

HARRIET ZUZE (nee NOUSENGA)  
vs  
ALEXIO RUFINU ZUZE

HIGH COURT OF ZIMBABWE  
NDOU J  
HARARE 8 January and 8 May 2002

Ms *Bukutani*, for the plaintiff  
Mr *T.P. Kawonde*, for the defendant

NDOU J: The plaintiff instituted a claim for a decree of divorce (with ancillary claims) against the defendant. The parties married each other on 29 March 1985 at Harare in terms of the Marriages Act [*Chapter 5:11*] and the marriage still subsists. Four children were born from the marriage between the parties. Two of the children are majors and the other two are still minors, namely, Alexio Tawona Zuze (born 18 July 1989) and Gwyneth Anna Zuze (born 8 June 1993). The parties are agreed that it would be in best interests of the two minor children if the plaintiff was awarded custody of the said children. Both parties agree that it would be in the best interests of the minor children that the defendant pays maintenance. They differ on the quantum of the maintenance.

The parties agree that the marriage relationship between them has irretrievably broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them. They, however, advance different reasons for the cause of the breakdown. It is common cause that the defendant left the matrimonial home on 29 October 1999 and has not returned since then. The plaintiff prays, on the one hand, that it would be just and equitable that the matrimonial property be shared as follows:

Plaintiff:

- (a) The sole and exclusive award of the matrimonial home No. 9 Kinnord Court, 10 Wicklaw Road, Avondale West, Harare;
- (b) a stove;

- (c) a refrigerator;
- (d) 5 piece bedroom suite;
- (e) double bed and bunk bed;
- (f) colour television set and video (VCR) working;
- (g) a telephone receiver;
- (h) a book case;
- (i) 4 piece lounge suite;
- (j) a dining room suite;
- (k) kitchen table and chairs;
- (l) kitchen utensils;
- (m) a room divider.

#### Defendant

- (a) An Alfa Romeo 33 motor vehicle;
- (b) colour television set and video (VCR) (not working);
- (c) radio with two speakers;
- (d) cassette deck and its stand;
- (e) an amplifier;
- (f) a telephone receiver.

On the other hand the defendant prays that the same matrimonial property be shared as follows:

#### Plaintiff

- (a) 50% of the matrimonial home No. 9 Kinnord Court, Widcklaw Road, Avondale West, Harare.
- (b) a refrigerator;
- (c) 5 piece bedroom suite;
- (d) double bed and bunk bed;
- (e) a telephone receiver;
- (f) 4 piece lounge suite;

- (g) a dining room suite;
- (h) kitchen table and chairs;
- (i) kitchen utensils;
- (j) colour television set and video (VCR) ( not working);

Defendant

- (a) 50% of matrimonial home (as described above)
- (b) colour television set and video (VCR) (working);
- (c) A book case;
- (d) a room divider;
- (e) Alfa Romeo 33 motor vehicle;
- (f) radio with speakers;
- (g) cassette deck;
- (h) an amplifier;
- (i) a telephone receiver.

Both parties testified in support of their respective cases.

(a) The Maintenance Claim

Plaintiff was adamant that the defendant can afford the quantum of maintenance of \$6 000 per month per child. The basis of her conclusion was that the defendant is in receipt of pension of \$5 280,23 per month and also his bank statement reflects deposits of substantial amounts. On this issue I should hasten to point out that this will only be relevant if this court can vary the order granted by the magistrates court. This court cannot deal with variations of maintenance orders of magistrates except in exceptional cases. In the case of *R v de Jager* 1953 (2) SA 197 (T) at 199E ROPER J correctly stated as follows –

“The ordinary rule of law is that an order made by a court can (except by way of appeal or review in a higher court) not be varied except by the court itself;

and in maintenance cases where there is a change of circumstances the court which made the original order must be approached for a variation.”

This principle has been followed and applied in subsequent cases – see *Chibaya v Chibaya* 1985 (2) ZLR 237 (HC); *Hoffman v Hoffman* 1964 (1) SA 746 (C); *Joseph v Joseph* 1958 R v& N 500 (SR) (1958 (4) SA 268 (R) and *Kirk v Kirk* 1969 (2) RLR 328 (GD). In this case the issue of maintenance can only be varied by the maintenance court which made the order in the first place. The plaintiff is free to go to that court for variation. In the circumstances the first issue, i.e. quantum of maintenance, falls away. The only issue left for determination is, therefore, the division of property, especially the matrimonial home.

(b) The Matrimonial Property : No. 9 Kinnord Court: Avondale

In matters of this kind it is seldom possible for the court to ascertain with total accuracy the incomes and contributions of the parties to the joint estate. Section 7(1)(a) of the Matrimonial Causes Act [*Chapter 5:13*] gives the court granting a decree of divorce, the power to order that any asset be transferred from one spouse to the other if in all the circumstances of the case, it is just to do so and is reasonable and practicable way by which to place the spouses in the position they would have been in had a normal marriage relationship continued between them. The parties must make full, frank and clear disclosures of facts to enable the court to determine the assets belonging to each of the spouses – see *Dlamini v Dlamini* HB 27-2000; *Livesey v Jenkins* [1985] 1 All ER 106 at 114 and *Calderbank v Calderbank* [1975] 3 All ER at 340C.

