

HOPE MAGUMUYE SHIRIYAPENGA (NEE SITHOLE)
versus
OBERT SHIRIYAPENGA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 10 & 11 January and 6 September 2023

CIVIL TRIAL

T Chiguvare, for the plaintiff
G Taper, for the defendant

MAXWELL J:

BACKGROUND

Plaintiff and defendant were married on 2 September 1978 under the then Marriage Act [*Chapter 5:11*] as evidenced by the marriage certificate a copy of which was tendered as an exhibit. The marriage was blessed with three children, Blessing T. Shiryapenga (born 25 September 1979), Obrian O. Shiryapenga (born 4 July 1962) and Obey T. Shiryapenga (born 11 December 1985). On 21 October 2021 plaintiff issued out summons for divorce and ancillary relief. In her declaration she averred that the marriage of the parties has irretrievably broken down and there is no prospect of restoration of a normal marriage relationship between them. She stated that the defendant has lost love and affection for her, has verbally abused her and has engaged in an extra marital affair. She stated that during the subsistence of their marriage the parties acquired both movable and immovable properties. She proposed the distribution of the assets in the following manner:-

PLAINTIFF

1. Plot 3, Bulawayo Drive, Trenance Bulawayo, also known as certain piece of land situate in the District of Bulawayo measuring 2, 0947 hectares called the Remainder of Lot 3 of Umguza Estate of Umvutcha held under Deed of Transfer No. 944/2002 dated 19th April 2002.

2. Shiriyapenga General Dealer Shop Bottle Store Masvosva Township P.O. Neshuro, Masvingo.
3. Shiriyapenga Grinding Mill Matande Township P.O. Neshuro Masvingo
4. Mazda B2500
5. Queen Size bed (Manyuchi)
6. 3 piece queen size bed suite (Bulawayo)
7. Peanut shelling machine
8. Peanut butter roasting machine
9. Peanut butter husk remover machine
10. Peanut butter making machine
11. Cement mixer (Bulawayo)
12. 4 piece sofas (Bulawayo)
13. Refrigerator (upright-Bulawayo)
14. 4 plate electric stove (Bulawayo)
15. Room divider (Bulawayo)
16. Display cabinet (Bulawayo)
17. Coffee table (Bulawayo)
18. Kitchen utensils (at all sites)
19. 10 piece dining room suite (with side board)
20. Brick moulder and electric motor (Bulawayo)
21. Chest freezer (Negari)
22. Dover coal stove (Negari)
23. 4 dowry beasts (Negari)
24. Submersible pump (Bulawayo)
25. 1 x wardrobe (Manyuchi)
26. Electric sewing machine
27. Hand sewing machine
28. Physical exercise machine
29. Dyna Lorry
30. 1 x TV 32' flat screen (Manyuchi)
31. Blankets
32. 7 beasts (half of the herd)
33. 3 piece sofas (Negari)

DEFENDANT

1. Shiriyapenga Hardware Shop P.O. Neshuro, Masvingo, registered under a company known as Hebo Hardware (Private) Limited.
2. Shiriyapenga Homestead Negari Masvosva P.O. Neshuro, Masvingo.
3. Shiriyapenga General Dealer Shop Bottle Store Chomutohwe Township Manyuchi, P.O. Neshuro Masvingo.
4. Shiriyapenga Grinding Mill Shazhaume Township, P.O. Neshuro, Masvingo.
5. Manyuchi Lodges in Mwenezi registered under a company known as Manyuchi Holiday Resort (Private) Limited.
6. 2 x Residential Stands in Neshuro and Manyuchi.
7. Hino lorry
8. Mazda B1800
9. 7 beasts
10. 2 small refrigerators (Manyuchi)
11. Three plate electric stove
12. Library stand
13. 1 x television 32' flat screen
14. Coffee table
15. Electric fan
16. Double bed (Negari)
17. 1 x wardrobe (Negari)
18. All furniture in Manyuchi Lodge chalets
19. Water pump equipment (Manyuchi)

Plaintiff stated that the parties are the Directors of Hebo Hardware (Private) Limited (Hebo Hardware) and Manyuchi Holiday Resort (Private) Limited (Manyuchi Resort). She proposed that these companies be evaluated by a reputable estate agent or valuator after which the defendant will retain sole ownership of the companies upon paying her 50% share of the net value of the companies' business within three months of the evaluation failing which the businesses be sold to the best advantage and the proceeds shared equally between the parties. She further proposed that the immovable properties and businesses listed as 1 and 5 under defendant should be awarded to defendant only after the evaluation and payment to her of a 50% share.

