

REPORTABLE (22)

FADZAI USAYI (nee MAGARA)
v
LEONARD USAYI

SUPREME COURT OF ZIMBABWE
UCHENA JA, MATHONSI JA & CHATUKUTA JA
HARARE: 6 FEBRUARY 2024

R. Mabwe with J. Sande, for the appellant

S. Banda with T. Gurira, for the respondent

MATHONSI JA: This is an appeal against part of the judgment of the High Court (the court *a quo*) handed down on 30 August 2023 granting to the appellant a decree of divorce and distributing the matrimonial assets of the parties to them. The part of the judgment being appealed against is the award of what has been, in essence, their matrimonial home, to the respondent, while according to the appellant a bed and breakfast business (B n B) consisting of a two roomed cottage that the parties constructed on a subdivision of the matrimonial home.

After hearing counsel and following engagement with the parties during which each of them yielded ground on their original polarized positions, this Court issued the following order:

“IT BE AND IS HEREBY ORDERED AS FOLLOWS:

1. The appeal succeeds in part with each party bearing its own costs.

2. Paragraphs 5 and 6 of the judgment of the court *a quo* are set aside and substituted with the following:

- ‘5 Each part is awarded a fifty percent share of the values of the Remaining Extent of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate measuring 2212 square metres and Stand 916 Borrowdale Township of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate measuring 2 000 square metres.
- 6.1. The properties referred to in paragraph 5 above shall be valued by an Estate Agent appointed by the Registrar of the High Court within fourteen days of this order.
- 6.2. The Estate Agent so appointed shall value the properties within a further period of two months from the date of appointment.
- 6.3. The costs of valuation shall be shared equally between the parties.
- 6.4. The plaintiff is granted twelve months from the date the valuation report is availed to her to buy out the defendant’s fifty percent share of the value of the properties.
- 6.5. In the event of the plaintiff’s failure to exercise the option granted to her in paragraph 6.4 above, the defendant is granted an option to buy out the plaintiff’s fifty percent share of the value of the properties within a further period of six months.
- 6.6. Should both parties fail to exercise the options granted in paragraphs 6.4 and 6.5 above respectively, then the two properties shall be sold to best value by an Estate Agent appointed by the Registrar of the High Court and the proceeds shared equally between the parties after deducting the costs of sale.’”

The court stated that the reasons for granting the above order would follow in due course. While the court takes the view that cases of division of matrimonial assets at divorce are not ideal for judicial docketing because, invariably it is the parties who know the assets better, and should be encouraged to try by all means to find each other on the sharing of their assets, the following are the reasons for judgment.

Fortunately, the distribution was achieved through significant concessions made by the parties, ably assisted by their legal representatives during robust engagement with the court. I must commend counsel for their efforts in that regard.

THE FACTS

At the ages of 25 and 26 respectively, the appellant and the respondent got married to each other at Harare on 27 September 1997. They were both professionals employed in the banking sector and remained engaged in income generating activities one way or the other throughout their married lives.

Their marriage was blessed with two children, a boy, born on 28 February 2002 and a girl, born on 28 February 2004. By the time their marriage hit turbulence both children had attained majority status. The boy was doing university studies in Germany while the girl had just completed “A” level studies and was awaiting enrolment at a university as well.

Trouble started when they started quarrelling and fighting until the respondent was banished from the matrimonial home in Borrowdale, Harare. As a sequel to that, divorce proceedings loomed large and the sharing of assets also became necessary.

PROCEEDINGS BEFORE THE COURT A QUO

On 30 September 2021, when the parties were by then aged 49 and 50 years respectively, and 24 years into the marriage, the appellant filed for divorce and ancillary relief in the court *a quo* citing an irretrievable breakdown of marriage for a number of reasons. The reasons she cited included allegations of physical violence of the respondent and his emotional and verbal abuse of the children of the marriage.

The appellant also sought the ancillary relief of what she perceived to be a fair division of their assets, namely a good number of motor vehicles, other movable items and the two immovable properties forming the subject of the present appeal. Giving reasons for doing so, the appellant lay a claim to both immovable properties.

The respondent would have none of it. He contested the action with everything in his power. While conceding the irretrievable breakdown of the marriage as a result of his own set of reasons, including allegations of physical and verbal abuse by the appellant, the respondent generally did not put up a serious challenge to the division of the movable assets suggested by the appellant. He had bigger fish to fry in the form of the appellant's claim to exclusive ownership of the two immovable properties.

The reasons given by the appellant for seeking to be awarded both immovable properties were that they were acquired through her sole financial effort in that she had to dispose of House No. 1524 Flame Lily Drive, Westgate Harare which belonged to herself and was registered in her name. She invested the proceeds of the sale with Banc ABC Bank where it gathered interest.

