.

It was clear to the court during the cross examination of the plaintiff by the defendant that that there was bitterness and acrimony between the two. It was necessary on several occasions for the court to step in and restore order during their heated interchange. I can find no basis to come to a conclusion other than that the marriage has indeed broken down.

As the issues of custody, access and maintenance were not an issue in these proceedings I will make an order as prayed by the plaintiff. There was also no claim for costs by the plaintiff I will thus not make an award of costs.

In the result I make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the minor child Shallom Murisa (born 28 April 2005) is hereby awarded to the defendant.
3. The plaintiff shall have reasonable access to the minor child on alternate weekends and alternate school holidays.
4. The plaintiff shall pay the full school account for the minor child including school fees, uniforms, groceries and pocket money until she attains the age of 18 or become self sufficient whichever occurs sooner.
5. Each party shall bear their own costs.

Masawi & Partners, plaintiff's legal practitioners