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versus
M

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 18 July 2011 & 26 January 2012

FAMILY LAW COURT

Trial Cause

B. Mtetwa, for the plaintiff
T. Kanengoni, for the defendant

MAWADZE J: The plaintiff and the defendant are husband and wife respectively and they married each other in Harare on Date1 in terms of the Marriage Act [*Cap 5:11*]. Prior to that the parties had married traditionally on Date 2 and the same marriage was blessed in church on Date 3. The parties have been married for 22 years.

The marriage was blessed with two children, N, male child born 29 December 1990 (now 21 years old) and a female child, O, born 16 August 1993 (now 18 years old). Despite attaining the majority status both children are still dependant on their parents. N is at a University in South Africa pursuing a degree in Architecture and is in his second year of the five year degree programme. O is expected to start or commence her University education in Europe this year. It is common cause that the plaintiff has the sole responsibility of paying the children's college fees.

The plaintiff issued summons out of this court on 25 March 2010 seeking a decree of divorce on the basis of irretrievable breakdown of the marriage, an order for custody of the then minor child, maintenance in relation to the then minor child, division of matrimonial assets and that each party bears its own costs.

As per the joint pre-trial conference minute signed by counsel for both parties on 14 March 2011 the parties could only agree that the marriage has irretrievably broken down. The following issues were referred to trial for determination:

“Issues

1. Who should have custody of the minor child?
 - 1.1 what would constitute a fair access regime for the non custodial parent?

- 1.2 what would constitute a fair maintenance contribution to the custodial parent in respect of the minor child?
2. What constitutes the matrimonial estate?
 - 2.1 what would constitute a fair and equitable division of the matrimonial estate?"

As already stated at the time the trial commenced items 1 to 1.2 of the joint pre-trial conference minute was no longer an issue as the minor child has attained majority status.

At the commencement of the trial the parties were able to agree on what constitutes the matrimonial estate and how the movable property should be shared between the parties. Counsel for the parties agreed during the trial to file a detailed list of all movable property which constitutes the matrimonial estate and how it has been shared between the parties. The schedule of the division of the movable property Exh 22 was filed with the court on 23 January 2012. It outlines in meticulous detail how the parties have distributed the movable property and Exh 22 would be incorporated in the order the court would make as regards division of matrimonial estate.

The only issue for determination during the trial related to the division of the matrimonial estate in relation to the immovable property which consists of two properties namely:

- a) The matrimonial home, stand number 999G (hereinafter referred to as the Borrowdale property or house).
- b) Stand No 888H (hereinafter referred to as Chegutu property).

The plaintiff lays no claim to the Chegutu property which he however deems to be matrimonial property and that it should be awarded to the defendant. It is the plaintiff's case that he should be awarded more than half share of the Borrowdale property and offers the defendant 20% to 25 % share of the Borrowdale property. This is based on what the plaintiff deems to be his direct contribution to the Borrowdale property and that the defendant would have been awarded the Chegutu property. On the other hand the defendant contends that the Chegutu property is not part of the matrimonial estate and falls outside the ambit of s 7 of the Matrimonial Causes Act [*Cap 5:13*]. The defendant claims a 50% share of the Borrowdale property. I shall revert to these issues later.

In terms of s 5 (1) of the Matrimonial Causes Act [*Cap 5:13*] (hereafter the Act) the court may grant a decree of divorce on the grounds of irretrievable breakdown 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 the parties. It is common cause that the parties are agreed that their marriage relationship has broken down. Although the parties still stay together in the matrimonial house they were both clear in their evidence to the court that their marriage relationship is beyond resuscitation. I see no cause to deal with the reasons thereof suffice to state that the parties blame each other for the breakdown of the marriage relationship. In fact it is common cause that in 1998 barely 8 years into the marriage defendant instituted divorce proceedings in this court and only withdrew the matter at pre-trial conference stage as both parties tried to salvage their marriage. It is clear that this did not succeed as in 2010 the plaintiff decided to institute the current divorce proceedings. As was stated in the case of *Ncube v Ncube* 1993 (1) ZLR 39 where the parties are consenting to divorce it may not be necessary for a court to hear evidence solely for the purpose of ascribing fault for the breakdown of the marriage. In the premis a decree of divorce should be granted.

