

**ALLISON NCUBE**  
**versus**  
**SAMANTHA MUTAWADZE NCUBE**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 6 & 7 MARCH 2014 & 17 JUNE 2014 & 11 JUNE 2015

**Civil Trial for Divorce**

*Advocate P. Dube* for plaintiff  
*J. Sibanda* for defendant

**KAMOCHA J:** In this matter the parties were in agreement that the marriage between them had irretrievably broken down and it was also accepted the defendant would have custody of the minor children with the plaintiff exercising reasonable access.

The parties held a pre-trial conference between themselves whereat the following were the issues recorded as issues for resolution by the trial court:

- (1) whether the plaintiff should be awarded absolute ownership of house number 59 Livingstone Road, Suburbs.
- (2) what should be the parties' responsibilities towards the minor children of the marriage?
- (3) how shall the movable property be distributed?

Both parties gave *viva voce* evidence in an attempt to prove their respective cases. They each had no witnesses to call.

The plaintiff's evidence was that he was 47 years old at the time of the trial he stayed in Gokwe under Chief Nemangwe kraal head Makuyu and was no longer employed. He, however, said he had been doing subsistence farming for two years.

He got married to the defendant on 8 August 1998 and the marriage was blessed with three children namely:- Emily Tariro Ncube - female born on 27 November 1995; Basirai Garet

Ncube – male born on 19 June, 1997 and Joseph Zvikomborero Ncube – male born on 3 January 2007.

He told the court that he had separated with the mother of the children who was living with them. He did not object to the children continuing living with their mother unless she felt otherwise or there was a good reason to the contrary.

He accepted that their marriage had irretrievably broken down and confirmed that it should be dissolved.

### **House at number 59 Livingstone Road, Suburbs – Bulawayo**

Plaintiff told the court how he purchased the house. He said 60% of the price of the house was what he personally contributed and the 40% was a loan from his employer Merchant Bank. The loan was paid with direct deduction from his salary starting from January 2004 ending in August 2006.

The 60% was proceeds from the sale of his Harare house which he had purchased on October 1994 before their marriage.

It was his evidence that his salary varied from time to time. He had a basic salary plus a number of perks such as 300 litres of fuel allowance, school fees for the children, medical aid for the whole family, a pension fully contributed for by the bank, holiday allowances in Zimbabwe, clothing allowance, vehicle allocation of a Mercedes Benz and facility for a vehicle loan as the Mercedes Benz belonged to the bank. He had access to a profit share scheme and a bonus of 13<sup>th</sup> cheque equivalent to his month's salary.

He did not use all the 300 litres of fuel. He most of the time converted the fuel into cash for the up keep of his family.

It was his evidence that he took care of all expenses relating to water, electricity and phone bills, surplus medical expenses. He said he also purchased the bulk of the family food.

He bought children's clothes and all his wife's clothes. He paid wages for both the house maid and gardener.

He said he had to take care of all those family expenses because when they got married they had an understanding that his wife would take responsibility of buying food and he would take care of the rest.

As they went along his wife who had been employed by Anglo America lost her job and became self employed in 1998. That, however, did not bring much and he would fund her most of the time from the remuneration from his employment. He took over the responsibility to buy all the food requirements for the family since her business did not generate enough as it had just started. Her line of business which was producing wedding cards and business cards did not produce any perceptible income.

He reiterated that when they started off in May 1995 in a customary marriage they resolved at the instance and insistence of his wife that the family's expenses should be apportioned in the manner he outlined. At that time she earned more money from her employment than he did. Although she was responsible for the purchasing of food and her own attire, after he realised that she had lost her employed the practical demand of the situation was that he had to assume the food expenses in essence. He allegedly bought bread and milk on a daily basis and supported his wife's business in order for it to run. That state of affairs carried on from 1998 to 2007.

In the year 2007 he left formal employment to start his own business. The result was that his own income was no longer as robust as during the period when he was in formal employment but at the same time there was a clear improvement in his wife's income.

In 2006 she allegedly purchased a motor vehicle for herself. I pause to observe that the car was allegedly bought during the period when the defendant's business was not generating any meaningful income and had to be supported by the plaintiff. This is difficult to follow.

