

ABIGAIL ALFETO
versus
HERBERT CHAPAGUTA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 13 & 26 May, 9 June & 4 July 2022

Civil Trial – Divorce

Ms PR Zvenyika, for the plaintiff
Ms F Ndou, for the defendant

MUCHAWA J: The plaintiff and the defendant were married in terms of the Marriage Act [*Chapter 5:11*] on 23 July 2005 at Harare. No child was born to this marriage. The parties acquired the following movable property during the subsistence of the marriage:-

1. 3 door kitchen unit
2. 4 door wardrobe
3. 4 plate electric stove
4. Duplicating machine
5. Sansui TV
6. Kitchen unit
7. Home theatre
8. Kitchen chairs and table
9. Toshiba laptop

The following immovable property was also acquired:-

- a) Stand No. 13409 Premier Park, Hatcliffe Extension, Harare.

The parties agreed in their joint pre-trial conference minute that the marriage relationship has irretrievably broken down warranting the granting of a decree of divorce. They are also agreed on the distribution of the immovable property as follows:-

For the plaintiff:

1. 3 door kitchen unit
2. 4 door wardrobe
3. 4 plate electric stove
4. Duplicating machine
5. Sansui TV
6. Kitchen unit
7. Home theatre
8. Kitchen chairs and table; and

For the defendant

1. Toshiba laptop

There was therefore only one issue referred to trial and which falls for determination. It is set out below:-

“What is the equitable distribution between the parties of the immovable property known as Stand No. 13409 Premier Park Hatcliffe Extension, Harare?”

Both parties filed closing submissions. In determining the outstanding issue, the court will resort to the evidence led in court, the bundle of documents and the closing submissions.

The plaintiff led evidence herself and called in another witness, her father, Mr Last Alfeto. She also tendered exhibits 1 to 5 in her bundle of documents in support of her case. The defendant gave evidence himself but did not tender any documentary evidence.

It is common cause that the immovable property was bought in the name of the plaintiff only. What is in issue is the respective contributions of the parties to the purchase and development of the property.

The plaintiff's case:

The plaintiff gave evidence that she has been married to the defendant for 16 years and is employed as a hairdresser in Pretoria, South Africa, where she resides, earning the amount of ZAR10 000 per month. She claimed to have initially bought a stand in 2010 when she had come for a visit to Harare. At that time, she alleges that they had had a misunderstanding with the defendant in relation to an adulterous relationship and he had apologized and given her his bank card from which she then withdrew the amount of ZAR5 000 to top up the deposit for an

undeveloped stand she had paid a deposit of US\$1 800 for. That initial stand bought was said to have turned out to be a fraudulent sale as it was a double allocation. The money paid as a deposit was alleged to have been lost and not recovered. The plaintiff claims to have then been referred by the first seller to Alpha Developers in 2011 from whom she then bought the stand in issue. It was plaintiff's evidence that in the second purchase, she did not use any of the defendant's money when she paid the deposit of US\$1 350.

In carrying out developments on the stand, the plaintiff claims to have directly paid for all such developments and the value of the property was now set at US\$16 000 through an evaluation report appearing on pages 9 to 16 of plaintiff's bundle of documents. The developments comprise of four bedrooms, a separate toilet and a separate bathroom. The plaintiff's father, Mr Last Alfeto, her witness corroborated that she was the one who would send money to him for the building developments and he would purchase the building material and attend to supervising the building. A sample of receipts and invoices for the purchase of some building materials appears on pages 6 to 8 of plaintiff's bundle of documents and appear in the names Alfeto or Arbgirl. It was stressed that the defendant never sent any money for the development of the stand.

The plaintiff further claimed that the defendant had shown a lack of interest in the stand as he had only visited the stand twice only. Mr Last Alfeto only remembered one visit when the defendant had come for a funeral. He claimed to have been in good books with his son in law. He believed the property belonged to his daughter as he saw her paying for the purchase of the stand and the developments thereafter. He claimed to have no motive to lie against the defendant.

The parties separated in 2017 and the plaintiff claims that there has been no further development on the property. The plaintiff however claims to have paid for electricity connections and rates from that time to date. There was however no evidence or value of such payments tendered.

