

CONSILIA DADIRAYI SHUMBA
versus
FREDRICK SHUMBA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 24, 25 April 2023 & 26 October 2023

Civil Trial

L Chiperesa, for plaintiff
L Zinyengere, for defendant

MAXWELL J:

BACKGROUND

The parties were married in terms of the then Marriage Act [*Chapter 5:11*] on the 7 of September 1991. Their union was blessed with three children, Anesu Elisha Shumba, born 19 November 1992, Tanaka Shumba, born 4 March 1996 and Laura Shumba, born 31 October 1999. On 27 August 2019, plaintiff issued out summons claimind a decree of divorce and ancillary relief. In her declaration she stated that the parties’ marriage has irretrievably broken down to such an extent that there are no reasonable prospects of a reconciliation. She further stated that defendant committed adultery with several women and treated her with such cruelty as is inconsistent with a normal marital relationship. She also stated that defendant publicly accused her of prostitution and attempting to kill him on three occasions. She averred that Defendant deserted her for over three years and told her in front of his brothers and her sisters that he no longer loves her and had “divorced” her three years earlier. She stated that during the marriage, the parties acquired both movable and immovable assets. She suggested a distribution plan and prayed that each party bears its own costs.

Defendant entered his appearance to defend the action. In his plea he agreed that the marriage had broken down irretrievably but disputed the reasons proffered by plaintiff for the breakdown of the marriage. He stated that plaintiff had stopped respecting him and had tried to kill him on several occasions. He stated that the property listed by plaintiff belonged to him at one point. However, the parties had agreed to transfer the immovable property into a family trust whose beneficiaries would be their children with the parties having usufruct rights to different residential dwellings. He submitted that following the agreement, he registered the ETL Shumba Trust (the Trust) to which, at plaintiff's instigation, three stands were donated. He further submitted that three properties were excluded from the trust, No 3 Poorle road Twinlakes Norton, which is to be awarded to the plaintiff, the Kariba stand which was to be awarded to the defendant and the plot which is a government property. He submitted that he was to have usufruct over the matrimonial home which is one of the properties donated to the trust. defendant had no issues with the diatribution plan proposed by plaintiff. He however pointed out that a 2-tonne Nissan Atlas truck was no longer available as it was sold and that a 105 KV Generator belonged to a third party.

PRE-TRIAL CONFERENCE

At the Pre-Trial Conference the parties agreed on the issues concerning divorce, maintenance, division of movable assets and costs. They failed to agree on what immovable assets were available for distribution and how they should be distributed. The following issues were referred to trial;-

1. Whether ETL Shumba Trust was formed by the Defendant with the Plaintiff's knowledge and consent.
2. Whether the following properties placed into ETL Shumba Trust by the Defendant constitute part of the parties' immovable matrimonial estate;
 - No 473 Port Road, Twinlakes, Norton.
 - 764 Hertfordshire Park, Gweru-school stand.
 - Stand 1100 Norton Township- commercial stand at Govans.
3. If so, what will be the just and equitable distribution of the assets listed under clause 2 above including the following immovable assets;
 - No. 3 Poorle Road, Twinlakes, Norton.
 - Commercial stand for lodges in Kariba.

- A six hectare agricultural plot in Norton.

THE TRIAL

Plaintiff testified as follows. She married the defendant and they have three children who have all attained majority status. The parties separated in January 2017. She disputed that she had knowledge of the formation of the Trust and denied consenting to the transfer of the properties to it. She stated that the properties in the Trust must be subject to distribution as she was not consulted and did not consent to their transfer to the Trust. All the properties in the Trust were registered in Defendant's name. On a Sunday, in February, 2017, a family meeting was convened at which Defendant advised her relatives that he was no longer interested in her. Stand 473 Poorte Road, Norton is the matrimonial home and should be awarded to her. In addition, she claimed Stand 1100 Norton Township and 764 Hertfordshire Park, Gweru. She proposed that Defendant be awarded Stand No. 3 Poorle Road, Twinlakes, Norton and a commercial stand for lodges in Kariba. She stated that in terms of value, she was getting less than what she proposed should be given to Defendant.