**Her general expenditure pattern**

Plaintiff alleged that his wife had a general expenditure pattern which was not acceptable to him. For instance in 2007 she allegedly proposed to host his birthday party in a three star hotel against his wish. She did not end there but she made them frequent hotels for either dinner or lunch with the children at her expense. Yet despite the fact that she had the responsibility of acquiring food requirements she did very little in that regard. He essentially had to procure maize meal, beef and other relishes like chicken while she did very little. He paid school fees for the children.

He denied that defendant took full charge of the food and further denied that at one point there were 16 people living in the house.

He told the court that in February, 2010 he moved out of the family house. He went to live in a flat at Bulawayo Poly. It was then that she took charge of the food items while payment of all other items still remained his responsibility.

He ran a micro finance business called ZENCORP FINANCE (PVT) LTD and was its managing director. That in fact was his main employment although that did not achieve much due to hyper inflation. Despite the fact that his business did not do well he continued to pay school fees and buy uniforms for the children and even bought his wife clothes.

He only stopped doing so in 2010 after discovering that his wife had encumbered the family house with a caveat which effectively barred him from procuring working capital finance for his business. Prior to the caveat he used to borrow money from banks using the family house. That was no longer possible due to the caveat. In fact two banks withdrew facilities to lend him money.

He said he conducted an investigation and allegedly discovered that the caveat was a fraud. He approached his wife to explain the effect of the caveat and pleaded with her to uplift the caveat but she was unmoved by his pleas and refused.

He told the court that there was a maintenance court order through which he is maintaining his children.

### **Movable property**

It was the plaintiff's contention that he should be awarded all the movables which he personally purchased with his money and the defendant should also be awarded all the movables that she personally bought with her money.

He proposed the respective lists as follows:

#### **Property to be awarded to plaintiff**

- 1) An Adam Bede dining room suite;
- 2) An Adam Bede lounge suite;
- 3) An Adam Bede bedroom suite;
- 4) A second lounge suite;
- 5) A piano;
- 6) Garden furniture set – 8 chairs and a table;
- 7) A second bedroom suite;
- 8) Plaintiff's personal effects and other assets; and
- 9) Garden tools.

#### **Property to be awarded to defendant**

- 1) A double door fridge;
- 2) A 4-plate stove;
- 3) A washing machine;
- 4) A 2-place gas stove;
- 5) All the dishes and cutlery;
- 6) Defendant's personal effects;
- 7) Defendant's bed and base set;

- 8) Radio
- 9) Television, decoder and dish;
- 10) Video player;
- 11) Four children's beds;
- 12) Chest of drawers;
- 13) Cot bed; and
- 14) 3 reading desks

The movable property on the above respective lists was bought during the 16 years life span of the parties' marriage. It is not difficult to see that the property was bought for the betterment of their modern home. The parties were jointly striving to buy property which befitted their station in life. The home is mainly furnished with Adam Bede furniture bought by the man while the woman bought a double-door refrigerator; 4-plate stove; washing machine; 2-plate gas stove; television set with decoder and satellite dish and video player.

It would not make any sense, for instance for the wife to also buy another dining room suite, lounge suite, bedroom suite for the same rooms. Neither would it make any sense, for instance, for the husband to also buy another 4-plate stove for the kitchen and another washing machine.

Quite clearly the above movable property except for the personal effects should, in view, be classified as theirs not as his or hers since none of it meets the requirements laid down in section 7 (3) of the Matrimonial Causes Act [Chapter 5:13] quoted *infra*.

The plaintiff, maintained that property which was personally bought by each party should be awarded that party.

He did not end there. It was his contention that since he paid for the house, it was 100% his he offered her nothing for the house.

The children should be awarded to the wife.

When asked by his legal representative to propose how the matrimonial home should be dealt with he made the following two proposals.

### **Option one**

In his preferred option he asked the court to award him sole authority and ownership of the matrimonial home with the view to selling it so that he could be able firstly to deal with his creditors as their persistence would mean that he would be unable to realise his full income generating capacity in a reasonable period of time. If the court allowed him to do that and in view of the court's sentiments and guidance, he thought it became important for him to give something to the defendant. In that regard he would request the court to allow him to retain the 60% that he had brought from his previous house without it being interfered with.

He thought it would be fair to share the remaining 40% in equal parts. The net effect would be to give her 20% of the net proceeds of the sale of the house.

