

SIKHUMBUZO MAVAKO DUBE

versus

SIBONGILE DUBE (nee MSIMANGA)

HIGH COURT OF ZIMBABWE

BERE J

BULAWAYO, 2, 3 and 15 November 2006,
22 February 2007, 12 March 2007 and
17 May 2012

Civil Trial

R Fuzwayo, for the plaintiff

J Sibanda, for the defendant

BERE J: At the conclusion of this matter and after hearing the evidence led by the parties I granted the following Order on 5 July 2007:

“It is Ordered:

1. That a decree of divorce be and is hereby granted;
2. That the defendant be and is hereby awarded as her sole and absolute property a Peugeot 306 motor vehicle bearing registration number 761-763 Q;
3. That the plaintiff be and is hereby awarded as his sole and absolute property the parties’ matrimonial house commonly referred to as house number 11 St James Crescent, Parklands, Bulawayo on the following terms and conditions;
 - a) That the plaintiff pays the defendant 20% of the current market value of the house in question as her fair share of contribution in the property and that payment be made within 20 days of the date of this order.
 - b) That in the event of the plaintiff failing to comply with 3 (a) (*supra*) the house be properly valued by a mutually agreed estate agent with the plaintiff contribution 2/3 of the cost of such valuation and the defendant paying 1/3 thereof to pave the way for the disposal of the house to enable the defendant to get her 20% share.
4. That the plaintiff be and is hereby awarded custody of the minor children of the marriage namely Qobo Sikhumbuzo Dube and Thomas Dube (twins born on 26th June 1992) and Thabo Mbekezile Dube (born on 5th June 2000) with the defendant being granted the usual rights of access.

5. That each party bears his/her own costs of suit.”

At the time that I granted the order I did indicate that my reasons would follow. Here they are:

It is absolutely commendable that by the time the parties’ trial started, it had dawned to both parties that the parties’ marriage had irretrievably broken down to the extent that the granting of a divorce order by consent was inevitable. The only issues which prompted the hearing of this case was to determine basically two issues, viz, the question of the custody of the minor children and the proprietary rights of the parties.

I propose to deal with the outstanding issues in the following order:

A. Custody

The statutory position is that upon separation of the parents the mother of the minor children assumes custody of the minor children in the absence of a mutually agreed alternative position. This statutory position derives from s 5 of the Guardianship of Minors Act, [*Cap 5:08*]. But at the conclusion of the hearing, this position can be altered as the court has now to consider the best interests of the children upon divorce.

The plaintiff projected himself as the Chief Executive Officer of the Mavako business empire which covers the running of grocery shops (2 (two) Supermarkets in Bulawayo and West Nicolson), milling company, transport and two farms.

The plaintiff gave three discernable reasons why he wished custody of the children to be granted to him upon divorce and these are; to ensure that the children are not alienated from the rest of the family members, to ensure continuity in the lives of the minor children and above all to enable the children to be inducted into the family businesses at a tender age and guarantee that they grow up in the businesses and with them like he did himself. The plaintiff argued that the children’s best interests would be compromised if they were to be awarded to the defendant who since separation has been hopping from place to place as she did not have her own accommodation.

In his testimony the plaintiff gave the Mavako family as an intact family, it has close family ties as ably confirmed by the grandmother of the children. The defendant did not dispute this. Despite her initial claim of custody of the children, under cross-examination the defendant conceded that indeed and on her reflection the children’s best interests would be best served if the plaintiff were to be awarded custody. I therefore found no hesitation in

granting the plaintiff custody. I did not feel it necessary to prescribe specific rights of access as I appreciated the parties are able to regulate this on their own.

B. The Defendant's claim to the Peugeot motor vehicle

After considering the evidence led by the parties I felt the plaintiff was being unnecessarily emotional if not mischievous in claiming a 50% share to the motor vehicle. In coming to this conclusion I was guided by the following considerations; It was the defendant's uncontroverted evidence that the plaintiff had specifically purchased the motor vehicle in issue for her. The plaintiff did also not dispute the fact as stated by the defendant that ever since the motor vehicle was purchased, the family had regarded the motor vehicle as the defendant's motor vehicle and the plaintiff had never routinely used it as he had access to several other motor vehicles registered under the Mavako business company. I reasoned that if the plaintiff had not been ordinarily using the motor vehicle in question he could not upon divorce claim to have 50% of the value of the vehicle unless he was being heartless. I also reasoned that even after divorce the plaintiff would continue to have unrestricted use of the several vehicles he had been using. I regarded the claim by the defendant to be quite conservative and actuated by need and not greed. For these reasons it was only fair and equitable that the defendant be awarded this particular motor vehicle as her sole and exclusive property.

C. The defendant's claim of 50% of the family's matrimonial house

There was no dispute that when the defendant got married to the plaintiff the house was already in existence. The defendant conceded not to have made any direct contribution towards either the acquisition or construction of the home in question. The evidence led and accepted suggests that the plaintiff played a more pronounced roll in the construction of the house than the defendant whose main noticeable involvement was with the payment of electricity and water bills for the house and its general maintenance and upkeep which can be said of any woman in happier times. I also accepted that up until the parties initiated these divorce proceedings the parties had been married for ten years. Naturally under these circumstances the defendant cannot be expected to move away empty-handed as advocated by the plaintiff.

But I do accept the point that it would be overstretching the concept of equitable distribution for the defendant to clamour for a 50% share in a matrimonial house unsupported

by a corresponding reasonable contribution. These percentages are not and must not be blindly thrown into pleadings.

Having considered the relevant evidence in this case I estimate that the defendant be entitled to 20% of the value of the property as at the time of the order.

It was for these reasons that I made the order.`

Calderwood, Bryce, Hendrie & Partners, plaintiff's legal practitioners
Job Sibanda & Associates, defendant's legal practitioners