She testified that the Parties were both working but she earned more than the defendant. She acquired a family car and Defendant got a loan to buy an incomplete house in Kuwadzana. The loan was not enough and the car was used to cover the deficit. She got cement and window frames from her workplace to finish the house. Defendant got bricks from his workplace. However the parties did not complete the house. They sold it and went to Norton where Defendant had been given a house by his employer. Some of the proceeds from the sale of the Kuwadzana house were used to repay the loan and the balance was used to buy a Nissan Hardbody vehicle. The parties and their two children went to Durban to collect the vehicle. On return they sold it and started a business of buying and selling cars. Defendant went to Durban on a number of occasions to collect vehicles for sale. When the business flourished, Defendant left employment and became a full time Pastor, though continuing in the business. He left employment in 1997. Defendant asked her to leave employment so that she accompanies him on home visits to church members. She left her employment in 1998. Between 1995 and 1996 they bought Stand number 473 Poorte Road, Norton from proceeds of the car sale business. They started building on the stand. She was there most of the time supervising builders. Defendant would go for trips to America and bring back lots of

money. In his absence she would be the pastor at church and the housewife at home. Initially the church did not have other pastors. They came as time went on but that did not relieve her of her duties as the founder's wife. At times she would accompany defendant on international trips where at times she would sing before he preached. At one time six vehicles were held at the border and defendant did not have money. She took her money from Beverly Building Society and paid the duty that was required before the vehicles could be released. She also engaged in cross-border trading through which she clothed the whole family and provided groceries for them. The parties also had a transport business and she would supervise the drivers when Defendant was away on trips. Plaintiff also testified that she took care of defendant's siblings until they were able to sustain themselves, Winnie from after A-Level, Farai from Form 3 and Tafi since 2006 . Henry would come during holidays as he was a boarder. She also took care of Defendant's brother's child, Carol, from 9 years old who turned 33 this year. In addition she took care of Defendant's father who had a chronic illness when Defendant was in America. Three of her children are in America. In 2017 she visited them and found them not going to school and with no food in the house.

Defendant has not been paying rates and charges for the matrimonial home. Defendant would bring congregants home for prayer and she would take care of them. She also accommodated Debra and Rumbidzai Mafunda as well as Phyllis and Felistas Hlatshwayo at Defendant's directive. At one time he attempted to dispose of all the properties in which her name appears but she refused. She produced valuation reports prepared by Josephine Chidora of Global World Properties. The properties were valued as follows; -

- 764 Hertfordshire Gweru- US\$96 000 .00
- 1100 Govans, Norton-US\$18 000.00
- 3 Poorle Road, Norton-US\$75 000.00
- Stand 473 Norton-US\$170 000.00
- Stand 1036 Kariba- US\$140 000.00

Under cross examination she admitted that the Gweru and Kariba properties have no title deeds but are on leases from the local authorities. She admitted that nothing stopped defendant from dealing with the properties registered in his name and that he did not misrepresent to anyone that he was passing ownership of property to the Trust. She further agreed that she instituted

divorce proceedings after the properties in the Trust had already been transferred thereto. Also that she had not taken any steps to prevent the transfer of the assets into the Trust. She stated that she made direct contribution to the purchase of the properties in the Trust but did not have a figure of such contribution. She further stated that initially she did not claim Stand 473 Norton because she was intimidated and was not emotionally well as she could not accept what had happened and the doctor said she had post-traumatic stress disorder. Further that when she amended her claim she did not claim Stand 473 Norton as she was physically, emotionally and psychologically not well. That was the Plaintiff's case.

Defendant gave evidence on his behalf. He testified as follows. He is the Continental Overseer for the continent of Africa for the Congregational Holiness Church Worldwide and the Founder and Senior Pastor for World Harvest Ministries, an affiliate to the Congregational Holiness Church. He has no salary but depends on offerings, the parties therefore invested in properties to finance their children's education. From the onset there were properties assigned for the children. This was done by agreement, in a family setting and there was no need for documentation. Some properties were for him and others for the plaintiff. They would dispose of some property whenever they needed educational expenses. He believes that a life well-lived is a life lived for others so he helps many children, widows and orphans.

Stand number 3 Poorle Road Norton was the matrimonial home. When the parties separated, they discussed and agreed to transfer properties to the Trust. Plaintiff agreed that she would take 3 Poorle Road Norton whilst he would have a usufruct over 473 Norton as he would be in and out of the country. After the discussion he registered the Trust and subsequently transferred the properties that were initially in his name to it. These were Stand 473 Norton, Stand 4838 Gweru, Stand 674 Hertfordshire Gweru and Stand 1100 Norton. There was neither an objection from the Plaintiff nor an attempt to stop the transfer of the properties to a Trust. He paid rates for the Kariba stand whilst Plaintiff paid rates for 3 Poorle Road Norton and collected rentals therefrom which were not shared. As a Karanga man he was taught by his father not to touch his wife's money, so plaintiff did not contribute anything to the family's welfare or to the acquisition of assets. He however admitted to having received a car from plaintiff as a present when they were still dating and that the car was used to top up payment for the Kuwadzana house. He also admitted that Plaintiff bought suits for him but indicated that she would charge his visa card. He disputed

the valuations of the properties tendered by Plaintiff. In 2008 the parties went to South Africa. He came back in 2010 but Plaintiff refused to come back. He started a combi business in plaintiff's absence. He took care of plaintiff's family as much as she did his. The finances were coming from the offerings from the United States of America.

