REPORTABLE **(44)**

ALAN CHARLES P. I. LOCK
v
ELLEN OLIVIA LOCK (NEE FISCHER)

SUPREME COURT OF ZIMBABWE
GOWORA JA, BHUNU JA & MAKONI JA
HARARE: MAY 31, 2018 & MARCH 16,2020

D. Tivadar, for the appellant

A. P de Bourbon (SC), for the respondent

MAKONI JA: On 27 September 2017, the High Court rendered judgment in HC 979/15 whereby it dissolved the parties' marriage and awarded ancillary relief which included distribution of the assets of the parties. The relevant part of the order, distributing the assets of the parties, reads as follows;

> "F. The matrimonial estate of the parties shall be divided and distributed in accordance with s 7(1(a) of the Matrimonial Causes Act (*Chapter 5:13*) as follows:
>
> i) The defendant shall, subject to sub paragraph (ii) below, at his expense transfer to, or cause to be transferred to, the plaintiff the two immovable properties situated at 10 Redhill Road, Highlands, Harare, 22 Aboynne Drive, Highlands, Harare.
>
> ii) Any liability in respect of capital gains tax arising from the transfer of any of the aforesaid properties to the plaintiff shall be shared equally between the plaintiff and the defendant;
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> iii) The defendant shall, at his expense, cause registered in the name of the plaintiff the Prado motor vehicle, registration number AAR5574;
>
> iv) The defendant shall pay the plaintiff into an account nominated by her, and subject to any exchange control laws applicable in Zimbabwe, the sum of

US$ 575 000. The parties shall agree on a payment plan for this amount within 30 days from the date of this order; (sic)

v) The Plaintiff shall retain as her personal property all movable property presently in her possession; and

vi) The defendant shall retain as his personal property all other property of the matrimonial estate."

Aggrieved by this part of the order of the High Court, the appellant noted the present appeal. He specifically appealed against para F (i), ii) and iv) wherein the immovable property and monetary assets were distributed.

His grounds of appeal are as set out below: -

"1) The court *a quo* erred at law and in fact in not finding that No. 6 Valyonga Land was paid for by the defendant prior to the marriage, and as a consequence of such error included Valyonga Land as part of the matrimonial estate, subject to distribution in terms of s 7 (1) of the Matrimonial Causes Act [*Chapter 5:13*], when in actual fact No. 6 Valyonga Land fell outside the matrimonial estate.

2) The court *a quo* erred at law and fact in including the US$ 160 000 00 compensation, from the compulsory acquisition of Leyland Farm, as part of the matrimonial estate, when the plaintiff (herein respondent), actually conceded that the farm and by extension any compensation for the same, was inherited by appellant and this could not form part of the matrimonial estate.

3) The learned judge in the court *a quo* erred in refusing, (sic) the appellant to call a witness to establish that the immovable properties (the distribution of which the respondent sought) were trust property, on the basis that the witness's name did not feature in the pre-trial conference minutes and by holding that in such circumstances respondent's consent to the calling of the witness by appellant was necessary.

4) The learned judge in the court *a quo* erred in awarding the plaintiff US$ 575 000 00 as cash balance, without seeking to detail how such a figure was arrived at or what considerations were taken into account." (sic)

THE APPLICATION

Pending the determination of the appeal and on 11 April 2018 the appellant filed in this Court, an application for leave to adduce further evidence on appeal in terms of r 39 (4) of the Supreme Court Rules, 2018 (the rules). The basis of the application was that in dealing with the distribution of No 6 Valyonga, the Judge *a quo* found against him on the ground that he had made bald assertions in claiming that the property was bought before the marriage. It further found that there was no written agreement confirming that position. He had now managed to locate the agreement and intended to produce it.

The application was opposed on mainly two grounds. Firstly, the respondent averred that the appellant delayed in bringing the application and had not explained the cause for such delay. Secondly, the production of the agreement of sale would not take the applicant's case any further. The document in question reflects that what existed prior to the marriage was, at best, a personal right to shares in a company which, at the time, had no real value as the shares represented no real property. The property, described in the agreement, was only transferred to the company a year after the marriage.

At the hearing of the matter, the court first heard argument in respect of the application in terms of r 39 (4) of the rules.