According to the appellant, even though the parties acquired Lot 4 of Chimwemwe in 2003 using a housing loan secured by the respondent from Trust Bank where he was employed as Assistant General Manager, they cleared the Trust Bank loan in no time using proceeds from her Banc ABC investment.

The appellant's case was that about 2017 and 2018 they agreed to subdivide Lot 4 of Chimwemwe in order to have the smaller Stand 916 Borrowdale Township on which to build

a cottage to be used as a business. They ran a B n B business catering for mainly international guests. The cottage was constructed using a loan she obtained from Standard Chartered Bank, her employer. She was solely responsible for servicing that loan and needs the business to raise money to pay the children's university fees. She has had to shoulder that responsibility on her own without any assistance from the respondent. I mention in passing that the respondent conceded that he has never contributed to the education expenses of the children but blamed the appellant for not involving him. Strange indeed.

The respondent's case, as hinted above, was that he singularly purchased the matrimonial home from proceeds of a personal housing loan he obtained from Trust Bank where he was employed as Assistant General Manager. Much later he donated to the appellant part of the land as a subdivision on which a cottage was built. He denied that proceeds from the sale of the Westgate property were used to acquire the matrimonial home.

In the respondent's view, an equitable division would be one which awards to him, as his sole and absolute property, the matrimonial home, being the Remaining Extent of Lot 4 of Chimwemwe of Subdivision A Kingsmead of Borrowdale Harare, while awarding to the appellant the two roomed cottage built on the adjoining land he donated to his wife.

On the immovable properties the court *a quo* found that the Remaining Extent of Lot 4 is where the matrimonial home is located and it is registered in the name of the respondent. It found that Stand 916 Borrowdale Township was severed from the matrimonial home to build a cottage used in the B n B business and is registered in the name of the appellant.

After identifying the factors that should be taken into account in considering the division of matrimonial assets as set out in s 7 of the Matrimonial Causes Act [*Chapter 5:13*], the court *a quo* examined the contributions of the parties towards their acquisition. It found that there was no “clear answer as to the extent of each party’s contribution.” It then concluded that none of the parties discharged the burden of proof resting on it and that the “probabilities are evenly balanced.”

On the factor relating to the needs of the children, the court *a quo* found that the interests of the children were “immaterial considering that they are both majors now and can chart their own paths in life.” In arriving at the division of the immovable property which it settled for the court *a quo* reasoned as follows:

“Divorce, of necessity, brings about fundamental changes in the parties’ lives and comes with the consequences of property sharing. 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 (supra)*. The properties therefore fall into the category of ‘his’ and ‘hers’ by virtue of registration. From the above analysis, there is no 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.”

It is a strain to the mind to try and decipher which, of all the factors set out in s 7 of the Matrimonial Causes Act for consideration in determining how to divide the assets of the spouses, the court *a quo* took into account in arriving at that conclusion. Whatever the case, the outcome was an award of the entire house the appellant lived in with the children to the respondent, while the appellant was awarded the two roomed cottage used as a business.

I mention, again in passing, that such division was arrived at without regard to the values of each of the properties or any of the guidelines set out by the law. So, by dint merely

of registration of title and nothing more, the court *a quo* resolved the dispute between the parties.

PROCEEDINGS BEFORE THIS COURT

Finding herself clutching only onto the cottage notwithstanding all the evidence she led to justify what she regarded as her entitlement to more, the appellant was understandably aggrieved. She noted the present appeal on the following grounds of appeal:

“GROUNDS OF APPEAL

1. The court *a quo* grossly erred in failing to consider the import and operation of the Matrimonial Causes Act [*Chapter 5:13*]. Particularly, the court *a quo* did not consider that the appellant resides with her daughter at the matrimonial home and that it is considered the primary residence by the children who are still dependent on the appellant.
2. The court *a quo* erred in failing to consider evidence establishing the appellant’s direct contributions in the acquisition of the Remaining Extent of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate. *Inter alia* the court ignored the Zimra Tax Clearance Certificate proving that funds from the sale of the said appellant’s Westgate property were utilised towards purchasing the aforesaid property.
3. Concomitantly (the) court *a quo* grossly misdirected itself in failing to find that stand Remaining Extent (sic) of Lot 4 Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate being a purchase from the proceedings from the sale of the appellant’s Westgate property ought to have been awarded to the appellant.