Under cross examination he stated that on 6 August 2017 they agreed on forming a Trust and he had it registered the following day and at that point their separation was official. He reiterated that in the 26 years of marriage plaintiff did not contribute anything to the acquisition of assets, and that she cannot claim compensation for the pastoral duties she dis as she was a pastor in her own right.

THE LAW

The Matrimonial Causes Act [*Chapter 5:13*] in s 7(4) in particular, lays out the considerations that the courts must make in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage.

However as stated in *Mhora v Mhora* SC 89/20, each case must be dealt with according to its own circumstances and merit.

The issues referred to trial are considered below.

Whether the Defendant with the Plaintiff's knowledge and consent formed ETL Shumba Trust.

Defendant stated in his plea that the Trust was formed after the parties tried to find common ground in 2017 and they agreed to transfer the immovable property into a family Trust. He further stated that they agreed that the beneficiaries would be their children and the parties would have usufruct rights to different residential dwellings. Further that Plaintiff refused being a trustee arguing that she would not want to interact with defendant post-divorce. In her replication Plaintiff simply stated

“The Plaintiff denies each and every allegation of fact and of law raised herein and hereby joins issues with the Defendant.”

In my view more than a bare denial of the allegations in the plea was necessary and the replication ought to have answered substantive points and not be evasive. See *Weichardt v Argus Printing & Publishing Co. Ltd* 1941 CPD 304. There are new averments in the plea which the plaintiff ought to have specifically respond to. The bare denial means the averments were not challenged. There was no specific denial of the fact that Plaintiff refused being a trustee arguing that she would not want to interact with defendant post-divorce. In *Nexbak Investments (Pvt) Ltd & Anor v Global Electrical Manufacturers (Pvt) Ltd & Anor* 2009 (2) ZLR 270, it is stated that:

“The importance of carefully pleading one’s case cannot be over-emphasised. As KUMLEBEN JA et NIENABER JA stated in *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 C-E:

‘At the outset it need hardly be stressed that:

The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.

(*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082).

‘This fundamental principle is similarly stressed in Odger’s *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22ed at 113:

The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each person states his case with precision.’”

Apart from addressing the issue in the Replication, Plaintiff had the option to apply to amend her summons and declaration to address the issue. She did not. Plaintiff’s legal practitioners filed the only Notice of Amendment on record on 21 October 2020 correcting the names of both plaintiff and defendant. It is evident that the amendment came after the defendant’s Plea was filed therefore plaintiff did not find it necessary to challenge defendant’s averments on the Trust. It is trite that what is not challenged is taken as admitted. In her Pre-Trial Conference Memorandum filed on 22 October 2019, Plaintiff sought an admission that defendant was lying that she proposed and or agreed to the formation of ELT Shumba Trust nor was she aware of the existence of such a Trust. Defendant also sought an admission that plaintiff agreed to the issue of transferring some of the immovable property into a family trust whose beneficiaries would be the children of the parties while the parties will have usufructs rights to different residential dwellings. Defendant’s Pre-Trial Conference Minute was filed on 29 September 2020. None of the parties made the admissions sought. It is therefore telling that Plaintiff did not mention this issue in her summary

of evidence despite the fact that the admission she had sought was not made. On the contrary, Defendant dedicated two paragraphs in his summary of evidence to this issue. He stated in paragraphs 4 and 5:

- “4. The defendant will lead evidence that the plaintiff omitted to mention that the parties agreed to transfer some of the property that the defendant personally owned into a family trust whose beneficiaries would be their children, while the parties in *casu* will have usufructs rights to different residential dwellings.
5. Defendant will further lead evidence that the family trust was created with plaintiff in the full picture and some of the properties were transferred into the family trust, thus those properties are not subject to these proceedings.”