The plaintiff acknowledged that the defendant had contributed indirectly to the purchase and development of the property as they lived together and he would contribute towards the rentals and food. She believed that it would be fair and equitable if the defendant was awarded 10% of the value of the property.

The defendant's case:

It was the defendant's case that he had contributed both directly and indirectly to the acquisition of the property. He stated that they each held separate bank accounts but he would give money to the plaintiff as his wife. He estimated his contributions to the purchase and development of the property to be around ZAR80 000. At the relevant time, the defendant said he was employed as a manager for lodges earning ZAR7 500 whilst the plaintiff was earning between ZAR3 000 to ZAR3 500 per month. He said he was also doing soccer betting and at one point won ZAR20 000 which he wanted to use to buy a car but the plaintiff insisted that they should buy a stand. It was explained that the defendant did not get time off work hence he sent the plaintiff to attend to purchase of the stand. No proof of the soccer betting winnings was provided. The defendant said that at the time of the purchase of the stand, they were relating very well and he had been shown a receipt which had both their names as he had directed the plaintiff to get his ID from his young brother. There was no such receipt tendered nor was the brother called to give evidence.

Whereas the plaintiff claims to have withdrawn ZAR5 000 from the defendant's bank account, the defendant claimed that ZAR15 000 was in fact the amount withdrawn. He denied that he had given his bank card to the plaintiff as a plea for forgiveness but that he gave his wife the card so that she could facilitate the planned family project of buying a stand. Whilst agreeing that it was the plaintiff who would send money to the father in law, the defendant claimed that he would contribute to the money sent for the property development. His further evidence was that though the plaintiff was working, she would sometimes be sick for up to three months and he would continue meeting all necessary expenses.

The defendant gave evidence that though he had indeed not constantly visited the project nor talked directly to his father in law on progress, he got all the relevant information from his wife and did not see the need to get additional information. He stated that he would also get pictures of the progress on the stand from his wife via WhatsApp communications. No copies of these were produced as the defendant claimed that his phone had broken down.

The defendant claimed that he had been cheated as the first agreement of sale shown to him had both their names. This was however not pleaded and came up under cross examination. It appears to be an afterthought.

Since the separation of the parties there had been no further developments on the property and the defendant claimed that this could be because he had stopped contribution to the pool of resources which he had previously funded for the developments to happen.

The defendant argued that he was entitled to a 50% share of the property as he contributed both directly and indirectly and particularly as the plaintiff was well aware of this and had been increasing her offer from the 10% in the particulars of claim, to 25% at the round table conference and finally 40% at the pre-trial conference.

The Law

Both parties pointed the court to the relevant law applicable in this case in their closing submissions. The power of the court to distribute assets upon divorce derives from s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] which I reproduce below:-

- “(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.”

In carrying out this function s 7 (4) lays out the factors to be considered:-

- “(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.”

There already has been guidance on how to approach this. In *Shenje v Shenje* 2001(1) ZLR 160 (H) at 163E – 164 A GILLESPIE J aptly noted that:-

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties’ needs are met rather than that their contributions are recouped.”

I will proceed to apply the law to the facts of this matter.

Application of the law to the facts

The parties have been married for 17 years though they have been on separation for the last 5 years. During the time they were living together, they were both working in South Africa. None of the parties assisted the court by providing proof of their earnings in any form. It appears to me that the plaintiff inflated her earnings which she put at ZAR10 000 per month without indicating she was self-employed and would sometimes not realize such amount as she would occasionally travel to Zimbabwe or would be off sick for long periods. This fact was not controverted in cross examination. On the other hand the defendant tried to minimize the level of earnings of the plaintiff so as to reflect his own contribution as higher.

What was established and agreed was that both parties used to contribute to the recurrent expenditures of rent and groceries. The evidence also showed that the plaintiff would have access to the defendant’s bank card and could withdraw money from his account. Though there were different accounts of the circumstances under which this happened, those are not crucial. They were running their household jointly.

The plaintiff talked about a first stand in which she had put ZAR5 000 of the defendant’s money which was subsequently lost as a result of an alleged fraudulent double allocation. There is however no documentary evidence of such sale having occurred. The Plaintiff did not provide any receipt or agreement of sale yet she claimed to have paid US\$1 800. That property is not available for distribution and I will not focus on it and whether or not it ever existed.