Mr *Tivadar,* for the appellant submitted that the documents only surfaced after the High Court had ceased to deal with the matter and that if admitted, would demonstrate that during the trial, the appellant was telling the truth, that the Valyonga land was paid for by the appellant prior to the marriage. He contended that he bought shares in a company that had already purchased

the land in question. There was no challenge that the document was not authentic. He further submitted that the issue of any prejudice to the respondent will be addressed as the appellant seeks that the matter be remitted to the High Court for determination on the basis of the additional evidence. The Respondent can then have an opportunity to relate to the document.

The court engaged Mr *Tivadar* on the relevance of the document in view of the fact that in terms of the document, the appellant could only have, at best, acquired shares in a company and not the land. The land did not exist at that time as there was a process of subdivision going on. Any agreement of sale entered into in respect of that land would have fallen foul of the provisions of the Regional, Town and Country Planning Act [*Chapter 29*:*12*].

Mr *Tivadar,* after a spirited fight, later conceded the point and indicated that his client would no longer pursue the application.

In the end the application, with the consent of both parties, was dismissed with costs on the ordinary scale.

<u>THE APPEAL</u>

I must, at the outset, say that I agree with the observations made by Mr *de Bourbon* in para 3 of the respondent's heads of argument where it is stated;

> "It is also noted that although the relief granted in paragraph (f)(i) of the order of the High Court is challenged, no ground of appeal is directed against the award of two immovable properties directed to be transferred by the appellant to the respondent. It is also to be noted that although the appellant purports to appeal against the issue of capital gains tax as set out in paragraph (F)(ii) of the order of the High Court, no ground of appeal is directed to that finding (sic).

> In essence it is submitted that grounds a), b) and d) of the Notice of Appeal are directed in reality at the relief granted in para
> (F)(iv) of the order of the High Court only. It is submitted that the Appellant must be held bound to his Notice of Appeal."

In essence, this means that the appellant has only appealed against the relief granted in para F (iv) of the order of the High Court.

The dismissal of the application to lead further evidence would have marked the death knell to the appellant's first ground of appeal if it had been properly before the court. As I have already alluded to above, the issue of No. 6 Valyonga, mentioned in ground number one of the Notice of Appeal, does not feature in para F(i) of the order which the applicant appealed against.

Before dealing with the grounds of appeal I consider it necessary to deal with a pertinent issue which runs through from the proceedings before the court *a quo* to the present proceedings which is, what was the essence of the dispute between the parties. The issue arose from the manner in which the parties couched their pleadings.

Mr *Tivadar* submitted that the respondent, in her summons, had prayed for the distribution of "the matrimonial assets." The appellant requested that the respondent particularize the "matrimonial assets" referred to by her in the summons and the division thereof sought. The respondent refused to supply the particulars on the basis that the appellant did not require them to enable him to plead. In his plea, the appellant consented to the prayer for the "matrimonial estate"

to be divided equally between the parties. The respondent, in her summary of evidence makes reference to "assets acquired by the parties" during the course of their marriage.

Counsel argued that in view of the manner in which the respondent pleaded her cause, the court *a quo* was asked to distribute 50 percent of the "assets" that the parties acquired during the course of their marriage i.e. the "matrimonial estate". The composition of the matrimonial estate, and not the assets of the spouses was agreed as the relevant issue for trial. It would have been open to the respondent to seek a division of all the assets of the parties if she so desired.

Mr *De Bourbon*, on the other hand, submitted that what was sought by the respondent, in para 8 of her declaration, was an order in terms of s 7 of the Matrimonial Causes Act [*Chapter 5.13*], (the Act) for the equal distribution between the parties of their matrimonial assets. He further submitted that the appellant, in his plea, agreed that the matrimonial estate be divided equally between the parties. If he intended to draw a distinction between 'assets of the parties', 'the matrimonial assets' or 'matrimonial estate', he did not make that clear. He argued that the use of the term "matrimonial estate" is synonymous with "the assets of parties." He further submitted that in the Joint Pre-Trial Conference minute both parties agreed to relate to the matrimonial estate, that is, what constituted the estate and how it was to be equally divided between the parties. It was not an issue, neither was it an agreed position that the trial would consider only matrimonial assets and not the assets of the spouses.

He further submitted that the parties accepted that the trial would be concerned with the distribution to be made in terms of s 7(1)(a) of the Act. This was made clear in the opening

address of the respondent. It was on the basis of the above that the Judge *a quo* issued an order that the matrimonial estate shall be divided and distributed in accordance with s 7(1)(a) of the Act.

