

EVANGELIST SANDE
(nee NYAMANGUNDA)
versus
TAKAWIRA KIZITO SANDE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 September, 2011 and 29 March, 2012

Matrimonial Action

A T Muza for the plaintiff
S Simango for the defendant

CHITAKUNYE J: In 1989 the plaintiff and defendant married each other in terms of customary law. Their marriage was however not registered. After a period of about ten years living together in the manner of husband and wife they decided to have their marriage solemnized in terms of the Marriages Act [*Cap 5:11*] of the Laws of Zimbabwe. Their marriage was thus solemnized on 11 February 1999 at Harare in terms of the Marriages Act. That marriage still subsists.

Their marriage was blessed with two children who were born in 1991 and 1998 respectively.

After a period of about ten years from the year their marriage was solemnized, some unhappy differences between the parties became unbearable and the plaintiff opted to seek a decree of divorce. On 9 April 2010, the plaintiff sued the defendant for a decree of divorce and other ancillary relief.

The plaintiff alleged that the marriage relationship has irretrievably broken down to an extent that it cannot be restored to a normal marriage relationship for the following reasons:

- 1) The defendant is verbally abusive towards the plaintiff and generally disrespectful;
- 2) The defendant is not financially responsible;
- 3) The defendant has lost all love and affection for the plaintiff; and

4) The defendant has a child born to an adulterous relationship with another woman.

As a consequence of this the plaintiff believed the marriage has irretrievably broken down. She therefore sought a decree of divorce.

During the subsistence of the marriage the parties acquired movable property of which she sought to be awarded most of that property.

She also sought an order awarding her custody of the minor child with the defendant being ordered to pay monthly maintenance for the upkeep of that child.

She further sought an order for costs.

The defendant in his plea denied being abusive and financially irresponsible. He however did not deny that he fathered a child as a result of an adulterous relationship he had with another woman. He equally did not deny that the marriage has irretrievably broken down.

The defendant raised a claim in reconvention. In his claim he sought an order distributing the movable property according to his own schedule. He alleged that parties also acquired an immovable property, namely Stand No. 458 Glen Norah A, Harare. He thus sought an order awarding him that immovable property.

The plaintiff's plea to the defendant's claim for the immovable property was to the effect that that immovable property was bought by the plaintiff alone and not by the parties. It should therefore be awarded to the plaintiff.

At a pre-trial conference most of the issues were settled. The parties agreed that:

- (1) The marriage between them has irretrievably broken down and so a decree of divorce should be granted;
- (2) Custody of the minor child Charmaine Tadiwanashe Sande (born 30 January 1998) be awarded to the plaintiff with the defendant exercising reasonable rights of access.
- (3) The defendant pays maintenance for the minor child at the rate of USD50-00 per month and that he buys a set of school uniform for the child twice a year;
- (4) The defendant shall contribute towards the adult child's University education;
- (5) The manner of sharing of all the movable property.

The issues referred for trial comprised:

- 1) Whether or not the defendant is entitled to claim a share in the immovable property known as Stand 458 Glen Norah Township of Glen Norah, Harare.
- 2) If the defendant is entitled to a share in the said immovable property, what share is he entitled to?
- 3) Whether or not there should be an award of costs against the defendant.

The plaintiff gave evidence and tendered a number of documentary exhibits in support of her case. The defendant thereafter gave evidence contending that he is entitled to a 60% share of the immovable property.

In terms of s 5 of the Matrimonial Causes Act, [*Cap 5:13*], before granting a decree of divorce court must be satisfied that the marriage relationship has indeed irretrievably broken down.

In the instant case, the plaintiff's evidence was to the effect that the marriage has irretrievably broken down with no prospect of restoration to a normal marriage relationship. In this regard she alluded to the fact that parties have lost all love and affection for each other. Though still staying at the same house parties have not shared conjugal rights for a period of about six years and neither party intends to resume cohabitation. She also testified that the defendant committed adultery with one of their domestic maids as a result of which a child was born from that illicit affair. This is a fact she is unable to live with.

These factors were not disputed by the defendant. If anything he seemed to confirm the loss of love and affection between the parties and the fact that he committed adultery with one of their domestic maids. The aspect he contested was one of financial irresponsibility. Though the defendant denied being abusive he did not deny that the manner in which they related to each other led to the plaintiff obtaining a peace order against him at the Magistrate's court. Such is not normal in a normal marriage relationship.

