

MASIYIWA CLEOPHAS GONYE
and
STELLA MARIS GONYE (NEE MUCHENJE)

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 15 March, 19, 10 and 30 May, 1 June, 20
and 25 July, 7 and 8 November 2005 and 22 February 2006

Civil Trial

Mr *E. Matinenga*, for the plaintiff
Mr *S. Chihambakwe*, for the defendant

UCHENA J: In 1966 the plaintiff fell in love with the defendant. In 1967 they started living together as husband and wife while the plaintiff was paying lobola. When lobola had been paid to the satisfaction of the in-laws they registered their customary law union in 1972. When the parties got into the customary law union in 1967 the defendant had just left school after attaining a Junior Certificate level of education. The plaintiff was then employed as an extension officer by Connex. During the subsistence of the marriage he rose in status and was able to first buy a house in Kambuzuma, then Greendale and later Christon Bank. He eventually bought Wonder Valley Farm the major property in dispute in this case. The defendant was in the early stages of the marriage a house wife. With the assistance of the plaintiff she studied and passed 'O' levels , trained as a bookkeeper/secretary and driver. She worked during the period 1980 - 1986. Her earnings compared to the plaintiff's were insignificant. The plaintiff was generous as he did not make demands on her earnings. He allowed her to use her salary as she pleased. She said she used all her earnings in the home. Plaintiff conceded that she would buy bread and milk and give children pocket money.

The plaintiff initially moved to Wonder Valley farm on his own leaving his family in rented accommodation in Marlborough Harare. He said it was because his wife was against the acquisition of the farm. She said it was because children had to wind up their schooling at the schools they were

attending before being moved to boarding schools then she would join her husband at the farm. She eventually left employment and joined him at Wonder Valley Farm in 1987.

They stayed together at Wonder Valley Farm from 1987 till October 2002 when plaintiff send his wife to their eldest daughter for counselling. He subsequently send all her personal belongings to her parents indicating that he no longer loved her.

The plaintiff has now issued summons seeking the following orders:-

- (a) A decree of divorce.
- (b) An order that the matrimonial property be divided between the parties in terms of paragraphs 9 and 12.
- (c) An order that defendant be awarded maintenance in terms of paragraph 14.
- (d) Each party bears their own costs.

In paragraph 9 of his declaration the plaintiff offers the defendant all movable assets mentioned in paragraph 7 and 8 except an Imperial upright freezer and a washing machine.

In paragraph 12 the plaintiff sought to be awarded the sole ownership of all shares in the company controlling Wonder Valley Farm and that the defendant be awarded sole and exclusive ownership of the poultry project on the farm.

In lieu of maintenance in the sum of \$600 000.00 per month he offered the defendant a B.M.W. motor vehicle.

In reconvention the defendant seeks the following orders:-

- (a) a decree of divorce
- (b) Maintenance for herself in the sum of \$2 000 000.00 per month until she dies or remarries.
- (c) 50% of the value of Wonder Valley Farm.
- (d) 50% of the Domboshawa house.
- (e) 25% of the assets of the farm.
- (f) 50% of the value of the movable assets in her annexure.B.

- (g) That the movables be shared as suggested by the plaintiff.
- (h) That the plaintiff pays costs of suit.

At the pre-trial conference the following issues were agreed-

- (1) Whether the breakdown of the marriage relationship was at the instance of the defendant or the plaintiff.
- (2) Whether the properties listed by the parties were acquired during the subsistence of the marriage as alleged or at all.
- (3) Whether the property proven to have been acquired during the subsistence of the marriage should be shared as proposed by the plaintiff or as proposed by the defendant.
- (4) Whether the defendant is entitled to maintenance from the plaintiff. If so the rate thereof.

