

VALERIE MAKONI  
and  
WILFORD MAKONI

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 13-14 September 2010 and 2 June, 2011

### **MATRIMONIAL TRIAL**

*P. Takawadiyi*, for plaintiff  
*M. Chasakara*, for defendant

CHITAKUNYE J. The plaintiff and defendant were married in terms of the Marriages Act, [Cap 5:11] on 8 December 2000. They had commenced living together as husband and wife in the year 1998 on a date they were not agreed on. On 15 October 1998 they had married under customary law.

Their marriage was not blessed with any child.

In October 2008 plaintiff brought this action seeking a decree of divorce and an equitable distribution of assets she alleged the couple had accumulated. She alleged that the marriage had irretrievably broken down to an extent whereby there was no reasonable prospect of its restoration to normalcy. She outlined the cause for the breakdown as that: -

- “1. The defendant has been having extra marital affairs during the subsistence of The marriage
2. The defendant has been violent towards the plaintiff
3. Due to the foregoing the plaintiff has lost all love and affection for the defendant and as a result is approaching this court for a decree of divorce.”

On the distribution of property plaintiff proposed that it is just and equitable that the parties' matrimonial assets be distributed as follows:

For plaintiff:

- i) Satellite dish and decoder,
- ii) 10 cattle and

- iii) 9 goats.

For defendant:

- i) DVD player,
- ii) 1 blanket and bed cover and
- iii) 4 cattle.

On immovable property:-

Plaintiff to retain as her sole property the Goromonzi house and defendant to retain as his sole property house number 3335 School Drive Glen View 4, Harare.

The defendant conceded that the marriage had irretrievably broken down and it was just that a decree of divorce be granted. He however disagreed on the manner of distribution of their assets as suggested by plaintiff. In his plea defendant contended that house number 3335 School Drive Glen view 4, Harare was not matrimonial property but his sole property as he acquired it in 1979 whilst married to his late wife. He also contended that the 14 cattle were not part of the matrimonial property but his alone. He went on to suggest that the matrimonial property be distributed as follows:-

For plaintiff-

- i) 50% share of the Goromonzi property,
- ii) 9 goats,
- iii) 4 plate stove,
- iv) Room Divider,
- v) Radio,
- vi) Satellite Dish and Decoder,
- vii) 2x 2-in-one Blankets;
- viii) Refrigerator;
- ix) Kitchen Drawer;
- x) Bedroom Suite;
- xi) DVD Player.

For defendant-

- i) 50% share of the Goromonzi property;
- ii) 14 cattle;

- iii) Lounge suite
- vi) Bedroom Suite
- iv) 1 Blanket and bedcover.

At a pre-trial conference the couple agreed that-

1. The marriage had irretrievably broken down and that there were no prospects of restoration to a normal marriage relationship
2. That all the goats be awarded to plaintiff
3. All household property/goods, including a 6 piece Lounge suite be awarded to plaintiff.

The issues referred for trial were as follows:-

1. Whether or not House no. 105 Takadiyi Village, Goromonzi was purchased and/or constructed through the joint contribution of the plaintiff and the Defendant and therefore is part of matrimonial estate; and if so, what proportion did each party contribute?
2. Whether or not the cattle form matrimonial property and if so, in what proportion should it be divided between the parties?
3. Whether or not plaintiff made improvements to the Defendant's Glen View property (Stand No. 3335 Glen View) and if so, what were the improvements and their value?

The plaintiff gave evidence after which defendant testified and called one witness. From the evidence adduced there was no denying that both parties were of the view that their marriage cannot be restored to a normal marriage relationship. They both seemed to have lost love and affection for each other. It was therefore clear that indeed the marriage had irretrievably broken down.

On the contentious issues of the immovable property and cattle both maintained their positions that they should be awarded what they were claiming.

Section 7(1) (a) of the Matrimonial Causes Act [*Cap 5:13*] provides 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 the division of, apportionment or distribution of the assets of

the spouses including an order that any asset be transferred from one spouse to the other.”

Section 7(4) provides that in making the decision in subsection (i)

“...court shall have regard to all the circumstances of the case.”

The subsection goes on to enumerate some of the circumstances to be considered in s.7 (4) (a)-(g). The subsection concludes by stating that-

“and in so doing the court shall endeavour as far as is reasonable and practicable 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 parties.”

