

JABULANI MANYATHELA

Versus

THANDO MANYATHELA

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 1,2 AND 10 MARCH 2011

Mr J. Tshuma, for the plaintiff

Mr N. Mazibuko, for the defendant

MATHONSI J: The parties were married to each other out of community of property on 21 September 1996 and that marriage was blessed with 1 child a boy by the name of Adrien Andisa Manyathela, born on 14 July 1997. He is currently a pupil at Christian Brothers College in Bulawayo. The plaintiff is a former train driver at National Railways of Zimbabwe who retired from employment on medical grounds in 2005 after 24 years of service. He is now a successful businessman running a retail shop in Bulawayo and is now 52 years old.

The Defendant is a 42 year old former sales lady who took up a tailoring business sewing items after receiving orders from customers. She currently runs a flea market stand at Geddes Building in Bulawayo.

After 13 years of marriage the plaintiff instituted divorce proceedings against the defendant in June 2009. He says what prompted him to do so is that she had obtained a protection order against him after he had assaulted her. She contested the action.

At a conference of the parties all the issues were resolved leaving only the distribution of the matrimonial home, namely No. 6 Blasson Avenue North End, also known as stand 7184 Bulawayo Township of Bulawayo Township Lands as the one to be determined at the trial. The agreement of the parties is recorded in the Joint Pre trial Conference Memorandum and it is their desire that it be incorporated in this final order for divorce.

The Plaintiff's evidence is to the effect that he was employed by National Railways of Zimbabwe (NRZ) in 1982 and after completing his probation period he applied for and was allocated rented company accommodation in 1985 being No. 36 Trout beck Road Greenhill Bulawayo where he moved in with his wife Mellina to whom he had been married in terms of the Customary Marriages Act, Chapter 5:07. That marriage was blessed with 2 children both of whom are currently University Students the first one being 25 years old while the 2nd one is 21 years old. In 1995 he was involved in a head on train collision in Gwanda and sustained certain injuries.

He divorced the first wife in February 1996 and then applied for upgraded accommodation resulting in him being allocated House No. 5 Ingram Road, North End Bulawayo (now No. 6 Blasson Avenue, North End, Bulawayo) by NRZ again as rented accommodation. He moved into that house with the defendant on 4 June 1996. They got married on 21 September 1996. He said he married her because she was good in tailoring and also out of love.

He accepted that NRZ may have precipitated the marriage because they had written letters to him demanding that he vacates the North End house as it had been allocated to him in error. The house was for married employees and as he was then not married he had been requested to vacate the house or risk having commercial rentals levied against him with effect from 1 September 1996. He was then allowed to remain in the house courtesy of his marriage to the defendant.

He stated that following successful negotiations between NRZ and employees unions the NRZ offered its rented houses to sitting tenants at concessionary prices. He is one of those employees who participated in that scheme and signed a memorandum of understanding, with NRZ in July 1999 for the purchase of the house: In terms of that agreement deductions were being made from his salary towards the payment of the purchase price, a discounted rental and an administration fee.

According to him, the defendant did not contribute anything towards the acquisition of the house, as she was a mere house wife who had left employment in 1997 when she was pregnant. She gave birth to the only child of the marriage and continued looking after the child while he paid the purchase price of the house in instalments at the same time providing for the family without any input from the defendant.

He paid off the purchase price of the house and then signed a sale agreement on 15 August 2001. Instructions were given by NZR for the house to be transferred to his name. At that stage he decided to register the house in the name of a company he had formed with his 2 brothers called J. Manyathela Retailers (Pvt) Ltd which was incorporated in 2001. The house was transferred to this company on 4 July 2002 for the sole reason of facilitating access to loans for the business.

He revealed that he and his brothers had intended to operate a retail business at their rural home area of Lupane in the name of that company. They tried to start the business but failed and only one of his brothers succeeded in starting a business in Lupane. He later tried to say that they did start operating as J. Manyathela Retailers (Pvt) Ltd in Lupane but this was contradictory.

Under cross examination he conceded that when that company was formed he was a minority shareholder holding only 5 000 issued shares, the same as his brother Fortune, while his brother Nkululeko was the majority shareholder with 10 000 shares. He conceded that although the share certificate which signifies the 5 000 shares held by the defendant is dated 18

October 2001, at that time the defendant had nothing to do with the company. It was not until 27 March 2007 that defendant was appointed director of the company and issued with 5 000 shares.

