

SHUPIKAI VITO
versus
ENGELINE ZACHARIAH VITO

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 9, 10 and 11 June and 1 August 2008

Family Court-Divorce Action

Plaintiff in person
I Ndudzo, for the defendant

KUDYA J: The plaintiff husband sued his wife for divorce on 20 September 2005. She entered her plea and counterclaim on 19 May 2006. The matter was referred to trial at the pre-trial conference held on 19 June 2007. The parties agreed at the pre-trial conference that their marriage had irretrievably broken down. They also agreed on the issues of custody, access to and the payment of school fees of the minor children of the marriage and on the distribution of all the movable property. The sole issue that was referred for trial was on the equitable distribution of the matrimonial home, Stand 567 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke Township.

The parties were married by civil rites at Harare on 12 February 1992. The marriage was blessed with two children, that is, Prettyosa Vito born 26 February 1992 and Cindy Vito born 10 March 1999. Their relationship deteriorated over time mainly due to verbal and physical abuse perpetrated on the defendant by the plaintiff. It culminated in plaintiff deserting the matrimonial home in September 2003. Allegations of infidelity were made by each against the other. The plaintiff attempted to establish one such affair through two photographs which he produced as exhibit 7. I am satisfied from the evidence led by the parties at the trial that the marriage has broken down beyond repair.

I proceed to review the evidence led by each party on how the matrimonial home should be distributed.

It was common cause that the matrimonial home is jointly registered in their names. The stand was purchased and developed during the subsistence of the marriage.

THE PLAINTIFF'S VERSION

He stated that he met his wife in 1982. She moved in with him in August 1990. She started working in 1990/91 for KM Stationers as a sales representative. She left and joined a company called Best from which she was dismissed in 1995. The two formed their own company, Prean Computers. At first she was the managing director and sole shareholder while he was a passive director as he was then in the full employ of the Air Force of Zimbabwe which he had joined on 7 June 1989. He provided the working capital of the company from his salary. It was easy for her to access his bank account as she was a signatory thereto. One Alan Clayton Jones, a Briton, injected \$50 000.00 into the company which amount was used to buy a Ford Laser Mark 1 and an Opel Kadet for the business in 1996. Jones failed to get Zimbabwe citizenship and relocated to South Africa.

The plaintiff at one time went to South Africa with defendant to discuss the change of shareholding with Jones. Jones wanted his sister Venus to join the company as a shareholder but he dropped the idea after both the plaintiff and the defendant opposed the proposal. The plaintiff produced Exhibit 1, a CR 2 form showing how shares were allocated in the company, entitled the return of allotments, which was filed with the company registry on 23 October 1997 and covered the period 14 December 1995 to 5 Sept 1997. It confirmed that the company was formed with an initial share capital of 20 000 shares of \$1.00 each. 1 share was allotted to the defendant. An additional 199 shares were later allotted to defendant (34), plaintiff (35), Alan Clayton Jones (35), Deidre Evans (35) and Thomas William Baxter (60). In this allocation both the plaintiff and defendant had an equal number of 35 shares each.

The CR2 form of 28 November 2001, exhibit 2, for allotments issued between 6 September 1997 and 8 November 2001 indicated that a further 9 900 shares were issued to each of them. They therefore held a total of 9935 shares each in the company. He said this took place in 1998. His job at the Air Force of Zimbabwe was for 10 years and was demanding. He gave the defendant advice and technical support and finance. He also accompanied her to Kolok in South Africa to buy stock, in the form mostly of cartridges, for resale.

In August 1998 he bought a Mazda 2200, which was used for company deliveries.

In October 1998 the two purchased the Borrowdale Brooke stand for \$500 000.00 through Unique Designer Homes with a total construction package of \$2, 5 million. During that month he saw service in the Democratic Republic of Congo where he was stationed until

1999. He was paid in hard currency. He also remitted funds from the sale of goods home. His wife was accessing his salary at home. His contract with Air Force of Zimbabwe ended in July 1999. He received a severance package of \$150 000.00 and cash-in-lieu of leave which he disbursed to Unique Home Designers towards the construction of the matrimonial house. He then worked for Prean full time until he found employment with the President's Department as a computer technician in May 2000 and left in March 2003. Even when at that department he used to work for Prean during weekends and after hours. He supplied computers for Prean to Regina Mundi School in Gweru. He produced an order voucher, exhibit 3, showing the work he did for Prean in August 2003 at the President's Department and exhibit 4 to show how he received purchase orders from companies in Malawi for Prean.

