

IAN NDLOVU
versus
PATRICIA NDLOVU (nee SIBANDA)

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15, 16 NOVEMBER 2016 AND 1 DECEMBER 2016

Civil Trial

Z C Ncube for the plaintiff
T Ndlovu for the defendant

MATHONSI J: Their marriage has failed. They both agree that a decree of divorce should be granted. Indeed it cannot be withheld as they have lived apart since year 2003 and he has remarried and is living with another woman. In fact he was already living with another woman in South Africa while she was based in Zimbabwe and she made that discovery when she tried to visit him, only to be banished forever from his lodgings.

They went to courtship when they were working together at Nando's Restaurant in South Africa. He was a manager while she was his subordinate. They then got married on 9 August 1996 at Bulawayo Zimbabwe. The marriage was blessed with one child Bekezela Ronald Ndlovu who has since attained majority status.

At their wedding ceremony they received gifts from well-wishers which included cash amounting to \$11 000-00 (Zimbabwe currency). In September 1997, more than a year after the marriage they acquired the matrimonial home, No 4944 Magwegwe West Bulawayo. It was a three roomed house then but it was improved during the subsistence of the marriage. It is now a four bedroomed house with a lounge and a kitchen. It is fairly comfortable.

While they were still working together in South Africa, they were attacked during the night by armed robbers who were targeting the plaintiff, whom they wanted to shoot. Gunshots

were fired and fearing for her life the defendant jumped from the second or third Floor of the building. She sustained serious injuries – a fractured arm and a fractured leg. Those injuries inhibited her capacity to work as she would be in pain especially in winter. As a result they agreed that she would leave the cold weather in South Africa and return home in Zimbabwe to live in the matrimonial home while he remained there working.

While she was in Zimbabwe the marriage suffered a strain. He stopped providing for her materially even though she lived with and looked after the then minor child of the marriage and his own mother. As she was not employed then she could not afford to buy food or to pay rates and other levies at the house. He became increasingly hostile. Although he was in the habit of viciously assaulting her during the marriage, he scared her more during the time she was living at the matrimonial home. He would come unannounced in the middle of the night, jump over the barriers and when he was finally allowed in he would not sleep but spend the night patrolling around the house.

It was then that she says she decided to return to South Africa to look for employment. The moment she made the decision he demanded that the child be surrendered to him, she capitulated and surrendered the child to him. Since then in 2003, he has retained custody of the child and ordered her not to set foot at his residence. They have remained in separation since then.

On 31 May 2013 the plaintiff instituted divorce proceedings. He sought an order that custody of the then minor child be awarded to him and that the defendant be directed to contribute towards its maintenance at the rate of \$50-00 per month. Regarding their respective proprietary rights he sought an order that they each retain whatever movable property is in their respective possession. He studiously remained silent about the matrimonial home, presumably suggesting that he would keep it for himself given that it is in his name.

The defendant contested the action and filed a counter claim laying claim to the matrimonial home whereupon the plaintiff retorted that;

“That property was purchased by the plaintiff as his sole and exclusive property and is not subject to distribution.”

The parties have since settled all the issues except one which was referred to trial. It is the issue of whether or not the immovable property, being house number 4944 was purchased by the plaintiff as his sole and exclusive property and should not be subject to distribution. It would seem that somewhere along the line the plaintiff underwent some damascene experience because when he testified in court he conceded that the house in question is indeed matrimonial property which is subject to distribution. He however suggested that it should be shared between the parties at the ratio of 70% to himself and 30% to the defendant of the value of the house not in its current form but at its value prior to any improvements being effected on it.

The plaintiff produced a valuation report prepared by Bard Real Estate on 6 March 2015 to the effect that prior to the improvements that were effected on the house it had an open market value of \$15000-00. After the improvements its open market value was at that time \$21 000-00. The plaintiff offered to pay the defendant 30% of \$15000-00.

While conceding that at the time the house was purchased in 1997 he used the \$11000-00 the couple had received as wedding gifts to top up from his personal savings of \$39000-00 to raise the purchase price of \$50 000-00 (all Zimbabwe currency), the plaintiff insisted that he was entitled to 70% of the pre-improvements value because the large part of the purchase price came from his personal savings.

The plaintiff maintained that the defendant is not entitled to the post-improvements value because not only did she not contribute to the improvements, she had deserted the matrimonial home when the improvements were effected. In addition she has not assisted him look after the child of the marriage or look after the house. He however conceded that he does not reside at the house, he never has, and that the house is rented out to tenants. One such tenant known to the defendant because she tried to move back to the house in 2014 before being unceremoniously evicted through a court order, Bhekezakhe Ncube, was paying rent of \$350-00 a month to the plaintiff. He conceded that he did not give the defendant any of the rentals but has singularly benefited from the house since the parties separated.

The defendant also testified. She stated that during the marriage the plaintiff used to severely assault her. At one stage when he was at it again using her as a punching bag, she had

retaliated by using a kitchen knife to stab him in the thigh. When they were working in South Africa they used to pool their resources together to purchase matrimonial assets.

At that time the plaintiff used to operate a motor vehicle which was used as a cross border courier ferrying goods from South Africa to Zimbabwe. Quite a substantial amount of money was made that way. It is that money that was put together with the \$11000-00 wedding gifts and their savings to raise the purchase price of the house. Immediately after the house was purchased, they used the same *modus operandi* to purchase building material and effect extensions to the house succeeding to do most of the improvement in a year or two. By the time she moved back to Zimbabwe around 2001, the extensions had long been completed including the durawall erected around the house.

