

**KHOLISANI NKALA**

**Versus**

**SARAH NKALA (NEE SEBATA)**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 2, 3, 4 & 25 NOVEMBER 2021

**Divorce Action**

*U. Nare* for the plaintiff  
*M. Ndlovu* for the respondent

**MAKONESE J:** The plaintiff resides in the United Kingdom and is employed as an Emergency Medical Technician in the East Midlands Ambulance Services. The defendant also resides in the United Kingdom and is a registered Mental Health Nurse and a clinical leader in Leicester under the Nottingham Trust. The parties were married at Gwanda on 16<sup>th</sup> December 2000 in terms of the Marriages Act (Chapter 37), now (Chapter 5:11). The marriage was blessed with three minor children. The marriage relationship broke down. The parties lost love and affection for each other. The parties drifted apart. The parties eventually separated and plaintiff instituted divorce proceedings on 11<sup>th</sup> September 2019.

This matter was set down for trial on 4<sup>th</sup> November 2021. Prior to the commencement of the trial the parties held a series of meetings and agreed that a decree of divorce would be entered by consent. The parties agreed to share the movable and immovable property acquired by the parties during the subsistence of the marriage. Agreement was reached on the bulk of the property. An order was issued by consent to record that agreement. What remained in dispute was a Nissan Pathfinder motor vehicle and stand number 14669 Selbourne Park, Bulawayo.

The order entered by consent is as follows:

1. A decree of divorce be and is hereby granted.
2. The defendant be and is hereby awarded custody of the minor children, namely:

- a. Princess Silokuthaba Nkala (female) born on 24<sup>th</sup> May 2006.
  - b. Princetone Thabela Nkala (male) born on 10<sup>th</sup> October 2009, with plaintiff having reasonable rights of access on alternative week ends, or at any other time convenient to both parties.
3. The plaintiff shall continue to pay maintenance in respect of the minor children in terms of an existing maintenance assessment with the child maintenance service in the United Kingdom, until the children attain the ages of 18 years or became self-supporting whichever sooner occurs.
4. The defendant shall be awarded the following movable assets.
- (a) Range Rover Evogue 2012 model, registration number MW12EVX (in the UK)
  - (b) 3 x double beds
  - (c) 1 king-size bed
  - (d) 1 king size fridge freezer
  - (e) 1 American fridge freezer
  - (f) 8 plate range cooker with wood
  - (g) 1 x kitchen table
  - (h) 4 plate Electric Stove with wood
  - (i) 48 inch television set
  - (j) Television cabinet unit
  - (k) 3 piece sofa set
  - (l) Bathroom tab (unfitted)
  - (m) 6 x dining leather chairs
  - (n) 6 x plastic chairs
  - (o) 20 litre metal water tank
  - (p) Bathroom set
  - (q) 1 x shower set
  - (r) Double kitchen sink
  - (s) Ironing board
  - (t) Curtain rails
  - (u) Kitchen utensils
  - (v) Linen

5. The defendant is awarded various movable properties at 21 Green Hedge Lane, Leicester, UK.
6. The defendant shall be awarded the following immovable property as her sole and exclusive property:
  - (a) Stand 3868 Spitzkop, Gwanda
  - (b) 21 Green Hedge Lane, Leicester, United Kingdom (LE 73 AF)
7. The plaintiff is awarded the following property:
  - (a) Mercedes Benz A class, registration number LO65ZGG
  - (b) House number 2111 Spitzkop, Gwanda
  - (c) Stand 1649 Spitzkop, Gwanda
8. It is ordered that the distribution in respect of the Pathfinder motor vehicle, recently imported into Zimbabwe, and stand 1466 Selbourne Park, Bulawayo be and is hereby referred to trial.
9. Costs of suit shall be in the cause.

The parties having settled their issues in respect of the distribution of movable and immovable assets in terms of the above order directed that the distribution in respect of the Nissan Pathfinder motor vehicle recently imported into Zimbabwe, and stand 14669 Selbourne Park, Bulawayo be and is hereby referred to trial.

#### **PLAINTIFF TESTIMONY**

Plaintiff testified that his marriage was out of community of property and that stand 14669 Selbourne Park, was his alone and was registered in his name. He testified that he sent money to his sister for the purchase of the stand. The plaintiff testified that defendant had indicated that she had no interest in investing in Africa. Plaintiff indicated that he decided to sell the Selbourne stand in 2018 and engaged the defendant who told him to do as he pleases as she was not interested in the property. Plaintiff indicated that he sold the property for US\$15 000. Prior to the sale of this property plaintiff had tried to have defendant's name on the property but she showed no interest. Plaintiff went on to state that the proceeds of the sale were disbursed for the benefit of the family. An amount of approximately US\$4 000 was used to purchase solar panels for stand 3868, Spitzkop, Gwanda. A durawall was erected at this property using part of the proceeds from the sale of the Selbourne Park stand. An amount of US\$3 000 was utilized in improvements at stand 2111 Gwanda. The balance of the funds was used to take the family on a holiday in Spain. Plaintiff testified that the