The two also formed a hardware department under Prean which utilized his skills as an electronic telecoms technician and exploited his contacts for the benefit of the company. He supplied 3 computers to Unique Designer Homes and installed an internet for them for a total of \$160 000.00 on behalf of Prean. This amount was set off against their indebtedness to Unique Designer Homes. He also did work for Prean at JJ Motors in Southerton in Harare whose proceeds also went towards meeting their construction costs with Unique Designer Homes.

The parties formed Wizcard Services (Pvt) Ltd. He was in charge. He produced 19 cheques as exhibit 5 to show the use he put of the money drawn on the First Banking Corporation account of Wizcard between 19 December 2002 and 19 June 2004.

They obtained mortgage finance of \$1, 6 million from CABS to roof the house using the title deeds as security. He would go to Mega Bricks to fetch the bricks and Kitchen Décor and Halsteads Brothers to fetch materials and items for the house. He designed and installed the satellite dish system for the house. They moved into the house in November 2000.

He also stood as a guarantor and co-surety for Prean for the order finance facility availed to the company by the Zimbabwe Development Bank. He accused his wife of abusing the facility and going on personal jaunts instead of retiring the debt such that before the three zeroes were removed in August 2006 the debt had ballooned to \$4 billion. When he moved out he took the Nissan Hardbody which was on hire purchase from Stanbic Finance to Prean and fully paid the outstanding \$16, 4 million as shown in exhibit 6. He left everything else for the use of the defendant and the children including his shares in Prean. He produced a copy of the title deeds as exhibit 8 to demonstrate that the CABS loan was retired and that any further mortgages were for the personal aggrandizement of the defendant.

He was cross-examined at length. Notwithstanding attempts to establish that he did not have intimate knowledge about the goings on at Prean, the plaintiff showed that he was involved in the affairs of the company. He admitted that it was formed by the defendant as a source of employment for her and income for the family. She appointed him a director and shareholder not only because she trusted him but also to demonstrate the family nature of the company. He demonstrated through exhibit 1 that the company was not formed from funds that were invested by Jones but by the defendant as shown by the initial allocation of 1 share to her. He made the point under cross-examination that the defendant was more involved in the company than himself during those times he was in gainful employment elsewhere. He however contributed as best as he could his time, money and expertise. The fact that he was not privy to the finer details as to the name of the seller of the undeveloped stand should not detract from his contribution. After all, the agreement was executed with Hoslo in November 1998 when he was serving with the Air Force in the Democratic Republic of Congo. He demonstrated that Prean was used as the special purpose vehicle to fund the purchase of the undeveloped stand and its subsequent development. He had knowledge of the basic milestones in the construction of the house.

He believed that the level of his contribution towards the purchase of the undeveloped stand and its subsequent development demonstrated that he was entitled to a half share and not to the 20% touted by the defendant. He urged the court to give defendant the option to buy him out in a month to enable him to purchase a house of his own.

THE DEFENDANT'S VERSION

She stated that at the time of the marriage he was an aircraft technician with the Air Force of Zimbabwe while she was a sales representative with Penguin Wholesalers. She worked for this stationery company from 1989 to 1993. She held a diploma in International Marketing. She earned a basic salary plus commission. Her take home salary was more than his for he earned \$700.00 p.m. while she earned \$5 000.00 per month. He played no part in her education or employment. In 1994 she joined BBC an Information Technology company. She received in house training in computers and was appointed a sales manager. Her perquisites included a company car and her salary was higher than in the previous company. She left BBC and joined Data Tech a company formed by one of the directors of BBC.