According to the defendant the house is their matrimonial home, she contributed directly and indirectly towards its acquisition and development and as such she is entitled to a 50% share. She strongly refuted that improvements to the house only commenced after she had left the house. This would not be possible because by then the house was already rented out to tenants for the exclusive benefit of the plaintiff.

Considering the performance of the two witnesses, their demeanor and the probability of their respective stories, I have no doubt that the defendant was a more credible witness. Her case was also assisted by the fact that the plaintiff not only brazenly lied about the house, he also tried to create the false impression that he singularly purchased it without any input from the defendant and only extended it after she had left.

The plaintiff's pleadings are at variance with his testimony. The summons and declaration left the house completely out from the list of matrimonial assets. When he finally testified he tried to down play the contribution of the defendant suggesting that her earnings were so insignificant they made no impact in the scheme of things. When he finally conceded the defendant's contribution he then wanted to limit it to the pre-improvements status of the house.

I am yet to come across a more greedy person than the plaintiff, a man who believes that a wife of 20 years should come out of an abusive marriage where she was rendered almost an invalid by criminals targeting himself should come out of the marriage with only \$7000-00 and a

few movable items of property which are more than thirteen years old. It would be recalled that whatever the applicant got out of the marriage she took in 2003.

I do not agree. As long as the courts are still open and they purport to be the arbiters of fairness and justice between man and man, or between man and woman, or between the powerful and the less powerful, they cannot possibly allow that kind of inequality to prevail. That position has found traction in s26(c) of the constitution which sits comfortably in Chapter 2 of the constitution dealing with national objectives.

It is one of the national objectives of this country that:

“The state must take appropriate measures to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution.”

House number 4944 Magwegwe West Bulawayo was acquired during the subsistence of the marriage using funds obtained from wedding gifts given to the couple and their savings. It is therefore matrimonial property to which this court has a wide discretion in terms of s 7(1)(a) of the Matrimonial Causes Act [Chapter 5:13] to distribute at the divorce of the parties. The factors that the court has regards to in discharging its obligation are set out in subsection (4) of s 7 of the Act. In considering those factors the court must endeavour to place the spouses in the position they would have occupied had a normal marriage relationship continued. Of course it has to have regard to their conduct.

It is now settled that the court approaches the distribution of matrimonial assets starting from a position of 50-50 ownership and only moving away from it if the justice and equity of the case demands that. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (5) 107 C- F; *Ncube v Ncube* 1993 (1) ZLR 39 (S).

The question which arises is whether the justice and equity of the matter demand that we move away from the 50-50 position. *Mr Ncube* for the plaintiff submitted that the court should move to a distribution of 70-30 because the marriage of the parties was from 2003 up to now an empty shell existing only on paper. During the 13 years that the parties lived apart the plaintiff looked after both the house and the child without assistance from the defendant. *Mr Ndlovu* for the defendant submitted that the court should maintain the 50-50 position because since the

defendant was forced out of the matrimonial home, it has been rented out at an average of \$350-00 per month to the exclusive benefit of the plaintiff.

The plaintiff seems to wallow under the false belief that a marriage is some kind of business transaction where the stakes are lined up in such a way that you take out what you invest in monetary terms. Marriage is an institution where the parties invest their lives, emotions and commitment among other things. Noone, except perhaps the demented, would go into a marriage expecting to while up time, possibly make some money and come out of it with their investment.

The plaintiff always had an unfair advantage over the defendant because he courted her as a subordinate and was better paid than her. She however surrendered all her income to him and together they built a home where they intended to live forever. When misfortune befell her after she got badly injured, thanks to the plaintiff, she could not work and was relegated to Zimbabwe leaving the plaintiff to take another wife. He used violence and threats of it, having cowed his wife into submission, to take away the minor child from her.

When she tried to return to the matrimonial home, he evicted her in favour of tenants who paid money to him alone. He has been the sole beneficiary of that house for 13 years at the expense of the defendant. There is no substance in his claim that he effected improvements worth only \$6000-00, if the valuation report is to be believed, after the defendant had left. I have accepted the evidence of the defendant that those improvements were effected around 1998 using the resources of both parties.

In light of the foregoing there is no basis upon which the plaintiff can be entitled to a share more than that of the defendant who also contributed directly and indirectly towards the acquisition and development of the house.

In the result, it is ordered that:

- (1) A decree of divorce be and is hereby granted.
- (2) Each party shall retain whatever movable property is in his or her possession.
- (3) The matrimonial house, being house number 4944 Magwegwe West Bulawayo shall be valued by estate agents appointed by the registrar of this court to determine its current

value after which the plaintiff shall be entitled to pay to the defendant 50% of that value as her share of the said house within 3 months from the date of the valuation.

- (4) In the event of the plaintiff's failure to pay to the defendant in terms of paragraph 3 above then the said house shall be sold by the same estate agents appointed by the registrar of this court and the proceeds shared at the ratio of 50% to the plaintiff and 50% to the defendant.
- (5) Each party shall bear its own costs.

Z. C. Ncube and Partners, plaintiff's legal practitioners
Sansole and Senda, defendant's legal practitioners