

JOSPHAT RADHU

versus

PATIENCE RADHU (nee CHIWARA)

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 27 June & 27 July, 2022

O. Mafa for the plaintiff

D. Charamba for the defendant

Civil Trial - Divorce

ZISENGWE J: The parties to these divorce proceedings are resigned to the fact that their marriage relationship has irretrievably broken down and therefore that their marriage should be dissolved. The cause of this matrimonial disharmony is however contested, whereas the plaintiff attributes the same alleged incessant and unfounded accusations (*which he does not elaborate*) and general harassment at the hands of the defendant, the latter however, ascribes the breakdown to plaintiff's alleged sexual indiscretions and philandering ways coupled with a deprivation of the expected *consortium omnis vitae*.

Over and above the question of the decree of divorce being granted, the parties have also since agreed on the division of the bulk of movable and one immovable property. The latter is a house situate in the Rujeko residential area of Masvingo, namely House No 19887 Mhizha street, Rujeko 'C', Masvingo ("*the Rujeko property*") which is to be awarded to the defendant. The parties however haggle over the distribution of two immovable properties comprising a general dealer shop situated in Mucheke, namely Stand No. 1709 Mahachi Street, Chesvingo ("*the Chesvingo shop*") and Stand No. 2702 Zimre Park, Masvingo, being a double storey residential property still under construction ("*the Zimre property*"). Additionally, the question of the

quantum of maintenance which the plaintiff should be ordered to contribute towards the upkeep of the remaining minor child was a sticking point.

The background

The parties contracted their marriage under the Marriage Act, [*Chapter 5:11*] in 2003 which marriage was blessed with three children, two of whom are now majors.

It is common cause that the plaintiff started off as a school teacher successively deployed at various rural schools in and Masvingo province before embarking on a commercial venture wherein he would purchase bovine beasts for resale at a profit. Whether he started this venture before or after quitting his teaching job in 2006 is a major born of contention as between the parties suffice it however to say that the couple would diversify and embark on a butchery in Rujeko C.

In due course the parties would acquire the three sets of immovable property referred to earlier namely the Rujeko property, the Zimre property and the Chesvingo shop.

What the parties do not seem to agree on, however, are three key things namely the chronology of the acquisition of those assets, the contribution made by each party towards the acquisition of the same and of course, ultimately the distribution matrix of those properties.

In the trial which ensued the parties were the sole witnesses for their respective cases.

In his evidence the plaintiff indicated that most of the property was acquired chiefly through his industry and that the defendant was, for the most part, a housewife. He also proposed a diminution of the proportion of the remaining two properties that should be awarded to the defendant in recognition of the fact she has since been awarded the Rujeko property. With regards to the latter property he testified that he acquired it when he was still a school teacher and that the defendant contributed minimally, if at all, towards its acquisition. He scoffed at suggestions that the defendant contributed towards its acquisition from her exploits as a cross boarder informal trader, let alone that he was inspired to quit his teaching job to join her on such a venture. He however conceded that defendant played a role in the day to day domestic chores which kept the family going.

As far as the Zimre Park property is concerned, the plaintiff's position was that it was acquired almost entirely through his sole industry as a cattle broker and that the defendant's name was included on the relevant papers solely on account of her status as his wife. He would

elaborate under cross examination that he made the initial payment for the Zimre property in 2008 but only finished paying for it in 2012 hence the date reflected on the agreement of sale with Great Zimbabwe Realtors in 2012. He indicated that the Zimre house is approximately 50% complete and that its estimate current value is US\$70 000. He also testified that as far as he is concerned it would be just and equitable that the defendant be awarded not more than 20% of the value thereof.

As for the shop in Chesvingo, it was his evidence that he acquired it upon quitting his employment as a teacher. He indicated that he received a tip off of the availability of the stand on which the shop was to be built and promptly seized that opportunity to purchase the same. He did so by borrowing some US\$3000 from a well-wisher to add to the US\$6000 which he had in savings. He claims to have subsequently paid back the loan from proceeds he realised from operating a “pirate” (i.e. unregistered) taxi.