There was no agreement on the levels of direct contributions to the purchase of the immovable property. Except for the fact that the plaintiff personally attended to the purchase of the property and would be the one sending money to her father for the developments, it still remains unclear how much of the defendant's own money was channeled towards this. The defendant's assertion that he won some money from soccer betting was not challenged in cross examination. It was therefore established that both parties had an income earning capacity which contributed to the joint running of the household. They both contributed directly and indirectly to the purchase of the property in issue. In cases such as *Mhora v Mhora* SC 89/20¹ the Supreme Court upheld an award of 50% share to the respondent over an immovable property which had been registered in the name of the appellant only and he had argued that he had bought the property without the wife's direct contribution.

The same approach the courts have used in protecting the rights of women to inherit 50% shares in immovable properties they may not have contributed directly to the purchase of, should be equally extended to a man who may not have shown clear proof of his direct contributions. This is in line with s 56 of the Constitution of Zimbabwe (2013) which provides as follows:-

“56 Equality and non-discrimination

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

In *Mhora v Mhora* (*supra*), the Supreme Court considered the human rights framework in our constitution and in international law and observed as following:-

“Section 26 (c) and (d) of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, whether through death or divorce, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means there must be a fair and equitable division and distribution of property at the dissolution of marriage.”

The defendant is clearly entitled to more than a 10% share of the immovable property. There is support for this in the human rights frameworks pointed to above. The case of *Shenje v Shenje* (*supra*) has cautioned against making the respective contributions of the parties

¹ See also *Mufumani v Mufumani* HH 32/16, *Muteke v Muteke* SC 88/94,

the only crucial consideration. The division of matrimonial property is not an exercise for the parties to recoup their contributions. The clear intent of the legislature is to also take the parties' needs into account. Here are parties who have lived and worked together for 12 years. Neither of the parties should walk away empty handed nor feeling cheated for having invested more than a decade of their life in this marriage. They each need to walk away with something to build on.

I however take note of the fact that for the last 5 years, after separation, the defendant has not been involved in paying rates and electricity connection fees for the property in question, which amounts the plaintiff has footed. It would only be fair and equitable if the defendant is ordered to contribute towards such expenses. He has to. Unfortunately, the plaintiff did not provide proof of such expenses. A deduction of 5% from the defendant's share should lead to an equitable settlement of this issue.

It would be fair and equitable to award 55% share of the value of the property to the plaintiff whilst the defendant gets 45% share.

IT IS ORDERED THAT:

1. A decree of divorce be and is hereby granted.
2. The plaintiff is awarded the following movable assets as per the agreement of the parties:-
 - a. 3 door kitchen unit
 - b. 4 door wardrobe
 - c. 4 plate electric stove
 - d. Duplicating machine
 - e. Sansui TV
 - f. Kitchen unit
 - g. Home theatre; and
 - h. Kitchen chairs and table
3. The defendant is awarded the following immovable assets as per the agreement of the parties:-
 - a. Toshiba laptop
4. The plaintiff is awarded 55% share of the immovable property known as Stand No. 13409 Premier Park Hatcliffe Extension, Harare, and defendant is awarded 45% share thereof.

5. The parties shall agree on the value of the property above within 30 days of this judgment failing which they shall appoint a mutually agreed estate agent to evaluate the property within 30 days from the date of such failure and they will each equally meet the costs of such evaluation.
6. Should the parties fail to agree on an evaluator the Registrar of the High Court is hereby directed to appoint an evaluator from his list of evaluators.
7. The Plaintiff is hereby granted the option to buy out the Defendant's share within 3 months, or such longer period as the parties may agree, from the date of receipt of the evaluation report.
8. Should the Plaintiff fail to pay the Defendant's share within the stated period, or such longer time as the parties may agree, the property shall be sold to best advantage and proceeds there from shall be shared in accordance with the proportions in the award.

Muchirewesi & Zvenyika, plaintiff's legal practitioners
Mabundu & Ndlovu Law Chambers, defendant's legal practitioners