

SAMSON MANYONI
versus
FRANCISCA SELINA MANYONI
(NEE CHIKEREMA)

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 12 and 13 November 2015 and 24 December 2015

Civil Trial (Family)

E Mangezi, for the applicant
A. Masango, for the respondent

MWAYERA J: The plaintiff issued summons seeking an order for divorce of their civil marriage contracted on 16 April 1993. He sought a decree of divorce and other ancillary issues. The defendant entered an appearance to defend and subsequent pleadings thereto. At pretrial conference stage the parties came up with a joint PTC minute. At trial the issues were narrowed down by consent of both the plaintiff and the defendant. The parties agreed that the marriage relationship between them had irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship. The parties also agreed that a Mazda T35 was no longer in contention and therefore not subject for distribution. By agreement the following issues were referred for trial:

1. Are the plaintiff's 38929 Old Mutual shares matrimonial property
2. How should the matrimonial property be distributed
3. Should the state land offered to the plaintiff be taken into account in distribution of the assets of the parties.
4. Should any maintenance be awarded to the defendant and to the parties child Simbarashe Manyonni who is now a major.

It was apparent from the testimony and pleadings of both the plaintiff and the defendant that two immovable properties namely 2842 David's Way, Bluffhill, Harare and Stand number 778 Prospect Park, Hatfield Harare were jointly owned by the parties in equal shares. There was argument in presentation of evidence as regards who contributed more towards the immovable properties but the parties in principle agreed the property was equally owned. This saw the defendant move from her earlier stance that she should be awarded 100% of the immovable property. The defendant was generally a bitter person going by the manner she testified. This was also shown when she presented argument over movable property. The plaintiff was prepared to let go or go by defendant's suggestion on most of the movable property except the Old Mutual shares.

He was also readily agreeable to 50% sharing of the immovable property, despite his assertion that he contributed more directly. At the end of it all, it was clear the property which was jointly owned was subject for apportionment and or distribution. The court having regard to the totality of evidence was to grapple with what would amount to just and equitable sharing. The parties in evidence agreed that the plots 209 and 210 acquired through the land reform programme is state land given the plaintiff holds on to it only through an offer letter in his name. The plaintiff agreed to let the defendant continue to use plot 210 on which she built a kitchen and toilet. The defendant agreed on the arrangement. What was abundantly clear from the parties testimony and closing submissions filed on their behalf was that the plots were state land to be best handled by the lands ministry. The plots were at trial therefore not viewed by the parties as their assets for sharing and distribution.

The hotly contested issue of the Old Mutual Shares was not compromised on by the parties. The plaintiff argued that the Old Mutual shares, which were partly donated to him by his employer and partly purchased by him from his employer were his personal benefits and not spousal assets for distribution and apportionment. The plaintiff likened the shares to his bonus and pension. He argued that the defendant had her own benefits at work and he was not seeking to benefit from those. The defendant on the other hand argued that she was entitled to a 50% share of the Old Mutual shares because they were purchased during the subsistence of the marriage and that they qualified as spousal assets. It is important at this stage for one to look at shares so as to understand what they are. **Shares are defined as corporeal movable property**

owned by a shareholder to whom it is issued or transferred and entitling him such rights as provided for by law. The learned author R. H Christie Business Law p 393 clearly spells out that shares are movable property which can be sold for value.

It is clear from the wording of the matrimonial clauses act that matrimonial assets include almost everything the spouses acquired and accumulated during their marriage. It does not matter whether the property is in one spouse's name. All matrimonial assets fall for distribution and sharing. Since shares are corporeal by nature and definition therefore, the Old Mutual shares qualify as spousal assets. The division of assets consequence to a divorce is governed by s 7 of the Matrimonial Cause Act [*Chapter 5 : 13*]. Section 7 (1) reads:

“Subject to this section, in granting 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 spouses, including an order that any asset be transferred from one spouse to the other”