According to him, having thus purchased the stand on which shop was to be built, he personally performed part of the manual labour towards the shop’s construction. He gave reasons why he believes that the defendant should not be awarded any share of that shop a summary of which are the following. Firstly, that the said property was acquired almost entirely through his effort, the corollary being that the defendant contributed almost nothing in this regard, secondly that he acquired the shop upon a realisation of its importance for the future upkeep of the family and thirdly that at the PTC he acceded to the award of a 26-seater registered Minibus to the defendant, which according to him is a commercial vehicle from which she can derive a livelihood.

The defendant’s evidence regarding the acquisition of the Rujeko property was that same was acquired through the joint efforts of the parties. She testified in this respect that she engaged in a vibrant cross border informal trade. She indicated that at the material time the plaintiff was still a school teacher whose meagre salary was insufficient to meet even the purchase price of the stand. It was for that reason, according to her, that her brother came to their rescue and made a financial contribution towards its acquisition. Needless to say, that she completely denied plaintiff’s position that the Rujeko property was acquired through his sole efforts.

She reiterated her position under cross examination that the plaintiff quit his teaching job to join her in South Africa upon realising that her cross-border business was booming.

As far as the Zimre property is concerned, it was defendant's evidence that the stand itself was acquired through profits generated from the butchery project and that the construction of the structure thereon was financed from the profits generated from the shop at Chesvingo. She vehemently disputed plaintiff's assertions that the stand was acquired by plaintiff through *inter alia* a loan from one Chikukwa's mother

Regarding the fiercely disputed Chesvingo shop, it was defendant's evidence that the stand on which it is built was purchased using proceeds from the butchery which they rented in the Sisk area (*not to be confused with the butchery at Rujeko C*). She therefore refuted plaintiff's version that he acquired the stand from any loan whatsoever. Ultimately she insisted on a 50% share of the value of the shop. She was adamant that plaintiff's offer for her to retain the Rujeko property should not prejudice her claim in respect of the remaining properties.

The parties filed written closing submissions wherein the parties proposed contrasting distribution "formulae". It was suggested on behalf of the plaintiff that he be awarded exclusive ownership of the Chesvingo shop and 70% of the value of the Zimre property with the remainder being awarded to the defendant in addition to the Rujeko property. On the other hand, it was proposed on behalf of the defendant that she be awarded exclusive ownership of the Chesvingo shop in addition to the Rujeko property and that the plaintiff be awarded exclusive ownership of the Zimre Park property.

The division of assets upon divorce is governed by section 7 of the Matrimonial Causes Act [*Chapter 5:13*] which in subsection 4 provides a set of guiding principles in arriving at an equitable distribution. It reads as follows:

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 of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;*
 - (b) *.....*

- (2)
- (3)
- (4) *In making an order in terms of subsection (1) an appropriate court shall 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;*
and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

The judicial process of distributing assets upon divorce is therefore not a straight-forward linear process. It does not merely involve a computation of the sum of the values of the property divided by two, as seemingly suggested by the defendant who proposed that the combined values of the Rujeko property and the Chesvingo shop was equivalent to the value of the Zimre property and therefore that on that basis, she be awarded the former two properties and the plaintiff be awarded the latter. The process involves a consideration of a myriad of factors. This is no mean

task given that oftentimes the parties seek to downplay the contribution made by the other party while exaggerating or inflating theirs. Not infrequently one observes that, records, receipts and invoices relating to the purchases of any materials or acquisition of services will have gone missing over the years. It is rare to find a meticulous collection of such documents thereby compounding the process. Additionally, the contributions by the parties are often so intricately intertwined that it is virtually impossible to disentangle the contribution of one vis-à-vis that of the other.

In giving effect to the above provisions of the Matrimonial Causes Act to the present case, however, I was guided chiefly by the following considerations; firstly, that the two disputed properties (i.e. the Chesvingo Shop and the Zimre property) are registered in the names of both parties and as correctly submitted by the plaintiff this gives rise to the presumption of equal ownership in the same. In *Lafontant v Kennedy* 2000 (2) ZLR 280 (S) the following was said;

“It seems that joint ownership is the same as co-ownership, which in thus coincides with what the Deeds Registry Act [Chapter 20:05] calls ‘land held by two or more persons in undivided shares – see ss 24, 25 and 26 of the Act

Where two persons own immediate property in undivided shares (as is the case here) there must, I think be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired. This Jones Conveyancing in South Africa 4 ed p 118 states:

‘Where transferees acquire equal shares, it need not be stated in the deed that they acquire in equal shares; as this fact is presumed in the absence of any statements to the contrary.’