4. The court *a quo* grossly erred at law in failing to consider evidence establishing the conduct of the parties in accordance with s 7 (4) of the Matrimonial Causes Act and how they related to the properties during the subsistence of the marriage. Particularly, the erroneously (sic) disregarded an email dated 14th August 2013 in which the respondent considered Remaining Extent of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate as property belonging to the appellant.
5. The court *a quo* grossly misdirected itself in failing to properly consider the circumstances as delimited by s 7 (4) of the Matrimonial Causes Act establishing those circumstances. The court *a quo* ought to have awarded the Remaining Extent of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate in favour of the appellant.”

With those long-winding, and indeed repetitive grounds of appeal, the appellant sought the setting aside of the award of the matrimonial home to the respondent and that it, instead, be awarded to herself. The grounds could have been more elegantly drafted but only one issue commends itself for determination from those grounds. It is: how should the immovable property of the parties be divided between them.

Ms *Mabwe*, who appeared for the appellant, strongly submitted that even though the court *a quo* correctly captured the applicable principles set out in the Act for distribution of matrimonial assets, it completely ignored those principles when making the award. Counsel submitted that the court *a quo* strayed after correctly identifying the relevant legal principles, by adverting to s 26 of the Constitution. According to counsel, that constitutional provision is not a rights-creating provision as stated by the Constitutional Court in *S v Chokuramba & Others* CCZ 10/19.

It was further submitted on behalf of the appellant that, if the court *a quo* had had regard to s 7 of the Act, in particular the future earning capacity and obligations of each of the parties and their direct contributions to the acquisition of the properties, it would have realized that registration of title was an insignificant consideration.

Per contra, Mr *Banda* for the respondent, submitted that the court *a quo* correctly exercised its discretion when it rejected the appellant's claim because her proposed division was unfair. Counsel further submitted that the court *a quo* correctly rejected the aspect of the interests of the children regard being had to their majority status at the time of divorce.

Mr *Banda* took the view that the division adopted by the court *a quo* was fair because each of the parties was awarded a "habitable" property. That way neither of them was rendered homeless.

I must point out that after extensive engagement with the court both counsel conceded that an equitable division would be one that accords to each party a fifty percent share of the matrimonial home. However, after being allowed the opportunity to confer with their respective clients, counsel could not achieve any further convergence on the modalities of such fifty percent sharing. Significantly it became common cause that the appellant continues to singularly look after the parties' grown up children and to meet their university fees without any assistance from the respondent.

THE LAW

The point of departure in discussing the law regulating the division of the assets of spouses at divorce is reference to s 7 (1) of the Act which empowers an appropriate court to make an order with regard to "the division, apportionment or distribution of the assets of the

spouses.” What the court has regards to in that endeavor is set out in s 7 (4), which was quoted *in extenso* by the court *a quo*, to wit:

- “(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 or 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 endeavor 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.” (Underlining is mine)

Clearly therefore, the law provides a wide range of factors that go into the division of the assets thereby giving the court an extremely wide, if not unfettered, discretion to divide the assets. In doing so, the overarching consideration is to place the parties in the position they would have occupied if the marriage had continued, as far as possible in the circumstances.

It is significant that s 7 does not recognize the spectre of registration of property as an important consideration in the division except that s 7 (3) protects certain types of property from the long reach of the court. The property forming the subject of this appeal does not fall under the exclusionary provisions of subs (3). Yet subs (1) specifically empowers the court, where appropriate, to order the transfer of property from one spouse to the other. Having said

that, it becomes apparent that what the court *a quo* regarded as a matter of life and death, the registration of title, was only a footnote in the broader scheme of things.

The provisions of s 7 have been subjected to judicial interpretation in a number of cases. Some of the most recent cases include *Mhora v Mhora* SC 89/20 where this Court stated at p 12:

“It is trite that in matters involving the distribution of property, the court has to exercise its discretion in deciding what is a just and equitable distribution of the parties’ property. As a result, a lot of authorities, in construing s 7 as a whole, refer to the need to achieve an equitable distribution of the assets of the spouses consequent upon the grant of a decree of divorce. This Court’s view on the discretion of the trial court on the distribution of assets of the parties was aptly stated in the *Ncube* case, *supra*, at p 41A where the court said:

‘the determination of the strict property rights of each spouse in such circumstances involving, as it may, factors that are not easily quantifiable in terms of money, is invariably of theoretical exercise for which the courts are indubitably imbued with wide discretion’’. (My emphasis)

Slightly earlier than that, the court had extensively discussed the implications of s 7 in the case of *Lock v Lock* SC 51/20 where at p 8 it said:

“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.

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 Act

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 foregoing authorities graphically illustrate that, by restricting itself to only the aspect of registration of the two immovable properties, the court *a quo* was unduly fettering its otherwise very wide discretion.