The defendant’s summary of evidence was signed on the 25 of September 2020 and was filed with the Registrar of this court on 29 September 2020. Plaintiff’s summary of evidence was signed on 15 October 2020 and was filed with the Registrar of this court on 3 November 2020. Plaintiff’s Summary of Evidence is silent on the issue of the Trust. A summary of evidence makes it clear what evidence will be led by a party in an effort to influence the court to exercise its discretion in that party’s favour. Plaintiff’s Summary of Evidence was indicative of the fact that to her, the issue of the Trust was not in contention. Furthermore, plaintiff was not clear as to when she first came to know of the Trust. In her evidence in chief, she indicated that she came to know of the Trust through a letter written by defendant’s legal practitioners dated 28 August 2019. Under cross-examination and in closing submissions, she indicated that she came to know of the Trust when defendant filed his plea. Defendant’s plea was filed on 26 September 2019. I noted that in the Notice of entering Appearance to defend, defendant stated that he was served with summons on 27 August 2019. It would therefore be reasonable for defendant’s legal practitioners to engage plaintiff’s legal practitioners by letter after considering the contents of the summons and declaration. The prevarication by the Plaintiff on when she became aware of the Trust is therefore held against her. Considering the pleadings and the evidence before the court, I find it more probable that ETL Shumba Trust was formed by the Defendant with the Plaintiff’s knowledge and consent.

Whether the properties placed into ETL Shumba Trust by the Defendant constitute part of the parties’ immovable matrimonial estate

The Plaintiff submitted that the donation of the assets to the Trust was fraudulent and aimed at avoiding their equitable distribution between the parties as their immovable matrimonial assets during divorce proceedings. Defendant's position was that the assets do not belong to the parties and are not available for distribution. On the 7 of August 2017, Defendant signed a Notarial Deed of Donation and Trust, donating Stand No 473 Port Road, Twinlakes, Norton, Stand Number 764 Hertfordshire Park, Gweru and Stand 1100 Norton Township to the ETL Shumba Trust. The Notarial Deed of Donation and Trust was registered on the 11th of August 2017. All the properties were in Defendant's name before the donation. The registration of the assets in the name of the Trust has not been impugned. Defendant submitted that the property belonging to a third party cannot be qualified under the categories "his", "hers" and "theirs" stated in *Takapfuma v Takapfuma* 1994 (2) ZLR 103. Assets of a trust are not owned by the trust but are held in trust on behalf of the beneficiaries.

Defendant submitted in his closing submissions that trust assets are not assets of the spouses and the court can only interfere with them where the trust is a sham or the *alter ego* of the donor. Further that the *alter ego* trust denotes a situation where the donor is the *de facto* person in control of the assets. Paragraph 7.2 of the Notarial Deed of Donation and Trust does not allow the Trustees to sell the assets of the Trust. The trustees therefore cannot be said to be in control of the assets. In *Van Zyl & Anor v Kaye N.O & Anor* 2014 (4) SA 452 (WCC) it is stated that:

"Holding that a trust is a sham is essentially a finding of fact. Inherent in any determination that a trust is a sham must be a finding that the requirements of the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation."

Under cross-examination Plaintiff conceded that she had not given evidence that the Trust was a fraud, that the Trust was duly registered and valid as at the time of her testimony. No evidence that it was a farce to hide some of the parties' matrimonial assets as submitted by the Plaintiff was led. No basis was therefore laid for the court to interfere with assets of the Trust. The three properties in the Trust are therefore excluded from the parties' matrimonial assets. I find Plaintiff's actions consistent with an acceptance that these properties are not part of the matrimonial estate. The summons in this matter were issued out on 27 August 2019, meaning that more than a year had passed from the registration of the Trust. When asked why she had not done anything to protect the assets from 2017 until they were transferred, Plaintiff indicated that she

had not anticipated a divorce. This was contrary to her evidence-in-chief which was to the effect that the purpose of the meeting on a Sunday in 2017 was that Defendant wanted to inform her relatives that he was no longer interested in her. She testified that Defendant had told her in front of his brothers and her sisters that he had “divorced” her three years ago. It cannot be true therefore that Plaintiff had not anticipated divorce when her relatives were advised of Defendant’s lack of interest in her. Traditionally, the seriousness of a matter between spouses is shown by the involvement of their relatives. In addition, in the summons, she did not claim Stand 473 Port Road, Twinlakes, Norton. An attempt is made to ascribe that omission to threats and intimidation. During cross-examination, the following transpired:

“Q You indicated that you were intimidated by the Defendant?