I must at the outset say from the evidence led this seems to have been a happy marriage which remained so for 35 years. Four children were born to the marriage, two boys and two girls. The children were educated at expensive multiracial schools and the girls have acquired high qualifications. The boys too have achieved success in life. All the children are now adults. The girls are now married. The elder one lives in Harare. The younger one lives in Germany. The boys are twins. One is in the United Kingdom. The other is in Harare and is currently staying with the defendant in Vainona. He got married in 2002, at the time the parents' marriage had landed on marital rocks. His wedding seems to have been the final breaking point after the marriage had been severely tested by the parents' disagreement on when to go and see their grand child born to their younger daughter living in Germany.

The Irretrievable Breakdown of the Marriage

The parties blamed each other for the breakdown of the marriage. According to the plaintiff it was because the defendant went to Germany without his authority and thereafter she influenced Ronald to go ahead with his wedding with or without his blessing.

Evidence led reveals that the parties should have gone to Germany together. They disagreed on when they should have gone. The plaintiff said they should have gone after harvesting. The defendant agrees that that was the issue they disagreed on. She then opted to go alone. When she returned they did not talk to each other. The tension in the home resulted in the plaintiff calling a meeting at which the family discussed Ronald's wedding. He asked Ronald to postpone the wedding. The defendant objected and told Ronald to go ahead with the wedding with or without the plaintiff's involvement. The plaintiff did not attend his son's wedding as a result. He only send him his wedding gift of \$1 000 000.00

The plaintiff thereafter send the defendant to their eldest daughter for counselling. She did not come back and that marked the end of a marriage of 35 years.

The defendant in evidence said the plaintiff's lack of love for the children and his infidelity caused the breakdown of the marriage. She mentioned his not being in a hurry to go and see their daughter and grand child in Germany and ordering the postponement of Ronald's wedding as examples. She mentioned his being in love with other women.

The plaintiff gave his evidence well. He struck me as a firm man who brooks no nonsense. I have no doubt that his version is the truthful one as to what caused the breakdown of the marriage. His evidence is supported by the defendant's on the events leading to her being sent to their daughter for counselling. While the plaintiff's reaction to the defendant's apparent challenge on the two issues involving the children may not depict him as a caring and loving father, the manner in which he brought up his children certainly proves he is a loving and responsible father. The issue is simply what caused the breakdown of the marriage? In my view though the defendant had suspicions that the plaintiff was not being faithful to her, that certainly played no part in the breakdown of the marriage. It is common cause that they had both gone for AIDS tests and they were found to be

negative. They continued to happily live together as husband and wife until the issue of the Germany visit arose.

As already indicated trouble started on the disagreement over the visit to Germany to see their younger daughter and a grandchild and Ronald's wedding was the final breaking point. It seems to me both were strong headed and none was prepared to defer to the other. As the plaintiff's reasons for the breakdown of the marriage have been confirmed by the defendant's evidence, he will be granted the divorce he seeks.

Distribution of Assets

Though the couple started from humble beginnings they ended up as prosperous farmers and owners of a farm, a company which runs the farm and various farm and household movable assets. Their standard of living and the involvement of a company justified the hearing of their case by this court in spite of their having been married in terms of customary law.

Among their assets three generated disputes as to whether or not they are matrimonial assets.

The Domboshawa House

It is common cause that the defendant left the matrimonial home in October 2002.

It is also common cause that the plaintiff was at that time building a house in Domboshawa the couple's rural home. The plaintiff said when the defendant left the house was at foundation level. The defendant says it was at roof level. It is trite that property which was in existence at the time defendant left the matrimonial home is matrimonial property. The fact that the house was completed after she had left can merely reduce her share of the value of the completed house. This is because a spouse cannot have a share in what was acquired independently by the other spouse after she or he had left. This position is supported by the Supreme Court's decisions in the cases of *Daniel Mujuru v Daphine Mujuru* SC 4/2000 and *Ruth*

Pasipanodya v Kosmas Mushoriwa SC 146/98 which I will deal with later in this judgment. The defendant however alleges that after she had left, the plaintiff used proceeds from their matrimonial property to finance the building of the Domboshawa house. In particular she alleged he had no source of income other than that from Wonder Valley (Pvt) Ltd a company in which she is a 25% share holder. I will resolve the issue later.

