

PETER PATRICK DUBE

PLAINTIFF

AND

THEMBANI DUBE

DEFENDANT

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 26 OCTOBER 2010, 2-3 NOVEMBER 2010 AND 18 NOVEMBER 2010

Plaintiff in person

Defendant in person

Civil Trial

MATHONSI J: In this action, the Plaintiff seeks a decree of divorce and equitable distribution of the matrimonial assets. The Defendant also seeks an order for personal maintenance.

The parties were married to each other out of community of property at Bulawayo on 3 September 1983. They had been customarily married earlier in 1982. He is now aged 49 and is employed as an executive by the Zimbabwe Independent Newspaper while she is now aged 47 and is employed as a primary school teacher at Saint Patricks School in Bulawayo.

The marriage has not been a happy one as on two other occasions before these proceedings were instituted, he instituted proceedings seeking a decree of divorce and he withdrew them when the parties reconciled and resumed their marriage relationship. The first action was instituted in 1987 and he was accusing her of infidelity. It was withdrawn.

In 1991, he against brought an action for divorce accusing her of impropriety. He later withdrew that action again and the parties continued with their married life until this action

was instituted in 2008. Both parties are now agreed the marriage has irretrievably broken down and he blames her for that alleging that he has, in the 27 years that they have been married, uncovered her extra marital activities which, although he forgave her, eventually ruined the marriage. During the trial he was pressed to submit any evidence of infidelity and admitted he never caught her in any compromising position.

On her part she alludes to numerous extra marital activities he got involved in including the gory details of encounters when he severely beat her up after being found in compromising positions with other women. I make reference to this issue because he wants the sharing of property to be influenced by the conduct of the parties as he takes the view that she should be penalised for her conduct.

I propose to dispose of this issue now before dealing with the rest of the issues and I am unable to penalise either party due to conduct. Firstly, other than the often overblown accusations he makes, it has not been shown that she caused the breakdown alone. He is also accused of similar conduct, if not worse as his conduct includes severe assaults. Secondly, the parties agree the marriage has irretrievably broken down and when that happens conduct is of no relevance. As stated in *Ncube v Ncube* 1993(1) ZLR 39(S) at 41 B-D:

“It is true that the provisions make reference to a division of assets having regard to the conduct of the parties, but as LORD DENNING M. R. explained in *Wachtel v Wachtel* [1973] 1 ALLER 829 (CA), when the parties come to an agreement that their marriage has irretrievably broken down, what place has conduct in it? The proper approach to adopt is to accept that both parties have contributed to the breakdown and then to get on with the distribution of the assets on that basis. To invite a court to take cognisance of who was responsible for the breakdown after such an agreement, as the appellant requested of the trial court, is to resurrect the old spectre of guilt and innocence and drag the judge ‘to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days.’ If that was the intention of Parliament

then the concept of the irretrievable breakdown of the marriage in section 5 of the Act is shorn of almost all meaning.”

The parties are also agreed that the property that they acquired individually during spells of living in separation should be retained by whoever acquired such property and is not subject of the trial. It is that property which the parties acquired jointly which is in dispute.

The Plaintiff gave evidence. He met the Defendant and they commenced living together as husband and wife in 1982. They registered their marriage on 3 September 1983. It was blessed with two children, Kholwani Peter Dube, now 28 and Kuthula Dube, now 21. The marriage has been punctuated by endless problems to the extent that although it has subsisted for 27 years, they have stayed together on three different periods totalling 13 years. There has been three periods of separation totalling fourteen years. He has another child Kwanele, Peter Patrick Dube, born in 1991 outside marriage.

The Plaintiff maintained that it was during one such period of separation in 1988, when he was then employed by National Fencing, that his employer assisted him access a loan facility to purchase stand 2605 Nketa 8, Bulawayo and had it registered in his name. A mortgage bond was registered on the title deed of the house. When he reconciled with the Defendant, she found him already staying at the house. After reconciliation they used their joint earnings to build an estate including paying off the mortgage.

When they separated again in 1991, he was left saddled with debts created by both of them which he could not service forcing him to surrender stand 2605 Nketa 8, Bulawayo for foreclosure by the bond holder. It was these debts which led to him being detained by virtue of

a warrant of civil imprisonment. The Defendant came to his rescue and paid for his release even though they were separated.

According to the Plaintiff the proceeds of the sale of stand 2605 Nketa 8, Bulawayo were used to pay off the balance on the mortgage bond and although he says that balance had “more than trebled” when the house was sold to Anglo American he was left with sufficient money to pay off some of the outstanding bills.

