

PUMULA DZVOVA
versus
LUKE DZVOVA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 25 March and 7 May 2008.

CIVIL TRIAL

Mrs J V Pratt, for the plaintiff
R Y Phillips, for the defendant

MAKARAU JP: The plaintiff and the defendant were married in Harare in February 1982. There are no children to the marriage. The parties have realized that they no longer have love and affection for each other and that their relationship has broken down and cannot be retrieved. They came to this joint conclusion at a pre-trial conference that was held after the plaintiff had issued summons for divorce in January 2006. At the same pre-trial conference, the parties also agreed on how to share the movable assets of their joint estate in the event that the court agreed with them that their marriage cannot be salvaged and granted a divorce in the matter. The sole issue that remained for determination was how to distribute the immovable property of the marriage, namely stand 493 Houghton Park Township. It was the plaintiff's contentions that she be awarded 50% of the net proceeds from the sale of the property. On the other hand, the defendant argued that the immovable property was his sole property and that it should be declared as such. He further argued that in the event that the court awarded a share to the plaintiff, the property should only be sold upon his death as to do so prior would be to render him homeless.

The facts of this matter regarding the acquisition of the immovable property are to a large extent common cause.

When the parties married, they were in rented accommodation; they then secured a vacant stand in or about 1985. At that time he was the one in gainful employment. She would then use her time to attend to all those tasks that required someone who had more time on their hands. The property was registered in their joint names. The parties developed the stand to its current state from the proceeds of a loan secured by a bond over the property which loan he repaid from his earnings.

In 1997, she became gainfully employed and had the kitchen and the bathrooms tiled. She also had cupboards installed in the kitchen. This was from her earnings.

It is further common cause that the parties assisted his family to put up a residence at a farm that he considers as his family home. Her parents owned a property in Dube, Soweto, South Africa and upon their untimely demise, the property either passed onto her, (which fact she denies) or she has the right to reside in the property.

The plaintiff is in her mid-fifties while he turns sixty-seven next September. He is on pension from a company that he worked for thirty four years. He is currently a contract worker with the same employer.

During the trial of the matter, both gave evidence. As indicated above, their evidence is largely common cause. She admitted that whilst the property is registered in their joint names, he developed the stand virtually on his own save for the tiling of the kitchen and of the bathrooms that she saw to after she obtained employment in 1995. He admitted that since the property was acquired during the subsistence of the marriage, she is entitled to a share but that she should only be able to realize that share upon his demise. He further testified that the plaintiff is South African by origin and after divorce, she will return to South Africa where her family is. She has a son from a previous marriage who at one stage lived at the family home in Soweto which has been left by her parents.

Although I found both to be generally good witnesses, it is in my view pertinent that at this stage I mention that I have accepted the defendant's contention as more probable that the plaintiff is unlikely to remain in Zimbabwe after the divorce. I did not believe her averments that she will stay in the country as she has developed a clientele for catering service. With the economic downturn that the country is experiencing resulting in the shortage of basic commodities, her line of business is not the most lucrative and would hardly entice her to stay where she has an option to leave. I have also based my finding on the admitted fact that she has already taken to that country some of her clothes. She argues that these are now a wee bit loose as she has lost weight. I do not believe her in that regard. She has accommodation in South Africa even if she may not own that property. She has not sought to find and establish another home in Zimbabwe for herself even after filing for divorce. She has sold some of the movable assets that the parties agreed could be retained by her as her sole and absolute property.

Two issues fall for determination in this matter. Firstly, I have to determine whether from her 50% share in the property, I may deduct any percentage to award to the defendant in exercising the discretion vested in me by section 7 of the Matrimonial Causes Act [*Cap 5:13*], (the Act). Having made that determination, I will have to go further and establish whether there is any basis upon which I can make any consequential or supplementary provisions to give effect to the award that I would have determined under the first issue.

I return to the first issue.

It is common cause that the property in issue is registered in the parties joint names. As has been held in the much cited case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC), the plaintiff is a half owner in the immovable property. Such ownership is not derived from her status as a wife nor does it arise from the direct contributions that she made towards the acquisition of the property. She is an owner by virtue of the registration of her name against the Deed of Transfer in respect of the property. Her title to the property in this regard holds against the world at large and to an extent, against her husband unless he can show recognizing her right in the property will not achieve the objectives set out in the Act, namely of placing the spouses in the position they would have been in had a normal marriage relationship continued, as far as this is reasonable and practicable.

In the result, I will award 50% of the net value of the property to the plaintiff.