EXAMINATION

The court *a quo* said a lot in its attempt to assess the case before it and apply the legal principles regulating the division, apportionment and distribution of the spouses’ immovable assets. After identifying the factors it was required to have regard to as set out in s 7 of the Act, the court *a quo* went on to tie itself in knots, going round and round picking only two principles which it mentioned, namely, the direct contribution of the parties to the acquisition and the future needs of the spouses and the children.

Having mentioned those two, the court *a quo* did nothing about them and, in the end it determined the matter, not on any of the legal principles set out in s 7 of the Act, but only on a single principle mentioned in the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). That there was a misdirection of gigantic proportions does not require rocket science.

The court *a quo* found that none of the parties had discharged the onus of proving their direct contribution to the acquisition of the immovable property but appeared to accept only the evidence of the respondent that he singularly acquired the Borrowdale properties. This, the court *a quo* did, despite the fact that it accepted that the respondent’s evidence was

inconclusive not being backed by documentary proof while that of the appellant had documentary support.

Although the court *a quo* listed all the relevant factors it was required to take into account, it only zeroed in on the two that I have referred to above, that is, the direct contributions and the needs of the spouse and child. Immediately after doing that the court *a quo* recanted from those two.

It inexplicably found the future needs irrelevant even though the appellant has resided and still resides at the matrimonial home with the children. Indeed, the irrefutable evidence shows that the children still require the support of their parents. It also shows that the appellant has singularly borne the brunt of paying huge amounts in foreign currency for the boy's fees at a German University and the girl is yet to commence university education.

After finding itself unable to decide where the truth lay in so far as the direct contribution of the parties was concerned, the court *a quo* was caught in a spider's web. It then completely failed to consider the other relevant factors governing property division, apportionment or distribution at divorce. The income-earning capacities of the parties as well as assets and other financial resources were relevant considerations. These spouses earned income throughout their married lives. The appellant disposed of another asset in Westgate to earn income to plough into the acquisition of the Borrowdale properties.

Their financial needs, obligations and responsibilities were important in determining disposition of the properties. Evidence showed that the parties deployed all their

skills in raising funding for the B n B business for the sole purpose of earning an income to educate their children.

Their standard of living was such that they had an affluent suburban double storey home where their children were brought up. It is a standard the family was used to and not living in a two- roomed cottage. At the ripe ages of about 50 years their earning capacities had dwindled and as such both required a boost going forward in order to maintain a reasonably similar standard of living after divorce.

The duration of the marriage, 24 years, was an important factor to be taken into account. Surely both deserved to take something significant in consideration of longevity.

I have no doubt in my mind that the court *a quo* paid lip service to the important and overriding principle of endeavouring to place the parties and the children in the position they would have occupied had the marriage continued to subsist. I say so because the award it settled for does not even begin to achieve equity or to recognise their standard of living.

Surely it cannot be said that awarding a two roomed cottage, no matter how glowingly it is advertised to international clients, to the appellant, while awarding the respondent a double storey mansion next door, places the parties in the same position they occupied during the marriage. This is more particularly so regard being had that it is in fact the appellant currently occupying the house while the respondent resides elsewhere.

In my view, there is no magic in the “his” and “hers” concept referred to in the *Takafuma* case, *supra*. It is just one formula to be resorted to, where it is applicable, in an

endeavour to follow the guidelines set out in s 7 of the Act. It may be appropriate to resort to it where the spouses bought more than one house in their respective names.

The sooner married couples realise that marriage is not a business arrangement where they come together in matrimony for convenience to acquire property separately while keeping receipts and other documents for future use in court, the better for everyone. The courts recognise that parties come together in Holy Matrimony for their common good and the good of their children. It is both the direct and indirect input of the spouses which leads to property acquisition.

This case is a classic example of parties who thought they were in a business arrangement. They spent a lot of time trying to outdo each other on evidence to show that it is one and not the other who singularly acquired property. This was a poor investment of time and energy. There has to be an obvious and compelling reason for the court's departure from the overarching principle of equality in the sharing of property. None existed in this case.

DISPOSITION

The court *a quo* fell into grave error by failing to appreciate that the parties have only one home which they developed in order to generate income on the side. To that extent, the “his” and “her” concept had no application. There was no basis whatsoever, having regard to the totality of the evidence, for not sharing the matrimonial home equally between them.

Both parties have been employed in one form or the other throughout their lives earning income. They both contributed directly and indirectly to the property acquisition. In doing so, they intended to live in that property and they have dependent children who also need

a home. They could not be left to their devices to “chart their own paths in life.” It is for the foregoing reasons that this Court issued the order set out above.

UCHENA JA : I agree

CHATUKUTA JA : I agree

Tarugarira Sande Attorneys, appellants’ legal practitioners

Sinyoro & Partners, respondent’s legal practitioners