defendant was merely being malicious for wanting a share in the proceeds of the Selbourne Park stand as it was no longer available for distribution. Plaintiff indicated that defendant had waited for a period of 12 years to register her interest in the property. As regards the Pathfinder motor vehicle plaintiff indicated that he had purchased the motor vehicle on his own and paid instalments of 350 pounds per month. The vehicle was purchased in 2011. Plaintiff produced electronic proof of registration of the vehicle in his name. Plaintiff indicated that defendant had her own motor vehicle at that time, a Mercedes Benz A Class. It is not disputed that the plaintiff shipped the Nissan Pathfinder to Zimbabwe and paid 800 pounds in shipping costs. Further the plaintiff paid the Zimbabwe Revenue Authority an amount of US\$7 400 in excise duty. Plaintiff took the view that it was unfair for the vehicle to be sold, in view of the huge expenses he personally incurred to export the vehicle to Zimbabwe. Plaintiff stated that this is the vehicle he uses when he visits Zimbabwe. He testified that he is a frequent visitor to Zimbabwe. Plaintiff insisted that the marriage was out of community of property and that the motor vehicle was his own asset not liable to distribution. In any event, plaintiff stated the defendant has her own motor vehicle.

#### **DEFENDANT'S TESTIMONY**

Defendant gave a totally different version regarding those disputed items. As regards the Selbourne Park stand she testified that when the stand was acquired it was a collaborative effort between her and the plaintiff. She testified that she was involved in the purchase and liaised with the Bulawayo City Council. She contributed financially to the purchase of the property. In 2003 she travelled to the United Kingdom with her eldest child. She obtained asylum status in 2004 and received a sum of about 7 000 to 8 000 pounds as settlement funds from the United Kingdom government. Defendant averred that parts of those funds secured in 2004 were used towards the purchase of the property. It is common cause that the Selbourne Park stand was acquired in 2007, some 3 years after defendant received the settlement funds. Defendant did not dispute that by the time the Selbourne Park stand was purchased she had used the settlement funds to purchase various household goods and effects.

Defendant insisted that she was never consulted in the sale of the Selbourne Park property and that she was entitled to a share of the proceeds. Defendant stated that she was surprised to discover that the property had been sold without her knowledge. Defendant disputed that a sum of US\$4 000 was used on improvements at stand 3869 Gwanda and stand 2111 Gwanda. Defendant pointed out that she never went on holiday to Spain as alleged by

the plaintiff. She indicated that the family had never gone on holiday due to the ill health of one of the children who has a brain tumor which placed travel restrictions on them. Defendant testified that at the time of the purchase of the Selbourne Park property, she was at school but working part-time, four days per week. She indicated that she sent money to Zimbabwe using the unofficial means and at that time the exchange rate was in free fall. She could not recall the exchange rate at that time. The defendant led evidence from one witness Robert Nkala. His evidence was largely common cause and was not challenged. The witness was related to the plaintiff and the defendant as he married one of their aunts. He testified that he knew about the Selbourne Park property as both plaintiff and defendant would call him regarding developments on the stand. A cottage was erected on the stand and plaintiff would call him and tell him where to collect cash for various purchases. In some instances defendant would also call him. The import of the evidence of this witness is that both plaintiff and defendant were involved in the development at the stand.

## **ANALYSIS OF THE EVIDENCE**

### **Nissan Pathfinder**

There is a dispute with regards what contributions were made towards the purchase of the Nissan pathfinder. The defendant claimed initially that she contributed 3 000 British Pounds towards the purchase of the motor vehicle but under cross-examination she stated that she contributed a further 4 500 British Pounds. What is undisputed is that the vehicle was registered in the name of the plaintiff and that plaintiff met the monthly obligations of servicing the loan for the motor vehicle. It is not denied by the defendant that plaintiff used US\$7 500 on duty for the vehicle and 800 British Pounds for shipping the vehicle to Zimbabwe. Further it was not disputed that the plaintiff is currently using the motor vehicle. It is therefore undesirable to deprive the plaintiff of the vehicle by selling it and sharing the proceeds with the defendant. It was not disputed that the actual costs of shipping and duty payable on the vehicle are close to the open market value of the motor vehicle. It would be equitable to award the motor vehicle to the plaintiff who has already allowed the defendant to retain all the household goods that are in Zimbabwe and the United Kingdom. It is reasonable and equitable for the plaintiff to retain the vehicle.

### **Stand number 14669 Selbourne Park, Bulawayo**

It is common cause that this property was sold at US\$15 000 in 2018. The funds were used to improve the properties at stand 3868, Gwanda and stand 2111 Gwanda. Despite defendant's denials, it does not seem probable that defendant would have held on to the funds received from her asylum settlement from 2004 to 2007 when the stand was acquired. No evidence was placed before the court to show that the sale of the stand was done in bad faith. It is evident that for practical purposes stand 14669, Selbourne Park is not available for distribution. The defendant conceded that the property is subject to litigation in this court. There is an order of this court that is extant.