In the same year she formed Prean, a derivative from the names of her first daughter and herself. Her husband was not supportive of the idea. She without his knowledge or

approval put his name up as her co-director when she registered the company on 14 December 1995. She operated the company while still employed by Data Tech. She produced the CR14 form dated 18 January 1999 as exhibit 9 to show that Alan Jones and his wife Deidre Evans were appointed directors on 19 December 1995. This came about after Alan Jones injected \$20 000.00 into the company. He and his wife resigned their directorships on 10 December 1998. During the period 1995 to 1998 Prean did very well. Her husband being a technical person would do jobs for the company for which he was paid an allowance. He would lend money to the company for which he was always repaid. He remained a director while she was the managing director.

She decided to buy an undeveloped stand. She used funds from Prean Computers to purchase the undeveloped stand from Hoslo Investments for \$520 000.00 in November 1998 without the help or participation of her husband. She included his name in the agreement. She stated that she used her salary from Prean where she was now in fulltime employment to construct the house. Her husband made a direct financial contribution of \$158 000.00. He also went once to collect bricks used in the construction of the driveway, otherwise she entered into a fix and supply construction agreement with Unique Designer Homes. She produced a nine paged document as exhibit 10 to demonstrate the nature of the fix and supply agreement and the progress reports and costs of each stage of construction. The first 7 pages are in both their names, while the last 2 are in her name. The contractor constructed the house up to the wall plate level. Inflationary pressures in the economy affected Prean operations. She fell behind schedule in repayments and was penalized.

In order to put up the roof, she persuaded her husband to take a loan from CABS for \$1 638 488.00. They signed the loan, exhibit 11, which was guaranteed by Barclays Bank, on 25 June 1999. They failed to service the loan because her husband had left employment and business at Prean was beset by economic challenges. She produced 4 letters from CABS as exhibit 12 which were written between 7 March and 22 June 2001 which showed their failure to service the loan. She was helped by a CABS mortgages manager to obtain further loans from the Zimbabwe Development Bank to retire the CABS loan. They used the title deeds in their joint names as security for the Zimbabwe Development Bank loan of \$15 million, which was advanced to Prean Computers in January 2002. This loan has ballooned to \$440 856 275 140 200.32 according to exhibit 13, a letter of demand of 31 May 2008 that she received from the Infrastructural Development Bank of Zimbabwe, the successor company to the Zimbabwe Development Bank. It is noteworthy that she was not able to explain how the \$15 million loan

could increase to \$440 trillion, especially when exhibit 8, the copy of the title deeds indicates that this mortgage loan was cancelled on 20 September 2006 with 3 other loans of \$45 million, \$40 million, and \$380 million respectively. The only outstanding mortgage is for \$7, 2 million registered in 2006. She was also unable to explain the nature of these mortgages that were registered against title.

She was at a loss as to how she would settle the \$440 trillion. She did not believe that her husband's new found enthusiasm in accepting that he was responsible for half that amount was genuine. He had failed since he deserted the matrimonial home in September 2003 to maintain his children or even visit them at home or school. They both owe, according to exhibit 17, Girls' College school fees for term 2, 2008 of close to \$73 million and £225.00 for the elder child's Cambridge Examinations. He was no longer a director of Prean since 19 December 2004 as shown by CR14 form, exhibit 14, of 28 April 2004. She produced exhibit 15 and 16 to show that she has been lending him money even as they are divorcing. She accepted that the debt of \$ 440 trillion was hers alone to settle.

She agreed that the matrimonial home was registered in both their names but stated that he contributed 20 % to its purchase and construction. It was fair and just that he be given 20% share of the property and that this percentage be given to the children as his share of maintenance and school fees.

She maintained that she did not need capital to form Prean. She was still employed and would use the customers and suppliers of her employers to source business for Prean. She purchased a Ford Laser for his use. She explained that the 5 cancelled mortgages on exhibit 8 reflect not new money but refinancing of the initial debt by the Zimbabwe Development Bank. The amount owing was for her to settle. It became clear that the amount is owed by Prean. It was not clear to me how the house was mortgaged for a debt incurred by Prean. No documentary evidence was led by the defendant in this respect.

