

MUNYARADZI JUNIOR MUTENJE
versus
NORMAN CHENGETA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 13-14 February & 13 September 2023

Civil Trial

B Chipupuri & T Mupangwa, for the plaintiff
M.Nyatsama, for the defendant

MAXWELL J:

The plaintiff and defendant were married on 29 October 2007 in terms of the then Marriage Act [*Chapter 5:11*] at Guruve. The marriage was blessed with three children, X (born on 9 April 2001) (X), Y (born on 1 March 2003) (Y) and Z (born on 2 August 2013) (Z). On 19 July 2017 plaintiff sued out summons claiming a decree of divorce and ancillary relief. In her declaration she stated that the marriage between the parties has irretrievably broken down such that there is no reasonable prospect of restoration of a normal marriage relationship. She averred that the defendant is cohabiting with another woman and the parties are now living separate lives. She stated that during the subsistence of the marriage the parties acquired both movable and immovable property. She proposed how the property should be distributed. She prayed for custody of the minor children and for an order that defendant pays maintenance until the children reach the age of eighteen years or become self-supporting whichever occurs first. She also proposed that defendant exercise reasonable access to the minor children two weeks of every alternate school holiday per year and at any other reasonable time and public holiday with her consent.

Defendant entered his notice of appearance to defend and filed his plea. He disputed that the marriage had irretrievably broken down. He denied committing adultery and stated that reconciliation was almost achieved after the commencement of these proceedings. On the ancillary issues, he stated that he will contribute school fees to a government or mission

school which is in line with his earnings. He agreed with the access terms except the requirement to get Plaintiff's consent on other reasonable times and public holidays. He proposed that the issue be dealt with by the court. He counter proposed the distribution of the immovable property.

A Joint Pre-Trial Conference was held. The parties agreed that a decree of divorce be granted, and that custody of the minor children, Y and Z be awarded to the plaintiff with defendant having access on every alternate school and public holiday. They further agreed that they both contribute to the maintenance of the minor children and that defendant will continue paying school fees equivalent to government school rates for day scholars. defendant's contribution is to be deposited directly to the school accounts. The parties also agreed on the distribution of the movable properties. The following issues were referred to trial.

1. What is the just and equitable distribution of the immovable properties acquired by the parties during the subsistence of their marriage:
 - a. Stand number 210 Guruve, Mashonaland Central Province.
 - b. Stand number 214 Guruve, Mashonaland Central Province.
 - c. Unit 3 Shangri-LA situated at Pietermaritzburg measuring 90 square meters (No 1 Connaught Road), KwaZulu-Natal, Republic of South Africa.
 - d. Stand 51 Chishawasha Township of Lot 3 of Chishawasha A measuring 995 square meters.

THE TRIAL

Plaintiff was the first to testify. Her evidence was as follows, they were married in 2000 but wedded in 2008. They have three children together. They separated in July 2016 as Defendant was living with another woman. During the subsistence of the marriage, she bought the property in South Africa in 2010 when she went for her PHD. She used her grant and also a loan from Standard Chartered Bank to pay for the property which is still under mortgage in her name. She is also seeking to be awarded the matrimonial home in Chishawasha, stand 51, as she contributed most of the money to purchase it. The money was from loans and her salary. She produced bank statements to show that part of the money came from her bank. Defendant should be awarded the Guruve Stands as he stays there. Both parties made equal contributions to the acquisition of Stands 210 and 214 Guruve. Under

cross examination she indicated that defendant was not honest and accountable in using money she was sending to him.

Defendant's evidence was that the parties contributed equally to the purchase of all the immovable properties. He abandoned the claim to the South African property and indicated that the rest should be distributed equally. The parties pooled their salaries and income from farming together and their roles complemented each other during the marriage. He indicated that he had no documentary evidence to produce before the court as all records were kept at the matrimonial home under the custody and stewardship of the plaintiff. Further that plaintiff refused to assist him with the records.

THE LAW

The law relating to the sharing of the assets of the spouses is set out in section 7 of the Matrimonial Causes Act [*Chapter 5:13*], (the Act). The assets subject to distribution are those that were acquired by the parties during the subsistence of the marriage which they consider to be belonging to the family. See section 7 (3) of the Act. In subsection 4 of the same section, the Court is enjoined to 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;...”

