

FRADRECK MUTAMBIRWA
versus
SHARON M. MUTAMBIRWA (NEE SHITO)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J.
HARARE, 1 September 2009 and 22 July 2010

FAMILY COURT TRIAL

Mrs. *L Chiperesa*, for plaintiff
O Hute, for defendant.

CHITAKUNYE J: On 29 April 1995 the plaintiff and defendant were joined in holy matrimony by a minister of religion in terms of the Marriages Act *Chapter 5:11*. That must have been a joyous occasion, not only to the two but to their respective families and friends. Sadly 14 years down the line the couple no longer wishes to continue as husband and wife. Whatever happened to their vows to live together ‘till death do us part’ is only known by the two of them.

During the 14 years of marriage no child was born of the marriage. At the time of the marriage they lived in a single room as tenants/lodgers. Soon after marriage they moved to now rent two rooms. In the year 2001 they eventually acquired an immovable property namely stand number 10771 Kuwadzana Extension Harare. That property was registered in the plaintiff’s name. Thus from being lodgers they were now proud owners of an immovable property. In that same period they also acquired movable property.

Unfortunately in that same period differences began to emerge leading to this divorce action.

On 21 May 2008, the plaintiff sued the defendant for a decree of divorce on the ground that their marriage had irretrievably broken down to such an extent that there are no prospects of reconciliation. He alleged that:-

- (1) The parties have lost all love and affection towards each other and;
- (2) The parties have become uncommunicative towards each other and are invincibly incompatible.

The defendant in her plea thereto agreed that the marriage has indeed irretrievably broken down.

As there are no children the contentious issue pertained to the distribution of the matrimonial estate they acquired during the subsistence of the marriage. At the pre-trial conference counsel for both parties indicated that the issue of movable property had been resolved and so was no longer an issue before this court.

At the same conference the defendant withdrew her claim for spousal maintenance. The only issue referred for trial pertained to the equitable distribution of the immovable property, which is the parties' matrimonial home.

Section 5 of the Matrimonial Causes Act; *Chapter 5:13* herein after referred to as the Act, states that:

“(1) an appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.”

Section 5 (2) provides some of the circumstances court may consider in determining whether the marriage has irretrievably broken-down.

The plaintiff gave evidence to the effect that they married here in Zimbabwe. He has lived in Zimbabwe all his life and he is thus domiciled in Zimbabwe. On that basis this court has jurisdiction to determine the case.

He also gave evidence on the grounds for the breakdown and why he believed that there were no prospects of restoration of a normal marriage relationship between them.

The defendant in her evidence agreed that the marriage had indeed irretrievably broken down to an extent whereby there was no reasonable prospect of restoration to a normal marriage relationship between them. Upon hearing the evidence of the break-down as testified to by the parties I was left in no doubt that indeed there were no reasonable prospects of restoration of a normal marriage relationship between the parties. The parties had become incompatible and had lost love and affection for each other. Where parties have professed that they no longer have any feelings of love or affection towards each other, this court cannot force them to continue with the marriage relationship. It is therefore inevitable that a decree of divorce be granted.

In granting a decree of divorce this court is enjoined to also decide on the proprietary and other ancillary issues as between the parties. In that regard section 7(1) of the Act states that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage or at any time thereafter, an appropriate court may make an order with regard to-

- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favor of one or other of the spouses or of any child of the marriage.”

Section 7(3) provides for assets that court may not consider in the exercise of its powers in terms of section 7(1) (a) these include assets acquired by inheritance, in terms of any custom and which in terms of that custom, are intended to be held by the spouse personally; or which have a sentimental value to the spouse concerned. No such assets were pleaded in this case.

Section 7(4) of the Act outlines some of the principle considerations court must take into account in making an order in terms of section 7(1) thereof. Subsection (4) states that:-

- (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following:
 - (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
 - (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
 - (d) the age and physical and mental condition of each spouse and child;
 - (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
 - (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
 - (g) the duration of the marriage;

and in doing so the court shall endeavor as far as is reasonable and practical and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

It is clear that court is enjoined to consider all the circumstances of a case. It is thus incumbent upon the parties to candidly place before court all the circumstances from which court will have to decide the case. The guidelines in section 7(4) (a)-(g) can only be appropriately applied where the parties have adduced evidence on the aspects. Without such evidence court may not be able to apply due weight to each of the factors in arriving at its decision.

In their closing submissions counsel for both parties implored court to consider the provisions of section 7(4) of the Act in favor of their respective clients. Unfortunately they could not adequately address on the aspects of their clients evidence that touched on many of the factors in question. The predominant feature in the evidence by the parties was that of contribution to the purchase and development of the house.

The plaintiff's evidence was to the effect that when they got married they briefly lived in a single room. Soon thereafter they rented two rooms. He thereafter obtained a loan to purchase the immovable property in question. He began servicing the mortgage bond from his salary. This was in 2001. In August 2003 he paid off the mortgage bond using funds he had received as a gift from his late young brother Bernard. That gift was his alone and so the entire loan for the house was paid by him alone without the defendant's contribution.

When the house was bought it was a core house. After paying off the bond he set upon rebuilding the house to a 5 roomed house. That processes involved demolition of the core house and rebuilding a new house all together. That house is almost complete. It was the plaintiff's evidence that the defendant did not make any financial contribution towards both the purchase and the rebuilding of the house. The plaintiff went to great lengths to show that the house was bought and rebuilt from his own financial resources with no contribution from the defendant. He felt that because the defendant did not make any such contribution she did not deserve any meaningful share in the house. To that end he initially offered the defendant a 10% share. When asked why he had made such an offer he said that:- "the 10% is meant to be a token of appreciation of the time we shared as husband and wife."