I now proceed to deal with the contentious issue of the division of the immovable property being the Borrowdale house and the Chegutu property

THE CHEGUTU PROPERTY

It has not been disputed in any serious manner by the plaintiff that the Chegutu property was acquired by the defendant in the manner she alleged in her evidence. The defendant's uncontroverted evidence is that her father who apparently has large family decided to apportion part of his estate amongst all his children both males and females during his lifetime as a way of possibly averting the acrimony which may arise after his demise in relation to his estate. This was confirmed by ST defendant's young sister whose evidence was not challenged in any manner by the plaintiff. All the children were given immovable property either residential property or business property which was transferred into each child's respective name. The defendant was clear that her father advised all those of his children who were married to advise their spouses. She said she in turn advised the plaintiff. This is not disputed by the plaintiff. It is therefore clear to my mind that the defendant acquired the Chegutu property in the manner she explained and that it was during the subsistence of the marriage. This means that it is part of the matrimonial estate. The issue which then falls for determination is whether in Chegutu property falls within the exceptions outlined in s 7 (3) of the Act which provides as follows;

“7 Division of assets and maintenance orders

- (1)
- (2)
- (3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to 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.”

It is clear to my mind that the Chegutu Property was not acquired by the defendant by way of inheritance. The defendant’s father is alive. The defendant’s father bequeathed to the defendant the Chegutu property (Exh 13 being the title deed of the property in defendant’s name) as a donation during his lifetime, although the defendant and her young sister Rosa Shorai Tunduwani may perceive this as some sort of inheritance. I am not persuaded by this perception. No evidence was led in my view which established the existence of a custom which would entitle the defendant to hold the Chegutu property personally and therefore excludes it from the division of the matrimonial estate in terms of s 7 of the Act. The mere fact that the defendant’s father decided to donate part of his estate to his children cannot be deemed to be a custom in existence and practiced by the community to which the defendant and her father belong to.

The question this court has to answer in my view is whether the Chegutu property which was donated to the defendant by her father has particular sentimental value to the defendant and therefore falls within the exceptions provided for in s 7 (3) of the Act.

The ENCARTA ENGLISH DICTIONARIES defines sentimental value as

“value based on emotional association” or “ a value placed on something because of its emotional associations rather than its monetary worth.”

The defendant in her evidence told the court that she would not want the Chegutu property to be subject to sharing between the parties on account of her strong view that it constitutes part of what she deemed to be her “inheritance”. While the Chegutu property is some commercial premises which can be utilised for that purpose by defendant herself or by renting it out to other parties the defendant did not give this as the reason for her desire to have the property excluded from the matrimonial estate by virtue of s 7 (3) of the Act. The

reason she gave is that it is property given to or donated to her by her father just like all other children and her father has good reasons for doing so to all his children. It is my considered view that the Chegutu property has sentimental value to the defendant. She is emotionally attached to it taking into account how she acquired the property from her father. The value she places on the Chegutu property in my view is not much of monetary worth but the fact that her father in some special way decided to bequeath this property to her. The plaintiff in my view has no interest in the property and simply wants to use it to ward off the defendant's claim to Borrowdale property – a bargain tool as it were. It is therefore my finding that the Chegutu property falls within the exception provided for in s 7 (3) (c) of the Act. I shall therefore proceed to deal with the Borrowdale property as the sole immovable asset of the spouses subject to distribution.