The Act further directs that in distributing the assets, the court shall endeavor as far as is reasonable and practicable and, having regard to the conduct of the parties, where it is just to do so, place the spouses and child in the position they would have been in had a normal marriage relationship continued between the spouses.

Section 26 (c) and (d) of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution

and in the event of dissolution, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means there must be a fair and equitable division and distribution of property at the dissolution of marriage.

ANALYSIS

Plaintiff produced a lot of documents proving her monetary contribution to the acquisition of the properties.

a. Stand 51 Chishawasha

The parties are joint owners of Stand 51 Chishawasha and as registered joint owners of the property, defendant has a real right to a half share in the property, even in circumstances where he might have made no direct contribution to its acquisition. See *Ncube v Ncube* SC 6/93. Plaintiff prayed that she be awarded this property because she acquired it and developed it with her own money from her salary and loans. As stated in *Shenje v Shenje* 2001 (1) ZLR 160, the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped. In any event, it has also been stated that one cannot put a monetary value to the indirect contribution of a party. Defendant submitted that while plaintiff was in South Africa pursuing her studies, he took care of the family and most of the financial obligations. Plaintiff also argued that as the custodian parent, it is in the best interest of the minor child if she is awarded the matrimonial home. Reference was made to the case of *Simango v Simango* SC 29/14 in which a decision was made that the respondent should stay in the matrimonial home until the minor child attained the age of eighteen years. That case does not support plaintiff's position as she is not advocating for a right to stay until the minor child attains majority status. Being a custodian parent is no justification for taking a real right from the non-custodian parent. At most, it can only be a reason for a delay in enjoying the real right until the minor becomes a major. Accordingly this property will be apportioned equally to both parties, with plaintiff being given the right to remain in occupation until the minor child attains majority status. Thereafter the Plaintiff shall buy out defendant's share failing which that option will be given to defendant.

b. Stands number 210 & 214 Guruve, Mashonaland Central Province.

The two properties were jointly purchased by the parties. Plaintiff proposed that the properties be awarded to defendant whilst she gets the matrimonial home. I have already stated that the matrimonial home will be shared equally between the parties. In line with the provision of the Constitution stated above, the two properties are to be shared equally as well. Plaintiff made an insinuation that to share the properties equally would leave her in a worse position than she would have been if the union had continued. She referred to the case of *Denhere v Denhere* SC 51/17. In my view, had the union continued, both parties would be benefitting from both urban and rural properties. In any event, defendant has allowed plaintiff to be awarded sole ownership of the South African property. I am therefore persuaded to order as prayed for by defendant, that plaintiff gets one GURUVE property of her choice.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Plaintiff be and is hereby awarded Unit 3 Shangri-LA situated at Pietermaritzburg measuring 90 square meters (No 1 Connaught Road), KwaZulu-Natal, Republic of South Africa.
3. Plaintiff be and is hereby awarded a 50% share in Stand 51 Chishawasha Township of Lot 3 of Chishawasha A measuring 995 square meters.
4. Defendant be and is hereby awarded a 50% share in Stand 51 Chishawasha Township of Lot 3 of Chishawasha A measuring 995 square meters.
5. Plaintiff be and is hereby given the right to remain in occupation of Stand 51 Chishawasha Township of Lot 3 of Chishawasha A measuring 995 square meters, until the minor child attains majority status. Thereafter the plaintiff shall buy out defendant's share within three months of the minor child attaining majority status, failing which that option will be given to defendant.
6. In the event that the parties fail to buy each other out, the property will be sold to best advantage by an Estate Agent appointed by the parties and the net proceeds shared equally between the parties. Should the parties fail to agree on an Estate Agent, one would be appointed by the Registrar of the High Court from the panel of Registered Estate Agents within thirty days of the failure to agree.
7. Plaintiff be and is hereby awarded one GURUVE property of her choice.
8. Defendant be and is hereby awarded one GURUVE property left after plaintiff's choice.
9. Each party bears its own costs.

Thompson Stevenson and Associates, Plaintiff's Legal Practitioners.
Chambati, Mataka & Makonese Attorneys at Law, Defendant's Legal Practitioners