When asked about his offer at the pre-trial conference of 20% he said: "I offered the increase from 10% to 20% meant to cushion the defendant so that we could meet halfway."

Clearly in my view the plaintiff had no appreciation of any meaningful contribution to the matrimonial estate by the defendant. This is why he offered a token percentage. The word token connotes a symbol, sign or just an indication.

The plaintiff was asked to outline the contribution if any that the defendant did to which he said that the defendant was involved in all the chores a house wife does. She would prepare food for the builders. After demolition of the core house by builders she would clean up around the construction site. She would also clean up as the builders built the new house. He clearly belittled the defendant's contribution to the purchase and development of the new house to something inconsequential.

It was because of his apparent belief that the defendant was not entitled to any share of the matrimonial house as of right that the plaintiff said he was initially offering the defendant 10% share as a token of appreciation of the time they shared as husband and wife. When he upped the offer to 20% he said this was to cushion the defendant and to meet halfway.

The plaintiff's approach to the issue of distribution of matrimonial estate was certainly flawed. In as far as it is admitted that the property is matrimonial property that property is subject to distribution in terms of section 7(4) of the Act. It is not within the plaintiff to 'give' as if he is being charitable.

The plaintiff's attitude has been a subject of judicial correction in a number of cases. For instance in *Shenje v Shenje* 2001 (2) ZLR 160 GILLESPIE J alluded to the need to seriously consider the first two factors in section 7(4) of the Act which deal with the parties' needs, then the parties expectations. The learned Judge went on to indicate that those factors should not be overshadowed by the fifth factor of contribution.

In *Sithole v Sithole & Anor* HB14/94 court held that even if a wife made only indirect contributions, she cannot leave empty-handed merely because she did not contribute financially towards the acquisition and development of the matrimonial home.

In *Muteke v Muteke* S 88/94 the wife made no direct financial contribution except as a housewife but court awarded her a substantial share. The court considered primarily her needs and expectations rather than her contribution.

It is apparent from the above cases that in deciding on what share to award in the matrimonial estate, a party's direct financial contribution is only but one of the factors to be considered. It is however not the defining factor. In as far as court's endeavor is to ensure that each party lives a life as near as possible to a life they lived before the divorce, the parties' needs and expectations must always be seriously considered irrespective of the differences in contributions.

It is also important to appreciate the importance of indirect contribution made by a party as more often than not such indirect contribution makes it possible for the other party to divert most of their resources to the acquisition and development of the matrimonial estate.

In *casu* the defendant contended that she contributed to the matrimonial estate both directly and indirectly. Though her direct financial contribution was less than the plaintiff's it must never the less be considered as entitling her to a reasonable share in the estate.

There was no doubt about her indirect contribution in taking care of the home and providing a homely environment to the plaintiff. The plaintiff admitted to that. She also attended to the builders when the plaintiff was at work.

The defendant indicated that she engaged in the trade of buying and reselling of various wares. On about five occasions she went out of the country on such buying and reselling missions. The money she realized from her trade was utilized for family needs.

The plaintiff in his evidence and under cross examination acknowledged this contribution serve to say he deemed it insignificant. The defendant contended that the gift from Bernard that the plaintiff said was used to pay off the mortgage bond was in fact for both of them as a family and not for the plaintiff alone. This is a point the parties did not agree. It is my view that this would not be decisive to the distribution.

The defendant went on to outline her needs and expectations. I did not hear the plaintiff to seriously challenge the defendant's evidence on this. It is common cause that as husband and wife the parties had graduated from being lodgers to being proud house owners or land lords. With the divorce the defendant will no longer be an owner of a house unless she gets a share big enough to enable her to buy another house. Currently she is leaving in squalid conditions in Matererini Flats Mbare, where she has to use communal toilet and ablution facilities. The defendant's expectation of living as a house owner has been shattered. The standard of living she had attained as the plaintiff's wife is no more. The plaintiff on the other hand continues to enjoy the comfort and status of a house owner with all the security that goes with it.

I am of the view that the 20% that the plaintiff offered the defendant is not commensurate with the defendant's contributions both direct and indirect for the 14 years they lived together. It is also not adequate taking into account the defendant's needs and expectations. The defendant needs such a share as would enable her to start a new life at almost the same standard of living as was the case when she lived with the plaintiff at their

matrimonial home. If what they accrued as a couple is not enough for both to sustain that standard of living then both should share the disadvantages brought about by the divorce. A share in the region of 35% would, in my view, meet the justice of this case.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.
2. The plaintiff is awarded a 65% share in the matrimonial home, being Stand 10771 Kuwadzana Township of Fontainbleau Estate situate in the district of Salisbury; also known as stand 10771 Kuwadzana Extension, Harare.
3. The defendant is hereby awarded 35% share in the said matrimonial home.
4. The parties shall agree on the value of the property within 7 days of this order.
If the parties fail to agree on the value they shall appoint a mutually agreed evaluator to evaluate the property within 14 days of the date of this order.
If the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property.

The plaintiff shall meet the cost of valuation.

5. The plaintiff shall pay off the defendant her 35% share of the value of the property within 120 days of the date of evaluation unless the parties agree otherwise.
Should the plaintiff fail to pay the defendant's share in full within the stipulated period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the registrar of the High Court and the net proceeds there from shall be shared in the ratio 65:35.
6. Each party shall pay their own costs of suit.

Mkuhlani Chiperesa, plaintiff's legal practitioners.
Hute & Partners, defendant's legal practitioners.