THE BORROWDALE PROPERTY / HOUSE

The Law

Section 7 (1) of the matrimonial causes Act [*Cap 5:13*] (the Act) deals with the division, apportionment or distribution of assets of the spouses upon the dissolution of the marriage. Section 7 (4) (a) to (g) of the Act outlines the factors the court should consider in the exercise of its discretion in order to achieve an equitable distribution of the matrimonial estate see *Hatendi v Hatendi* 2001 (2) ZLR 530

In the case of *Ncube v Ncube* 1993 (1) ZLR 39 (s) at 40 H – 41 A KORSAH JA had this to say in relation to the provision of s 7 (4) (a) to (g) of the Act;

“the above provisions, to my mind, do more than furnish broad guidelines for deciding what is a fair order in all circumstances, adjusting property rights if need be, under the wide powers bestowed on the court. The determination of strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion.”

See also *Shenje v Shenje* 2001 (2) ZLR (160) (H) at 163 F in which GILLESPIE J had this to say in relation to the provisions of s 7 (4) of the Act;

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances at this case. A number of the more important and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all possible relevant factors. The decision to property division order is an exercise of judicial discretion, based relevant factors, aimed at achieving a reasonable, practical and just division which

secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.”

It is therefore clear to my mind that in dealing with the Borrowdale property the court is imbued with the wide discretionary powers which should be exercised judiciously taking into account all factors listed and s 7 (4) of the act and all the relevant factors in the case.

The bulk of the evidence led by both parties in my view focussed mainly on each party’s direct and indirect contribution to the acquisition of the Borrowdale property and to the marriage generally. The plaintiff gave very detailed evidence on how the Borrowdale property was acquired through his sole effort – direct contribution. The defendant in her evidence, while conceding that she had little direct contribution in the acquisition of the Borrowdale property, maintained that she should be awarded an equal share on account of her indirect contributions and other factors. While I agree that these are important factors to consider, I find the poignant views expressed by GILLESPIE J in *Shenje v Shenje supra* at 163 H – 164 A to be crucial in dealing with the factors listed in s 7 (4) of the Act;

“The factors listed in subsection deserve fresh comment. One might form the impression from decisions of the court that the crucial consideration is that of the respective contribution of the parties. This would be an error. The matter of the contributions made to the family is the fifth listed of the seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognise that the legislative intent, and the objective of the courts, is more weighed in favour of ensuring that the parties’ needs are met rather than that their contributions are recouped.”

I am inclined to adopt this approach in dealing with the evidence led by the parties in relation to the Borrowdale property and how it should be apportioned between the parties.

The Evidence

I find both parties to be very impressive witnesses in most material respect. In fact there is very little to choose between the parties as it were. They were both eloquent, focussed and admirably candid with the court on many issues. The evidence led by plaintiff in relation to the Borrowdale property is largely unchallenged just like the defendant’s evidence on her employment history and part of indirect contributions.

Let me briefly turn to the relevant evidence.

The plaintiff acquired flat No 7777GK before he married the defendant through mortgage finance facility granted by his employer Zimbank now ZB Bank for Zimbabwean \$95

000.00. *See* Exh 2. In March 1990 plaintiff again obtained mortgage finance to renovate the flat granted by the same employer *see* Exh 3. When the parties married to each other in 1990 they stayed in his flat until 1991 when they acquired the Borrowdale property.

It is common cause that the Borrowdale property was acquired through mortgage finance extended to plaintiff by his employers Zimbank and that the plaintiff solely paid for the loan through his salary. This was also after the plaintiff has disposed of the flat in Greendale and used the proceeds to also purchase the Borrowdale property. After the parties acquired the Borrowdale property extensive extensions and improvements were done on the property for a long period of time using mortgage finance facility extended to the plaintiff by his employer and that plaintiff shouldered this burden. In 1994 as per Exh 4 plaintiff was granted mortgage finance to erect a durall way and in 1995 as per Exh 5 to sink a borehole. Extensive extensions were done in 1996 as per Exh 6 which included the extension of the kitchen, addition of new master bedroom, new guest room, gym, new lounge, converting garage to dining room, addition of new domestic quarters, paving of the drive way, installation of outside Jacuzzi. The defendant's father provided additional finance of Zimbabwean \$100 000.00 for this massive extensions to the parties and plaintiff's parents also helped financially *see* Exh 7 (a) to (e) 1995 – 96 for the numerous mortgage facilities granted to plaintiff by his employers to finance the extensions of this Borrowdale property.