Of interest in s 7, from the guidelines the court should consider in deciding on sharing, division and apportionment of property, is the use of the words “assets of spouses as opposed to matrimonial property. This clearly brings all assets or property his, hers and theirs into consideration at the time of dissolution of the marriage. The property or assets registered in another spouse's name can even be transferred to the other during the exercise of the wide discretion in division of property. In the case of *Gonye v Gonye* ZLR 2009 (I) 232 Malaba JA (as he then was) remarked on the leeway the court had in exercise of discretion regarding the granting of an order for division of property. The underlying principle being that the court has to, as far as practically possible, come up with the fairest possible settlement where each of the spouse is, as far as it is practically possible, placed in a position where they would have been had the marriage subsisted. The court in dealing with division of matrimonial assets has wide discretion per the Matrimonial Causes Act. However, sight of the presumption of equal sharing should not be lost. This is more so when one considers the legislative intention when it opted to use spousal asset in s 7 as opposed to matrimonial assets. The central intention is to ensure minimal hardships occasioned to either of the spouses at dissolution of marriage. The principle of equality is clearly buttressed in the supreme law of the country, the Constitution of Zimbabwe Amendment (No 20) Act 2013. Section 26 on marriage is relevant. In particular s 26 (c), reads:

“The state must take appropriate measures to ensure that (c) there is equality of rights and obligations of spouses during marriage and at dissolution and (d) in the event of dissolution of a

marriage, whether through death or divorce provision is made for the necessary protection of any children and spouses.”

The law is fairly settled that, in so far as it is reasonably practical, the spouses and children should be placed in a position they would have been in had the normal relationship subsisted. There is in my view, no room for extremes and desire to fix and frustrate the other party. The bottom line as spelt out in *Shenje v Shenje* 2001 (2) ZLR 160 and *Usayi v Usayi* 2003 (1) ZLR 684 are the wide spectrum of considerations including direct and indirect contributions, protection of spouses and equality of rights which fall for scrutiny. The aim is to achieve a fair distribution that would bring about as far as possible justice and equity.

Having considered the totality of evidence before the court, it is apparent the parties were married for over 20 years. Both parties are executives and gainfully employed. They acquired property jointly and individually. The movable property, except the Old Mutual shares distribution, is not in real contestation. As regards the immovable property due regard is given to the need to come up with a fair distribution as correctly spelt out by Chitakunye J in *Kwedza v Kwedza* HH 34/12 where he remarked:

“It is only fair that whatever apportionment or distribution is done it does not burden the defendant so much that he is left without accommodation.”

I will go further to propagate that whatever apportionment or distribution is done should not burden or inconvenience either of the parties, if one is to fulfill the fair, just and equitable distribution. Both spouses are entitled to protection per the Zimbabwean Constitution.

In *casu*, movable and immovable assets that is the two houses in Bluffhill and Prospect respectively fall for distribution. The Old Mutual shares also qualify as spousal assets for distribution. It is my considered view that given, as testified by the parties, the Bluffhill home has higher value than the Prospect home, the award of the Bluffhill home to the defendant would ensure the defendant has a home while the award of the Prospect home of lesser value to the plaintiff would be argued in value by the award of the shares to the plaintiff. Awarding the defendant part of the shares given my decision to have her retain the Bluffhill home would amount to unfair distribution, because of the obvious unjust enrichment.

The defendant claimed post-divorce spousal maintenance. Clearly under common law, spouses are under a reciprocal duty to support each other. The duty arises where a spouse states they need assistance from the former spouse on the basis that they cannot maintain themselves.

The learned author Hahlo, in his book *South African Law of Husband and Wife* 5th Ed p 364 wrote:

“It remains to be said that with the emergence of the “working wife” and woman’s liberation”, the attitude of the courts towards the award of maintenance has been changing world over.”

The same sentiments were echoed by Munyarara JA when he stated in the case of *Chiomba v Chiomba* 1992 (2) ZLR 198.