He said that it was during yet another period of separation that he approached his then employers ABF for a loan which he used to purchase from the Bulawayo City Council a vacant stand No. 153 Mahatshula, Bulawayo in 1992. He signed a sale agreement on 23 March 1992 and the purchase price was \$9000-00 (Zimbabwe currency). He started putting up a cottage at that stand and moved into the cottage with his young brothers and first son at a later stage.

He says he started purchasing building material, mainly second hand from the destroyed Grand Hotel which was now paving way for construction of Bulawayo Centre. It is this building material he says he gave to the Defendant for safekeeping in Nkulumane, Bulawayo.

He then joined Zimpapers Group and relocated to Harare in 1994 where he was to remain for a number of years until his return to Bulawayo in 2005. He says he bought the 1970 Toyota Bakkie in Harare. It was registered in the name of the Defendant in 1996 not because he bought it for her but in order that she would find it easy to use it on her cross border trips she was engaged in to supplement the family income. He bought it using proceeds from the sale of another vehicle which he had bought after borrowing money from her mother who had received a war victims compensation for the death of his father during the war of liberation.

During his stay in Harare, he says he used to buy building material as well as irrigation equipment for the rural home from auctions and send it to Bulawayo. The building material was for construction of both the Mahatshula house and the rural homestead in Garanyemba, Gwanda. He later moved the family from their lodgings in Nkulumane to a house in Mahatshula North so that they could work on construction at 153 Mahatshula, from close by.

As he had been promoted to a managerial post he was able to earn commission in foreign currency which he gave to the Defendant to change in the black market. With it they bought roofing timber from PG Timbers and roof tiles from Turnall Fibre Cement. He says bricks for the foundation of the house were bought from the material available after the destruction of Grand Hotel while those for the construction of walls were moulded free of charge by his young brother. He later conceded that the Defendant was hard working and that she is the one who was running around with construction work at both the town house and the rural homestead although he says he was sending the money to her for construction expenses. During that time he also purchased a 1967 Ford Transit truck while the Defendant purchased a dining room suite on her own.

He says that after his return from Harare in 2005 he later moved the family into 153 Mahatshula when it was habitable. Construction work has not been completed but the parties are residing at that house. In year 2000 while he was still in Harare he had given the Defendant a letter he had addressed to Bulawayo City Council Treasurer authorising them to include the Defendant's name on the utility bills. This was to enable the Defendant to approach Women's Organisations for funding with proof of residence as the Mahatshula Property was held in Plaintiff's name only.

He has since discovered that Bulawayo City Council fraudulently included the Defendant's name on the agreement of sale as she is now a joint holder without his authority. All he authorised was her inclusion on the bills. The agreement of sale with the Defendant's name has been produced as part of the bundle of documents. The Plaintiff has strongly argued that stand 153 is his sole property acquired without any assistance from the Defendant. Initially he claimed it for himself. At pre-trial conference, he relented and suggested that it be shared equally. At the trial he reverted to his original claim arguing that this was because of the fraud he had uncovered at which the Defendant tried to steal his other half share.

Under cross examination, he did not dispute that the Defendant was involved throughout during the construction of both the rural home and town house. He accepted that she is the one who was purchasing some of the building material like the roofing tiles purchased from Turnall and was paying the builders. In his own words the Defendant distinguished herself as a hardworking woman.

On the rural home, the Plaintiff took the view that the Defendant is exaggerating the quality of that home in order to make it appear like a modern homestead when it is a simple rural home. He however conceded that it comprises a 3 bedroomed house with other out buildings, it is solar electrified and has running water, irrigation equipment has been installed and it is fairly comfortable. He infact moved to that home after his return from Harare and only came back to Bulawayo after he secured employment.

While admitting the availability of most of the items listed as being in the rural home, he denies that there is a dam constructed there preferring to refer to it as a well the size of the court room. He however conceded that the parties had to hire machinery from DDF Gwanda to

do excavation of the dam. He also denies the existence of livestock as alleged by the Defendant saying that a lot of livestock died during long drought spells and that at present there are 5 head of cattle and a calf, 3 of which he inherited from his father. He could not explain why only those survived the drought. Under cross examination he said there may be a couple of goats.

The Plaintiff is claiming the rural home and all the items of property located on it. He conceded that in addition to it, he applied for and was allocated under the land reform programme an A2 farm known as Subdivision 2 of Pirie in West Nicholson.

Regarding the Defendant's claim for personal maintenance the Plaintiff strongly argued that she is a professional woman earning a living. Her standard of living has improved since the parties started having problems to such an extent that she has imported a car and appears to be living comfortably. In his view, she should be able to look after herself.