#### **Evidence on the contentious issues**

The plaintiff gave evidence on her contributions on the immovable properties

The plaintiff abandoned her initial inclusion of house no. 3335 School Drive Glen View as matrimonial estate when in her amended declaration she excluded it. In her evidence she now only claimed the value of the improvements she said she made to that property. These improvements comprised 3 door screens, a veranda screen and a toilet seat. She valued all the improvements she effected at 100 United States dollars. She thus wished to be reimbursed that sum alternatively that the sum be offset with any claim defendant may have on the Goromonzi property. I did not hear defendant to deny that plaintiff did effect the improvements in question.

On the Goromonzi property, that is house no. 105 Takadiyi village, Goromonzi, plaintiff's evidence was to the effect that she acquired that stand on her own before she had married defendant. In that regard she tendered an agreement of sale showing that she bought the property as a stand on 17 August 1998 for the sum of 15 000 Zimbabwe dollars. The agreement was tendered as exhibits 2. She made payments for the stand through cheques from two Cabs accounts. The first cheque for Z\$5000 was drawn on her Cabs account and the second cheque for Z\$6000 was drawn on Defendant's Cabs account. These were paid on the date of agreement of sale. Copies of the two cheques were tendered into evidence as exhibits 3(b) and 3(c). She paid the balance of Z\$4000 in cash and she tendered a receipt of that payment as exhibit 4.

It was her evidence that the Z\$6000 from defendant's account was a loan which she repaid within a month from the date of purchase. It was her contention that since the stand was purchased before both customary and civil rites marriage it should not be considered as matrimonial property. Plaintiff went on to say that after the purchase she went on to fence the property. Apparently these are the only tasks she claimed to have done before the two got married.

The construction of the house occurred after they had been married. The plaintiff maintained that though they were now husband and wife she is the one who contributed the most in the construction of the house. According to plaintiff defendant's role was that he assisted her in securing the builders and he also assisted her in buying window frames and door frames. On the question of contributions towards the purchase of the window frames and door frames plaintiff said they contributed equally. The defendant's contribution having been on the window frames and door frames only plaintiff felt he did not deserve much of a share in the property.

Under cross examination plaintiff maintained that the Z\$6000 from defendant's Cabs Account was a loan and not his contribution towards the purchase of the stand. On the only movables in dispute, that is the cattle, plaintiff's evidence was to the effect that as husband and wife they harvested their maize crop for the year 2002. They sold the maize and realized a sum of Z\$30 000 which they agreed defendant should buy cattle with. Defendant went to Zimstock Sales and bought a herd of 5 cattle at a total cost of 102 000 Zimbabwe dollars. The receipt for Z\$102 000 by Zimstock Sales was tendered into evidence as exhibit 6 and is dated 12/6/02.

Under cross examination plaintiff admitted that according to the Zimstock Sales receipt the Z\$30 000 was inadequate to buy a herd of 2 cattle. She accepted that of the Z\$30 000 her share would have been Z\$15000 with defendant retaining Z\$15000. That meant as at the time of the purchase of the cattle she could at most claim only one beast. Her share was thus 20% of the cattle bought. She however could not accept such a share now because, according to her, she is the one who suggested that they buy cattle and when the cattle were bought they were kept at her place hence she believed she was entitled to 50% of the cattle. The stock card was also in her name.

The plaintiff's evidence was generally well given. She readily accepted that the Glen View house was not for sharing as it was defendant's sole property. On the other aspects her evidence has to be weighed against that of the defendant.

The defendant's evidence on house no. 3335 School Avenue was not disputed at all. Plaintiff withdrew her earlier claim for a share in that house. Defendant did not deny the plaintiff's evidence on the nature of improvements she did. He however disputed the value.

Pertaining to house no 105 Takadiyi Village Goromonzi, Defendant's evidence was to the effect that as of 17 August 1998, they were staying together as husband and wife at his Glen View house. The plaintiff advised him that she had found a stand to buy. The two of them made equal contributions of Z\$7500 each. He paid Z\$6000 by Cabs cheque and Z\$1500 he paid cash to plaintiff for her to go and pay. The plaintiff never repaid him the money as it was never a loan. As a co-purchaser defendant said after entering into the agreement of sale they were given a copy of the agreement of sale. That copy was kept by plaintiff and is not the copy tendered by plaintiff as exhibit 2. He however could not confirm with any certainty that on that Agreement of Sale he had indeed been included as a co-purchaser. This latter aspect of defendant's evidence was contrary to the contents of his supplementary summary of evidence wherein he said that the Agreement of Sale was never reduced to writing.

Apart from paying the Z\$7500 defendant said he thereafter looked for builders and he is the one who paid the builders. After the first builders left, he later looked for other builders to complete the construction and, as before, he paid the builders.