“... Today courts are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected again after divorce at least if there are no young children of the marriage ... Middle aged women, who have for years devoted themselves to full time to marriage are awarded “rehabilitative maintenance”, for a period sufficient to enable them to be trained or retrained for job or profession.” Permanent maintenance is reserved for the elderly wife who has been married to the husband for a long time and is too old to earn her own living and unlikely to remarry.”

I must add my voice that the propagation of equal rights and the notion of equal rights cannot be ignored in deciding whether or not a maintenance award is to be granted. Either of the parties, if deserving of the maintenance, ought to be granted. The bottom line is to look at the notion of what is fair and just. If there is a need for maintenance and the responsible person from who it is claimed is able to pay then an award ought to be made. The factors have to be considered cumulatively. In the present case the plaintiff is capable of maintaining the defendant but the need for such maintenance has not been established. The defendant is an executive holder of a master’s degree. She drives to and from work. She is in the early 40s and still working. The defendant, although she mentioned having a medical condition, she is not incapacitated or disabled. She is gainfully employed and has her own medical aid to cater for the medical expenses. The youngest child of the parties is a major and there is clear evidence the plaintiff has been paying school fees and giving the child upkeep money. The plaintiff has offered that he will continue to pay for his child through tertiary training. The claim for maintenance by the defendant in the circumstances is exposed as extravagancy at the expense of the plaintiff. Maintenance after divorce is only granted in exceptional circumstances and the need must be clearly spelt out. It is my view there are no exceptional circumstances in this case. The claim for maintenance is unwarranted more so given the proprietary distribution and that for the futuristic needs of upkeep, the defendant who is fairly young, qualified and employed, can sustain herself.

Accordingly it is ordered that:

1. A decree of divorce be and is hereby granted.
2. The claim for maintenance by the defendant be and is hereby dismissed
3. The immovable property namely 2842 David's Way Bluffhill be and is hereby awarded to the defendant
4. The plaintiff is to sign all transfer documents within a period of 3 months from date of this order failing which the Master of High Court is hereby authorised to sign all transfer documents to facilitate the said transfer.
5. The defendant is to bear all transfers costs in respect of stand no. 2842 David's Way Bluffhill, Harare.
6. The immovable property namely stand no. 778 Prospect Park, Hatfield Harare, be and is hereby awarded to the plaintiff
7. The defendant is to sign all transfer documents within a period of 3 months from the date of this order failing which the Master of High Court is hereby authorized to sign all transfer documents to facilitate the said transfer.
8. The plaintiff is to bear all transfer costs in respect of stand no. 778 Prospect Park Hatfield
9. The 38929 Old Mutual shares be and are hereby awarded to the plaintiff
10. The other movable property is awarded as follows:
 - (a) For the Plaintiff
 - Black Lounge Suite
 - Bedroom King Bed
 - Brown Reed Garden Chairs
 - Brown coffee table with glass and side tables
 - Washing machine
 - 42 inch LCD Television
 - Hyundai 110 Reg Number ACX2946
 - New Upright Refrigerator
 - Wardrobe
 - Kitchen Utensils at Prospect property
 - 3 Golf kits
 - 4 plate stove
 - Radio and speakers at the Prospect property
 - Reading desk and Boardroom table and chairs at Prospect Property and Prospect property
 - Garden tools at Prospect property
 - Book Shelf
 - Double bed
 - 100% share of left over building material at Prospect property

(b) For the Defendant

Black leather lounge suite at Bluffhill property
Floral lounge suite
Green lounge suite
Mitsubishi 1.200 Reg Number AAB 3391
Old Bedroom suite (head board)
Room divider
1 coffee table (black) and side tables
Lawn mower
42 inch LCD TV
32 inch LCD TV
Generator
Dining room suite
Kitchen fridges
Wardrobe
Kitchen Utensils at Bluffhill
2 gas cylinders
New 4 plate stove
Reading desks at Bluffhill property
Black Tv Stand
2 plated gas stove
Kitchen table and chairs
Furniture wall unit
100 % share of the left over building material Bluffhill property.

11. Each party to bear its own costs.

Musunga and Associates, applicant's legal practitioners
Mambara and Partners, respondent's legal practitioners