### **Option two**

In this option he suggested that defendant be allowed to stay in the house until the youngest child is 18 years old. In that event, he would not be averse to her having beneficial access to the movable household goods that he had indicated as his.

In the event of this option being allowed, he requested the court that he be granted leave to use to house for the purpose of leverage to access working capital finance for his business. It was his view that that was of critical importance as it would ensure that he would be able to support the children in terms of their upkeep particularly as it related to their education.

He then sought permission to discuss the issue of the children since the finalization of the divorce would not be adequate without a clearer position on the welfare of the children

Under cross-examination he admitted that he was aware several of his creditors obtained judgments against his company ZENCORP Finance (Put) Ltd for various sums of money. He in

fact accepted that four individuals had judgments totaling \$25 425,65 but denied being aware that movable assets were attached from the matrimonial home. He also professed ignorance of the fact that the defendant had had to obtain a restraining order in case number 406/12 against the four people in order to save the property from attachment.

When asked if he had done anything about those judgments from 2011 to 2014 he was hesitant and prevaricated. When pressed further he said he did not see the relevance of that line of cross-examination to the divorce proceedings. When it was put to him that as far back as February 2012 the defendant had in fact told him that the property had been attached and he did nothing about that he prevaricated again and said there was no case against him *per se* and there was therefore no attachment against him. He avoided answering the question whether or not he had approached the creditors who were attaching matrimonial movable property for company debts.

When asked what he understood by matrimonial property his answer was that it was property which is co-owned. Meaning that in the case of immovable property it has to be registered in the names of both parties. In the case of movables if he bought a television set, dining suit, lounge suite etc that becomes his personal property if he used his money to buy it. The same would apply if the wife bought a fridge, stove, washing machine etc.

That understanding is clearly erroneous, in my view and is untenable. While accepting that he had left the defendant to singly handedly look after their children since 2010 and he had not contributed in any way he at the same time sought to deny that she had lightened his burden as a father. But when pressed further all he could say was that he was grateful.

While accepting that the defendant's salary was more than his from May 1995 to February 1998 he still denied that she had made direct or indirect contribution to the matrimonial estate and was entitled to 50% for the 16 years of her life she had expended in that marriage.

It was clear to this court that the plaintiff sought to under play the part played by the defendant at all cost. He was untruthful and wanted everything for himself. He was not worth to

be believed. He seemed not to have regard to the provisions of section 7 of the Matrimonial Causes Act [Chapter 5:13] quoted hereunder.

**“7. Division of assets and maintenance orders**

- (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;
  - (b) ...
- (2) ...
- (3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage –
  - (a) by way of an inheritance; or
  - (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
  - (c) in any manner which have particular sentimental value to the spouse concerned.
- (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 and 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 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.”

### **Defence case**

The defendant in her *viva voce* evidence told the court that she was born in 1973 and lived at number 59 Livingstone Road, Suburbs. She averred that she was married to the plaintiff and that their marriage was blessed with three children.

It was the evidence that this court had two issues to resolve *id est* the distribution of movable and immovable of the matrimonial assets.

### **Movable assets**

The defendant told the court that plaintiff moved out of the matrimonial home in November 2009 without disclosing where he was going to stay. He left her with the children at the matrimonial home and went to live in a flat at Bulawayo Polytechnical College at the hotel school where he was paying \$65 per day.

In 2011 the movable property was attached by the deputy sheriff. Since she did not know where he stayed she had to frantically look for him. It was only then that she discovered where he lived. She allegedly discussed the matter with him and claimed that service of the matter was actually effected on him at Bulawayo Polytech. He then followed that up by going to the matrimonial home that week and confirmed that the property had been removed and was no longer there.

As far as she could recall the following movables were attached:- two lounge suites except one two seater which was upstairs at the time of attachment; 8 seater Adam Bede dining room suite; the fridge; gas stove and its cylinder. Plaintiff did nothing that she could recall about the attached property. The defendant said she had to engage the services of her legal practitioner to get the property back. She successfully did so through a court order. She claimed that during

the process of getting the movables back she and the children were emotionally traumatized. She spent a considerable amount of money in legal fees, transporting the goods back to the matrimonial home and storage fees at the deputy sheriff. She believed that it would be fair and equitable if she could be awarded an Adam Bede dining room suite and a lounge suite in addition to what plaintiff had suggested in list (b).

