

SMART MALABA

Versus

NOMATHEMBA FENNY MALABA

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 8 AND 16 MARCH 2004 AND 3 MARCH 2005

A J Sibanda for the plaintiff

R Moyo-Majwabu for the defendant

Trial Cause

NDOU J: This matter has a chequered background. I propose to give a summary of the material facts and events for the purposes of determining the issues before me. The parties became married to each other in terms of the Marriages Act of 1964 (as it was then) on 9 June 1978. There were two children of the marriage who have since attained the legal age of majority as at the date of issue of summons. Prior to solemnising the said marriage in 1978, the plaintiff had in 1964 purchased in his own name and right, immovable property known as stand number 49753, Bulawayo Township.

In 1997, when he was critically ill, the plaintiff registered this property in the name of defendant. On 17 May 2001 the plaintiff issued summons with this court claiming for a decree of divorce with ancillary relief. After the pre-trial conference the matter was referred for trial. For one reason or the other the matter could not take off on the original trial date. The matter was eventually allocated 23 October 2003 as date of trial. On that date the plaintiff and his legal practitioner did not turn up. The defendant turned up with her legal practitioner. The defendant successfully applied for the dismissal of the

plaintiff's claim and the granting of her counter claim. The defendant testified in this regard. On 4 November 2003, the plaintiff became aware of the judgment granted in his absence. He launched an application for rescission of the judgment in HC 2581/03. He, however, did not challenge the dissolution of the marriage but focussed his application for rescission on the ancillary relief. The defendant consented to the granting of the rescission. In other words the decree of divorce stands and this application is only in respect of the distribution of the matrimonial assets and the question of costs. The parties adduced evidence on the acquisition and division of the assets. They led evidence on the circumstances surrounding the registration of the matrimonial home in the sole name of the defendant in 1997.

I will assess the testimony of each witness in turn.

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He claims the following items for himself:

- a) the matrimonial home
- b) 1 x 4 plate stove
- c) GEC double door fridge
- d) 1 x double bed and mattress
- e) 1 x chest of drawers
- f) 1 x double door wardrobe
- g) 6 pots
- h) 1 teapot
- i) 12 plates
- j) 4 knives
- k) 12 teaspoons
- l) all bed linen that he is currently using.

He then offered the following to the defendant:-

- a) 1 x video cassette recorder
- b) 1 x National colour television set
- c) Table with six chairs
- d) Dinning room side cupboard
- e) Room divider
- f) 4 piece brown lounge suite
- g) Aiwa radio

- h) Television stand
- i) 1 x lounge suite fitted carpet (green)

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- j) 1 x bedroom carpet (beige) (loose)
- k) 1 x spare bedroom carpet (green) loose
- l) 1 x children's bedroom (carpet) (loose)
- m) Four picture frames
- n) Wall watch
- o) Fan
- p) Lamp stand
- q) 2 flower stands
- r) 1 x iron
- s) 3 x floor vases
- t) 2 kitchen tables
- u) 4 kitchen chairs
- v) the rest of the cutlery
- w) Garden tools
- x) Bookshelf
- y) Shoe stand
- z) 2 x $\frac{3}{4}$ beds with mattresses
- aa) 1 x double door wardrobe
- bb) Dressing table
- cc) Bed linen
- dd) Six suitcases
- ee) Satellite receiver
- ff) Uno motor vehicle registration number 613-368D
- gg) 3 sewing machines
- hh) 4 desks
- ii) 1 x overlocking machine
- jj) 1 x iron and stand

He testified that the above division reflects generosity on his part. He gave details of the improvements he carried out on the matrimonial house. From his testimony the greater of such improvements were carried out prior his marriage to the defendant. He also gave evidence of the improvements by the defendant. Suffice to say that these were said to be negligible compared to his own. He also gave details on the acquisition of the other assets. He then justified the above distribution of the assets. He said a lot. He is generally a man of many words. He also testified that the parties jointly owned the dressmaking business. He outlined his contribution towards the setting up and subsequent life of the business. On his illness he said that he

started having health problems in 1988. He suffered from osteomyelitis for the right tibia in 1991. He had high blood pressure and was diabetic. According to medical evidence of the orthopaedic surgeon Mr B A V Ncube, in 1991 the plaintiff developed osteomyelitis of the right tibia which could not be controlled because of his diabetes. He had multiple operations culminating in a more extensive operation in 1995 in which a lot of necrotic bone was removed. At the time of the treatment in 1995, the plaintiff's leg was so bad that his decision was initially to amputate the leg. However, after a last attempt extensive operation his leg was salvaged. At this time his blood sugar was uncontrollable. He was grossly affected mentally and he kept lapsing into a confusion state and a semi-comatose state. His whole life was actually in danger. After the 1995 operation he then started recovering slowly and he has not had problems with his leg since then. His sugar has also remained relatively well controlled and so has been his blood pressure. He is now very stable and mentally strong. This was opined by Mr Ncube in March 2000.

