

REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No. 10044/09

In the matter between:

N T

Plaintiff

and

P T

Defendant

J U D G M E N T

SEEGOBIN J:

INTRODUCTION

[1] The plaintiff, N T, has instituted an action against the defendant, P T, in which she claims a decree of divorce and certain ancillary relief. The pleadings having closed the matter has been set down for trial commencing on 8 May 2013. In his plea, however, the defendant has raised a special plea contending that the plaintiff has no claim under section 7(1)(a) of the Zimbabwean Matrimonial Causes Act, 1985 [Chapter 5:13] since the marriage was concluded before the inception of the Act on 17 February 1986.

ISSUE FOR DETERMINATION

[2] The only issue for determination at this stage is whether, as a matter of law, a spouse married in Zimbabwe prior to the promulgation of the Matrimonial Causes Act has any claim under section 7(1)(a) of the Act. Put differently, the issue is whether the provisions of section 7(1)(a) of the Act apply retrospectively to marriages concluded in Zimbabwe before 17 February 1986.

COMMON CAUSE FACTS

[3] The following facts are common cause: the parties were married to each other in Zimbabwe (then Rhodesia) on 23 August 1969; such marriage is accordingly out of community of property; the matrimonial regime is governed by the laws of Zimbabwe; in 1985 the Legislature in Zimbabwe enacted the Matrimonial Causes Act, 1985 [Chapter 5:13] which came into operation in 1986; the Matrimonial Causes Act repealed and replaced the Matrimonial Causes Act [Chapter 39].

DEFENDANT'S CASE

[4] The defendant contends that upon a proper interpretation of the provisions of section 7(1)(a) of the Matrimonial Causes Act, such provisions are not retrospective in effect and accordingly do not apply to marriages concluded before the promulgation thereof, namely on 17 February 1986. By virtue of the fact that the plaintiff and the defendant were married on 23 August 1969, the defendant contends that the aforesaid provisions of the Act do not apply to their marriage.

PLAINTIFF'S CASE

[5] The plaintiff's case on the other hand is that the Act applies only to divorces granted after its inception and there is therefore no question of it being retrospective. It is the only Act in Zimbabwe regulating a divorce and *a fortiori* applies to all marriages irrespective of when they were concluded. Once it is accepted that the Act regulates all such divorces, it follows that relief consequential upon the divorce, such as redistribution orders and maintenance, would likewise apply to all such marriages.

RELEVANT PROVISIONS

[6] The stated aim of the Matrimonial Causes Act 33 of 1985 [Chapter 5:13] is:

'... to amend the law relating to marriage, judicial separation and nullity of marriages; and to provide for matters incidental thereto or connected therewith.'

[7] In terms of section 2(1) of the Act an 'action for divorce, judicial separation or nullity of marriage means an action by which a decree of divorce, judicial separation or nullity of marriage or other relief in connection therewith is applied for, and includes -

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a child of the marriage or for payment of maintenance; or
 - (b) an application for a contribution towards the costs of such action, or to institute such action, or make such action or such application;
- ...'

[8] The division of assets and maintenance orders is dealt with in terms of section 7 of the Act, section 7(1) which reads as follows:

'(1) 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) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.

...'

ZIMBABWEAN DECISIONS

[9] The meaning of the words 'at any time thereafter' as they appear in the provisions of section 7(1), and the issue of retrospectivity, was first dealt with in the matter of *Faria v Claridge*¹, a **decision of the High Court, Bulawayo**. **In that case the plaintiff was formerly married to the defendant but they were divorced in terms of the old Act, namely the Matrimonial Causes Act [Chapter 39] in October 1985. That Act was of course repealed by the Matrimonial Causes Act No. 33 of 1985 which came into effect in February 1986. The plaintiff, relying on the provisions of section 7(1) of the new Act, sought a division of the assets of her former marriage, and in particular sought to have the former matrimonial home transferred into her name. The court (per Blackie J) held that such a claim was excipiable on the basis that there is a presumption against retrospectivity of legislation. At pages 204 – 207 of the judgment, the learned Judge reasoned as follows:**

'There is a presumption in our law against retroactivity:

"It is a rule of both English and Roman-Dutch Law that a law is presumed not to be retrospective unless such is clearly the intention of the legislature".

¹ *Faria v Claridge* 1988(2) ZLR 202 (HC)

See von Weiligh v Land and Agricultural Bank of SA 1924 TDP 62 at 66 per Morice AJ.