To support this aspect he called Weston Masiyandima Musumire as his witness. The testimony by this witness was to the effect that he is the builder who was engaged by defendant to complete the construction of the house. In his evidence in chief he maintained throughout that he was being paid by defendant at each stage of the construction.

Under cross examination it became clear that it is plaintiff who handed-over money to him after each stage. When asked how in those circumstances he was able to say he was being paid by defendant Weston said he assumed that the money was coming

from defendant as it was defendant who had engaged him and defendant would make follow ups to confirm that he had been paid. It was also Weston's evidence that when he needed to buy building material plaintiff is the one he would go with and she would pay for the material. Somehow he still believed the money came from defendant. The difficulty with Weston's evidence is that he did not sound original in his testimony. He gave me the impression of someone who had been co-opted to merely come and confirm a given version and nothing more.

I am of the view that apart from taking the initiative to buy the stand before they were married plaintiff contributed more to the construction of the house on that stand. Her share should therefore be greater than defendant's share. A share of about 70 % would meet the justice of the case. In arriving at that percentage I have also taken into account the value of improvements she made to defendant's Glen View house of 100 United States dollars.

The defendant's evidence on the cattle was rather contradictory. In his plea he demanded that all the cattle be awarded to him without stating any reason for such. It was only in the supplementary summary of evidence that it emerged that he was claiming that the cattle were paid to him as lobola by his sister's husband. In that regard the sister's husband was expected to come and testify to that effect. Unfortunately that witness was not called to testify for unexplained reasons. According to that supplementary summary of evidence David Mukuruva was charged a herd of 8 cattle as part of lobola for defendant's sister, Eunice Nyahada. He paid a herd of 2 cattle leaving a balance of 6. On 25 June 2002 David paid a sum of Z\$120 000 *in lieu* of the remaining six cattle to the defendant. The defendant used that money to buy cattle from an auction. These are the cattle defendant seemed to contend were the subject in this case. Unfortunately for defendant the Zimstock Sales receipt, which he did not dispute, shows that the cattle were bought on 12 June 2002, which was almost two weeks before the date defendant said he was paid by David Mukuruva. Apparently faced with such contradiction and highly unlikely story, in his *viva voce* evidence in court the defendant now said that he used his income from employment to purchase the cattle in dispute. This new version was given without any apology or explanation on its contradiction with his earlier version. I am of

the view that had defendant acquired the cattle on his own he would not have presented two contradictory stories on how he acquired the cattle. It is clear to me that the cattle were acquired in the manner stated by plaintiff, that is Z\$30 000 from the sale of their maize crop and the balance was contributed by defendant. It would appear that from the manner in which the cattle were bought the parties agreed that the cattle be in the name of the plaintiff on the stock card and the cattle were being kept at plaintiff's place from the time of purchase. It was admitted that defendant used to pay for the herdsman on some occasions.

Based on the contributions towards the purchase price of the seed 5 cattle, I have already shown that plaintiff would be entitled to about 20%. However as was shown from the evidence she thereafter contributed in looking after the cattle to their present number of 17. Her percentage share would obviously need to be adjusted. I am of the view that an increase of her share to about 35% would be fair and just in the circumstances.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted
2. The plaintiff is awarded the following movable assets-
  - i) 35% share of the current number of herd of cattle
  - ii) All goats
  - iii) All house hold property including a 6 piece lounge suite.
3. On immovable property-  
70% share of house no 105 Takadiyi Village, Goromonzi
4. Defendant is awarded the following movable assets-
  - i) 65% share of the current number of herd of cattle.
5. On immovable property-
  - i) He is to retain house no 3335 School Drive Glen View 4, Harare, as his sole and exclusive property since this was never part of the matrimonial assets.
  - ii) 30% share of house No. 105 Takadiyi Village, Goromonzi.



6. The parties shall agree on the value of the 105 Takadiyi Village, Goromonzi, within 30 days of the date of this order failure of which they shall appoint a mutually agreed evaluator to do the evaluation of the property within 60 days of the date of this order.

Should 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 list of evaluators to evaluate the property. The parties shall share the costs of such evaluation in equal proportions.

7. The plaintiff shall pay off defendant his share of the value within six (6) months of the date of receipt of the evaluation report unless the parties agree otherwise.

Should the plaintiff fail to pay 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 thereof shall be shared in the ratio 70:30.

8. Each party is to pay their own costs of suit.

*P. Takawadiyi & Associates, Plaintiff's Legal Practitioners*  
*Gunje & Chasakara, Defendant's Legal Practitioners*