I am of the view that all this confirms that the marriage has indeed irretrievably broken down.

In *Kumirai v Kumirai* 2006(1) ZLR 134 (H) at p 136 B-D MAKARAU J (as she then was) stated that:

“In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably, where the plaintiff insists on the day of trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985.”

In *casu*, both parties confirmed they no longer love each other and that, though still living under the same roof, they have not been living in the manner of husband and wife for the past six years. In the circumstances court cannot deny them the prayer for a decree of divorce.

The contentious issue pertains to the immovable property, namely Stand number 458 Glen Norah A, Harare.

From the evidence adduced in court it was common cause that the parties' first immovable property was a residential Stand in Ruwa. That Stand was bought after the defendant obtained a loan from his employer. Though parties are not agreed as to the eventual contribution of each one, they are, however, agreed that the Stand was registered in their joint names and that both of them directly contributed to its purchase price. This Stand was sold after the purchase of Stand 458 Glen Norah A (the immovable property in question.)

The immovable property in question was acquired in 1999 whilst the Ruwa Stand was sold, at the earliest in 2000, as that is the year the defendant's loan towards that Stand was paid off. The parties are however not in agreement on the manner in which the proceeds from the sale of the Ruwa Stand were utilized. The defendant contended that part of the proceeds went towards clearing the balance of the plaintiff's loan for the purchase of the Glen Norah house, partly towards the purchase of a pick-up truck and the balance towards improvements to the Glen Norah house. The plaintiff denied that any of the proceeds went towards the Glen Norah house. She maintained that the defendant used

all the proceeds, including her 50% share, towards the purchase and repairs to a pick-up truck the defendant stubbornly bought.

The plaintiff argued that she should be awarded the immovable property because she is the one who bought it and she will be the one staying with the children. She tendered documents showing that she applied for a mortgage loan from her then employer Standard Chartered Bank. She was granted the loan in the total sum of \$455 000-00 to enable her to buy Stand number 458 Glen Norah A, Harare. This amount comprised the full purchase price of \$435 000-00 and transfer fees. The loan was to be repaid through deductions from her salary over a period of 300 months. She repaid the loan in about five years due to additional income she got from her employment such as staff bonus and profit sharing scheme that her employer devised for its employees. She argued that during the period of loan repayment the defendant did not assist her at all. The defendant had in fact been against the idea of the plaintiff purchasing the house.

The plaintiff categorically refuted defendant's contention that proceeds from the sale of the Ruwa stand were used to pay off her loan.

The plaintiff also tendered the agreement of sale and the Deed of Transfer both showing that they were in her name as the purchaser and owner.

The defendant's evidence was to the effect that he contributed about 80% of the purchase price for the Ruwa Stand whilst the plaintiff contributed about 20%. For the Glen Norah house the plaintiff's contribution was about 20% by way of loan from her employer and the balance of the purchase price was from proceeds of sale of the Ruwa Stand. He contended that his contribution in the Glen Norah house must be assessed on the basis of his greater contribution in purchasing the Ruwa Stand which in turn was a greater contribution towards clearing the plaintiff's loan. In the circumstances he believed he deserved a 60% share in the Glen Norah house.

The defendant did not however have any documentary proof of his assertions. The defendant's excuse for lack of such proof was that the plaintiff had destroyed all the documents to do with the Ruwa Stand. At the end it became a question of his word against the plaintiff's word as supported by her documents.

The defendant's position is not supported by certain contradictions and inconsistencies within his evidence. For instance whilst documentary evidence shows that the plaintiff obtained a loan covering the total purchase price including transfer costs, at some stage the defendant gave the impression that the loan was inadequate to pay the full purchase price. When this was shown to him he seemed to retract and to now contend that it is the loan that was cleared by proceeds from the Ruwa Stand. This is epitomized in para 10 of his Summary of evidence wherein he stated that –

“The defendant will tell the court that all in all the house costed (*sic*) about ZW\$ 475 000-00 and the plaintiff only contributed about ZW50 000-00 which she got from her workplace.”

According to para 8 of that same summary of evidence he said:

“However, before the Ruwa Stand was sold, the parties agreed that the plaintiff would acquire a loan from her work place in order to raise a deposit for the Glen Norah Stand. The plaintiff obtained the loan from Standard Chartered Bank where she was working.”