The court proceeded in this regard by referring to the cases of *Takafuma v Takafuma* 1994 (2) ZLR 103 and *Ncube v Ncube* 26 – 93 that a registered joint owner is in law entitled to a half share of the value of the property and that that was the starting point. The court concluded by stating that the court cannot move from that position on mere grounds of equity and that a court cannot give away A’s property to B on the mere grounds that it would be fair and reasonable, or just and equitably, to do so. See also *Judith Ishemunyoro (nee Mandidewa) v Anthony Ishemunyoro & Ors* SC374/17.

Secondly, the main reason for tussle for the control of the Chesvingo shop was not lost on me, its intrinsic utilitarian value as a going concern far outstrips the bare value of the building. It will be naïve and incorrect therefore to consider its value solely on the basis of the value of

building and the ground on which it is built and disregard its potential commercial value in generating an income including its good will. Due regard therefore will be had to this important consideration.

Thirdly, regard will be had to the value of the Zimre property including its location, size and the developments thereon notably an incomplete double storey building and the materials *in situ*.

Also important is the fact that the defendant was awarded a commercial motor vehicle namely a 26-seater Commercial minibus which though not as commercially valuable as the shop is nonetheless of substantial potential commercial value.

Equally pertinent, of course, is the fact that the defendant has since been awarded the Rujeko property for her sole exclusive use the net effect of which will be an appropriate negative adjustment of her overall share from the remainder of the assets relative to that of the plaintiff.

What is problematic however is the assessment of the individual contributions made by the parties towards the acquisition of the properties to rebut the presumption that each party is entitled to an equal share of the three immovable properties. In this regard the evidence adduced in court shows on balance that the parties acquired and built up their matrimonial “portfolio” largely through the plaintiff’s industry in cattle brokerage. It is a thread that transcends most, if not all, of the properties the parties acquired. The assertion by the defendant that the plaintiff quit his job to become a cross boarder vendor is as far-fetched as it is unrealistic. What is by far more probable is that he quit that teaching job to concentrate on the cattle broking business which had turned out to be more lucrative. The defendant insisted that the plaintiff quit his teaching job in order to pursue cross border vending but in the next breath claimed that he became a house help at a white man’s house in South Africa, which of course is a contradiction.

What is clear, therefore, is that the plaintiff’s exploits in the cattle broking business formed the foundation upon which their business achievements were to be realized. This finding, however, does not in the least suggest that the defendant’s endeavours as a cross boarder informal trader were inconsequential, nor are they to be disregarded. It also does not imply that her contributions in looking after the home and caring for the family and innumerable other domestic duties will be overlooked. The evidence further shows that during the construction of

the shop, the defendant had a “hands on” contribution to make as she assumed by cooking for the construction workers and in staking the bricks.

All that is being said however, is that the distribution matrix cannot in all fairness be blind to the relatively more significant role played by the plaintiff’s cattle broking and other business exploits which formed the bedrock upon which the parties’ business and domestic portfolios grew from strength to strength.

In the final analysis therefore, the order which I find appropriate and least cumbersome is one which awards sole and exclusive ownership of the Chesvingo shop to the plaintiff as well as a share in the Zimre property which recognizes the overall contribution made by the parties to their matrimonial estate. In the latter regard a 60/40 share of the Zimre property is in my considered view appropriate.

Maintenance

From the available evidence there is no justification in not awarding an order of ZWL\$ 35 000 as maintenance for the parties’ minor child who is still a minor.

Ultimately, therefore the following order which encompasses all the issues including those agreed at PTC is hereby made.

1. **Divorce**

A decree of divorce between the parties be and is hereby granted.

2. **Custody of minor children**

The custody of the minor child, namely **JOSPHAT RADHU** born on **11 February, 2010** be and is hereby awarded to the defendant.

