

**FLORA NDORO (NEE FEREMENGA)**

**Versus**

**FABIAN CHAMUNORWA NDORO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 9 JUNE & 2 JULY 2020

**Divorce Action**

*Miss N. Ndlovu with J. Tsvangirai* for the plaintiff  
Defendant in person

**MAKONESE J:** The plaintiff and the defendant are husband and wife. On 27<sup>th</sup> May 1976 they contracted a marriage in terms of the African Marriage Act (Chapter 5:07), (then Chapter 105). The marriage was blessed with five children. They are all majors. One is now deceased. Sometime in 1988 the parties started having marital problems. The parties lost love and affection for each other. In August 2018 the defendant forced the plaintiff out of the matrimonial home. The plaintiff now resides with relatives in Bulawayo.

On 22 August 2018 the plaintiff issued summons out of this court seeking a decree of divorce and ancillary relief. In her declaration plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects for the restoration of a normal marriage. The grounds adduced for the breakdown of the marriage are that:

- (1) The parties have had no sexual intercourse for a period in excess of 24 years.
- (2) The parties have lost love and affection towards each other.

The plaintiff claimed certain movable assets and a 50% share in other immovable property acquired during the subsistence of the marriage. At a pre-trial conference held before a judge in chambers the parties agreed that their marriage relationship had broken down. They also agreed that there were no prospects of reconciliation. They agreed that the movable assets were to be shared in terms of the pre-trial conference minute. The sole issue referred for

determination by this court is the distribution of the parties' immovable property being stand 1976 Bulawayo North of Bulawayo Township, also known as 28 Heany Avenue, Northend, Bulawayo and stand 56368/2 Lobengula, Bulawayo. The plaintiff claims that it is just and equitable that the properties be sold and that the proceeds be shared equally between the parties.

The defendant's plea was to the effect that the marriage had indeed irretrievably broken down and that plaintiff was not entitled to any share in the immovable property in view of the fact that by denying him conjugal rights, the plaintiff had abdicated her marital duties and was responsible for the collapse of the marriage. The defendant prayed for the dismissal of the plaintiff's claim for an equitable distribution of the immovable property.

The plaintiff gave evidence and narrated that the Northend property and the Lobengula homes were acquired during the subsistence of the marriage. She stated that although she did not make direct financial contributions towards the purchase of the two properties she made indirect contributions by carrying out all the domestic work and caring for the family. She stated that in the 44 years of her marriage the parties never engaged the services of a housekeeper or maid. She single handedly took care of all the household chores. For these reasons, she is entitled to a 50% share of the immovable assets. She was aged 22 years old when she got married to the defendant. She is now aged 66 years. She has devoted all her life to raising the children until they became majors and became self sufficient. She has no prospects of remarrying. She was driven out of the matrimonial house with nothing. Under cross-examination by the defendant, the plaintiff explained that she could no longer have sexual intercourse with the defendant as he was in the habit of using herbs. The plaintiff conceded that she had not been sexually intimate with the defendant for close to 30 years. She blamed the defendant for engaging in spiritual rituals which drove her out of the bedroom.

The defendant testified that indeed the marriage relationship had broken down irretrievably. He accused the plaintiff of not fulfilling her matrimonial duties by denying him conjugal rights. The defendant stated that the plaintiff was a spiritual husband. To buttress his claims, the defendant stated that on certain occasions, the plaintiff would slap him on the face with open hands before speaking to him in a deep male voice. The defendant argued that in his

custom if a woman refuses to engage in sexual relations, upon divorce, she is not entitled to a share of the matrimonial assets. The defendant states that his ancestors would not allow him to offer the plaintiff any share of the matrimonial assets. The defendant went further to challenge and threaten the court that if any property was awarded to the plaintiff then certain consequences would befall the plaintiff or the court. The defendant claimed that a certain magistrate had died after making an adverse order against him.

The court notes with concern that the threats made to the plaintiff and the court in open court ought to be discouraged. These courts are required to determine issues brought to them by litigants without fear or favour.

It was apparent throughout the proceedings that the defendant focused on the direct contributions made towards the purchase of the matrimonial assets. It is also clear from the defendant's pleaded defence and evidence in court that defendant believes that the plaintiff is not entitled to a share of the property by virtue of his belief in cultural practices and custom. In his written submissions at the close of the proceedings the defendant alleged that the plaintiff had stopped cooking, washing, sweeping or scrubbing the kitchen floors. He averred that all the plaintiff did was to watch television. The defendant contends that plaintiff does not qualify for any share in the immovable properties. Although this was never canvassed in his evidence in chief, the defendant filed a medical report compiled by Dr H. H. Kuzanga. The report indicates that the defendant suffers from arthritis, diabetes and hypertension. The court does take note of the fact that defendant was not able to stand properly in court and that he was in some sort of pain.

The defendant is now aged 70 years old. There is no dispute that the defendant made the direct financial contributions towards the purchase of both houses. Both plaintiff and defendant are now elderly persons whose chances of employment are greatly diminished.

There is need to comment on defendant's assertion that in terms of his custom defendant is not permitted to share the matrimonial assets with the plaintiff and that plaintiff is not entitled

to anything at all. In terms of section 80 (3) of the Constitution of Zimbabwe (Amend No. 20) 2013, it is provided that:

“All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.”

It is clear that the defendant’s contention that his custom dictates that the plaintiff should not have a share in the immovable property is misplaced and has no place in our law and is unconstitutional. The court is not bound by defendant’s beliefs.