She agreed that in 2000 when he was unemployed he did some work for Prean in Southerton. He did some work at Unique Designer Homes and delivered computers for Prean. She was not aware that he put 3 electric timers to control outside lights and that he set up the satellite dish system at the matrimonial property. She agreed that as her husband and as an experienced technician he would assist at Prean. She agreed that \$158 000.00 from his Air Force of Zimbabwe pension went towards the construction of the house, hence her 20% offer.

THE SUBMISSIONS

I understood the plaintiff to submit that he was entitled to a 50 % share in the house because firstly, it is registered in both their names and secondly because he directly contributed to its construction by injecting \$158 000.00, and manually by working at the house. More importantly, he submitted that the immovable property was purchased and constructed by funds which emanated from Prean Computers. He held an equal number of shares in the company as the defendant. He was a director in the company. He forewent his fees and dividends for the good of the company. He thus indirectly through Prean gave as much as the defendant did.

Mr. *Ndudzo*, for the defendant, submitted that I should be guided by section 7 (4) (b) of the Matrimonial Causes Act [*Chapter 5:13*] in distributing the home. I am enjoined to consider the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future. The mother as the custodian parent requires the home to stay in with the children. It is the only home they have known. He contended that the plaintiff had not shown that he was able to look after the children. He referred me to *Shenje v Shenje* 2001 (2) ZLR 160 (H) at 164A and *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) as the basis for his submission.

RESOLUTION OF THE DISPUTE

Section 7 of the Matrimonial Causes Act reposes in the Court a very wide discretion in distributing matrimonial assets. In *Shenje v Shenje* at 164A, Gillespie J saw the legislative intent and the objective of the courts as one which met the needs of the parties rather than recoup their contributions. He decried the tendency in most court decisions to pay exclusive consideration to the contributions of the parties. Regrettably, the evidence led in this Court overemphasized the spouses' contributions at the expense of their present and future income generating capacities from assets and other financial instruments; their present and future financial needs; the standard of living of the family, the ages of the family members; the loss of benefits occasioned by the divorce; and the duration of the marriage. These and other considerations are designed to assist the Court achieve a fair and just apportionment which does not favour any family member at the expense of others. Indeed subsection (5) of section 7 permits the Court to apply these considerations even where the parties have executed a written agreement between themselves.

In the present matter I will start with the contributions of each party to the matrimonial asset in question. In the language of MCNALLY JA in *Takafuma v Takafuma* the asset falls

into the “theirs” category by virtue of joint registration of title in both their names. It is the wife who wishes the husband’s share reduced, so the onus lies on her to show on a balance of probabilities that she contributed more than he did to justify the reduction. In her testimony, she clearly demonstrated that she was at all times in the driving seat in regard to the purchase and development of the asset. The husband took a laid back view. She was at the forefront in the formation and development of Prean Computers (Pvt) Ltd, the special purpose vehicle she used to fund the acquisition and development of the asset. In both the company and the asset she registered him as an equal partner. It was always in her contemplation that they be equal partners in the company and in the matrimonial asset. Had the marriage continued, he would have remained an equal partner.

When they purchased the asset, she was giving her all to the company. He contributed his expertise to the affairs of the company when he had time to spare from his fulltime work schedule in the Public Service. He financially and materially contributed to both the affairs of the company and the development of the asset in question. He was doing it to further the matrimonial nest. That both were working in unison was shown by the oft repeated sentiment of the wife that she trusted him. I am not able to discern any lesser contribution in the affairs of the common estate by any of the parties. They both fully applied their complementary skills to the prosperity of their company, which in turn was their cash cow for the acquisition and development of the matrimonial home. The wife has failed to show any superior contributions which would entitle her to receive a portion from his half share.

The present and future income generating capacities of the two are skewered against the husband. The evidence suggested that he has run down Wizcard. He has fallen on hard times and depends on the wife for sustenance even as the divorce proceedings were underway. He is no longer a director in Prean Computers, even though he remains a shareholder. The wife continues to sustain herself and the children from Prean Computers where she remains in control. She did not dispute that she is the sole shareholder of Prean Computers registered in Malawi. There is no reason why the husband cannot put his contacts and expertise to better use to uplift him. At the moment the issue of earning capacities is tilted in favour of the wife.