The inescapable conclusion one gets is that the loan applied for and obtained by the plaintiff was for the deposit hence it was only ZW\$50 000-00 against a purchase price of ZW\$475 000-00. The evidence tendered by the plaintiff showed that the loan was for ZW\$455 000-00 to cover the entire purchase price of ZW\$435 000-00 and transfer costs.

The Agreement of Sale, which the defendant confirmed he signed as a witness, has a special clause that the sale was conditional upon the purchaser, who in this case is indicated as the plaintiff, being able to secure a loan of ZW\$435 000-00 from Standard Chartered Bank.

No where in that agreement is it stated the plaintiff was to secure only a deposit. Clearly the defendant was not being truthful.

I am of the view that Stand 348 Glen Norah A was paid for in full by the loan obtained by the plaintiff from her then employer. What the plaintiff was saddled with was the loan repayment. The evidence showed that loan deductions were in fact being made from her salary.

The plaintiff's evidence that she paid off the loan within five years as she earned annual bonuses and got some dividends from the employer's profit sharing scheme was

more credible than the defendant's assertion that he paid off the loan using the proceeds from the Ruwa Stand.

The question to be asked is whether the fact that the plaintiff paid the purchase price in full without the defendant's significant direct contribution means that the defendant is not entitled to a share in the property? The answer appears to be a straight NO. A Spouse's entitlement to a share in an asset acquired by one or both spouses is not dependant on their direct contribution towards the purchase of that asset. Whilst direct contribution must be considered, it is not the only consideration.

Section 7(1) (a) of the Matrimonial Causes Act (*supra*) 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, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other."

The only assets of the spouses excluded from the application of the above section are stated in subs (3) as:-

".. any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage-

- (a) by way of inheritance; or
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner and which have particular sentimental value to the spouse concerned."

Any assets of either or both spouses which does not fall within the ambit of the exception must be considered in the division, apportionment and distribution of the assets as between the spouses.

A guideline to the consideration of the division, apportionment and distribution of the assets is provided for in s 7(4). That subsection states that:-

"In making an order in terms of subs (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 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 spouses.”

It is clear from the above that the fact of a spouse having bought an asset single handedly is just one of the numerous considerations to be **had**. Even where an asset is registered in the name of one spouse as his or her asset, s 7(1) (a) provides that the court may make an order transferring that asset to the other spouse.

In *Kassim v Kassim* 1989(3) ZLR 234 at p 238B-C GIBSON J reaffirmed this when she said that:

“I agree that, by virtue of the provisions of s 7 of the Matrimonial Causes Act No. 37 of 1985, the court has power to order a division of the property, notwithstanding the strict legal title of the parties, in order to achieve a just settlement between them.”

In *Takafuma v Takafuma* 1994 (2) ZLR103 (S) at p 106B-D McNALLY JA had this to say on how to approach the division, apportionment, and distribution of assets in terms of s 7.

“The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers”, and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in s 7 (3) {now 7(4)} of the Act. Then it will allocate to the

husband the items marked “his” plus the appropriate share of the items marked “theirs”. And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7 (3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued...”

The above cases clearly confirm that the fact that property is registered or is deemed to be a spouse’s asset is only the starting point. Court in the exercise of its wide discretion has the power to transfer an asset owned by one spouse to the other in order to achieve the objective set out in s 7 of the Act.

In *casu* the parties agreed on the distribution of the movable assets. Each one got a share to their satisfaction. The immovable asset is registered in the plaintiff’s name. My finding from the evidence adduced is that it is probable that the plaintiff paid the purchase price. The defendant may only have made superficial contribution in this regard. This property can safely be placed in the category of the plaintiff’s asset.

It is however my view that awarding the property to the plaintiff as her sole and exclusive property and denying the defendant any share thereof would not meet the objective of “as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued between the spouses.”

The circumstances of the case show that the defendant deserves a share in the property. The parties lived together in the manner of husband and wife for over twenty years. In that period they were blessed with two children. They brought up the children as a family. In the first ten years of marriage they acquired a residential stand as a couple. That was made possible by the defendant obtaining a loan from his employer. Though their union was not yet solemnized they registered that property in their joint names, again confirming they were in it together. After the solemnization of their marriage another property was acquired this time through the plaintiff’s employer. The property was registered in the plaintiff’s name. The property acquired earlier was sold and

proceeds shared equally, though the plaintiff said she later gave her share to the defendant.