The second issue that falls for determination in this matter has exercised my mind. The plaintiff has argued that upon the granting of the divorce, the property in dispute must be sold and the proceeds shared in terms of the respective awards. He in turn has pleaded that he is a pensioner. He has no means to purchase the plaintiff's one-half share in the property so as to save the property from being sold immediately upon the granting of the divorce. He is still employed as a contract worker and cannot therefore relocate to the farm which he considers his rural home. He is too old to start his hand at farming. In this regard, he has further pleaded that I put a condition that the property can only be sold upon his demise.

The parties' positions above in my view bring into focus the contrast between the "clean break" concept in divorces and the objectives of s 7 of the Act that imposes a duty upon the court to view the distribution of the matrimonial assets as if a marriage between the parties continues. The plaintiff's stance is clearly a manifestation of the clean break concept. She would want to break cleanly from him and realize her share of the immovable property upon the granting of the divorce and move on with the remainder of her life. His is the exact

opposite. He would not want the divorce to unsettle his life save as for that which cannot be avoided. In this regard he would want to remain in the property until his death notwithstanding the granting of the divorce.

In *Nyatwa v Nene* 1990 (1) ZLR 97 (H) EBRAHIM J (as he then was) had occasion to remark on the place of the clean break concept in our divorce law in the context of the provisions of the Matrimonial Causes Act. He was of the view that the statutory objective as set by s 7 (3) of the Act is foreign to our legislation and militates against the clean break theory or principle towards which the entire statute is geared.

The learned judge proceeded to note that our own legislation, the Matrimonial Causes Act was promulgated very shortly after the repeal from the English equivalent of a similar provision and our legislature did not take the opportunity to include the clean break principle into the legislation.

As stated by the learned judge in the opinion, the clean break principle as its name implies, envisages a situation where after the divorce, there are no strings financial or social, tying the parties one to the other. Each party is given their due from the failed marriage and is left to pick up their lives and move on. This, on the face of it, appears to be the desires of most plaintiffs' and some defendants in divorce actions.

On the other hand, s 7 (3) of the Act introduces a duty on the court divorcing the parties to maintain as far as is reasonable and practicable, the status quo of the lifestyle that the spouses had during the subsistence of the marriage. Upholding one obviously frustrates the other.

While our Act was framed on the basis of the South African equivalent, which in turn was framed after the fashion of the English one, the Matrimonial Causes Act does not specifically embrace and provide for the clean break principle. On the contrary, it provides for the continuance of the marriage as far as is reasonable and practicable after divorce. It is on this basis that this court has made orders for custodian parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority. It is on the basis of this that this court has ordered the procurement of new residences or motor vehicles for divorced spouses to achieve the objectives of the Act.

On the basis of the foregoing, while the plaintiff is entitled to 50% of the net proceeds from the sale of the property of the marriage, she is not as of right entitled to enjoy that award

upon the granting of the divorce. She would only be so entitled if the clean break principle was a part of our divorce law. It clearly is not.

As indicated above, I have found on a balance of probabilities that the plaintiff will return to South Africa upon the granting of the divorce. I have taken this into account in weighing the equities of the matter before me.

I have also taken into account on the other hand that he is still employed although on a contract basis. He is advanced in age and is unlikely to raise funds that will enable him to pay off the plaintiff to retain full ownership of the property. From his one-half share he is unlikely to pay for rented accommodation for any appreciable period. His circumstances are in my view such that his need to remain in the property outweighs her need to realize her one half share of the property immediately and achieve a clean break from the defendant.

I have taken into account that it may take the plaintiff quite some time before she can realize her one-half share of the property. This I have weighed against her minimal cash outlay towards the acquisition and development of the property during the subsistence of the marriage. In my view, the two balance each other evenly. Thus, where she has gained by contributing less than him in monetary terms, he will gain by her wait on the terms I shall spell out in the order. In making this award, I am guided by the objective of s 7 of the Act of trying as far as reasonable and practicable to maintain the status quo *stante matrimonii* where both were equal owners of the property. I have attempted to achieve that equality after divorce.

In the result, I make the following order:

- 1 A decree of divorce is hereby granted.
- 2 Each party shall retain as their sole and exclusive property the movable assets in their possession.
- 3 Each party is awarded 50% of the net value of Stand 493 Ardbennie Township 3 of Subdivision A of Ardbennie.
- 4 The defendant is hereby granted the right to remain in occupation of the property until he dies or lives with another person after the manner of husband and wife whichever occurs sooner.
- 5 Each party shall bear its own costs.

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Mushonga & Associates, plaintiff's legal practitioners.
Coghlan Welsh & Guest, defendant's legal practitioners.