Defendant entered his notice of appearance to defend and in his plea disputed that he was to blame for the alleged irretrievable breakdown of the marriage. He stated that it was the plaintiff who had failed to show love and affection to him, emotionally abused him by denying him conjugal rights. He denied verbally abusing Plaintiff and having an extra marital affair. He stated that it is the plaintiff who has had several adulterous affairs with different individuals. Defendant stated that he has not lost love and affection for the plaintiff and that he foresees bright prospects for reconciliation.

Regarding the assets, he stated that plaintiff had left a property known as Stand 32 Sofers Crescent, Victoria Falls which was acquired during the subsistence of the marriage. He stated that the Mazda B1800 had already been disposed of and should not be listed for distribution, and that the items listed on numbers 19 and 33 under plaintiff and 17 under defendant were acquired before marriage and should not be part of the distribution plan. Further that the Toyota Dyna Lorry was donated to the Family Trust registered in August 2016 under Deed of Trust Number 0001138. He also stated that the two companies in which the parties are directors belong to the Family Trust. He submitted that all movable and immovable properties belonging to the Trust should not be distributed and that for those to be distributed, the contributions of each party should be taken into account. He submitted that he should be awarded the immovable properties claimed by the plaintiff or alternatively that the properties be shared in accordance with the direct contributions made by each party.

In her replication plaintiff pointed out that the parties are consenting to a decree of divorce and reiterated that there are no prospects of reconciliation. Further, that they have agreed on the distribution of the movable assets and would sign a consent paper. She disputed that the companies belonged to a Trust as she did not donate her shares to the Trust. She submitted that the Trust is defendant's alter ego and is being used as a reason for not sharing the assets of the companies. She pointed out that the court should consider both direct and indirect contributions of the parties in sharing the assets.

On 23 March 2022, the parties signed a Consent Paper agreeing to a decree of divorce. A Joint Pre-Trial Conference was held and the parties agreed on the distribution of eight immovable properties and the following issues were referred to trial.

1. Whether or not the properties under Obert Zvenyika Shiriyapenga Trust should form part of the distribution list of properties?
2. Whether or not the plaintiff is entitled to the payment of 50% of the net value of Hebo Hardware (Private) Limited?

3. Whether or not the plaintiff is entitled to the payment of 30% of the net value of Manyuchi Resort Lodges in Mwenezi?
4. Distribution of the following immovable property in Bulawayo and Victoria Falls:
 - 4.1 Plot 3, Bulawayo Drive, Trenance Bulawayo, also known as certain piece of land situate in the District of Bulawayo measuring 2,0947 hectares called the Remainder of Lot 3 of Umguza Estate of Umvutcha held under Deed of Transfer No 944/2002 dated 19th April 2002.
 - 4.2 A Certain piece of land measuring 3788 square meters called Stand 362 Victoria Falls Township held under Deed of Grant No. 810/92.

THE TRIAL

The plaintiff gave the following evidence. She married the defendant on 2 September 1978. She was 67 years old on the date the trial commenced. She confirmed that the parties had three children who are all self-supporting. She pointed out that she was seeking a decree of divorce because defendant had breached their agreement and married another woman. They separated in 2019. The other woman has three children, she is currently unemployed but was a teacher from 1978 to 2006. Her source of income are rentals from the Victoria Falls property. Defendant is not employed but worked for the National Railways of Zimbabwe from 1980 to 2012. Manyuchi Resort Company and Hebo Hardware were registered during their marriage. She is a director with 600 shares in Manyuchi Resort and 1000 in Hebo Hardware. Defendant has 1 400 shares in Manyuchi Resort and 1000 in Hebo Hardware. Hebo Hardware is rented by someone and the rentals go to the defendant. Manyuchi Resort is managed by the defendant and she is not getting any income from it. She contributed to the building of the lodges by supervising construction and sourcing materials. Defendant was working in Harare and would come during weekends and pay for the job done. Most of the money used in building was from defendant as well as labour costs. Defendant would also ferry the materials required for the construction whenever he was available. She also made sure that the lodges were in good condition, seeing to it that the rooms are clean and ready for use by visitors. She also supervised the construction of Hebo Hardware, making sure that the builders had all they required and was also responsible for stocking goods for sale and overseeing the running of the shop. She does not want any property in Mwenezi due to the presence of defendant's second wife there. She stays in Bulawayo with her son and has been collecting rentals from Victoria Falls since May 2016. The Bulawayo property is registered in defendant's name whilst the Victoria Falls property is in her name. Her contribution

