

CHRISTIANE KWEDZA (nee MARTIN)
versus
MUSA JOHNSON KWEDZA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 16 February, 2012

MATRIMONIAL ACTION

S Njerere, for plaintiff
B Mtetwa, for defendant

CHITAKUNYE J: The plaintiff and defendant were joined in holy matrimony in terms of the Marriages Act, [*Cap 5:11*] on 8 January 1988 at Harare. Their marriage subsists. Their marriage was blessed with two children who are now adults.

During the subsistence of the marriage they acquired both movable and immovable properties. After many years of marriage some irreconcilable differences arose which led to the plaintiff filing for divorce and other ancillary relief against the defendant. The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no prospects of restoration of a normal marriage relationship in that:

- a) The parties do not have any meaningful communication resulting in each party living his/her own life.
- b) The plaintiff has lost love for the defendant.
- c) There is disharmony, distrust and disrespect between the parties and as a result there is no peace between the parties.

At the time of issuance of the summons the children were still minors and so the plaintiff had asked to be granted custody of the minor children.

On immovable property she asked for a 50% share in the matrimonial house; namely 18 Normanton Close, Marlborough, Harare. She provided what she deemed an equitable distribution of the movable property.

The defendant initially contended that the marriage had not irretrievably broken down; he envisaged it could be salvaged. He also made a counter claim in which he claimed custody of the minor children, and that the immovable property 18 Normanton Close be donated to the children of the marriage. He later amended his claim to include that in the alternative he be declared the sole and absolute owner of number 18 Normanton Close, Marlborough, Harare. This amendment came about because the plaintiff had categorically rejected the suggestion that the property be donated to the children.

At a pre-trial conference held on 13 September 2005 most of the issues were resolved. The major issue referred to trial pertained to the distribution of the immovable property.

On the date of trial all issues except on the immovable property were confirmed as having been settled. The two children were now adults and so any issue relating to children was no longer sustainable. The parties had distributed the movable assets in terms of a document they tendered as exhibit 3. Both had finally accepted that the marriage has irretrievably broken down.

The parties could not settle on the immovable property due to the fact that apart from the Marlborough house the plaintiff had also bought number 60 Garlands Ride, Mt Pleasant during the subsistence of the marriage. They could not agree on how to treat that property. The defendant wanted it to be considered in the division, apportionment and distribution of the assets of the spouses whilst the plaintiff contended that it should not be considered as it was registered in the name of a company whose shareholding was 100% held by Garlands Trust.

The plaintiff gave evidence after which the defendant gave evidence. From the evidence adduced it is common cause that both parties had contributed financially to the purchase of the Marlborough house. That property is registered in their joint names and so joint ownership is not disputed. It is common cause that after living in the Marlborough house for some time the couple moved to number 60 Garland Ride Mt Pleasant in 1993 which the plaintiff had bought that same year. They have since been living in that house serve for a period of two years when they moved back to the

Marlborough house. The Mt Pleasant property was bought by the plaintiff and is registered in the name of a company, Linford Investment (Pvt) Ltd.

It is common cause that the couple lived in that property rent free. The plaintiff's argument was to the effect that as the Mt Pleasant property was registered in the name of a company it should not be considered as matrimonial property. In any case she is not a share holder in that company. The entire shareholding is held by a trust- Garlands Trust of which she is one of the three Trustees. She formed that Trust for the benefit of the children, her parents and her sister. The plaintiff indicated that she and her daughter, Chiedza, were the directors in Linford Investment (Pvt) Ltd.

The plaintiff confirmed that she was the accounting officer of the company and that for all intents and purposes she controls the assets of Linford Investment (Pvt) Ltd. She is the one with the power to make decisions concerning the company. She does the annual returns which are then signed by herself and Chiedza.

It was clear that the plaintiff did not want this property considered in anyway in the distribution of assets of the spouses. She contended that the only immovable property for sharing is the Marlborough house which she insisted must be shared equally.

On his party the defendant contended that the Mt Pleasant house must be considered in the apportionment and distribution of the property. It is a property that was acquired during the subsistence of the marriage and the plaintiff still stands to gain from it by living in it rent free. Though registered in the name of a company it is for all intents and purposes the plaintiff's property.

The division of assets consequent to a divorce is governed by s 7 of the Matrimonial Causes Act, [Cap 5:13] herein after referred to as the Act. Section 7(1) (a) 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;”

Subsection (4) of s 7 then enjoins the appropriate court to consider all the circumstances of the case in the exercise of its discretion in this regard by stating that:-

“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 is 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 by each spouse to the family, including contributions made by looking after the house 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 the children in the position they would have been in had a normal marriage relationship continued between the spouses.”

As aptly noted by MALABA JA in *Gonye v Gonye* 2009 (1) ZLR 232 at p 236H to 237B:

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of ‘assets of the spouses’ including an order that any asset be transferred from one spouse to the other.’ The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of broad discretion...

The terms used are the ‘assets of the spouses’ and not matrimonial property. It is important to bear in mind the concept used, because the adoption of the concept ‘matrimonial property’ often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept ‘assets of the spouses’ is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regards to the division, apportionment or distribution of such assets.”

The wide discretion must of course be exercised judicially taking into account the circumstances of each case. The object of the exercise must be to place the spouses in the

position they would have been in had a normal marriage relationship continued between them.

In an effort to achieve this object court has demanded of spouses to be candid with court in respect of their assets individually and jointly.

The question in the instant case is whether the Mt pleasant house should be considered in assessing a fair and equitable manner in the division, apportionment and distribution of assets of the spouses. The plaintiff says it must not be considered because it is owned by a company. The defendant says it must be considered as for all intents and purposes it is the plaintiff's property or at least it is for her benefit. It is important to examine the relationship between the plaintiff and the company in question.