In terms of section 7 (4) of the Matrimonial Causes Act (Chapter 5:13), the court is enjoined to take into account certain factors in making an order for the division, apportionment or distribution of the assets of the spouses or the payment of maintenance. It is provided as follows:

- “7 (4) In making an award 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 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 house and caring for the family and any other domestic duties;
  - (f) The value to either of the spouse 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 doing so 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 normal marriage relationship continued between the spouses.”

It was clear that from the evidence led in court, the defendant believed that the plaintiff was not entitled to any share at all, firstly because she did not make any direct financial contributions towards the purchase of the immovable properties, and secondly the defendant caused the break-up of the marriage relationship by her refusal to have sexual relations with him. The defendant was adamant that in terms of his custom he was not allowed to share the property with the plaintiff since she failed to perform her duties as a wife.

In *Makaya v Makaya* HH-171-04, MAVHANGIRA J (as she then was) stated at page 8 of the cyclostyled judgment as follows:

*“I am of the view that once the parties finally consented to the dissolution of their marriage on the ground of irretrievable breakdown, and their mutual recriminations appeared to counter balance each other, and the conduct of one was not more gross than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would otherwise be a fair and just apportionment of the assets of the spouses.*

*I take the phrase “assets of the spouses” to include all such property as a spouse was possessed at this time of the distribution and not only what was acquired by one or the other or both parties sharing the subsistence of the marriage, since such assets “which are proved to the satisfaction of the court to have been acquired by a spouse whether before or during the marriage. ....”*

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S), McNALLY JA at page 106E – F, held as follows;

*“In the present case there is no question of penalizing one or other of the parties “having regard to their conduct”. Each party blamed the other for the failure of the marriage and the court, quite properly did not go into the matter. It was satisfied that the marriage had broken down irretrievably, and did not apportion blame. So the criterion was not applicable and was rightly not applied.”*

In this matter the parties blamed each other for the break-up of the marriage. The plaintiff testified that the defendant was notorious for the use of herbs. This made it impossible for the parties to be sexually intimate. The defendant on the other hand alleged that plaintiff denied him conjugal rights. As a consequence of these disagreements the marriage fell apart. The parties did not exercise conjugal rights for close to 30 years. They however, continued

living together up to August 2018. The plaintiff is entitled to an equal share of the immovable properties for the following reasons;

- (a) The plaintiff was married to the defendant for a long period and remained devoted to the marriage relationship.
- (b) The plaintiff contributed towards the marriage through her devotion to all household chores,
- (c) The plaintiff had five children during the subsistence of the marriage and thus devoted a large part of her life raising the children.
- (d) Both parties are equally to blame for the breakdown of the marriage.
- (e) The plaintiff is aged 66 years old, whilst the defendant is aged 70 years old. Both parties are unlikely to remarry and their chances of being gainfully employed are diminished.

It is my view, that if the plaintiff is awarded a 50% share in the immovable property she can acquire a modest home for herself. The defendant has the option to buy out the plaintiff if he is so minded. In the event that both properties are sold and the proceeds are shared equally, the defendant is similarly able to acquire a modest property for himself. In his submissions, the defendant evaluated stand 56368/2 Old Lobengula to be about \$9 000 and stand 28 Heany Avenue, Northend to be valued at \$70 000. If the plaintiff were to be awarded the Lobengula property this would not be equitable as the value of the property would be far less than a 50% share of the value of the Northend property. For the plaintiff to receive a 50% share in both immovable assets the only reasonable and practical approach is for both properties to be sold and the proceeds shared equally. In that event an estate agent would be appointed to dispose of the properties after placing a true market value on these properties. The defendant and the plaintiff should be afforded the opportunity to buy the other out. This would achieve a certain measure of fairness and equitable distribution of the immovable property.

## **Disposition**

I conclude that the plaintiff is entitled to a 50% share in both immovable properties. Both parties are advanced in years and are unlikely to be gainfully employed. The defendant cannot hold on to both houses to the exclusion of the plaintiff. Although the defendant refused to offer the plaintiff any share in the immovable property he conceded at the pre-trial conference stage that the movables should be shared as follows:-

## **Plaintiff**

1 x 24 inch television set and decoder

1 x double bed

1 x set of sofas

## **Defendant**

1 x double door fridge

1 x 4 plate stove

In the result, and accordingly I make the following order.

1. A decree of divorce be and is hereby granted
2. The plaintiff be and is hereby awarded the following movable property
  - (a) 1 x 24 inch television set and decoder
  - (b) 1 x double bed
  - (c) 1 x set of sofas
3. The defendant be and is hereby awarded the following movable property:
  - a. (a) 1 x double door fridge
  - b. 1 x 4 plate stove

4. The plaintiff is hereby awarded a 50% share of the immovable property known as stand 56368/2 Old Lobengula, Bulawayo.
5. The plaintiff is hereby awarded a 50% share of the immovable property known as stand 1976 Bulawayo North of Bulawayo also known as 28 Heany Avenue, Northend, Bulawayo
6. The parties are hereby awarded the right to buy each other out of their share in the immovable properties within a period of 6 months from the date of this order.
7. The property shall be valued by an estate agent appointed by the Registrar of this court within a period of 30 days from the date of this order.
8. In the event that both parties fail to buy the other out of his/her share in the immovable properties, the property shall be sold to the best advantage of the parties through a registered estate agent and the parties shall be paid out their shares from the net proceeds.
9. The plaintiff and the defendant shall contribute equally the costs of evaluation of both immovable properties.
10. Each party shall bear their own costs.

*Dube-Tachiona, & Tsvangirai*, plaintiff's legal practitioners