3. **Access**

The plaintiff to be afforded access to the minor child during the first two weeks of every school holiday.

4. **Maintenance**

The plaintiff is hereby ordered to contribute ZWL\$35 000 (Thirty-five thousand Zimbabwe dollars) per month as maintenance for Josphat Radhu born 11 February, 2010 until the said minor child attains the age of 18 years or becomes self-supporting whichever occurs first. Payment to be made through defendant’s **ECOCASH**

Account No. 0772 960 909 on or before the 1st day of each succeeding month. First payment due 1 August, 2022.

5. **Division of movable assets**

5.1. The following movables are hereby awarded to the plaintiff –

- (a) Mercedes Benz C180 Registration Number AEN 9712
- (b) Mercedes Benz Sprinter Registration Number AEF 0024
- (c) Non-runner accident damaged trailer Registration ABU 1942
- (d) One 65-inch LED television set
- (e) One LED 45-inch television set
- (f) One decoder (South African account)
- (g) One four place stove
- (h) One upright Hisense refrigerator

5.2. The following movables are hereby awarded to the defendant –

- (a) BMW X 5 Registration Number AEN 9711 (registered in defendant's name)
- (b) Mercedes Benz Sprinter Registration Number AEG 1877 a 26-seater commercial registered motor vehicle registered in plaintiff's name
- (c) Unregistered trailer (runner)
- (d) One 65-inch curved LED television set
- (e) Two decoders (South African and Zimbabwean account)
- (f) Gas tank with two plate stove
- (g) Home theatre system
- (h) Three beds
- (i) Kitchen Unit and all kitchen utensils
- (j) Set of sofas
- (k) Room divider
- (l) One washing machine
- (m) One upright Defy refrigerator
- (n) Two wardrobes
- (o) One microwave oven

6. **Immovable property**

- 6.1. **House No. 19887 Mhizha Street, Rujeko 'C', Masvingo** registered in the name of the plaintiff is hereby awarded to the defendant, subject to the following;
- (a) The plaintiff to sign all documents to effect transfer
 - (b) The plaintiff shall meet the costs of the transfer of the said property
 - (c) The plaintiff to sign all relevant transfer documents and in the event that plaintiff does not co-operate in signing the said documents, the Sheriff is empowered to sign the same on his behalf.
 - (d) The property shall be transferred to defendant's name within six (6) months of the date of this order.
- 6.2. **Stand No. 1709 Mahachi Street, Chesvingo, Masvingo** under cession being a shop registered in both the plaintiff and defendant's names (including all stock, two double door refrigerators, one cold room, two display refrigerators, counters, shelves, one office desk, sub-woofer speakers and a set of hotel cups and saucers) is **hereby awarded to the plaintiff** subject to the following;
- (a) The defendant to sign all relevant documents to effect transfer of the property into the sole name of the plaintiff.
 - (b) In the event that defendant does not co-operate, the Sheriff is hereby authorized to sign the said documents on her behalf.
- 6.3. **Stand No. 2702 Zimre Park, Masvingo**, under cession and registered in both the plaintiff and defendant's names (including the following items on site, three door frames, one pivot door, twenty brick force wires, 300 face bricks, two loads quarry stones, one load gravel, timber, one ladder, three wheel-barrows and shovels) is hereby **awarded to the plaintiff and the defendant at the ratio of 60% to 40% respectively (60/40)** subject to the following;
- (a) The plaintiff is given the option to buy out the defendant's share within 24 months of this order subject to the following;
 - (i) For purposes of (a) above, the property, is to be evaluated by an evaluator agreed upon by the parties or, failing such agreement, by an

evaluator selected from the Sheriff of Zimbabwe's panel of evaluators.

The Cost of such evaluation to be borne by the plaintiff.

(ii) In the event of plaintiff failing to exercise his right as per the buyout clause, the said property to be sold by private treaty to the best advantage of the parties and the proceeds thereof to be shared between the parties at the ratio of 60/40.

7. There shall be no order as to costs

Mutendi, Mudisi and Shumba, plaintiff's legal practitioners
Ndlovu & Hwacha, defendant's legal practitioners