The Mazda 626 and No. 12 Lomagundi Road

At the end of the plaintiff's case the defendant applied to amend her counter claim by including a claim for a share in a Mazda 626 and No. 12 Lomagundi Road which were acquired by the plaintiff at the end of 2003 and 2004 respectively. The defendant had left the matrimonial home on the 7th of October 2002.

It is conceded that the Mazda 626 and No. 12 Lomagundi Road were acquired by the plaintiff after the defendant had left the matrimonial home. Mr *Chihambakwe* for the defendant's argument was that the plaintiff had no other source of income besides their company's farming operations at Wonder Valley Farm, so the two were bought from proceeds of the farming operations and are therefore matrimonial property.

The law on whether or not property acquired after separation forms part of a matrimonial estate is clear.

In the case of *Ruth Pasipanodya v Kosmas Mushoriwa* SC 146/98 at page 4 of the cyclostyled judgment KORSAH AJA said:-

"It would be setting a dangerous precedent if a spouse several years after the breakdown of the marriage were allowed to claim a half share of property acquired by the other spouse after such breakdown and which was not in existence during the period of their co-habitation." (emphasis added)

The parties had separated before the purchase of a house they were renting. After the appellant had left, the respondent on his own bought the house. The appellant after summons had been issued made an unsolicited payment for the house to the Building Society which had funded the

respondent in purchasing the house. The court found the house was not matrimonial property and that the unsolicited contribution did not make it part of the couple's matrimonial property. The appellant was refunded the money she had deposited into the Building Society's Account. The house was held to belong to the respondent.

In the present case this could have applied to the Mazda 626 and No. 12 Lomagundi Road if there was no allegation that these assets were bought using funds from Wonder Valley (Pvt) Ltd's operations as the plaintiff has no other source of income. Mr *Chihambakwe* also submitted that since company money was used to acquire the assets they belong to the company and defendant being a shareholder is entitled to a share of their value. I will deal with that later.

In the case of *Daniel Mujuru v Daphine Mujuru SC 4/2000* at pages 1 - 2 of the cyclostyled judgment McNALLY JA said:-

"But the property in Dzivaresekwa was not dealt with in the order because the learned judge was satisfied that it did not fall into the matrimonial estate. It was her separate property acquired with financial help from her mother at a time when she had fled the matrimonial house and had nowhere to house her children. The husband in fact did not even know about this property until shortly before the court proceedings began....."

I see no reason to disbelieve her on these matters. The learned judge found her to be credible. Mr Kawonde sought to suggest on no basis at all except hypothesis, that she might have saved up enough from the allowance her husband gave her to accumulate the \$6 500.00 which was the initial payment of the Dzivaresekwa property. I must confess I find this submission fanciful in the extreme"

This case again puts beyond doubt that property acquired by a spouse after the breakdown of a marriage is not matrimonial property.

The issue in this case is what happens if proceeds of the matrimonial estate are used to buy property after the other spouse has left. Does property bought using such proceeds fall into the matrimonial estate? In my view it should and I will illustrate from the following example. Assuming a couple owns 100 head of cattle on separation and the departing spouse

leaves the herd with the remaining spouse. It is clear that he or she is entitled to a share of the 100 herd of cattle. In fact he or she will also be entitled to a share of calves born to the herd which belong to the undivided matrimonial estate. If the spouse in charge of the cattle were to sale some of the calves and buy a house the house would be matrimonial property.

The reason why the calves and proceeds of their sale are matrimonial property is because they can be traced to have come directly from what is clearly matrimonial property.

In cases where the property in issue cannot be directly traced and be linked to matrimonial property such a finding is not possible. A further example will demonstrate this. Assuming the 100 herd of cattle was left in circumstances where it was known which cow, ox or bull belonged to which spouse it can in such circumstances be proved which calf belong to which spouse. Evidence would have to be led as to which cow gave birth to the calf before the spouse who departed can claim it. If the spouse in charge of the cattle sales calves which are his, the other spouse cannot claim what he bought with such proceeds as the proceeds cannot be traced back to their matrimonial property.

