

PATRICIA NCUBE

Versus

MANDELA NCUBE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 12 JULY & 9 DECEMBER 2004

G Nyathi for applicant
E Marondedze for respondent

Civil Appeal

CHEDA J: Appellant noted an appeal against the decision of the Magistrates' Court sitting in Bulawayo on 7 February 2001. The 2 grounds of appeal were couched as follows:

“Grounds of Appeal

- 2.1 It is contended that the learned magistrate did not make specific findings of fact as to the existence or otherwise of the movable property awarded to appellant. The judgment is vague in that it merely refers to “all movable property” without specifying which movable property was awarded to appellant. As a result of this fundamental error from the court, respondent disposed of all or most of the movable property.
- 2.2 The learned magistrate erred in disregarding the actual market value of the immovable matrimonial property being house number 40 Pelham Road, West Sommerton, Bulawayo when she only awarded appellant half of what respondent had contributed towards the purchase of house number 40 Pelham Road, West Sommerton, Bulawayo. Appellant avers that the just and equitable option is for the two parties to be awarded equal shares of the net market value of house number 40 Pelham Road, West Sommerton, Bulawayo.”

The parties were married to each other under the African Marriages Act the then [Chapter 238] in 1983 and four children were born out of this union. The union experienced problems which resulted in respondent instituting divorce proceedings which were contested. The court *a quo* ordered as follows:-

- “(1) Divorce by consent
- (2) Custody of all the minor children to defendant (now appellant) together with adequate maintenance for the said minor children and herself.
- (3) Defendant (now appellant) be awarded all the movable property
- (4) Plaintiff (now respondent) to pay (the now appellant) half of what he had contributed towards the purchase of house number 40 Pelham Road, West Sommerton, Bulawayo by 28 February 2001 and appellant was to remain in occupation until she receives her share.”

The appeal is against the award of both the movable and immovable properties.

Movable property

Appellant has argued that the learned trial magistrate did not specify what property he was referring to. It is her contention that this decision has resulted in respondent disposing of the motor vehicle, a Mazda B 1600 which was bought during the subsistence of the marriage. The said motor vehicle was purchased in 1997.

Respondent through his legal practitioner contends that the parties understood the judgment to mean that appellant was awarded all the movable property in the rural home inclusive of the Mazda motor vehicle. He however, blames appellant for her failure and/or delay in executing the judgment in question.

The question is whether the judgment of the trial court couched as follows:

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) The defendant to get all the movable property,
refers to all the property in the rural home or town or both.

Judicial officers must always bear in mind that whenever disputes are brought before them, they must be resolved to finality. Finality of a dispute can only occur when the judgment is decisive and free from any ambiguities. It is this decisiveness that its validity is derived from. It is therefore necessary that its validity must either contain some certainty or by reference to something else which on its own can be ascertained with easy.

This court is being asked to set aside the order of the trial court and substitute it with its own. Respondent, if my understanding is correct, does not quarrel with the order with regards to the movable property as he says that the appellant should have executed the order timeously and therefore she can not blame him for her tardiness in the execution of the said judgment. My understanding of this submission is that it is a partial admission of liability. This argument, with respect, is, in my opinion, not valid because, as long as the judgment is ambiguous the end result would have been the same.

However, there is the other side of the problem, being that respondent allowed the seller of the motor vehicle to re-possess it. This was after respondent had been in possession of the motor vehicle for 4 years. His reason for this, is that the agreement of sale between respondent and Mr Siziba (seller) was cancelled in December 2000. The reason for the cancellation, in my view, lacks genuineness in every material respect. It does not make economic sense to possess a car for 4 years and thereafter return it to the owner without any financial adjustments to the purchaser's benefit. The only irresistible conclusion which can be drawn from such a transaction is that the transaction was designed to prevent appellant from successfully laying

claim on the said motor vehicle since the parties were now divorcing and the said motor vehicle was subject to distribution as required by law.

While the trial court's order lacks clarity to a certain extent, it is my opinion that the movable property referred to, can easily be ascertained in that the parties themselves knew of the existence of the movable property in general and the motor vehicle in particular. Therefore the property was ascertainable. There is therefore certainty in the judgment for the purposes of establishing the property the parties had in mind.

Immovable property

Appellant's position is that the trial court erred in awarding her half of what respondent had contributed towards the purchase of the house. She has also argued that in as much as she was not formally employed, it is essential that her indirect contributions should be taken into account. Respondent on the other hand firmly holds the view that she should be awarded in accordance with the judgment of the trial *a quo*.

I fail to understand the logic of awarding appellant a share of what she did not contribute. However, the fact that the trial court saw a need for her to be awarded a certain share is an indication that the trial court acknowledged the fact that she is entitled to a share in this property. It is, therefore, incompetent for the trial court to have ordered a non specific share. It is here that the ambiguity lies. In light of this, there is reason enough for this court to interfere, thus coming up with a just and equitable distribution of the matrimonial property.

In *Ntini v Masuku* HB-69-03 I stated that not only should tangible contributions be taken into account but that the courts should now recognise the existence of intangible contributions as well, namely the fact that a man derives dignity from being referred to “as a married man”. This indeed gives him dignity which enhances his social status and this should not be ignored.

The immovable property in question belongs to the National Railways of Zimbabwe, who are respondent’s employers. He had paid a substantial amount of money and the outstanding balance was \$135 800,29. Respondent contended that the said house does not form part of the matrimonial property because when the loan repayments were being made the parties were already divorcing. This, may well be so, but the parties were still legally married. The trial court, did not specifically declare this property as matrimonial property but the fact that it ordered respondent to pay appellant half of his contribution towards the said immovable property, surely indicates that it was an implied acceptance by the court that the immovable property indeed formed part of the matrimonial property. I fail to see why it was made subject of distribution, if it was not so recognised by the trial court. Again it is for this reason that the appeal court should recognise it as matrimonial property. On the basis of *Ntini’s* case *supra*, it is only just and equitable that appellant be awarded a meaningful share in accordance with her contributions having regard to section 7 (a) of the Matrimonial Causes Act [Chapter 5:13]. The appeal therefore succeeds and the following order is made:

HB 128/04

1. Appellant is to get the movable property listed in the summons including a Mazda B1600 or the equivalent value thereof.
2. Respondent to pay appellant 35% of the net proceeds of house number 40 Pelham Road, West Sommerton, Bulawayo.
3. Each party to pay its costs.

Ndou J I agree

Messrs Sansole & Senda appellant's legal practitioners

Maronedze, Nyathi, Majome & Partners respondent's legal practitioners