consisted of providing food, clothing and taking care of Defendant's parents and siblings who were going to school. She used to sew and knit different things for sell to supplement the family's income. At times she would go to Botswana to sell her items. She prayed that she be awarded both the Bulawayo and Victoria Falls houses. She indicated that she will be staying in the Bulawayo house and the Victoria Falls house will be a source of income.

Albert Shiriyapenga gave evidence for the plaintiff. He is defendant's brother. He confirmed that defendant married another wife without agreeing with plaintiff. He confirmed plaintiff's contribution during the construction of the assets in Mwenezi. He indicated that his father had twenty children of whom fourteen were catered for by plaintiff and defendant in terms of education and welfare. He stated that there were also three others who the parties sent to school. In terms of education the parties catered for seventeen of his father's children, him included. He pointed out that Mwenezi has food shortages and the parties took care of the whole family, including their parents. He stated that the family had grown to over seventy people being cared for by the parties.

Defendant's evidence was as follows. He still loved the plaintiff as his wife but cannot force her to continue the marital relationship. Manyuchi Resort and Hebo Hardware are shelf companies which do not own any property. The lodge and the hardware shop are in his name. He entered into lease agreements with Mwenezi Rural District Council in his personal capacity and single handedly constructed Manyuchi Resort and Stand 445 Neshuro Township. He pointed out that the lodge is under a 99 year lease and Stand 445 Neshuro Township is on communal land. The Victoria Falls property was registered in Plaintiff's name as a way of evading creditors. The Bulawayo house is registered in his name and has sentimental value to him. He disputed his brother's evidence and stated that plaintiff was in the rural area when the business premises were built. He indicated that he was the one paying school fees for his brothers and that plaintiff sourced material for the rural home and did not supervise the construction of the business premises. The business at Manyuchi Lodge is affected by the state of the roads, network as well as the lack of electricity. What is fair is for plaintiff to be awarded the Victoria Falls house whilst he gets the Bulawayo house. In addition, he would give plaintiff 12% of Manyuchi lodge as well as a portion of Stand 445 Neshuro Township. In his view his brother lied because of a misunderstanding between them which arose after defendant refused to sell a Marondera house to his brother on terms. Stand 445 Neshuro Township was built after divorce proceedings had commenced. Under cross

examination he conceded that in his pleadings he did not mention that the companies are shelf companies.

ANALYSIS

The law relating to the sharing of the assets of the spouses is set out in s 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. The Court's power to distribute the family assets however does 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 an 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.”

See s 7 (3) of the Act. In subs 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.

Of the four issues referred to trial, counsel for the defendant requested that the first issue be removed. Defendant conceded that there were no properties donated to the Obert Zvenyika Trust. Accordingly, the first issue was removed from the list of issues referred to trial. The remaining three issues are considered below.

1. Whether or not the Plaintiff is entitled to the payment of 50% of the net value of Hebo Hardware (Private) Limited and 30% of the net value of Manyuchi Resort Lodges in Mwenezi?

The parties are agreed that Hebo Hardware (Private) Limited and Manyuchi Holiday Resort (Private) Limited were registered during the subsistence of their marriage. They own 1000 shares each in Hebo Hardware. In Manyuchi Resort, Plaintiff owns a 30% share and Defendant a 70% share. Plaintiff produced an evaluation report which estimated the value of Hebo Hardware at Stand 445 Neshuro Township at \$18 000. She confirmed that the value is for both the land and improvements thereon. The report shows that the following are the improvements on Stand 445 Neshuro Township: -

“IMPROVEMENTS

Commercial building

A rendered and painted single storey brick structure having an IBR sheet roof on timber truss externally unserviced and internally unlined over granolithic flooring. Steel door and window frames. Affords a hardware shop, canteen, varandah/canopy, offices. Warehouse, gents and ladies toilets, office.”