In the present case the facts are closer to the first example. Mr *Matinenga* for the plaintiff submitted that as the defendant was alleging that her share was used she should have led evidence to prove it. The issue is not simply that of proving that her share was used. In my view the defendant's allegation is supported by the law. A company is a separate legal *persona*. It therefore enjoys its own separate legal existence apart from its shareholders. It also has legal ways of distributing dividends to its shareholders.

In the present case Mr Gonye did not allege that he was paid a dividend or salary by the company and that he used such monies to buy the Mazda 626 and No. 12 Lomagundi Road. It is common cause that he had no other source of income besides that from Wonder Valley Private Ltd. In the absence of proof that he used money other than that from Wonder Valley

(Pvt) Ltd's undeclared dividends I am satisfied that the defendant has proved her claim to the Mazda 626 and No. 12 Lomagundi Road as they were bought with proceeds from Wonder Valley Private Limited a company in which she is a shareholder.

It must be noted that there are 4 shareholders each holding 25%. Therefore only 50% of the value of the Mazda 626 and No. 12 Lomagundi Road belongs to the matrimonial estate. The other 50% belongs to Ronald and Donald who were not involved in these proceedings. There is no reason why the property should not be distributed in terms of the parties shareholding in the company.

In the result I would award the defendant 25% of the value of the Mazda 626 and No. 12 Lomagundi Road.

Coming back to the Domboshawa house the evidence led is that part of the house was built after the defendant had left. If the plaintiff had means distinguishable from that of the matrimonial estate the defendant would not have been entitled to a share of the whole house as she would not have contributed to what was built after she had left.

As to the extent of development at the time she left I will accept the plaintiff's version to the defendant's. This is because I found the plaintiff to be an honest witness. He was prepared to concede details against his interest if that was the truth. He admitted his being challenged by his wife about the alleged affair with Eunice. He admitted that they had to go for an AIDS test. He struck me as a man who does not avoid the truth. On the other hand though the defendant was generally truthful she was not as forthright as the plaintiff. On this aspect the defendant was relying on what she heard as she never set foot on the Domboshawa house. The plaintiff was in charge of the construction and was therefore better placed to know the stage of development at the time his wife left the matrimonial home.

I have already found that Mr Gonye used proceeds of Wonder Valley Private Ltd as he had no other source of income according to the common cause evidence. When he left employment he ploughed all they had into

Wonder Valley Farm. He is not employed elsewhere. Therefore his only source of income is Wonder Valley Farm which is operated by the company Wonder Valley (Pvt) Ltd. All proceeds of the farming operations accrue to Wonder Valley (Pvt) Ltd. They can only be accessed in terms of company law. Mr Gonye did not explain how he accessed the money he used to build the house from Wonder Valley (Pvt) Ltd. There is therefore merit in the defendant's allegation that he used company money to build the house.

Therefore the defendant's evidence that he used company funds to build the house is sufficient to bring the whole Domboshawa house into the matrimonial estate. The defendant is therefore entitled to a share of the whole house even though part of it was built after she had left. Even if Wonder Valley Farm was not operated by a company I would have arrived at the same conclusion but with different percentages for the parties. This would have been based on the use by the plaintiff of the proceeds of the undivided matrimonial estate. Before the defendant left they were by virtue of their being married to each other joint owners of Wonder Valley Farm and they still are. Mr Gonye has no other means of raising income besides farming on the matrimonial farm using matrimonial assets. What he earned would have been proceeds of an undivided matrimonial estate. He would have been awarded a higher percentage because of his higher contribution in the farming operations when defendant's contribution would have been diminished by her absence from the farm and her not participating in the farming operations.