### **THE APPLICABLE LAW**

It is common cause that since 1929 and in terms of the Married Persons Property Act (Chapter 5:12), marriages in Zimbabwe are out of community of property. The introduction of the Matrimonial Causes Act (Chapter 5:13) defined the issue of what is to be distributed upon distribution of a marriage. What is being distributed is not the matrimonial property as outlined in the plaintiff's declaration or other pleadings. What is up for distribution are the assets of the parties and the court has a wide discretion in distributing the property of the parties which includes the discretion to order that a property owned by one party be transferred to the other party.

The issue for determination is what property must be distributed in terms of section 7 (1) of the Matrimonial Causes Act. The position is settled in our law. The starting point is section 7 (1) (a) of the Act which provides that:

“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 decision, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to another.” (emphasis added)

The interpretation and import of the above cited section was made clear in *Gonye v Gonye* 2009 (1) ZLR 232 (SC) at p237 by MALABA JA (as he then was) when he stated as follows:

*“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 spouse before the marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept “the assets of the spouse” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”*

It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7 (1) of the Act provides, that the court may make an order with regard to the division, appointment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses under section 7 (1) of the Act are dependent upon the exercise by the court of the broad discretion. It is this broad discretion that the court should exercise by considering the assets already awarded to the defendant by consent. Although it appears evident from the defendant’s plea that she is of the view that she is entitled to all the assets of the spouses, the position cannot be regarded as being just and equitable. It would be unreasonable for the defendant to be allowed to have “everything” with the plaintiff remaining with “nothing”. It has been held in several cases that in some instances the needs of the parties have outweighed direct financial contributions such that where a spouse may not have made any significant direct financial contribution they were nevertheless awarded a half share in consideration of their indirect contributions and their needs at the dissolution of the marriage. See: *Usayi v Usayi* 2003 (1) ZLR 684 (S) and *Govati Mhora v Emmaculate Mhora* SC-617-18.

This court notes that the defendant had been awarded a house in the UK, fully furnished with various household and effects. The property at 21 Green Hedge Lane,

Leicester, though on mortgage has high monetary value. Over and above that defendant has been awarded house number 3868 Spitzkop, Gwanda. The property is furnished. The defendant was awarded an assortment of various movables presently in Zimbabwe. The defendant has her own personal motor vehicle for use in the UK. The plaintiff on the other hand has to furnish both his house in Zimbabwe and his rented accommodation in the UK. The court ought to take these factors into consideration.

With marriages in Zimbabwe being out of community of property since 1929, the plaintiff had every right to dispose the Selbourne Park property as he sees fit. This position was made clear in the recent decision in *Chigwada v Chigwada & Ors* SC-188-20 where MALABA CJ held that:

*“The law regarding the property rights of married persons in Zimbabwe is the Married Persons Property Act (Chapter 5:12), which provides that since 1929 marriages in Zimbabwe are out of community of property. Parties to a marriage contract out of community of property are legally entitled to own and dispose of property in their individual capacities.”*

In any event, despite the conflicting versions surrounding the acquisition and disposal of stand 14669 Selbourne Park, the court must consider the equities of the matter and exercise its wide discretion.

## **DISPOSITION**

The evidence on record shows that stand 14669 Selbourne Park, Bulawayo was sold sometime in 2018. There is current litigation with respect to that property. The property is not available for distribution. The defendant has not proved on a balance of probabilities that the sale of the stand was not *bona fide*. The plaintiff demonstrated how the proceeds were utilized. In my view no order may be made with regards stand 14669 Selbourne Park, Bulawayo as it is no longer property of either of the parties.

As regards the Nissan Pathfinder motor vehicle, both parties agree that the vehicle was registered in the plaintiff's names. Plaintiff was solely responsible for the monthly payments in respect of the purchase price. The motor vehicle was shipped to Zimbabwe by plaintiff at his own expense. Duty was paid to the Zimbabwe Revenue Authority by the

plaintiff. Besides, plaintiff has been using the motor vehicle. Both parties own personal vehicles in the UK. There can be no justification for the disposal of the Nissan Pathfinder. As I have indicated earlier in this judgment the court cannot ignore that defendant has been awarded substantial and valuable property by way of a consent order.

In the circumstances and accordingly it is ordered as follows:

1. The Nissan Pathfinder motor vehicle be and is hereby awarded to the plaintiff as his sole and exclusive property.
2. No order is made in respect of stand 14669 Selbourne Park, Bulawayo.
3. Each party shall bear its own costs.

*Maseko Law Chambers*, plaintiff's legal practitioners

*Ndlovu Mehluli & Partners*, defendant's legal practitioners