It is not in dispute that the plaintiff had a more secure and rewarding job than the defendant. During most period of the marriage consequently the plaintiff bore the most financial burden in fending for the family. He solely paid for the children's full school account and, met most of the household expenses. The plaintiff conceded that the defendant bought clothes for the family and groceries especially as he concentrated in servicing the mortgage. *See* also Exh 8 a bundle of documents also relating to mortgage finance.

The plaintiff in his evidence sought in my view to down play or minimise the role played and contributions made by the defendant during the subsistence of the marriage. I did not find the plaintiff credible in this respect. As already said that plaintiff conceded that the defendant would buy clothes and groceries for the family. He admitted that she would at times pay for the maid. It is however plaintiff's contention that the defendant had been secretive about her income especially now in her new role as a consultant, *see* Exh 9 and that she had not used such income for the benefit of the plaintiff and children but solely for herself *see* Exh 10 documents various invoices issued to defendant using international credit card. In fact the plaintiff said the defendant as per Exh 11 had the temerity to seek a

contributory maintenance order against the plaintiff in the Magistrates Courts despite the fact that she was able to support herself and that plaintiff had the sole burden of fending for the family as per the schedule of his expenses Exh 12.

Under cross examination the plaintiff while admitting to have been married to the defendant for almost 20 years insisted that her overall contribution to the marriage is only 20% and not 50% hence she should be awarded a 20% share of the Borrowdale property. The plaintiff grudgingly conceded that the defendant looked after their two children and would do household chores. It was clear that the plaintiff had much difficulty in accepting the normal motherly role the defendant played as his wife. As regards the Borrowdale property plaintiff said the defendant bought some garden furniture and that she at one time supervised the massive extension at the property. The plaintiff was grateful for the donation of a motor vehicle to him by defendant's family and that defendant was active as a member of the Parent Liason Committee at the school their children attended. The plaintiff however maintained that he played a major role during the marriage and at one point opened a Bank Account Exh 16 for the sole benefit of the defendant.

The defendant in her evidence chronicled her role and contributions during the marriage and submitted that on that basis she is entitled to a 50% share of the Borrowdale house. The defendant was not only a housewife and mother but at most of the times was also gainfully employed. At the time she married the plaintiff and they were staying at a flat in Greendale she was employed by her father's company M & M Enterprises now Zimbabwe Motor Distributors from 1989 to 1996 a period of 7 years. Despite being employed she said she had time to play her role as a wife to the plaintiff hence their relationship was very balanced during that time. She would also perform household chores like cooking, supervising the maid and also the biological role of giving birth to the children (in 1990 & 1993). Whilst at the flat she said she also bought household goods like desk, curtains, small lounge suite, fridge, watch dresser, and plates. In 1996 the defendant said she was employed now part time at M & M and at the same time working for Lonrho Enterprises involved in marketing and developing the Borrowdale Brooke Country Club and housing project. In 1997 she said she stopped working as a result of marital problems hence she commenced divorce procedures in 1997 and only withdrew the case at pre-trial conference stage in 1998. Between 1998 – 2000 she worked for a management consultancy People Assistance Inclusive and also embarked on a master's degree programme. From 2001 to 2005 she worked for Price Water House Coopers as an Assistant Manager Consultancy in Public Sector donor

funded programmes and cooperative sector. The defendant said she started to do consultancy work in 2005 to date. See Exh 18 (a) to (e) which are relevant documents to defendant's employment history. It is the defendant's contention that while employed for that period she was earning money and contributing to the family income. She also had a motor vehicle allowance which she converted to the benefit of the family. The defendant produced Exh 19 – a cheque book stubs showing her account with Zimbank and the various cheques she issued out to buy goods for the family. In fact the defendant said when the plaintiff was promoted and transferred to Bulawayo in 1992 she had to resign from her job to support the plaintiff and followed him to Bulawayo where they stayed from 1992 to 1993 and had their second child while in Bulawayo. She said she was for that period a full time housewife performing all the duties including curtaining the house, packing and unpacking the goods and look after the children.