I must now consider what share of the Domboshawa house the defendant is entitled to. Her contributions to the matrimonial estate was mainly indirect while the plaintiff's was direct. She looked after the house, children and the plaintiff. It is common cause that the plaintiff's hard work landed the couple on the fortune they are now in court to share. Defendant described the plaintiff as a very hard working man. He got to the extent of personally ploughing fields for a fee to raise income to buy Wonder Valley Farm. On her part the defendant bore him children, two sons and two

daughters who were through their joint effort raised to be prosperous adults in their own right.

In spite of all this, the Domboshawa house has to be shared on the basis that the defendant is a shareholder of Wonder Valley (Pvt) Ltd whose proceeds were used to build the house. She is a 25% shareholder and he is a 25% shareholder, therefore only 50% of the house falls into the matrimonial estate. The other 50% belongs to shareholders who are not before me. There is no reason why each party should not be awarded what is due to him or her in terms of the company's shareholding structure. The defendant is therefore awarded 25% of the value of the Domboshawa house.

The Household Movables

The couple has many movables. The plaintiff is prepared to give most of them to the defendant. He only wants an Imperial upright freezer and a washing machine. The defendant only wants 50% of the movables but reluctantly accepts the plaintiff's offer. The plaintiff had sought to trade in the movables for the shares as he wanted all the shares of Wonder Valley (Pvt) Ltd. I refer to paragraph 12 of the plaintiff's declaration.

I must point out that the plaintiff's request in paragraph 12 cannot be granted. Only 50% of the shares can be dealt with. That which belongs to him and his wife. I cannot deal with their two sons' shares as that is not part of the matrimonial estate and the claim is against persons who are not parties to the case before me.

I will therefore award the defendant all the household movables except the Imperial upright freezer and the washing machine. My decision is based on the plaintiff's offer and defendant's reluctant acceptance of more than half of the movables. As a wife who used those movables she is entitled to them. In fact she will suffer no harm by being given more than she asked for.

The Shares

As regards the shares evidence led proves each party holds 25% of the company's shares. The plaintiff sort to be granted all the shares. I have already said that cannot be done as their two sons hold 50% of the issued shares. In my view there is no need to temper with the percentages of the parties. The plaintiff gave his wife and children shares in the company. I see no reason why any of her shares should be taken from her and be given to him. However I appreciate that the parties want a complete break from each other. She does not wish to remain a shareholder in the company and he does not wish to remain associated with her through the company. To achieve that he has to buy her out. He has to pay her 25% of the net value of the company as at the date of divorce.

The Farm, Farm Equipment and Farm Movables

The plaintiff told the court that the farm, equipment and cattle now belong to the company. He produced a balance sheet prepared for presentation to a bank to which they were applying for a loan as proof that the farm belongs to the company. Only one such document was produced. In evidence the plaintiff being a man who does not avoid the truth conceded that he could not say whether or not the farm was company property by virtue of Exhibit 6. He conceded that according to the title deeds he is still the owner of the farm. He could not produce proof showing that the farm was bought by the company. He conceded that he was not paid by the company for the farm. There is no company resolution in which the sale of the farm is dealt with. The defendant said the company was formed so that they could borrow money and protect the farm and assets against execution in the case of failure to repay loans or death. I found the defendant's explanation consistent with the truth and the probabilities raised by comparing the value or authenticity of what is stated in the title deeds and a balance sheet prepared for purposes of obtaining a loan. I find that the title deeds contains the correct position on the ownership of the farm. The fact that the assets are also said to be company property when they have not

been purchased by the company from the plaintiff leads me to the conclusion that they too still belong to the plaintiff and the defendant. They are matrimonial property.

I have already found that the defendant's contribution was mainly indirect in respect of all movable assets. It was also indirect in respect of the farm. As regards the farm the plaintiff said she had to be persuaded to agree to go to the farm and that while at the farm she refused to do the farm books. She said she remained in Harare pending their putting the children in boarding school. On refusing to do the books she said she could not do them. I found her version unreliable as she should have attempted to do the books to the extent she could instead of taking the stance she did. After considering that the plaintiff was the direct contributor and hard worker and that the defendant was initially reluctant as regards the farm and that she only contributed indirectly in its purchase and that of the farm implements I would grant the plaintiff 70% of the value of the farm, farm movables and the farm equipment and defendant 30%.