On the aspect of future financial needs the wife raised the issue of Prean’s supposed indebtedness to the tune of \$440 trillion dollars. She was not able to demonstrate that the company is indebted in this amount and that the matrimonial house may be attached in the absence of proof that the husband, as joint owner, guaranteed the debt on behalf of Prean. In

fact his testimony went unchallenged that the Infrastructural Development Bank of Zimbabwe had dissociated him from that debt. She was prepared to assume the debt herself. The title deeds do not disclose that title has been registered against the debt. All other mortgages were cancelled except for the 2006 one for \$7, 2 million. It would appear the alleged debt is fictitious and was designed to cheat the husband of his fair share in the matrimonial house. The future needs of the parties appear equally balanced save that the wife at present bears the duty to support the minor children. She can always approach the maintenance court for assistance in the event that the husband's lot improves in future.

The standard of living of the family will be affected if the house is disposed. At the moment the wife and children are in the house while the husband has found shelter in his father's house in Mbare. It is his standard of living which has fallen drastically.

The two are aged 39 and 40 years respectively. Their two children of the marriage are 16 and 9. This factor and that on duration of the marriage do not apply in this case. The two will be able to rebuild their lives after the divorce by utilizing their talents and networks to improve their fortunes. The children will benefit from any such future improvement.

The result of these considerations is that the husband remains with his entitlement to a half share in the property. The agreed resolution of the other issues at the pre-trial conference gave the wife custody and the husband access to the children. They also agreed that they would each contribute 50% of the school fees of the minor children. They further agreed on the distribution of the movables. The husband received the gym equipment and a Nissan Hardbody. The wife took all the other property. The children will benefit from the use of all the other household goods and effects. The youngest should also be given an opportunity to continue residing in the house until she is 18 years old. Thereafter the house can be evaluated and sold if the wife is unable then to buy him out. In the meantime he can use the skills he intended to utilize to fund what he believed was his half share of the \$440 trillion indebtedness to raise money to buy a house for his own use.

I am satisfied that each party is entitled to an undivided half share in the immovable property. The defendant will be awarded a usufruct to use it until Cindy is 18 years old. Thereafter it shall be evaluated and she shall have the option to buy him out failing which it shall be sold to best advantage and the proceeds shared equally between them.

DISPOSITION

It is accordingly ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children Prettyosa Vito born 22 February 1992 and Cindy Vito born 10 March 1999 is awarded to the defendant.
3. The plaintiff is granted access to the minor children every weekend from 8am on Saturday to 5pm on Sunday and on every alternate holiday.
4. Each party shall contribute 50% towards the school fees of the minor children
5. Each party is awarded the sole and exclusive possession of the movable property currently in his or her possession.
6. Each party is awarded 50% of Stand 567 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke Township commonly known as 567 Eagle Place Borrowdale Brooke Harare.
 - 6.1 the defendant is granted the sole right of occupation in the immovable property until the youngest of the minor children is 18 years old
 - 6.2 thereafter the parties shall by consent appoint an evaluator within 14 days of that event
 - 6.3 in the event that the parties fail to agree on such appointment within the period stated in 6.2 above, then within 7 days of such failure the Sheriff shall, from his list of evaluators appoint an evaluator
 - 6.4 The evaluator appointed either in terms of clause 6.2 or 6.3 above shall evaluate and submit his report to the parties and the Sheriff within 14 days from the date of his appointment.
 - 6.5 The costs of such evaluation are to be shared equally between the parties
 - 6.6 The defendant shall make payment to the plaintiff within 90 days of the evaluation of such amount as represents 50% of the net value of the property
 - 6.7 In the event that the defendant fails to effect such payment within the period referred to in clause 6.6, the property is to be sold to best advantage and the proceeds thereof are to be shared equally between the parties.
7. Each party shall bear its own costs.