According to the plaintiff, the premises are rented by someone who deals in hardware and defendant collects the rentals. She testified that during construction she would ensure that the builders had all they needed and that subsequently she ordered what was required in the hardware and in the canteen and ensured the smooth running of the businesses. According to defendant, since the structure on Stand 445 Neshuro Township was constructed by him single handedly, a fair share to the plaintiff will be 12% of the value of the structure. Plaintiff also produced a valuation of Manyuchi Lodge which put the market value of the property at US\$140 000. Again defendant offered a 12% share in Manyuchi lodge to the plaintiff on the basis that he single handedly constructed the lodge at a time plaintiff had already retired from her employment as a teacher.

During the trial, defendant claimed that both companies are shelf companies that do not own assets. The offer by defendant of the 12% shares to plaintiff points to the fact that though he claimed that the companies did not own any property, there is a structure at stand 445 Neshuro Township and at Manyuchi resort that he considered available for distribution. I will therefore take plaintiff’s claim for 50% share in Hebo Hardware (Private) Limited to be a claim in both the company and Stand 445 Neshuro Township and the claim for 30% in Manyuchi Holiday Resort (Private) Limited to be a claim in both the company and the lodge.

Defendant confirmed that the construction of both the structure at Stand 445 Neshuro Township and at Manyuchi Lodge was done during the subsistence of the marriage.

In line with the direction in section 7 (g) of the Matrimonial Causes Act, the court notes that the parties have been married for 45 years now. Of those years Plaintiff had been working for 28 years. It was not disputed that the parties have been taking care of defendant's siblings and other family members. Plaintiff's contribution in that regard cannot be quantified in monetary terms. See *Usayi v Usayi* 2003 (1) ZLR 684. As stated in *Mufunami v Mufunami* HH 32/16, the value of indirect contribution increases with the length of time. Defendant tried to down-play the significance of the plaintiff's indirect contribution to the needs of the family. He however demonstrated an appreciation that the plaintiff is entitled to a share in the property. He offered 12% as a share he deemed fair and reasonable taking into account the circumstances of this case. I am of the view that a fair and equitable distribution of the property would be to award each party a share equal to the shareholding in the companies in issue. That means an equal share for each spouse in Stand 445 Neshuro Township, and a 30% share to the plaintiff and 70% share to the defendant in Manyuchi Lodge.

A lease with option to purchase was produced in relation to Stand 445 Neshuro Township where the structure is located. Whether or not defendant exercised the option to purchase the stand remained in dispute. In the event that it is established that defendant exercised the option to purchase the stand and actually purchased it, the equal share therefore will be for the net value of the land and buildings. If the land still belongs to the Rural District Council, the net value of the buildings will be shared equally. The lease in relation to the land on which Manyuchi lodge is situated has no option to purchase. Accordingly, the parties are to share the net value of the improvements thereon.

2. Distribution of the following immovable property in Bulawayo and Victoria Falls:

- a. Plot 3, Bulawayo Drive, Trenance Bulawayo, also known as certain piece of land situate in the District of Bulawayo measuring 2,0947 hectares called the Remainder of Lot 3 of Umguza Estate of Umvutcha held under Deed of Transfer No 944/2002 dated 19th April 2002.
- b. A Certain piece of land measuring 3788 square meters called Stand 362 Victoria Falls Township held under Deed of Grant No. 810/92.

Plaintiff's prayer is that both properties be awarded to her. She indicated that she stays at the Bulawayo property and lives on the rentals from the Victoria Falls property. In her closing submissions an argument is made that the Victoria Falls property should not be subject to distribution as it is of sentimental value to her. The sentimental value is said to have been derived from the fact that the property was given to the plaintiff at a time the defendant was happy with the plaintiff. On the other hand defendant disputed that the Victoria Falls property should be excluded on the basis that it has sentimental value to the plaintiff. He pointed out that it had been transferred to her to evade creditors. He prayed that he be awarded the Bulawayo property whilst plaintiff gets the Victoria Falls property.

Plaintiff confirmed that the Victoria Falls property was transferred to her to avoid it being attached to settle a debt. The transfer was effected in 1993. She stated that later the defendant indicated he was giving her the house as a present and the donation was not revoked. Further that she connects the property with the times she was happy with the defendant and the property therefore has a sentimental value to her. Defendant confirmed that he did not revoke the donation. He insisted that the intention of the parties was to keep the property within the family since it was an asset of the spouses. Since plaintiff confirmed the initial intention of the parties, i.e. to evade creditors, the intention of the parties to keep the property within the family as stated by the defendant is confirmed. That there was a subsequent offering of the property as a gift was not established. I find that the property does not fall within the category of those of sentimental value that should be excluded from distribution.