The court *a quo* dealt with the dispute as follows:

> "Issue 2.2 was the real dispute throughout the trial. It can be noted throughout the pleadings, the parties were referring to "matrimonial assets" in para 8 of the summons; "matrimonial estate" in para 6 of the plea and "matrimonial estate" in para 2.2 of the joint Pre Trial Conference minute. This points to the fact that the parties were looking to the assets they acquired during their marriage. These are the assets which they agreed to distribute 50/50. In my view, there is no conflict between the parties' desire to look to what they acquired during their marriage and the provisions of s 7 of the Matrimonial Causes Act, (*Chapter 5.13*) which refers to the assets of the spouses. The assets of the spouses, in this instance would be limited to the assets which the spouses acquired during the marriage; while they were spouses in the marriage, because that was the intention of the parties as indicated in the summons, plea and joint PTC Minute. While the legal position as given in *Ncube v Ncube* 1993 (1) ZLR 39 (SC) and *Gonye v Gonye* 2009 (1) ZLR 232 is correct, what distinguishes the current case is the specific intention of the parties to limit their 50/50 distribution to matrimonial assets. This means that if the defendant is able to prove that an asset was acquired before the marriage, or is exempt in terms of the law, then such an asset shall be excluded in view of plaintiff's claim in the summons. Although the legal position is settled as argued by plaintiff's counsel, it is the plaintiff who chose to limit herself in her claim and pleadings. She cannot abandon that position in the absence of appropriate amendments to her pleadings."

The question that arises from the above discourse is what is it that is distributed in terms of s 7(1) of the Act. This position is settled in our law. The starting point being s 7(1)(a) of the Act which provides:

> "7 Division of assets and maintenance orders
> (1) Subject to this section, in granting a decree of 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 <u>of the assets of the spouses</u>, including an order that any asset be transferred from one spouse to the other;" (my emphasis)

The import of the above section was made clear in Gonye (*supra*) where the following was stated.

> "It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of "the assets of the spouses including an order that any asset be transferred from one spouse to the other". The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.
>
> > The terms used are the "assets of the spouses" and not "matrimonial property". It is important to bear in mind the concept used, because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise.
> >
> > The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.
> >
> > To hold, as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Ac is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend.""

Such a wide discretion was bestowed on the High Court to cure the mischief that existed prior to 1986 where the court had no power within its inherent jurisdiction, to make a distribution order upon the dissolution of a marriage. In particular, it could not order the transfer from one spouse to the other of any property. The learned author W *Ncube* in Family Law in Zimbabwe Legal Resources Foundation WO 41/84 at p 173 had this to say on this point.

> "The most important point to note is that the courts now have the power to order the transfer of property from one spouse to another when dissolving a marriage or separating spouses from each other. The provisions of the Matrimonial Causes Act, 1985 apply equally to all valid marriages under both customary and general law...These powers are extensive. A court may make any order it deems fit for the division, apportionment, distribution or

transfer of property from one spouse to another when granting a decree of divorce, judicial separation, or nullity of marriage, or at any time thereafter. In addition, the court may make maintenance orders either by way of a lump sum or periodical payments."

As a result, courts had to resort to considering the parties' way of life and transactions between them and many wives resorted to using the concepts of universal partnership or a partnership in a particular venture in order to obtain an equitable share of the matrimonial estate. Such an approach had its own challenges. See *Jirira v Jirira* 1976 (1) RLR 7, *Chikomo v Katsidzira* 1981 ZLR at 418 and *Chapeyama v Matende 2000 (2) ZLR 356 (S)*. It was only after the introduction of s 7 of the Act in February 1986 that the court was conferred with jurisdiction to transfer property by way of a distribution order. See Ncube (*supra*) and *Takafuma v Takafuma* 1994 (2) ZLR 103 (5). As this is power conferred by statute rather than common law, in any claim brought before the High Court in terms of s 7 of the Act, the court can only deal with the "assets of the spouses".

Nothing, including an agreement by the parties, can limit the exercise of the judicial discretion that s 7 (1)(a) creates. Parties may agree on the distribution of their matrimonial assets, however the High Court is still entitled, in the breath of its discretion, to make a distribution order relating to the assets of the spouses if for some reason it does not agree with the parties position.