The Defendant also gave evidence. She said that the marriage has experienced problems because of the Plaintiff's pathological thirst for other women. Each time he was caught in compromising positions he would assault her but because she loved her husband very much she persevered and would reconcile with him all the time. When they had problems the Plaintiff was always quick to pack and leave but their periods of separation were always very short. The Plaintiff would soon come back to her, humble himself and ask her to take him back which she always did.

She said after paying for the Plaintiff's release from civil imprisonment, he had approached her and as usual humbled himself asking for forgiveness for his wayward ways. He pleaded with her that as he was incapable of settling down on his own seeing he was then moving from place to place and incurring debts for other women. He wanted them to build a

proper home together and having realised that she was a hard worker he could only succeed with her.

She said it was at that stage when the Plaintiff was begging her to build a home with him that he disclosed to her that after he had unilaterally sold the then matrimonial home, No. 2605 Nketa 8, Bulawayo, he had used the proceeds of the sale to purchase the vacant stand No. 153 Mahatshula from Bulawayo City Council. He invited her to come and build a house with her at that standard she agreed only on condition that they changed the ownership of that stand to include herself. She did not want to fall into the trap which allowed the Plaintiff to sell their previous home without her knowledge or consent.

According to the Defendant in his excitement at having her back in his life, the Plaintiff offered to transfer the entire stand to her name as a sign of his commitment. He then initiated the process of doing so but Bulawayo City Council refused a complete transfer and asked him to write another letter authorizing joint ownership. As the Plaintiff had relocated to Bulawayo at the time, working at Typocrafters, the two of them attended at the Bulawayo City Council offices and ensured the inclusion of the Defendant's name on the sale agreement. It was only due to his presence that council officials agreed to effect the change.

During the same deliberations about their reconciliation the Plaintiff had also offered to buy her a car to show his commitment to her. He then bought the Toyota Bakkie which was later registered in Defendant's name but not before she was forced to pay the balance of \$3000-00 (Zimbabwe currency), to the seller Mrs Gumede because the Plaintiff had run out of money. She therefore lays a claim to that vehicle for that reason.

Using that vehicle she started working very hard buying and selling goods to raise money to construct the Mahatshula house. They were already staying together as a family where she had been lodging in Nkulumane and the landlord asked them to leave because they could not all be accommodated there after the return of the Plaintiff. This acted as an incentive to build in Mahatshula with zeal. She played the leading role in the construction with the Plaintiff only giving directions. She says she personally moulded the bricks for the house with the assistance of the Plaintiff's young brother and people used to poke fun at her as they passed by. In her enthusiasm to build the house she criss crossed Bulawayo buying material like cement and quarry stones and hiring constructors. She would pay them and in doing so made them sign invoices acknowledging receipt of payment. These were produced as exhibits.

She says the Plaintiff wanted to short circuit the process by constructing a flat roof due to shortage of money but she pleaded with him to let her work hard for a proper roof. She eventually succeeded in purchasing roof tiles at Turnall and together with the Plaintiff they went to purchase roofing timber at PG Timbers. When part of the house was complete they moved in so as to save money which was being spent on rentals. It was uncomfortable but she persevered even as the Plaintiff suggested they rent a flat in town. That way the house was constructed and they stopped construction about 2002 before they completed to concentrate on building the rural home. Up to now the house is incomplete with electrical fittings still outstanding.

In respect of the rural home she says it was her initiative again as she felt that they needed a rural home. As it is located in the Plaintiff's place of origin, his elder brother allocated them a stand adjacent to her mother-in law's homestead and they put up an impressive 3

bedroomed house with other out buildings. It is a modern home with an excellent toilet and jacuzzi. They constructed a dam and she would travel to Harare where she and the Plaintiff bought irrigation equipment from auctions. He is the one who applied for a water engine from AFC which was set up to pump water.

The Defendant says they bought livestock and when she last visited the homestead in June 2006 there were 15 head of cattle and 30 goats. Most of the goats were obtained from her own rural home in Manama. Some were given to them as gifts by her relatives while they used to buy some from Mtshabezi area each time they took their maid to her home area. The number of cattle mentioned by the Defendant seems to tally with documentary evidence in the form of letters submitted belatedly by the Plaintiff which he had addressed to Police Commissioner Chihuri. In a letter dated 24 July 2009 when this matter was already pending the Plaintiff complained that police in the area were not investigating cases of stock theft he had reported. For instance he refers to 10 head of cattle stolen from his West Nicholson property in December 2005. He says between September and October 2008 6 cattle were stolen. Some of these cattle were recovered.