He also accepted that he removed his brothers from the directorship of the company and took their shares without paying them anything for those shares. Currently he holds 75% while she holds 25% shares which were just donated to her. He insisted that the matrimonial house should be divided between them in that ratio. His main reason for saying so is that the house represents an estate he should share with his 2 children who are at Universities and 24 years of hard work at NRZ. It represents his pension from NRZ, the injuries he sustained in 1995 in a train accident and at the age of 52 he is unable to secure any loans from finance institutions to acquire another house, while at 42 she still can secure loans.

Asked how he would pay off the 25% he is offering her, he insisted that he would get a loan from a finance house in clear contradiction with his earlier claims that he is unable to do so because of his age.

The defendant also gave evidence. She started living with him at Emakhandeni Suburb where she was renting late in 1995. When he got NRZ accommodation in Northend, they moved in together. NRZ soon discovered it had issued the house to him in error because he was not married and started proceedings to evict him from the house. A former workmate of hers was married to a marriage officer and when this problem arose arrangements were made for him to marry them.

She left formal employment in 1996 and commenced her tailoring business from TV Bazaars in Bulawayo. She had got those premises through her former workmate who knew the owner. She called the owner Anratbhai Vallbhai Desai to confirm that story.

When she started that business he was still employed full time at NRZ and would join her to run the front part of the business which was usually manned by her sibling, when he was on night duty. She made money from that business which was used to cover some of the family expenses like the utility bills. As his income was being wiped out by the payments for the house, she was the mainstay of the family covering all the other necessary expenses. He eventually took over that business from her.

She was not consulted when the house was registered in the name of the company as she only discovered that when she saw bills coming in that name. When she queried, he told her that had been done to make it easy to secure loans for the business. She was never consulted when he took decisions and when she questioned that he would end up assaulting her as shown by the admission of guilt fines he paid at police stations. She produced proof of those fines.

She stated that on one occasion in March 2007, he had so severely assaulted her that she was forced to leave him returning to her parents' home. He asked for forgiveness and as a sign of his good faith, he offered to register her as one of the directors of the company. Her sister assisted in ensuring that her name was added and she was issued with shares. She was never involved in that company which had nothing to do with the business they were running until recently. In fact their own business of selling buttons, zips and cotton was known as Dress Maker's Haven.

As far as she is concerned, having been a working woman throughout the marriage, who contributed fully towards the building of the matrimonial estate, she is entitled to an equal share of the matrimonial house. This is particularly so considering that when they acquired the house, it was a small 2 bedroomed house. Together they developed it by adding a 3rd bedroom, ensuite bathroom, a garage and fitted wardrobes.

The plaintiff did not make a good witness. He prevaricated a lot and his testimony was punctuated by exaggeration of his own contribution to the matrimonial estate while under playing the role of the defendant to complete insignificance. He tried unsuccessfully to portray the defendant as a mere house wife who had no hand at all in the acquisition of the matrimonial estate.

On a balance of probabilities and the credibility of the witnesses, I find that the defendant's version is more probable. There is no doubt in my mind that she was not a mere house wife. She was a working woman throughout the marriage and generated income for the good of the family. Even the plaintiff unwittingly conceded her roll by saying that he married her well knowing she was good in tailoring.

I conclude that the parties worked together in acquiring house No. 6 Blasson Avenue North End Bulawayo. They moved in together as tenants and later acquired it during the subsistence of the marriage. They developed it together to what it is today. The defendant therefore had a direct and indirect contribution towards its acquisition.

I reject the assertion by the plaintiff that the house represents his pension from NRZ and that because of his train accident injuries he should be treated differently from the defendant. That train accident occurred before the parties got married and acquired the house. He was to remain in employment for another 10 years before retiring. I tend to agree with the defendant that his retirement was influenced more by the economic situation prevailing then which reduced the value of his earnings.

The provisions of section 7(2) of the Matrimonial Causes Act [Chapter 5:13] enjoin me to make an order that operates fairly between the parties. Section 7 (4) gives me a very wide discretion which must be exercised judicially having regard to all the factors mentioned therein: *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106 B-C; *Ncube v Ncube* 1993 (1) ZLR 39 (S) and *Dube v Dube* HB 149/10 (unreported) at page 13.