### **Immovable property**

The defendant told the court that she was claiming 50% of the value of the matrimonial house irrespective of the fact that it was registered in the name of the plaintiff. She alleged that when she suggested to the plaintiff at the time the house was bought that it be registered in the names of both of them his response was not pleasant at all. He responded "If this is your sister telling you what to do, then tell her to bugger off".

She asserted that she was entitled to a 50% share because she was a married woman who conducted herself as such during the subsistence of the marriage. She was gainfully employed from the time she met her husband.. She therefore contributed to the matrimonial expenses from the onset.

She bought food for the family. Her husband did not drink tap water and she bought bottled water for him. He even did not want her to boil any food using tap water.

In addition to their immediate family, they had members of the extended family in the house. At one stage they had as many as 15 people in the house. When he moved out of the matrimonial home he told his relatives not to go to the house as he was not buying food for the house. It was her testimony that she even contributed towards food stuff for her parents-in-law when she could.

She ensured that her husband was always smart when he went to work. He was a graduate trainee in Harare at ZB Bank, when she met him. He was transferred to Bulawayo where he moved to Syfrets and then moved from there to Kingdom Bank and finally moved to

Interfin in 2003. By the time of their separation he was running his own company ZENCORP Finance with his sisters.

Defendant said at the time she met him, she was employed as a publisher by a friend of the plaintiff called Jona Mungosi. She later joined another company before joining Anglo American in 1994.

### **Package from Anglo American**

When Anglo American was retrenching she was one of those retrenched and was given a package which she used to start the business which still runs at the present moment. She runs a company called Eco-Pack Wholesalers in which the plaintiff is a 50% shareholder.

Part of the package from Anglo American was used to carpet the Harare house. She rewired and repainted the Harare house. She also bought a 4-plate stove and a refrigerator. To ensure that plaintiff was smart she bought him eight Van Hussein shirts.

When she was still in employment she said she made sure that she would buy him and the children something. She took out a funeral policy with Nyaradzo wherein he and the children were beneficiaries.

Defendant averred that when the plaintiff moved out of the matrimonial house in 2010 he did not assist her in any way with the upkeep of the children. That in fact was accepted by him and was common cause. At the time he left her with the children the first born was finishing form 2, the second born finishing grade 7 and the third born finishing grade 1 all at Petra private school which is one of the most expensive private schools in Bulawayo. Her school fees bill was very heavy. It was so heavy that she was unable to meet her commitment which she had undertaken relating to a payment plan she had entered into with the Bulawayo City Council for rates and water bills. She also had to settle electricity bills.

It was her evidence that she had spend a total of US\$38 000,00 on school fees from the time the plaintiff left the matrimonial home in 2010. She therefore rejected his policy that what he bought with his money during the subsistence of the marriage was his alone.

She testified that when the Bulawayo house was purchased it needed a lot of renovations to be done to it. Her husband went to withdraw from the company's account an amount of three million Zimbabwe dollars. She also soft furnished the house. She put curtains worth 8.5 million Zimbabwe dollars. She had maintained a clean and presentable house from the time it was bought. She ensured that she repaired the borehole each time it broke down. She also ensured that the family maintained a high standard of living which she described as up middle class.

On the other hand her husband did not appear to be open and transparent in his dealings. He did not tell her when he was selling the Harare house and did not even tell her when he was leaving work but only did so during the last month.

The effect of leaving his employment was that the family's standard of living dropped drastically. Yet he insists that he wants to continue with his business which she pointed out to him had landed him into very serious financial troubles. The business had almost gotten several houses being sold. Even his sister's house was nearly sold. The matrimonial house was nearly sold without her knowledge like the Harare house. She had to apply and obtain a caveat to save it.

She complained that she did not have any landed property registered in her name and that she would have no chance of getting a house of a standard the family was living in at present. If the house were to be sold the family's standard of living would be drastically lowered. It would be below the position they would have been in had a normal marriage relationship continued between the parties.

She finally moved that the children be allowed to remain in the house until the last born turns 18 years as she did not want them to leave the house because they already have been traumatized by the divorce.

