

NETSAYI MASVETO

Versus

LAMECK MASVETO

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE AND NDOU JJ
BULAWAYO 24 FEBRUARY 2003 & 8 APRIL 2004

Civil Appeal

NDOU J: The appellant instituted proceedings in Bulawayo Magistrates' Court seeking a decree of divorce and ancillary relief. The court *a quo* granted her an order in the following terms:

- “1. A decree of divorce is hereby granted.
2. Custody of the 3 minor children, Tongowona Masveto born 17 July 1989; Tsitsi Masveto born 21 January 1992 and Tendai Masveto born 12 July 1996 is hereby awarded to plaintiff.
3. Defendant is to have access to the children and enjoy rights of custodianship (*sic*) every alternative school holidays and alternative weekends.
4. Each party is declared the sole and absolute owner of the movable property in their possession.
5. Defendant is declared sole and absolute owner of house number 5688 Nketa 9 Bulawayo provided he pays off \$30 000 to the plaintiff by 30 January 2001, failing which, the house should be sold to advantage and proceeds apportioned (*sic*) on a ratio 3:17 in favour of the defendant.
6. Each party will bear its own costs.”

The appeal is mainly against the ratio according to which the matrimonial house number 5688 Nketa 9, Bulawayo was distributed in paragraph 5, *supra*. She also appeals against the award of satellite dish Sony radio, Multisystem video machine, room divider, red carpet, 2 door Imperial fridge, 2 plate stove (with oven); double bed, wardrobe, wheelbarrow, sewing machine, curtains, 4 piece lounge suite, dustbin, ZEC radio, Giant (black & white) television set, RECO colour television set

and a cellular phone. She challenged the distribution of the said assets for lack of equity and fairness.

The facts are that the parties contracted their marriage pursuant to African Marriages Act [Chapter 238] on 11 February 1988 at Bulawayo Community Court. The marriage is blessed with three minor children. Both parties were in agreement that the marriage had broken down irretrievably and that there were no prospects of reconciliation and normal marital relationship.

The only issue on appeal is the distribution of the matrimonial home and other movables alluded to above.

We are dealing here with appeals on matters of discretion. The court *a quo* has given a decision on a matter within its discretion, and this court of appeal will interfere only if it comes to the conclusion the trial court has not exercised a judicial discretion SC it has exercised its discretion capriciously or upon a wrong principle, has not brought its unbiased judgement to bear on the question, and has not acted for substantial reasons – *The Civil Practice of the Supreme Court of South Africa* (Herbstein and Van Winsen) (4th Ed) by L Van Winsen AC Cilliers and C Loots at pages 918-9; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & Anor* 1989 (4) SA 31 T at 40A-J and *Exparte Neethling & Anor* 1951 (4) SA 331 A.

In matters of the type subject matter of the appeal, it is seldom possible for the court to ascertain with total accuracy the incomes and contributions of the parties to the joint estate. Section 7(1) (a) of the Matrimonial Causes Act [Chapter 5:13] applies here as the parties were in a registered African marriage. The definition of marriage in the Matrimonial Causes Act “includes a marriage solemnised in terms of the Customary Marriages Act [Chapter 5:07] (i.e. the successor to the African

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Marriages Act supra). Section 7 (1) (a) *supra*, gives the court power to order that any asset be transferred from one spouse to the other if in all the circumstances of the case, it is just to do so and is reasonable and practicable way by which to place the spouses in the position they would have been in had a normal marriage relationship continued between them – *Dlamini v Dlamini* HB-27-00; *Takafuma v Takafuma* 1994 (2) ZLR 103 (S); *Ncube v Ncube* 1993 (1) ZLR 39 (S); *Chikomba v Nkomo* SC-62-91 and *Zuze v Zuze* HH-66-02.

In *casu*, the court *a quo* had a wide discretion in that any asset could be transferred to achieve the statutory objective of placing the parties in the position they would have been in had a normal marriage relationship continued between them. In this regard, in the *Takafuma* case, *supra*, McNALLY JA at p ... said-

“The duty of a court in terms of section 7 of the Matrimonial Causes Act involves the exercise of considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in a fair way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers” and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in section 7(3) of the Act. Then it will allocate to the husband the items marked “his” plus the appropriate share of the items marked “theirs”. And the same to the wife. That is the first stage. Next it will look at the overall result, again applying the criteria set out in section 7(3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and having regard to their conduct, it just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued’. Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually “his” or “hers”. “ *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H)

In the court *a quo* the appellant claimed half share of the matrimonial house.