The plaintiff told the court that when the parties moved to Borrowdale house she did all the curtains and supervised the painting and gardening. She also supervised the three maids and buying household goods like kitchen utensils, glass ware, pots, blankets and towels. It is plaintiff's evidence that when they moved back to Harare in 1993 from Bulawyo and embarked on massive extension of the Borrowdale house she also played a role by supporting the plaintiff. She also bought items for the house like iron table, kitchen table and outside furniture, beds for children, dressers, draws, coffee table, the bed in spare bed room and various paintings to decorate the house. The defendant said she used the Jagers Account used by her father's company to purchase furniture and that while employed by Price Coopers 2001 – 5 she was allowed to buy furniture using an equivalent of 10% of her salary. See Exh 17 (a) – (b) on her employment and benefits at Price Coopers.

According to the defendant she supported the plaintiff morally and with ideas in the massive extension project at the Borrowdale house. She said both of them mutually agreed to extend the house and she approached a mutual family friend one Mwamuka to work on the plans and architectural work. During the extension of the house she would assist by obtaining quotations for materials from various construction companies.

Lastly the defendant chronicled her role as a mother. She said when they had their first child she would take him to and from the nursery and would later take him to and from school. According to the defendant she said her children were virtually her life and she did all a good mother could do for her children. She said she played a key role in the placement of the second child at Chisipite Junior School, would take children to and from school, assist

them with homework, attending parents meetings at their respective schools, involved in Parents Liason Committees, fundraising activities at St Johns College. See Exh 20. The plaintiff denied that she has been secretive about her income and pointed out that she holds a foreign account for the purposes of her current consultancy work and would utilise the funds held in the account as her per diems when she is asked to travel at short notice by buying tickets and booking hotels. She uses the credit card for that purpose and said that on average that account would have a balance of US\$1 000 - \$2 000. The plaintiff was very clear that she had played her due role in the marriage and that she had put her soul and heart in the marriage to such an extent that she deserves a 50% share of the Borrowdale house.

Under cross examination the defendant conceded that plaintiff made all the direct financial contributions for the renovation and extension of the Borrowdale House. She strenuously denied suggestion that she did not contribute in buying food and other household needs for the family. She accepted that plaintiff paid all the school fees for the children. She indicated that it was unfair to put much emphasis of her contributions or lack thereof arising from her consultancy work which she only embarked on 15 years into the marriage in 2005 while ignoring her role from 1990 to 2005. She admitted buying expensive items like mobile phone handset and jewellery using her income from consultancy work indicating that as a consultant she had to build a profile and look well.

The defendant was asked to justify her claim for 50% share of the Borrowdale house as follows;

“Q – What is your basis for claiming a 50% share of the house?

A – I contributed too. Marriage is not only about money. We have two children whom I spent time with and made sacrifices for .”

The plaintiff said she prefers the Borrowdale house to be revalued again despite that both parties have valuation reports. She said she would prefer the house to be sold on an open market and for each party to get his own share although she is not opposed to the plaintiff buying her out if he has means to do so and her share allows her to acquire a house in a comparable affluent residential area.