The parties considered the property in question as their matrimonial property and have lived there since its acquisition. During this period the defendant played his part as husband and father to the family. He was not just seated but was employed. When he was no longer employed he engaged in income generating activities such as the tuck shop for which he said he had bought the pick-up truck to service. These are but some of the circumstances that show the need to award the defendant a share in the property.

The issue of what percentage share to award is not an easy one. The defendant's evidence was unfortunately fraught with inaccuracies and inconsistencies regarding his contributions. It is my view that the evidence adduced does not warrant a 60% share at all. The defendant's conduct was to a great extent the cause of the breakdown of the marriage. He must not be seen to be benefiting from such conduct lest a wrong signal be sent that you can be as belligerent as you want and still profit from it by a substantial award in the assets of the spouses.

After a careful analysis of the circumstances of the case, the manner in which the parties lived as a family for the twenty years and the fact that there is only one immovable property, the plaintiff as custodian parent will need accommodation for herself and the children. I am of the view that an award of 25% to the defendant would meet the justice of the case. The plaintiff will be given the option to buy out the defendant.

The plaintiff's claim for costs of suit was not well argued. The parties having settled all the issues, the defendant's claim for a share in the immovable property was reasonable as evident from the award. The question of his conduct having led to the plaintiff seeking divorce has already been taken account of in the ratio of sharing the property. It may not be appropriate to use the same conduct for costs against him as if his claim for a share was without basis.

Accordingly it is hereby ordered that-

(1) A decree of divorce be and is hereby granted.

- (2) Custody of the minor child namely, Charmaine Tadiwanashe Sande, (born 30 January 1998) be and is hereby awarded to the plaintiff. The defendant shall have reasonable rights of access to the minor child at his expense in the following manner-
- 2.1 one week (7days) every school holiday;
 - 2.2 as and when the minor child requests to see him and
 - 2.3 on special occasions upon prior arrangement with the plaintiff.
- (3) The defendant shall pay maintenance in respect of the minor child in the sum of USD50-00 per month until the child attains the age of 18 years or become self supporting whichever shall occur first.
- (4) The defendant shall pay a sum of USD40-00 per term towards the minor child's school fees.
- (5) The defendant shall buy one set of school uniforms for the minor child twice a year.
- (6) The defendant shall pay half of Melissa Tapiwa Sande's University fees as charged by Midlands State University where she is enrolled.
- (7) That the parties' movable property be and is hereby shared as follows-

For the plaintiff

- i) One 21 inch Phillips Television set;
- ii) One DSTV Decoder and Satellite dish;
- iii) One Video Cassette Recorder;
- iv) One Stove;
- v) Two double beds;
- vi) One Wardrobe;
- vii) One Lounge Suite.

For the defendant

- i) One queen size bed;
- ii) One Refrigerator;
- iii) One Dining Room Suite;
- iv) One Wardrobe.

The Room Divider that was owned by the parties shall be sold and the proceeds thereof shall be shared equally by the plaintiff and defendant.

(8) On the immovable property

The plaintiff be and is hereby awarded a 75% share in the immovable property known as Stand number 458 Glen Norah Township of Glen Norah, Harare also known as Stand 458 Glen Norah A, Harare.

The defendant be and is hereby awarded a 25% share in the said immovable property.

The parties shall agree on the value of the property within 14 days from the date of this order failing which they shall, within 30 days, appoint a mutually agreed evaluator to evaluate the property.

Should the parties fail to agree on an evaluator the Registrar of the High Court shall be and is hereby directed to appoint one from his list of evaluators to evaluate the property.

The parties shall share the cost of evaluation in the ratio 75:25 (as per their shares).

The plaintiff shall pay off the defendant his share within six months from the date of receipt of the evaluation report unless the parties agree on a longer period.

Should the plaintiff fail to pay off the defendant in full or make a payment plan acceptable to the defendant within the period stipulated (in 6) above, or a longer period as agreed by the parties, the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the Registrar of the High Court, if the parties cannot agree on one, and the net proceeds thereof shall be shared as per their respective shares in the property.

Each party shall pay their own costs of suit.

Mawere & Sibanda, plaintiff's legal practitioners
Nyikadzino, Koworera & Associates, defendant's legal practitioners