I have had to divert from the main issues in this matter because of the use of an incorrect description of the assets to be distributed employed by the respondent in her declaration. She sought the distribution of matrimonial assets in terms of s 7(1) of the Act. The appellant compounded matters by agreeing to the proposed distribution but describing them as the

matrimonial estate. This continued through to the Pre-Trial Conference minute. My view is that once a party pitches its claim on s 7 of the Act, the wording used in the pleadings is neither here n or there. The court would have been asked and is required as a matter of law to consider what constitutes the assets of the spouses and how, applying its discretion and the general guidelines in s 7(4) of the Act, those assets were to be divided, distributed and apportioned.

All the above discourse would have been avoided if care had been taken by the legal practitioners in this matter to make reference to the relevant statute first before drafting their pleadings. I would go further to say that this problem would have been resolved at the Pre-Trial Conference stage if the presiding Judge had exercised due diligence. It did not matter that the parties had agreed to a 50-50 distribution. The question would be 50-50 distribution of what. The answer would then be found in s 7 of the Act.

In *casu* the court *a quo* was conscious of the fact that it was dealing with a claim in terms of s 7 of the Act and it exercised its discretion and issued an order in terms of that section.

GROUND OF APPEAL NO. 2

The appellant's argument in its Heads of Argument, was that the appellant had inherited Laylands farm which was subsequently acquired by the State. In 2011 and during the subsistence of the marriage, he received compensation from the state in the sum of US160 000 for improvements on the farm. This amount should have been considered as inheritance and deducted from the matrimonial estate.

During the hearing Mr *Tivadar* conceded that the compensation received, from the State, was not an inheritance and should be considered for distribution. He proposed that the amount be dealt with as was suggested by Mr *de Bourbon*. Mr *de Bourbon* had suggested, although not conceding the point, that half of the amount of US$ 160.000 be excluded from the amount of US$575 .000 awarded to the respondent in terms of para F (iv).

In view of the concession made by the appellant the ground of appeal has no merit. However, the court will deal with the issue as was proposed by the respondent.

GROUND OF APPEAL NO. 3

The appellant's contention was that he was denied permission to call a witness on the basis that the witness's name was not on the appellant's summary of evidence. The court *a quo* suggested that he seek the consent of the respondent to call the witness. The respondent did not consent to the calling of the witness. He therefore prayed that justice would be served by rectifying the procedural shortcoming. He did not suggest how this could be done.

On the other hand, the respondent contended that there is nothing in the record to support the contention that the appellant was not allowed to call a relevant witness.

I find merit with the submission made by the respondent. There is nothing, on record, to show that the appellant made an application for a postponement of the trial to allow him to call the witness and that it was refused. Nor, that the witness was available and was not permitted to take the witness stand. Put differently there is no factual basis set out for the allegation

that the court *a quo* refused to allow the appellant to call a relevant witness. This ground of appeal is devoid of merit and must fail.

GROUND OF APPEAL NO. 4

Regarding this ground the following is what was submitted on behalf of the appellant in his heads of argument.

> "The Learned Judge awarded a cash payment of US$575 000.00 to the respondent in addition to immovable and movable assets. How these figures were arrived at was not explained by the court *a quo*. Further, the amount awarded is inexplicable in the light of the evidence that was before the Learned Judge."

I am persuaded by the respondent's contention that this ground of appeal, "advanced without any great enthusiasm or conviction" is devoid of merit. To the contrary the court *a quo* explains how it arrived at that figure. No details were given of what is alleged to be that evidence that was before the court a *quo* that was not taken into account. The amount awarded in para (F) (vi) will therefore be adjusted, as was proposed by the respondent as discussed earlier on, and conceded to by Mr *de Bourbon* which is in the sum of US$80 000-00.

As a result, the appeal succeeds in part and, in that event it is only fair that the appellant pays respondent's wasted costs.

In the result I make the following order: -

1. The appeal succeeds in part
2. Paragraph F (iv) of the judgement of the court *a quo* is set aside and substituted with the following;

> "The defendant shall pay the plaintiff, into an account nominated by her, the sum of US$495 000. Such payment shall be and subject to any exchange

control laws applicable in Zimbabwe. The parties shall agree on a payment plan for this amount within 30 days from the date of this order;"

3. The appellant shall pay the respondents costs.

GOWORA JA I agree

BHUNU JA I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Messrs Atherstone & Cook, respondent's legal practitioners