In his evidence the Plaintiff had said cattle were wiped out by drought and never mentioned stock theft. Clearly therefore quite a substantial number exists at the rural home. The Defendant maintained that all the movable property at the rural homestead was acquired together including the Ford truck and should be shared. She played a pivotal role in putting the rural home together at a time when he was away in Harare but when he briefly retired in 2005, he moved to the rural home refusing to have anything with the town home. She says this was because that home is more comfortable.

She says when she paid him a surprise visit at the rural home on 21 June 2006, which was to be her last visit, he found another woman he was introducing to his mother as his new wife. He was so angry that he armed himself with a knobkerrie and threatened to kill her if she dared set foot at that homestead again. While denying he was violent he unwittingly admits having traced the owner of the vehicle she had used to travel there, and making it clear to him that if he dared give the Defendant his vehicle for use to get to his rural home he would burn that vehicle. It is therefore more than likely he made the same threats to the Defendant.

She says that when the Plaintiff returned to town having come out of semi-retirement he started taking his property out of the Mahatshula house to his girlfriend in Paddonhurst and that right now he has nothing left in that house. Although he conveniently returns to that house from time to time to keep an eye on her, there is nothing of him left there and he now uses their son's bed and other items at the house.

The Defendant urged the court to award her personal maintenance as she is now in the twilight of her life and is unable to attract man to look after her. She has expenses which she cannot service with her meagre salary of US\$180-00. She however admits having recently imported a Mazda Demio Estate motor vehicle although she says this was with the assistance of her brother and he is yet to pay for it but has a payment plan for it.

Dealing with the probabilities and the credibility of the parties, I found the Defendant's version more probable. The Plaintiff appears to have been blinded by deep seated jealousy which made him suspect impropriety on the part of the Defendant even though he could adduce no tangible evidence of adultery. It is this which blinded his assessment of the equitable distribution of the matrimonial assets. He was given to exaggeration of his own

contribution while at the same time underplaying the significance of the contribution of the Defendant.

The evidence clearly shows that although the parties had problems stemming mainly from the Plaintiff's uncontrollable jealousy, they were very much in love and were determined to live together and build a joint estate. I find as fact that when they came together after the purchase of 153 Mahatshula, then a vacant stand, they set about to work together to build a home for themselves not only in Bulawayo but also in Garanyemba, Gwanda. I also find as a fact that the said stand was acquired using part of the proceeds of stand 2605 Nketa 8, which was the former matrimonial home. Indeed it is the Plaintiff who authorised BCC to include the Defendant as a co-owner and his belated effort to reverse that transaction was actuated by an improper motive to deprive the Defendant of a share. Otherwise there would have been no reason to write letters to BCC asking them to include the defendant's name only on the utilities bills.

I conclude therefore that the parties worked together in acquiring 153 Mahatshula and building the house. They are therefore entitled to equal shares of that house. They also worked together in acquiring and building the rural homestead and everything that is at that house. Clearly they regarded it as their retirement home and as the Plaintiff stated, they wanted to leave the town home for children. An adjustment would have to be made to take into account that the plaintiff will retain the rural home for himself together with the livestock.

The Plaintiff applied for and obtained the A2 farm in West Nicholson on his own and the Defendant did not have an input in it. Regarding the Toyota Bakkie it clearly belongs to the defendant it having been acquired for her as a gift during good times. It is the Ford Transit

which the Plaintiff acquired for himself and kept at the rural home having barred the Defendant from it.

I accept that the Plaintiff has moved most, if not all, of his belongings from the Mahatshula house. This is consistent with the fact that he long stopped taking meals from there and told the court that although he now works in Bulawayo, he spends all his weekends at the rural home. He also stated that he is confined to the bedroom he uses even when he is at Mahatshula. The parties are generally agreed how most of the movables, except for the livestock, should devolve. They actually tried to share that property among themselves. I will, as much as possible, give effect to their agreement.

Section 7(2) of the Matrimonial Causes Act [Chapter 5:13] requires me to make an order that will operate fairly between the spouses. In doing so, I am required to have regard to what is reasonable, practicable and just taking into account the factors set out in Section 7(4) of that Act. See *Rich v Rich* S-16- -01 at page 2 of that cyclostyled report.

In *Takafuma v Takafuma* 1994 (2) ZLR 103(S) at 106 B-C McNally JA stated:

“The duty of a court in terms of s7 of the Matrimonial Causes Act involves the exercise of a 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 as fair a 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.”