He testified that it was on account of the above illness that he registered the immovable property in the name of the defendant solely out of reasonable apprehension of impending death, and in order to secure her future in the event of his death. At the time he loved and trusted her. He said he did so because he feared that in the event of his death his relatives may give the defendant problems. He testified that at the time of the donation their marriage was estranged. She, the defendant had through her erstwhile legal practitioners managed to stop the parties from sharing bedroom around April 1997 i.e. a few months prior to donation. At the time of the donation their relationship had not normalised in fact it never did again. He said he made the donation for the sake of the children of the marriage and not as a token of love to the defendant. He said this was a way of securing the future of his children

with the defendant. In June 2001 the defendant moved out of the matrimonial house. By arrangement of the parties she went back in the company of the Police Officers and removed some movable assets. He stated that he wished the donation of the matrimonial so that he could use it himself as he is no longer in a position to acquire a house on account of his state of health and age i.e. 63 years. He has no other house in his name. He is surviving on medication. The witness was subjected to some detailed and tactful cross-examination. I find his testimony satisfactory in material respects.

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She says the plaintiff got sick in 1995. He was hospitalised and when he was discharged their problems started. The plaintiff started accusing her of infidelity. She says out of love she spent sleepless nights attending to him. She said that the plaintiff was fine health wise when he donated the matrimonial home to her. She said that he is now trying to revoke the donation for selfish reasons. Under cross-examination she stated that the cause of divorce was that the plaintiff was using African herbs (commonly known as “muti”) and he was also impotent and accused her of infidelity. She conceded that she is the one who took initial steps to bring the parties to a separation after approaching her erstwhile legal practitioners. She also gave a detailed account of the acquisition of the matrimonial assets. She also conceded that the matrimonial home was acquired by the plaintiff many years prior to the parties’ marriage (... I was a baby then” to use her statement). She agreed with the findings of Dr B A V Ncube on the state of the plaintiff as a result of his illness. She agreed that the plaintiff was grossly affected mentally and kept lapsing into coma and his life was in danger prior to the surgery. She agreed that during his illness the plaintiff totally depended upon her and she wielded a lot of influence on him. At that stage the plaintiff had virtually no source of income. She conceded that it came as a surprise

when he decided to donate the matrimonial home to her. She said she found it strange that he was making such a donation out of nowhere. The plaintiff had no other house at the time. She however, disputed that the plaintiff was in “fragile” state and had just survived death. She opined that he had recovered from his illness. She states that she wants to keep the donation house for sentimental reasons. She denied that she took advantage of the plaintiff’s illness and dependence on her to undue influence him to make the donation. She opposes any attempts by the plaintiff to revoke the donation. She, however, could not explain the plaintiff’s apparent strange and irrational behaviour of donating the house at the time when they were fighting and involving legal practitioners in their fight as evinced by the letter from the erstwhile legal practitioners. More or less the same time that he had health problems and matrimonial problems with the defendant is the same that he makes this unusual but extremely generous donation. I hold the view that the defendant has not given a credible explanation on the circumstances surrounding the donation. She took advantage of an ailing and wholly dependant partner. It is trite that the common rule relating to the prohibition of donations between the spouses *stante matrimonio* has been repealed by section 11 of General Law Amendment Act [Chapter 8:07]. Section 11 provides:

“The rule of the common law relating to the prohibition of contracts of donation between spouses is declared to be no longer of any force.”

I have cited the current statutory provisions because Mr Sibanda, for the plaintiff relied heavily on The South African Law of Property, Family Relations and Succession by R W Lee, A M Honore and T W Price (1954) and cases cited therein. One has to bear in mind that the law on this issue has undergone tremendous transformation since 1954.

From the facts of this matter, the plaintiff made a donation *inter vivos* to the defendant. In law there is nothing wrong with such a donation per se. Such a donation *inter vivos* may be made by a simple document signed by the donor – section 10 of the General Law Amendment Act (supra) – and Wille's Principles of South African Law (8th Ed) by D Hitchison, B Van Heerden, D P Visser and C G Van Der Merwe at page 626. Such a donation *inter vivos* is not revocable by the donor save in exceptional circumstances. The donation, therefore, can be revoked for reasons justifiable in the circumstances – Ahrend v Winter 1950(2) SA 682 (T). A glance at the common and case law show that the following have been held to be exceptional circumstances justifiable reasons-

- a) gross ingratitude on the part of the donee or ill-treatment by him/her of the donor – Grotius 3.2.17 and Voet 39.5.22
- b) malicious desertion of her husband by a woman – Mulligan v Mulligan (11) 1925 WLD 178
- c) on account of a breach of a condition (modus) attached to it, but not on the ground that the donor has subsequently been reduced to dire financial straits – Mathews v Mathews 1936 TPD 124; Benoni Town Council v Minister of Agricultural Credit and Land Tenure 1978(1) SA 978 (T) and Ex parte Boyd et Uxor 1938 CPD 197. (See also Principles of South African Law supra). Only (a) and (b) are relevant to the facts of this case.