In *Sibanda & Anor v Sibanda* 2005 (1) ZLR 97 (S) when the marriage failed the wife obtained a decree of nullity. The parties were possessed of nine immovable properties, as well as numerous vehicles. Apart from one property and one car, all the property, movable and immovable, including the matrimonial home, was registered in the name of one or other company or nominee of the appellant. The directors of those companies were the appellant's parents and one of his girlfriends - but the sole signatory on the various bank accounts was the appellant, who controlled all the companies. The trial judge awarded the wife a house which was registered in the name of one of the companies. That house had been the matrimonial home for ten years before the marriage was annulled. The husband contended that as the house was owned by a company wholly owned by the appellant, it did not constitute matrimonial property which fell to be divided in terms of the Matrimonial Causes Act. The Supreme Court, at p 103E-F, whilst acknowledging the fact that a company duly incorporated is indeed a distinct legal entity endowed with its own legal personality went on to state that:

“However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and control of a company.”

Upon finding that the appellant was the one who controlled the company the court of appeal dismissed the appeal.

In *Mangwendeza v Mangwendeza* 2007(1) ZLR 216(H) NDOU J followed the above reasoning and considered property registered in the name of a company in the division, apportionment and distribution of assets of the spouses.

Equally in *Gonye v Gonye supra* at page 233 the Supreme Court held that:

“Where the issue arises of whether the property rights, a proportion of the value of which is claimed by the one of the spouses, in reality lay with the other spouse or a company run by him, it is permissible to ‘lift the corporate veil’ in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. Where the company can be said to be the spouse’s alter ego, the company’s assets and proceeds can be said to be the spouse’s and thus can be subject of an order under s 7(1).”

It is apparent that a primary consideration is on the relationship between the person seeking to distance the assets and the company or entity in whose name the property may be registered.

In *casu* the plaintiff said that in about 1993 she bought the house in question by buying shares in the company that previously owned the house. In 1992 she had created a Trust in which she is one of the three Trustees. She said the Trust is for the benefit of the couple’s children, her parents and her sister. The other trustees are apparently people of her choice. The directors of the company herself and Chiedza were apparently out of her choice as well.

As already alluded to above it is common cause that the plaintiff has been the accounting officer for the company since its inception. She will continue to be so. There is no denying that she is the one in total control of the company. From her own evidence it is clear that she is the one who has been and will continue to make decisions for the company. Other persons mentioned even as Trustees appear to be her nominees.

It is common cause that since the family started living at 60 Garland Ride they have not been paying rent. The family has been living rent-free. The plaintiff will continue to live in the house in question rent free for as long as she desires. Apparently no one has the power to deny her of this. It is my view that all this points to the fact that the plaintiff has more interests in the house in question than she would like court to believe. The property is virtually hers as she has the mandate to do as she pleases with it.

In the circumstances I am of the view that the property ought to be considered in the division, apportionment and distribution of assets of the spouses.

The defendant's claim is not for a share in the Mt Pleasant house but that it be considered in determining his claim for an award of the Marlborough house since he needs a roof over his head. The plaintiff will have the Mt Pleasant house.

Taking into account the object of s 7 (4) of the Act, particularly the need to place the spouses in the position they would have been in had a normal marriage relationship continued, it is clear that each party would have remained entitled to live in the Mt Pleasant house rent free at the determination of the plaintiff. The defendant would not be without a roof over his head. It is only fair that whatever apportionment or distribution is done does not burden the defendant so much that he is left without accommodation. Mention was made that the defendant has a farm which he can use. Unfortunately not much was said about this farm save to say it is far away and the defendant would not be able to commute there to and from on a daily basis in order to run his business. Not much was said on the suitability of the accommodation at this farm for a husband who had been used to living in the Mt Pleasant house.

In deciding on the issue of how much to award the defendant as his share of the Marlborough house I will also consider the fact that whilst in the Marlborough house both parties contributed in its purchase, in the Mt Pleasant house the defendant did not make a direct contribution towards its purchase. The Marlborough house is registered in the joint names of the parties whilst the Mt Pleasant house is not. Registration in joint names is *prima facie* proof of a 50:50 ownership in the property. The question to be answered is whether the justice of the case requires that a spouse's share be awarded to the other if so how much of that share.

After a careful assessment of the parties contributions, needs and other factors as detailed in s 7(4) of the Act I am of the view this is a case where a part of the plaintiff's share should be transferred to the defendant to achieve a just and equitable distribution of the assets of the spouses. A deduction of 15% would in my view be appropriate in the circumstances. I thus conclude that that the defendant deserves a 65% share in the Marlborough house and the plaintiff a 35% share.

The defendant will be granted the option to buy out the plaintiff's share within 120 days.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. The movable property be distributed in terms of exhibit 3 with the plaintiff being awarded items under annexure A and the defendant items under annexure B. The document as agreed by the parties is hereby attached as part of this order.
3. The plaintiff is hereby awarded a 35% share in the Immovable property namely No. 18 Normanton Close, Marlborough, Harare, also known as Stand 728 of Stand 558A Marlborough Township, Harare.
4. The parties shall agree on the value of the property within 14 days of the date of this order failing which they shall appoint a mutually agreed evaluator to evaluate the property within 30 days of the date of this order.
5. 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 independent evaluators to evaluate the property.
6. The parties shall share the cost of evaluation in the ratio 35:65 (as per their shares in the property). The defendant shall pay off the plaintiff her share within 120 days from the date of evaluation unless the parties agree on a longer period.
7. Should the defendant fail to pay or to make a payment plan acceptable to the plaintiff within the period stipulated in (6) above, 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 therefore shall be shared as per their respective shares in the property.
8. Each party shall bear their own costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners
Mtewa & Nyambirai, defendant's legal practitioners