The court went on to say that if looking at the overall result it must assess whether the objective of placing the spouses in the position they would have been in had a normal marriage relationship continued is achieved. If not, the next stage would be to consider taking away

from one or other of the spouses something which is actually "his" or "hers". See also *Ncube v Ncube* 1993(1) ZLR 39(S).

Applying these legal principles to the case at hand, in respect of the immovable property I consider 153 Mahatshula as falling under "theirs" and the Garanyemba rural homestead, only by virtue of the fact that it is located at Plaintiff's family village, and the A2 West Nicholson farm as falling under "his". In respect of the motor vehicles, the Toyota Bakkie falls under "hers" while the Ford Transit falls under "his". The Mazda Demio Estate is not matrimonial property.

The movable property at the rural home including the livestock, farming and irrigation equipment fall under "theirs". The rest of the movable items have been dealt with by the parties and placed under the categories of "his" and "hers".

All that remains is for me to deal with the Defendant's claim for maintenance. The Defendant is an able-bodied professional woman and at 47 she still has enough energy to fend for herself. This is shown by her ability to improve herself after the separation of the parties. On the other hand the Plaintiff is not a man of means and only earns under US\$500-00 a month. He is riddled through and through with debts. I am not satisfied that the claim for maintenance has been proved.

On costs, I consider that the parties having self acted throughout these proceedings could both not be expected to settle this matter on their own. It was necessary to take the matter all the way to have their respective rights determined. None is entitled to costs.

Accordingly it be and is hereby ordered as follows:-

- (1) That a decree of divorce be and is hereby granted.
- (2) That the Defendant's claim for personal maintenance be and is hereby dismissed.

- (3) That the Plaintiff be and is hereby awarded as his sole property the Ford Transit Registration number AAP-4777.
- (4) That the Defendant be and is hereby awarded as her sole property the Toyota Corona Bakkie Registration number 63-840Q.
- (5) That the Plaintiff be and is hereby awarded as his sole property the dressing table, $\frac{3}{4}$ bedbase, wardrobe, 2 small cupboards, lounge suite, bedroom suite all of which are in the rural home in Garanyemba and any other household property in that rural home not herein specifically mentioned as well as the wood shelf, single white wardrobe and cupboard situated at the Mahatshula home in Bulawayo.
- (6) That the Plaintiff be and is hereby awarded as his sole property all the irrigation and farming equipment situated in Garanyemba including the ploughs, pipes, sprinklers, water pumps, water tanks and knap sacks.
- (7) That the Plaintiff be and is hereby awarded as his sole property all livestock (cattle and goats) at Garanyemba home as well as at Subdivision 2 Pirie Farm West Nicholson.
- (8) That the Plaintiff be and is hereby awarded as his sole property the rural homestead in Garanyemba Gwanda as well as the A2 farm known as subdivision 2 of Pirie Farm West Nicholson.
- (9) That the Defendant be and is hereby awarded as her sole property the double door fridge, Lounge suite, 2 double beds, kitchen table set, kitchen unit, 3 plate stove, 2 plate stove/oven, dinning room suite, 2 x $\frac{3}{4}$ beds, wardrobe, hifi, TV, decoder and satellite dish, VCR, DVD player, kitchen utensils, room divider, glass top centre table, bedlinen and curtains all of which are located at 153 Mahatshula Bulawayo.

- (10) That the matrimonial home being number 153 Mahatshula is to be valued by an estate agent agreed to by the parties or by one appointed by the Assistant Registrar from his list of approved valuers and the parties shall be entitled to the net value of the property as assessed at the ratio of 60% to the Defendant and 40% to the Plaintiff.
- (11) That within a period of six months after the valuation referred to in paragraph 10 above the Defendant shall have the option to pay to the Plaintiff his 40% share of the matrimonial property as indicated in paragraph 10 above. The exercise of such option shall be in writing and is to be made within fourteen days of the valuation report being made available and once the Defendant has paid the Plaintiff's share she shall become the sole owner of the property in question and the Plaintiff shall be obliged to pass transfer to the Defendant.
- (12) That in the event that the Defendant does not exercise her option in terms of paragraph 11 above or fails to pay the amount due to the Plaintiff within 6 months in terms of the same paragraph the property shall be sold on the open market by an estate agent agreed to by the parties or by one appointed by the Assistant Registrar from his list of approved estate agents and the net proceeds distributed in such a way that each party receives his or her share at the ratio set out in paragraph 10 above.
- (13) That each party shall bear its own costs.