Maintenance

The defendant applied for maintenance in the sum of \$2 000 000.00 per month. The plaintiff does not dispute that she is entitled to maintenance. He is in fact currently paying her maintenance in the sum of \$600 000.00 per month as ordered by the magistrates court. In this case he has offered her the B.M.W. in leau of maintenance. The defendant turned down the offer and insisted that she wants to be maintained.

In my view the only issue to be determined is the quantum of maintenance as the B.M.W. has already been shared under farm equipment and movables.

In evidence the plaintiff did not dispute most of the defendant's expenses. All he sort to do was to give the plaintiff the B.M.W. so that she could sale it and use the proceeds to start her own business from which she would earn an income and cease to be his dependant. The defendant

insisted on maintenance and even sought an amount exceeding \$2 000 000.00. Her counsel reminded her that the application was for \$2 000 000.00 and that there had been no amendment to the amount claimed.

The defendant's evidence on the breakdown of expenses is satisfactory. In view of the effect of inflation her claim for maintenance in the sum of \$2 000 000.00 can not be said to be exaggerated. It is in fact on the lower side. I would therefore find that the defendant is entitled to the amount claimed. The plaintiff is clearly a man of means. He is in my view well able to pay to his wife maintenance in the sum of \$2 000 000.00 per month. An award to that effect will be granted.

Valuation

Both parties have had the properties in dispute except the Mazda 626 and No. 12 Lomagundi Road valued. The plaintiff's valuation is earlier than that of the defendant. Neither party was able to challenge the valuation of the other. In addressing the court, counsels for both parties agreed that in respect of each property the value to be relied on be the average obtained by adding the plaintiff and defendant's valuation and dividing that figure by two. I am satisfied that this is a satisfactory way of arriving at the value of the matrimonial estate.

Acquisition of Wonder Valley Farm by Government

At the end of these proceedings counsels for both parties undertook to advise the court on whether or not the farm was being acquired by Government. They have not written to the court as they had promised to do. They could have easily verified this fact by making inquiries with the Ministry of Lands.

The issue can however be resolved from the evidence. All the plaintiff said was that Government at some stage had shown interest in the farm. The defendant said Government clearly has no interest in the farm and that Wonder Valley Farm (Pvt) Ltd is continuing with its farming operations

unhindered. This seems to be the situation on the ground. The plaintiff did not say Government took any further steps to acquire the farm. In the circumstances I find that the farm is still matrimonial property and will be distributed between the plaintiff and the defendant as has already been indicated.

In the result it is ordered as follows:-

1. That a decree of divorce be and is hereby granted in terms of the plaintiff's claim.
2. That the defendant be awarded all the household movable assets except the Imperial upright freezer and a washing machine which are awarded to the plaintiff.
3. That the defendant be awarded
 - (a) 25% of the value of the Mazda 626 and No. 12 Lomagundi Road which shall be valued by a valuer from the Master's Office's list of valuers.
 - (b) That defendant be awarded 25% of the value of the Domboshava House.
4. That the farm (Wonder Valley Farm), the farm equipment, farm movables including the herd of cattle be shared at the rate of 70% for the plaintiff and 30% for the defendant.
5. That the defendant is awarded 25% of the value of Wonder Valley (Pvt) Ltd.
6. That the value of the assets to be shared under 3(b); 4 & 5 shall be obtained by adding the plaintiff's and defendant's valuations and dividing that figure by two.
7. That the plaintiff shall maintain the defendant at the rate of \$2 000 000.00 per month until she dies or remarries.
8. That the plaintiff is granted the option to buy out the defendant in respect of orders 3, 4 and 5 by not later than the 30th July 2006.
9. That the plaintiff shall pay the defendant's costs.

Messrs Scanlen & Holderness, the plaintiff's legal practitioners
Messrs Chihambakwe, Mutizwa & Partners, the defendant's legal
practitioners