Defendant submitted that he stays in Mwenezi. He stated that plaintiff started staying in Bulawayo after filing of the divorce summons. This was not disputed by the plaintiff. Defendant submitted that there are two urban properties with title deeds and each party should get one. He argued that he will not be able to build another property in an urban area considering his age. I am inclined to agree with defendant that each party should get a property in the urban area with title deeds. Section 26 of the Constitution of Zimbabwe in dealing with marriage espouses the principle of "equality of rights and obligations of spouses during marriage and at its dissolution". Principles of fairness and justice in terms of the law are central considerations. To award both properties to the plaintiff as prayed for would be unfair.

Plaintiff urged the court to consider that the parties agreed that the eight immovable properties in Mwenezi be awarded to the defendant. She does not say the agreement was on

the understanding that she would get both urban properties. The issue of the eight immovable properties in Mwenezi was not part of the issues referred to trial. The evidence led by the parties did not include the eight properties. In my view there is no basis upon which to include them in considering the distribution of the properties in issues referred to trial.

Fundamental changes in the parties' lives and property sharing are consequences of divorce. In *casu*, there are two properties registered in each of the spouses' names. The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 20:05] is not a mere matter of form. It conveys real rights upon those in whose name the property is registered. See *Takafuma v Takafuma* 1994 (2) ZLR 103. The properties therefore fall into the category of "his" and "hers" by virtue of registration. I am not persuaded that there is justification for taking any portion away from one and give to the other. Accordingly, each spouse retains the immovable property registered in his or her name.

DISPOSITION

BY CONSENT

1. A decree of divorce be and is hereby granted.
2. The distribution of the movable property will be governed by the consent paper signed by the parties on 23 March 2022 and filed of record on 29 March 2022.
3. Defendant be and is hereby awarded the following immovable properties:
 - a. Shiryapenga Homestead Negari Masvosva P.O.Neshuro, Masvingo.
 - b. Shiryapenga General Dealer Shop and Bottle Store Chomutohwe Township Manyuchi P.O. Neshuro, Masvingo.
 - c. Shiryapenga General Dealer Shop and Bottle Store Masvosva Township P.O. Neshuro, Masvingo.
 - d. Shiryapenga Grinding Mill Matande Township P.O. Neshuro, Masvingo.
 - e. Shiryapenga Grinding Mill Shazhaume Township P.O. Neshuro, Masvingo.
 - f. Residential Stand in Neshuro.
 - g. Chadyiwa Vunyororo Vukutu Vunodyiwei Shop, Manyuchi Mwenezi.
 - h. Residential house, Manyuchi Mwenezi.

IT IS ORDERED THAT:

4. Plaintiff be and is hereby awarded a 50% share in Hebo Hardware (Private) Limited and Stand 445 Neshuro Township.

5. Defendant be and is hereby awarded a 50% share in Hebo Hardware (Private) Limited and Stand 445 Neshuro Township.
6. In the event that it is established that Defendant exercised the option to purchase Stand 445 Neshuro Township and actually purchased it, the net value of the land and buildings will be equally shared between the parties. If the land still belongs to the Rural District Council, the net value of the buildings will be shared equally
7. Plaintiff be and is hereby awarded a 30% share in Manyuchi Holiday Resort (Private) Limited and Manyuchi Lodge.
8. Defendant be and is hereby awarded a 70% share in Manyuchi Holiday Resort (Private) Limited and Manyuchi Lodge.
9. Plaintiff be and is hereby awarded a certain piece of land measuring 3788 square meters called Stand 362 Victoria Falls Township held under Deed of Grant No. 810/92.
10. Defendant be and is hereby awarded Plot 3, Bulawayo Drive, Trenance Bulawayo, also known as certain piece of land situate in the District of Bulawayo measuring 2,0947 hectares called the Remainder of Lot 3 of Umguza Estate of Umvutcha held under Deed of Transfer No. 944/2002 dated 19th April 2002.
11. Each party bears its own costs.

Muvirimi Law Chambers, plaintiff's legal practitioners
Tapera, Muzana & Partners, defendant's legal practitioners