A. Yes

Q. When

A. During 2018 elections.

Q. You filed summons a year later?

A. Yes.

Q. Were you still being intimidated?

A. No. I had blocked him.

Q. it’s therefore not correct that you proposed the sharing of property because you were intimidated?

A. In 2018 he was not intimidating me. He did so one day.

Q. So you were not intimidated when you filed summons?

A. I was still under the intimidation. He said over my dead body.

Q. Now where has the fear gone?

A. Passage of time, and I received advice that is why I changed.”

I am not persuaded that Plaintiff was influenced by fear and intimidation not to claim Stand 473 Port Road, Twinlakes, Norton. The fear and intimidation was not established. The summons were not prepared by a self-actor therefore the Plaintiff is considered to have received advice before the summons were issued out. Moreover, the legal practitioners representing her remained the same from the inception of the proceedings to the conclusion of the trial. I find it probable that the exclusion of the claim to what the Plaintiff says is the matrimonial home was a result of the appreciation that Stand 473 Port Road, Twinlakes, Norton is not part of the assets available for distribution between the parties. In any event, Defendant’s testimony that Stand number 3 Poorle Road, Twinlakes, Norton was the parties matrimonial home after Kuwadzana. And that Plaintiff did not want to have anything to do with Stand No 473 Port Road, Twinlakes, at the time of

purchase was not disputed. It would therefore make sense that in her summons Plaintiff sought to be awarded the matrimonial home, Stand number 3 Poorle Road, Twinlakes, Norton. I therefore make a finding that the properties placed into ETL Shumba Trust by the Defendant do not constitute part of the parties' immovable matrimonial estate.

What is the just and equitable distribution of the following assets?

- **No. 3 Poorle Road, Twinlakes, Norton.**
- **Commercial stand for lodges in Kariba.**
- **A six hectare agricultural plot in Norton.**

In considering the distribution of these three assets, the first port of call is to consider Plaintiff's prayer as stated in the summons and declaration. Her prayer was that division of the parties' matrimonial assets be done in terms of paragraph 8 of her Declaration. In the said paragraph, Plaintiff proposed that the first property be awarded to her whilst the remaining two are awarded to the Defendant. As stated above, there was no application to amend the pleadings. Even after Plaintiff was questioned on the departure from her pleadings, no application was made. Rule 41 of this Court's rules of 2021 provides for amendment of pleadings in the following terms:

"41. Amendment of pleadings and matters arising pending action

- (1) Any party wishing to amend a pleading or document other than a sworn statement, filed in connection with any proceedings shall, notify all other parties of his or her intention to amend and shall furnish particulars of the amendment."

It is trite that pleadings can be amended at any stage of the proceedings before judgment is issued. See *Agricultural Bank of Zimbabwe Ltd v Nickstate Investments (Pvt) Ltd and Others* – 2010 (1) ZLR 419 (HH 231/10). The law is clear that parties are bound by their pleadings and they are not allowed to depart from them without leave. The authors Jacob and Goldrein in **Pleadings: Principles and Practice**, (Sweet & Maxwell London, 1990) at p 8-9 make remarks which are cited with approval in the judgment in *Jowel v Bramwell-Jones & Ors* 1998 (1) SA 836,898 to the following effect:

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon an enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings..... In the adversary system of litigation, therefore, it is the parties themselves who set the agenda of the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.....” (underlining for emphasis).

See also *Dube v Bushman Safaris & Anor* HB 112 – 13. The failure by the plaintiff to seek amendment of the claim to include a prayer that she be awarded Stand 473 Port Road, Twinlakes, Norton, means that by the end of the proceedings her prayer remained unchanged. The court is therefore bound to strictly adhere to the agenda set by the Plaintiff in her pleadings. Defendant agreed to having No. 3 Poorle Road, Twinlakes, Norton awarded to Plaintiff and that he be awarded the commercial stand for lodges in Kariba. He pointed out that the six hectare agricultural plot in Norton is state land and not subject to distribution. Plaintiff did not dispute that the plot is state land. In any event she had proposed that it be awarded to the Defendant. What is subject to distribution is what belongs to the parties. State land does not fall within that category. I find that the plot is not subject to distribution.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Plaintiff be and is hereby awarded Stand No. 3 Poorle Road, Twinlakes, Norton as her sole and exclusive property.
3. The Defendant be and is hereby awarded the commercial stand for lodges in Kariba as his sole and exclusive property.
4. Each party bears its own costs.

Mkuhlani Chiperesa Legal Practitioners, plaintiff’s legal practitioners
Zinyengere Rupapa, defendant’s legal practitioners