See also Mohamed v Union Government 1911 AD 1 at 8 per Innes J:

“...The principle that (in the absence of express provision to the contrary) no statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The law-giver is presumed to legislate only for the future; and therefore a statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms. Very frequently, however, the legislature when it repeals one statute and enacts another in its place, inserts a clause in the repealing enactment defining with greater or less elaboration the extent, if any, to which the repeal is to operate retrospectively.”

There is a vast difference between the old and new Acts in respect of the grounds of divorce and courts' powers in relation to the proprietary rights of the parties and maintenance for either of them on divorce.

Under the old Act divorce was granted on the guilt principle. It could be granted on any one of a number of grounds (adultery, cruelty, desertion, incurable insanity and long imprisonment), but there had to be an innocent party and a guilty party. Maintenance could only be claimed by the innocent party. The claim for maintenance had to be made at the time of the divorce. The proprietary rights of the parties were dealt with in terms of the common law or any agreement between the parties.

The new Act has changed all this. There are only two grounds for divorce – irreconcilable breakdown and incurable mental illness or continuous unconsciousness. Fault has been replaced by failure. There is no innocent and no guilty spouse. The court is given wide powers (taking into account the factors mentioned in the Act), to deal with the assets of the parties and maintenance for either of them on a broad basis of equity and justice. It may act

in this respect either at the time of the granting of the divorce or at any time thereafter.

Compare Hahlo *The South African Law of Husband and Wife* 5 ed p 330.

If s 7 of the new Act were to apply generally to a divorce granted in terms of the old Act, the new Act would have created a whole series of new rights to the persons involved in those divorces. For example, an innocent party, who did not claim maintenance at the time of divorce, would now be able to claim it. A “guilty” spouse could claim maintenance from an “innocent” one. Property claims between former spouses which had otherwise become prescribed could be revived.

If the legislature had intended persons divorced under the old Act to acquire such rights I would have expected the new Act to have said so expressly and clearly. There is not such clear statement in the Act. Sections 7 and 17 say the opposite.

The grammatical construction and plain meaning of s7(1) shows that it can only apply to a decree of divorce granted under the new Act. The draftsman has used the present participle in the words “in granting a decree of divorce”. That can only mean a divorce granted in terms of a new Act. The words which follow, “or at any time thereafter”, are linked grammatically and in meaning with the decree of divorce in the previous phrase. They cannot be stretched to refer to a divorce granted under the old Act without doing violence to their obvious meaning.

Section 17² **deals with the repeal of the old Act and the savings in respect of existing rights. That section says this:**

“17. (1) The Matrimonial Causes Act [chapter 39] hereinafter called the repealed Act, is repealed.

(2) Notwithstanding the provisions of sub (1) –

² Section 17 was initially contained in the Act presumably to facilitate the transition between the old Act and the new Act.

(a) ...

(b) Any order for the division of assets or maintenance which was made in terms of the repealed Act shall be deemed to have been made under the relevant provision of this Act.”

The significance of that section is that in dealing with the position of spouses divorced under the old Act, the legislature has made provision only for those cases where there is an existing order of Court. Where there is such an order of court, it must relate to maintenance or a division of assets.’

[10] In my view, in upholding the exception as the court did in *Faria*, the court was in effect finding that section 7 (1)(b) does apply to *all* proceedings instituted in terms of the Matrimonial Causes Act of 1985 and not only to those proceedings instituted under that Act by spouses married after its inception (my emphasis).

[11] The finding in *Faria* which held that section 7 (1)(b) of the Act was not retrospective in effect stood unchallenged for almost a decade until the issue reared its head once more in the matter of *Walls v Walls*³. **In that case the parties had been divorced under the old Act in 1977. The plaintiff now sought to rely on the aforesaid provisions (section 7 (1)(b)) to seek an increase in her maintenance without the consent of her former spouse. With reference to several English⁴ cases which concerned the interpretation of Matrimonial Acts in England that contained wording very similar to that of s 7 (1) of the Matrimonial Causes Act 33 of 1985, Bartlet J**

³ *Walls v Walls* 1996 (2) ZLR 117 (HC)

⁴ *Williams v Williams* [1971] 2 All ER 764 at 771; *Powys v Powys* [1971] 3 All ER 116 at 124; *Chaterjee v Chaterjee* [1976] 1 All ER 719 at 722-723.

concluded that the provisions of section 7 (1)(b) were not retrospective. At page 143 of the judgment he held as follows:

'In the final analysis, I consider that the decision of Blackie J in Farai's case *supra* is correct. It is my finding that s 7 (1)(b) of Act 33 of 1985 is not retrospective in operation. I do not read the language of s 7 (1)(b) of Act 33 of 1985 as plainly retrospective or indicating a retrospective effect by necessary implication. At best I see the language as neutral as described by Lord Simon in Williams *supra*.