Mr Tshuma for the plaintiff has asked me to respect the *legal persona* principle and give effect to the share holding of the parties in J. Manyathela Retailers (Pvt) Ltd and award them their shares as contained therein. I do not agree. In my view that entity was the *alter ego* of the plaintiff. At the time that the house was registered in its name, it existed only on paper and for the sole reason of taking transfer of the house to the exclusion of the defendant.

It is for that reason that the plaintiff could dish out shares to his brothers and take them away as he pleased for no consideration at all. He tried to link it with a retail store run by his brother in Lupane but this could not work as it never traded there. He tried to link it to the business in Bulawayo but it was clear that it had nothing to do with it either. He may have started using that name now but that does not detract from the fact that the house was not bought for the business but the matrimony.

The plaintiff certainly did not deal with the court with candour as he tried to throw in the issue of his brothers and the company to cloud an otherwise straight forward matrimonial dispute. *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216 (H) at 217 F. In that case, Ndou J stated at 218 E as follows:

“It is trite that a company duly incorporated is a distinct legal entity (endowed) with its own legal personality. *Salomon v Salomon & Company Ltd* [1897] AC 22. However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decision and control of a company.”

I am in agreement with the learned judge. It has been accepted that the house was registered in the name of the company to provide a vehicle to access loans for the business of the parties. It had nothing to do with the running of that business, which at the time was not being conducted in the name of J. Manyathela Retailers (Pvt) Ltd but in the name of Dress Maker’s Haven, a business started by the defendant herself. The plaintiff only joined later as confirmed by Mr Desai.

The house itself was the matrimonial home of the parties for 13 years. They acquired it and developed it together for their joint benefit: *Sibanda v Sibanda* 2005 (1) ZLR 97 (S) at 103 B-C.

All the circumstances of this case point to an equal sharing of the matrimonial home. For the plaintiff to say that the defendant should take 25% of the value of the matrimonial house and use it to purchase a small house in the high density suburbs leaving him to enjoy the comfort of the house in the low density suburbs, is an indication that he has never regarded the defendant as an equal in their relationship. For him to suggest that he should get 75% of the house because he wants to share it with his 25 year and 21 year old children from a previous marriage who are now university students, is simply arrogant and selfish. It is unsustainable especially in a case as this where there is evidence that the marriage relationship broke down because the plaintiff repeatedly assaulted the defendant and it was her decision to protect

herself by obtaining a peace order which forced the plaintiff to file for divorce presumably not happy with being prevented from perpetuating further assaults on the defendant: *Marimba v Marimba* 1999 (1) ZLR 87 (H) at 98A.

None of the parties advanced argument regarding costs and in my view this is a case where each party should bear its own costs. In the result I make the following order:

It is ordered that:

1. A decree of divorce be and is hereby granted.
2. The custody of the minor child Adrien Andisa Manyathela, born on 14 July 1997, is awarded to the defendant with the plaintiff enjoying reasonable access.
3. The plaintiff shall pay maintenance for the minor child to the defendant in terms of the maintenance order registered at the Maintenance Court Bulawayo under Case number M29/2010.
4. The plaintiff is awarded the 4 plate stove, phone table, lounge suite, multichoice decoder, home theatre, black tv stand, Sansui tv, radio and the Nissan Hardbody Pick up Registration number ABF 7694 as his sole and absolute property.
5. The defendant is awarded the kitchen table with chairs, deep freezer, dining room suite, panasonic tv, wiztech decoder corner stand, silver tv stand, bed and mattress in main bedroom, bedroom suite, DVD player, bed and mattress in son's bed room, computer, computer stand, telefunken tv and Toyota Camry motor vehicle registration number ABD 7781 as her sole and absolute property.
- 6(a) The matrimonial home being No. 6 Blasson Avenue, Northend Bulawayo also known as stand No. 7184 Bulawayo Township of Bulawayo Township Lands shall be valued by estate agents agreed upon between the parties to determine its current market value after which the plaintiff shall pay to the defendant 50% of that value in settlement of the defendant's entitlement to that house within 3 months of the date of such valuation.
- (b) In the event of the plaintiff's failure to pay the defendant in terms of paragraph 6 (a) above, then the said house should be sold to best advantage and the proceeds shared equally between the parties.
7. Each party shall bear its own costs.

WEBB, LOW & BARRY Incorporating BEN BARON & PARTNERS, Plaintiff's Legal Practitioners
Calderwood, Bryce Hendrie & Partners, Defendant's Legal Practitioners

JUDGMENT No. 44/11
Case No. HC 949/09