Under cross-examination she maintained that the suggestion by her husband that he should be awarded the movables in list “A” and she be awarded what is in list “B” would not be fair and equitable. She also rejected the suggestion that he had no source of income at the moment on the basis that he himself had told the court he was now a farmer and she observed that he could even engage the services of an advocate. When she was asked why she had encumbered the house with a caveat she said prospective buyers had started to view the property when she had not been told that the property was on sale and as far as she was concerned it was not on sale. Secondly he once sold the Harare house without her knowledge. Hence, she reasonably feared that he would do it again. So she had to protect her interests and that of the children. She, however, fairly conceded that the caveat inhibited him from obtaining finance. It was her fair concession that when he approached her seeking the upliftment of the caveat she was not willing and referred him to her lawyers.

It came out in cross-examination that plaintiff paid school fees for the children up to 2006 when he left his job. She took over from that time. It was further established under cross-examination that the electricity bill was paid by her because she did a lot of baking. It was further established that although plaintiff occasionally bought food, the buying of food was her domain.

This court finds that the defendant testified in a clear and straight forward manner. Her evidence reads well, in my view. She was a fair witness who made concessions whenever there was a need to do so. She was a reliable witness who was worth to be believed. The same cannot be said about the plaintiff. He was hesitant and prevaricated. He was clearly bent on under playing the contribution made by the defendant. For instance, while accepting that the defendant earned more money than he did from May 1995 to February 1998 he still denied that she had made direct or indirect contribution to the matrimonial estate. This court made a specific finding that he was clearly untruthful. He wanted to have a lion’s share of the matrimonial estate. He was not worth to be believed.

In my view, the plaintiff behaved like an irresponsible father who abandoned his wife and children in 2010 at a critical stage of the children's lives. That is the stage of their education. They were in form II, grade 7 and grade one respectively at Petra one of the most expensive private schools in Bulawayo. The defendant single handedly took care of all their educational requirements for not less than four years yet plaintiff still maintains she did not contribute direct or indirectly to the family's estate.

This court makes a specific finding that the family's standard of living was that of upper middle class which the defendant contributed to maintain during the good days of the marriage. It admits of no doubt that the defendant looked after the home and cared for the family and the normal domestic chores.

The marriage subsisted for 16 years. The plaintiff's suggestion that the defendant should walk out of the marriage with no share in the immovable property is grossly inequitable and untenable. In fact I find that the defendant is entitled to a 50% share therein.

As regards the movable assets defendant had suggested in her plea that the Adam Bede furniture should be sold and proceeds be shared equally between the parties. There are three Adam Bede suits. She requested to be awarded an Adam Bede dining room suite and the second lounge suite. That would leave plaintiff with two Adam Bede suites while she has one. That, in my view, is fair and equitable.

In the result, the order of this court is as follows:

It is ordered that:-

- (1) a decree of divorce be and is hereby granted;
- (2) the custody of the three children be and is hereby awarded to the defendant with the plaintiff having a right to exercise reasonable access on every alternate school holidays and on month ends.
- (3) plaintiff shall be responsible for the said children's:

- (a) school fees
  - (b) school uniforms
  - (c) other school related expenses including examination fees, school trips, consumables etc
  - (d) medical aid until the said children reach the age of 18 or become self supporting whichever occurs first
- (4) the defendant shall be responsible for the following:-
- (i) food and clothing for the children;
  - (ii) transport on a daily basis to and from school;
  - (iii) minor medical expenses relating to drugs;  
until they severally reach the age of 18 or become self supporting whichever occurs earlier;
- (5) the defendant and the three children shall remain and live at number 59 Livingstone Road, Suburbs, Bulawayo until the youngest of them reaches the age of 18 years or becomes self supporting whichever occurs first. Thereafter, the property shall be sold and the net proceeds shared at the rate of 50% for each of the parties;
- (6) the plaintiff shall be awarded the movable assets in paragraph (a) of paragraph 11 of the declaration save for item (i) the Adam Bede dining room suite and (iv) a second lounge suite which shall be awarded to the defendant in addition to the items listed in paragraph (b)
- (7) each party shall bear his or her own costs of litigation.

*Coghlan & Welsh*, plaintiff's legal practitioners  
*Messrs Job Sibanda & Associates*, defendant's legal practitioners