It seems to me that the first determination that I have to make is whether there was lawful contract of donation in light of the dubious circumstances at the time of the donation as alluded to above. It is trite that a donation, *schenking*, is a contract whereby one person, who is not under obligation to do so, but out

of sheer liberality, promises to give another person something without receiving anything in return – *Avis v Verseput* 1943 AD; *Estate Jager v Whittake* 1944 AD 246 at 250; *The Master v Thompson's Estate* 1961 (2) SA 20 (FC) and *Dube NO v Mtambu and Ors* HH-117-02. The motive should be a disinterested benevolence and for moral purposes. This motive of liberality, the *animus donandi* is the distinguishing feature of a donation. Is the donation by the plaintiff to the defendant a genuine one in the strict sense? I.e. a *donatio propria* or *mera*. From the evidence alluded to above, this donation lacked the *animus donandi*. The donation took place against the background of serious illness of the donor who was wholly dependent on the donee. The parties were in the middle of gross matrimonial discord. This is not a *donatio propria* – *Kay v Kay* 1961 (4) SA 257 and *Mvududu v Mvududu* 1981 ZLR 397.

If I erred in this finding, there is the issue of revocation. I have already highlighted the legal principles applicable to revocation in such matter. It is apparent from the evidence that there was gross ingratitude on the part of the donee. She ill-treated the donor after the donation. She sought to remove him from the house on question when he was ailing and to some extent destitute. She herself had another home and the donor was desperate and had no other home. She did not require the house for occupation but for sentimental reasons. The house was purchased by the plaintiff long before their marriage and, as such, would not normally be part of the matrimonial circumstances justifying revocation of the donation. In a nutshell, whichever one looks at the above, the donation cannot stand. Once the donation is revoked the defendant's claim thereto falls away on account of the house having been purchased well before the parties contracted the marriage. It is not in dispute that she

did contribute the improvements effected on the property. These improvements were on the peripheral and not on the main house.

The rest of the matrimonial assets have to be shared in terms of a formula set out in section 7 of the Matrimonial Causes Act [Chapter 5:13]. In matters of this type it is seldom possible for the court to ascertain with total accuracy the incomes and contribution of the parties to the joint estate. Our case law provides guidelines – 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 Masveto v Masveto HB-51-04. The defendant, in her claim in reconviction accepts the division suggested by the plaintiff in his declaration. Notwithstanding the subsequent disputes during the trial on some of these issues, after carefully examining the evidence, I find that such division meets the statutory objective of section 7 (supra).

Accordingly it is ordered as follows:

1. That the donation of stand number 49753 Bulawayo Township by the plaintiff to the defendant be and is hereby set aside.
2. It is ordered that stand number 49753 Bulawayo Township be and is hereby declared to be the sole absolute property of the plaintiff.
3. It is ordered that the following property is awarded to the plaintiff as his sole and absolute:
 - m) 1 x 4 plate stove
 - n) GEC double door fridge
 - o) 1 x double bed and mattress
 - p) a x chest of drawers
 - q) 1 x double door wardrobe
 - r) 6 pots
 - s) 1 teapot
 - t) 12 plates
 - u) 4 knives
 - v) 12 teaspoons
 - w) all bed linen that he is currently using.

4. It is ordered that the following property be awarded to the defendant as her sole and absolute property:-

- kk) 1 x video cassette recorder
- ll) 1 x National colour television set
- mm) Table with six chairs
- nn) Dining room side cupboard
- oo) Room divider
- pp) 4 piece brown lounge suite
- qq) Aiwa radio
- rr) Television stand
- ss) 1 x lounge suite fitted carpet (green)
- tt) 1 x bedroom carpet (beige) (loose)
- uu) 1 x spare bedroom carpet (green) loose
- vv) 1 x children's bedroom (carpet) (loose)
- ww) Four picture frames
- xx) Wall watch
- yy) Fan
- zz) Lamp stand
- aaa) 2 flower stands
- bbb) 1 x iron
- ccc) 3 x floor vases
- ddd) 2 kitchen tables
- eee) 4 kitchen chairs
- fff) the rest of the cutlery
- ggg) Garden tools
- hhh) Bookshelf
- iii) Shoe stand
- jjj) 2 x ¾ beds with mattresses
- kkk) 1 x double door wardrobe
- lll) Dressing table
- mmm) Bed linen
- nnn) Six suitcases
- ooo) Satellite receiver
- ppp) Uno motor vehicle registration number 613-368D
- qqq) 3 sewing machines
- rrr) 4 desks
- sss) 1 x overlocking machine
- ttt) 1 x iron and stand

- 4. The defendant's claim in reconviction be and is hereby dismissed.
- 5. Each party to bear its own costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni defendant's legal practitioners