As the learned judge stated in *Faria's* case *supra* at 206B-C, Act 33 of 1985 made very substantial changes in respect of the grounds of divorce and the right to claim maintenance and "if the Legislature had intended persons divorced under the old Act to acquire such rights I would have expected the new Act to have said so expressly and clearly. There is no such clear statement in the Act".

[12] In the same case Gillespie J, in a judgment supporting Bartlett J, found that there was nothing in section 7 of the Matrimonial Causes Act that persuaded him that the intention of the legislature was to legislate with retroactive effect or to interfere with existing rights at the time of its promulgation. At page 160 of the Judgment the learned Judge reasoned as follows:

"I turn first to an examination of s 7, upon which Mr Dyke attempted to refine considerably. The words "in granting a decree of divorce ... or at any time thereafter" do not in my opinion address any issue of retrospectivity or interference with existing rights. Their literal sense is entirely neutral as to any issue of retrospective operation. The words are possessed of ample and complete meaning and effect if they are understood as referring only to a decree issuing after the date of promulgation of Act 33 of 1985. In my judgment, the phrase "or at any time thereafter" is included in order to alter the previous law, which, as I have shown, was to the effect that the giving of an order of proprietary

relief was the function of the court granting the divorce and to be exercised at the time the decree issued. In consequence of the inclusion of these new words, the court may grant proprietary relief on a separate cause independent of the cause for divorce after the marriage has already been dissolved.

I refer with respect to the treatment of these words by Blackie J in *Faria*:

“The grammatical construction and plain meaning of s 7 (1) shows that it can only apply to a decree of divorce granted under the new Act. The draftsman has used the present participle in the words ‘in granting a decree of divorce’. That can only mean a divorce granted in terms of a new Act. The words which follows, ‘or at any time thereafter’, are linked grammatically and in meaning with the decree of divorce in the previous phrase. They cannot be stretched to refer to a divorce granted under the old Act without doing violence to their obvious meaning.”

[13] I find myself in respectful agreement with reasoning contained in both the *Faria* and *Walls* cases, *supra*. A finding to the contrary would simply mean that parties married to each other in terms of the old Act which is now repealed, would be unable to determine the proprietary consequences of such a marriage in terms of the new Act. This could never have been the intention of the legislature.

[14] In my view, the only court granting a divorce, as envisaged in section 7, is the court acting in terms of section 4⁵ **of the Matrimonial Causes Act, 1985.**

⁵ Section 4 provides:

‘A marriage may be dissolved by a decree of divorce by an appropriate court only on the ground of-

- (a) irretrievable break-down of the marriage as contemplated by section *five*; or
- (b) incurable mental illness or continuous unconsciousness of one of the parties to the marriage as

Section 7 is ancillary to a divorce order (which applied to all marriages) granted under that Act. It follows therefore that on a plain reading of the Act it empowers an appropriate court to grant a decree of divorce and for the same court to make a redistribution order envisaged in section 7. Once it is accepted that the court's power to grant a decree of divorce extends to *all* marriages, irrespective of when they were concluded, it must as a matter of logic follow that the legislature in section 7 empowered the same court to make an ancillary redistribution order
(my emphasis).

[15] The defendant's argument that to apply section 7 to marriages concluded before the Act came into effect, would mean that pre-existing rights would be affected is for the reasons that follow, untenable: first, when parties get married they acquire rights in their capacities as married persons; as long as they remain married, the rights acquired by such persons are not altered by the Act; however, it is only on divorce that they acquire rights under the Act; these are rights relating to claims for maintenance, redistribution orders and the like; second, the defendant's argument would have some force if for instance the new Act declared all marriages to be in community of property which until then were out of community of property. In these circumstances pre-existing rights would be altered, however neither party had any pre-existing divorce rights until they actually became divorced. I accordingly conclude that the special plea raised by the defendant is misconceived.

ORDER

[16] For the reasons set out above, I make the following order:

The legal issue raised by the defendant is dismissed with costs.

Date of Hearing	:	13 December 2012
Date of Judgment	:	11 February 2013
Counsel for Plaintiff	:	Adv. A Stokes SC
Instructed by	:	Shepstone & Wylie
Counsel for Defendant	:	Adv. I Topping
Instructed by	:	Lister & Co.