

REPORTABLE (51)

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MUSA JOHNSON KWEDZA
v
CHRISTINE KWEDZA (NEE MARTIN)

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, MAY 7, 2013**

T W Nyamakura, for the appellant

C Chinyama, for the respondent

GARWE JA: After hearing argument from counsel, this Court dismissed the appeal with costs and indicated that the reasons for such dismissal would follow in due course. What follows are the reasons for that order.

The appellant and the respondent were husband and wife. Owing to irreconcilable differences during the marriage, the respondent issued summons claiming a decree of divorce and various other ancillary relief. At the hearing of the matter before the High Court various issues were resolved by the parties and the only issue that remained was the distribution of the immovable properties acquired during the subsistence of the marriage.

There were two properties at the centre of the dispute. These were number 18 Normarton Close, Marlborough, registered in the names of both parties and 60 Garlands Ride, Mount Pleasant, registered in the name of a company, Lilford Investments Private Limited, whose entire shareholding was held by the Garlands Trust. For purposes of this judgment these will be referred to as “the Marlborough property” and “the Mount Pleasant property” respectively. The court *a quo* found that, although registered in the name of a company, the Mount Pleasant property was controlled entirely by the respondent and that it was in fact the respondent’s alter ego. On that basis, the court *a quo* found it proper to pierce the corporate veil and include that property as part of the matrimonial estate. Indeed the appellant, whilst accepting that he had not contributed in any way to the acquisition of that property, had urged the court *a quo* to treat the property as part of the matrimonial property. The court also took into consideration that the appellant “had” a farm whose full details had not been disclosed.

Having taken into account the provisions of s 7 of the Matrimonial Causes Act, [Chapter 5:13] (“The Act”), the court *a quo* decided to award the appellant sixty five per cent of the Marlborough property and the respondent the remaining thirty five per cent. Although he did not say so specifically, the learned trial Judge allowed the respondent to retain whatever rights she had in the Mount Pleasant property and the appellant in the farm. What is the subject of this appeal is the order awarding the respondent a thirty five per cent share in the Marlborough property.

The appellant has attacked the order of the court *a quo* on the sole basis that the court *a quo* erred in failing to place the parties in the same position they would have been had a normal marriage relationship continued between them; more specifically, in failing to

declare the appellant the sole and absolute owner of the Marlborough property. The appellant accepted in his heads of argument that the distribution of the immovable property was an issue that was within the discretion of the trial court and that, in the absence of a misdirection on the part of the court, the exercise of such discretion cannot be interfered with.

The court *a quo* was mindful of the fact that there were two immovable properties at issue. It was aware that the Marlborough property was jointly owned whilst the Mount Pleasant property was owned by a company wholly controlled by the respondent. The court was aware that the two parties had resided in the Mount Pleasant property rent free and that, on divorce, the respondent was to continue residing in that property at will. The court was also aware that the appellant had made no contribution to the acquisition of the Mount Pleasant property but was of the view that its existence had to be taken into account in determining the fair distribution of the Marlborough property. It is also apparent that the court took into account that the appellant had access to a farm, whose details were not fully disclosed before the court. All that was said about the farm was that it is far away. The nature of the accommodation available at the farm was not disclosed.

In coming to the conclusion that the appellant should be awarded a sixty five per cent share of the Marlborough property, the court *a quo* remarked at page 7 of the cyclostyled judgment:

“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."

Is there any basis upon which the above finding can be impugned? I think not.

As stated by GUBBAY CJ in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) 62 F – 63A:

"It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

Attention should also be drawn to the recent decision of this Court in *Pharaoh B. Muskwe v Douglas Nyajina and Two Others* SC 59/14.

It is the submission by the appellant that the court *a quo* should have ensured that the parties were placed in the position they would have been had a normal marriage relationship endured and that, had it done so, the appellant should have been allowed to retain the Marlborough house. It seems to me that the appellant in this case, as many others do, has misunderstood what is meant by placing the parties "in the position they would have been had a normal marriage relationship endured."

In the court *a quo*, the appellant did not lay any claim to the Mount Pleasant property. Indeed he could not as he had played no role in its acquisition nor had he contributed financially to its purchase. His request was that the respondent's interest in the

property be taken into account in apportioning the Marlborough property. That the parties owned the Marlborough property in equal shares was not in dispute. Taking into account that the respondent had the enjoyment of the Mount Pleasant property and would continue to do so, and further that the appellant had some rights to a farm whose details had not been disclosed, the court then decided to take, from what would have been the respondent's half share, fifteen per cent of the value of the Marlborough property, so that, at the end of the day, the appellant would be entitled to sixty five per cent of the value of that house.

The court *a quo* took into account a number of factors and attempted to strike a balance between them. The direct contribution of each of the parties was obviously a pertinent consideration in this equation.

The apportionment of matrimonial property upon divorce is governed by s 7 of the Act. The court is enjoined to consider the various factors itemised in s 7(4) of the Act and to “endeavour, as far as is reasonable and practicable and, having regard to their conduct ... to place the spouses and the children in the position they would have been in had a normal marriage relationship continued between the spouses.” This is not an easy task. It involves the balancing of the factors therein set out regard being had to their conduct and what seems just. In the end the court exercises its discretion based on what is just in the circumstances. The guiding principle is in the words “as far as is reasonable and practical.”

Whilst a court should endeavour to place the spouses and the children of the marriage in the position they would have been in had the marriage relationship continued, in practical terms and in the majority of cases, this is not always achievable. As MAKARAU JP remarked in *Dzova v Dzova* 2008 (1) ZLR 294 (H), 298 whilst most plaintiffs and defendants

in divorce proceedings prefer the clean-break approach, the Act introduces a duty on the court divorcing the parties to maintain, as far as is reasonable and practicable, the lifestyle that the spouses enjoyed during the subsistence of the marriage but “upholding one obviously frustrates the other” - at 298 C-D.

The reality is that, once a divorce is granted, the position of the parties, in the majority of cases, changes considerably and irretrievably. In a case where the parties would have acquired more than one property during the subsistence of the marriage, it may be possible for a court to achieve a more-or-less similar style of living for both spouses after divorce. In many cases however this is not achievable. Usually there is one family house, or none at all, one stove, fridge or television set, etc, to be divided between the two. In such a situation it is impossible to put the parties “in the position they would have been had the marriage” continued. What the law requires and the court endeavours to do in such a situation is try to do justice, taking into account the personal and family circumstances of the spouses and the resources available at the time of divorce. It is for this reason, as noted in *Dzova’s* case, that in some cases, an order is made for the house to be sold once the children have become self-sufficient in order not to disrupt their growing up. The intention is to ensure that, given the overall circumstances, the outcome is just and equitable to the extent that it attempts to place the parties in as close a position as they would have been had a normal marriage relationship continued between the parties. Generally speaking however restoring the *status quo ante* may not, in the majority of cases, be feasible.

In the circumstances of the case that forms the subject of the present appeal, and in particular, it having been common cause that the Mount Pleasant property was acquired by the respondent without any input at all from him, the appellant cannot be heard to

complain that the respondent's entire fifty per cent share in the Marlborough house should have been awarded to him so that at the end of the day he would have had total ownership of the property. The court *a quo* took into account a number of factors and the result it reached cannot, by any stretch of imagination, be said to be irrational.

In the result, this Court was satisfied that there was no basis in law upon which the apportionment of the immovable property could be impugned.

It was for these reasons that the appeal was dismissed with costs.

ZIYAMBI JA: I agree

PATEL JA: I agree

Mtewa & Nyambirai, appellant's legal practitioners

Messrs Chinyama & Partners, respondent's legal practitioners