In his judgment on this issue the learned trial magistrate in the court *a quo* said –

“In relation to the matrimonial home evidence was at variance as to how the property was acquired. But whatever the case, it seems to me that the greater contribution came from the defendant. In my view it would not be fair to have

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the house sold. In my view, what is best is for the defendant to buy off the plaintiff. It must be remembered that mortgage payments have to continue on this house. In my view a ratio of 3:17 in favour of the defendant would seem to be fair.”

The learned trial magistrate in his judgment, unfortunately did not directly make findings on the credibility of the testimony of the parties on this issue. This is a misdirection that makes the resolution of this issue (on appeal) problematic. In light of the evidence led, it however, still possible to determine this issue even in the absence of such a finding of fact by the court *a quo*. The court *a quo* proceeded to distribute the property on the basis that the appellant’s contribution to the acquisition hereof was lesser than that of the respondent, and not that she did not contribute at all. The assessment of the contributions made by the appellant involves the making of a value judgment. From the evidence the trial magistrate rightly found that the respondent contributed more on the house than the appellant did. This finding cannot be faulted. It is the assessment of the percentage due to each party that is really, in issue. The appellant’s case was that she came up with the idea of acquiring the property in question. The respondent was not for the idea of having a house in town, She took the respondent’s (national) identity particulars to the Khami Housing Office and registered the respondent’s name in the housing waiting list. After three (3) months the application was successful and she requested the respondent to go and apply for a loan from CABS for the purpose of erecting a house on this property. The property was a stand (developed). She personally paid \$1 500 for the stand. At all the relevant times she raised income from her vending business. It is common cause that the respondent obtained a loan of \$22 500,00 from CABS. The deductions were made from the respondent’s income to service the loan. At the time of the trial

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\$8 000,00 was still owing. She played a pivotal role in overseeing the construction of and improvements on the property. The respondent spent around a year on national duties in Angola. During this period she was responsible for the oversight of work carried on the property. The parties have three children of their own. She also looked after respondent's two children from a previous relationship. The documents for such improvements and maintenance work carried out were naturally in her name as the respondent was out of the country. In the absence of the respondent she fitted the gates and plastered the house. During his absence, the respondent also sent US\$40 in addition to the deductions from his salary. The respondent offered her \$20 000 in full and final settlement of her claim to the house. The property was valued at approximately \$300 000,00 at the time of trial. It is not clear on what basis the trial magistrate arrived at the ration of 3:17. Certainly the trial magistrate did not use the criteria set out in section 7 of the Matrimonial Causes Act, *supra*. There was, therefore a misdirection. This court is therefore, at large, as far as the distributing of the disputed property. This court must have regard to all circumstances of the case including the factors set out in paragraphs (a) and (g) of section 7(3) which involve purely factual findings. The court shall have regard to the following-

- (a) income earning capacity, assets and other financial resources which each spouse has to is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future;
- (c) the standard of living of the family including the manner in which any child was being educated or trained;
- (d) the age and physical and mental conduct of each spouse and child;

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- (e) the direct or indirect contribution made by each spouse to the family, including contribution made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses of any benefit, including a pension or gratuity, which such spouse will lose as a result of the dissolution of the marriage; and
- (g) the duration of the marriage.

In *casu*, the parties were married in February 1988 and the marriage lasted until around 2000. It produced three children. The appellant has been mainly involved in looking after these children and the home. She also looked after two step children by the respondent. She earned her income from vending. She contributed directly and indirectly towards looking after the home and other domestic duties. As a result of the divorce, she lost financial benefit from the respondent's salary. The loss of the matrimonial house has obviously affected her negatively, the standard of living of the children and the family. Her indirect contribution seems more than that of the respondent. The respondent, however, contributed far more than her directly. His salary is the main source of servicing the mortgage loan. The property is in his name. He continued to service the bond even after the commencement of the proceedings in the court *a quo*. When he was on year long tour of duty in Angola he sent some US dollars to the appellant. In the circumstances, it is just reasonable and practicable to award the appellant 30% of the value of the house.

As far as the other movable assets are concerned I do not see misdirection on the part of the court *a quo*.

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Accordingly, the appeal succeeds with costs in respect of the question of the distribution of the house. Paragraph 5 of the court *a quo*'s order is set aside and its place is substituted the following:

- “5.1 The plaintiff is awarded 30% and the defendant 70% of the matrimonial home being immovable property known as house number 5688 Nketa 9 Bulawayo.
- 5.2 The property shall be valued by a reputable estate agent within 30 days of this order with the parties sharing the costs of such evaluation equally.
- 5.3 The defendant is ordered to pay 30% of the net value of the property to the plaintiff within 2 months of this order failing which the immovable property known as house number 5688 Nketa 9, Bulawayo is to be sold to best advantage and the net proceeds are to be divided between the parties with 30% awarded to the plaintiff and 70% to the defendant.”

Chiweshe J I agree