CONCLUSION

I am satisfied that both parties are sufficiently equipped to fend for themselves after the divorce in view of the various economic interests each party is pursuing. I am alive to the fact that the plaintiff will carry the financial burden of paying for both children’s university

fees for quite some time. It is clear from the evidence led that both parties have been enjoying a measure of affluence in their marital life and one would want to ensure that each party would be able to retain residency in an area of comparable standards. There is no doubt that the parties have been married for a long period of time from 1990 to date a period of about 21 years. It is therefore clear each party had invested heavily in the marriage and the better part of their prime life has been spent together. Both their children are now at University level. An assessment of all these factors would in my view suggest that each party has made an equal contribution to the marriage.

As already said the bulk of the evidence led by the parties relates to direct and indirect contribution made by each party for the family. I have already dealt sufficiently with the plaintiff's direct contribution to the acquisition and extension of the Borrowdale house which I put at 100%. Let me deal briefly with defendant's indirect contribution.

In the case of *Freddy Chinyavanhu v Letwin Chinyavanhu*, HH 156-09 GUVAVA J had this to say about direct and indirect contribution of the spouses see p 8 of cycostyled judgment;

"There can be no doubt that all contributions are important in a marriage whether they be material or otherwise. Some contributions are not even tangible as they related to moral support given to a husband as he goes about his work and ensuring that he comes home to a comfortable and happy home. Although such contributions cannot be quantified in any monetary terms they are no doubt important in building of a happy home."

In the case of *Masiwa v Masiwa* 2007 (1) ZLR 167 (5) GWAUNZA JA at 172 D had this say on indirect contributions;

"It has been generally accepted that indirect contributions made, in particular by a wife during the marriage include taking care of all household chores like cooking for and feeding the husband and the family, washing ironing and child minding. Many studies have been conducted locally and internationally and books written about how this type of work is not only unappreciated but under valued as well."

On how the court should treat the direct and indirect contribution the learned Judge of Appeal in *Masiwa v Masiwa supra* at 172 F had to say;

"To the extent that the applicant's claim was premised on both direct and indirect contributions. My view is that the court *a quo* should have combined the assessed value of the two types of contributions made by the appellant, in order to determine her entitlement. This would accord with the spirit of s 7 of the Matrimonial Causes Act which specifically refers to direct and indirect contributions."

In *casu*, the defendant's claim for a 50% share of the Borrowdale house is premised on both direct and indirect contributions. She contributed directly as she was also gainfully employed and indirectly in the manner explained. I would therefore assess the defendant's direct contributions to be about 20% and indirect contribution to be about 50%. I also have to take into account the other factors to be considered in terms of s 7 (4) of the Act in particular s 7 (4) (a), (b), (c), (d) and (g). I will therefore take into account all these factors in making the order in relation to the Borrowdale house or property.

Accordingly, it is ordered as follows;

1. A decree of divorce is hereby granted.
2. Each party is awarded as his or her sole exclusive the movable property outlined in Exh 22 jointly signed by the parties and herewith attached to this order.
3. The immovable property registered in the plaintiff's name known as stand 999G Harare is hereby distributed by awarding 60% share to the plaintiff and 40% share to the defendant.
 - 3.1. The property shall be valued by a registered estate agent nominated by both parties within 30 days of this order.
 - 3.2. In the event that the parties fail to agree on the estate agent, the Registrar shall appoint an estate agent from his list to conduct an evaluation of the property upon request by either party.
 - 3.3. The estate agent shall submit his or her report to the parties within 15 days of his or her appointment.
 - 3.4. The cost of evaluation shall be shared between the parties with the plaintiff paying 60% and the defendant 40%.
 - 3.5. The plaintiff is hereby granted the right to buy out the defendant's 40% share within 90 days of the date of evaluation of the property.
 - 3.6. In the event that the plaintiff fails to buy out the defendant in terms of para (3.5) above the property shall be sold at the best advantage by the deputy sheriff

and the net proceeds shared between the parties with the plaintiff awarded 60% share and the defendant 40% share as per para (3) above.

4. Each party shall bear his or her own costs.

Mtewa & Nyambirai, plaintiff's legal practitioners
Chikumbirike & Associates, defendant's legal practitioners.