The court has a wide discretion in that any asset may be transferred to achieve the statutory objective of placing the spouses in the position they would have been in had a normal marriage relationship continued between them. The court must have regard to all circumstances of the case including the factors set out in paragraphs (a) and (g) of section 7(3) which involve purely factual findings. The parties should

disclose information which makes clear to the court the following facts to which it shall have regard:

- (a) the income, earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse 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;
- (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 contribution made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses of any benefit, including a pension or gratuity, which such spouse will lose as a result of the dissolution of the marriage; and
- (g) the duration of the marriage – see *Dlamini v Dlamini (supra)*; *Ncube v Ncube* 1993 (1) ZLR 39 (S) and *Takafuma v Takafuma* 1994 (2) ZLR 103 (S).

In the case of *Takafuma (supra)* McNALLY JA (as he then was) stated as follows:

“The duty of a court in terms of section 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in a fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers”, and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in section 7(3) of the Act. Then it will allocate to the husband the items marked “his”, plus the appropriate share of the items marked “theirs”. And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in section 7(3) and consider whether the objective has been achieved, namely, ‘as far as is reasonable and practicable and having regard to their conduct, is just

to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued.’ Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually “his” or “hers”.”

In this case the applicant is a registered joint owner of the matrimonial home Number 9 Kinnord Court, 10 Wicklaw Road, Avondale. In the circumstances the approach is one of starting from a position 50-50 ownership and only moving away from that position if the justice and equity of the case required it. In *Ncube v Ncube* 1993 (1) ZLR 39 (S) KORSAH JA dealt with a similar situation at page 47D – E of the judgment as follows:

“It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.

The approach is to accord her share of that property and then, taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from spouse to the other.” – see also *Chikomba v Nkomo S 62-91*.

In this case the plaintiff adduced unnecessary detailed testimony to establish her contribution. This court has to take into account that she is the registered owner of an undivided half share in the No. 9 Kinnord Court property. It has to be borne in mind that the registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 20:05*] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered – see *Takafuma* case (*supra*) pp 105H to 106A.

In light of the above all I have to consider in respect of the matrimonial home is whether the applicant has proven that the justice and equity of the case required

that I move away from the 50-50 ownership and grant her sole and exclusive ownership of the disputed property. She wants “his” entire half share as well. The defendant is content with the distribution of the matrimonial property on a 50-50 ownership basis. The salient facts in this regard are that when the parties got married on 29 March 1985 they did not own immovable property. They bought the matrimonial property in 1988 through a loan obtained from Central Africa Building Society. This property was transferred into and registered in the joint names of the parties. This is the only immovable property that they have. Repayment of the loan commenced in 1988 by way of monthly instalments deducted directly from the defendant’s salary. In 1994 the plaintiff went on voluntary early retirement. She received a retirement package of \$98 627,31. This amount was deposited into the parties joint Standard Chartered Bank account. Defendant had deposited some unspecified amounts into the same account. Obviously this account showed a healthy balance from which the bond on the matrimonial property was cleared. The loan stood at \$43 500,72 at the time of such clearance. A total of \$51 708,05 had been repaid. According to the plaintiff, the clearance amount came from her retirement package. She stated that the arrangement was that she pays the balance on bond on condition that when the defendant went on early retirement the parties would purchase a second immovable property in the high density suburbs of Harare. She stated that when the defendant eventually got his package in 1997 he reneged on this agreement. It is on this basis that she feels cheated. In the circumstances she feels that she is entitled to “his” half share. The plaintiff did not convince me a credible witness. She lied and deliberately tried to mislead the court on how the repayments were made between 1988 to the time of full settlement. She stated that repayments were made from their joint Standard Chartered bank account when in fact she knew that this was done through deductions from the defendant’s salary. She has failed to establish that it is just and equitable to take away from the defendant what is actually “his” i.e. his half share. The defendant’s position, as alluded to earlier on, is that each party is entitled to a half share of the matrimonial property. But an

adjustment must be made to take into account the fact that the plaintiff invested certain sums in the property. She solely paid off the outstanding \$43 584,72, which they should have repaid jointly. She is, therefore, entitled to claim as a deduction from his half share, equivalent to half of the \$43 584,72 and half of amount of any proven amount of improvement expenses on the property.

(c) The household effects and movable property

In this case the parties are in agreement on the distribution of the following items:

Plaintiff

1. a refrigerator;
2. 5 piece bedroom suite;
3. double bed and bunk bed;
4. a telephone receiver;
5. 4-piece lounge suite;
6. dining room suite;
7. kitchen table and chairs;
8. kitchen utensils.

Defendant

1. An Alfa Romeo 33 motor vehicle;
2. radio with two speakers;
3. cassette deck with stand;
4. amplifier; and
5. telephone receiver.

The only disputed movable property is the

1. colour television set with VCR i.e. the working one;
2. book case; and

3. room divider.

I propose to consider the evidence of the parties on these disputed items. In respect of the colour television set and video; the plaintiff, on the one hand, claims the property mainly on behalf of their minor children. She testified that the defendant can keep and, possibly, repair the non-working colour television set and video. She further stated that the defendant has access to his mother's television set where he is resident. The defendant, on the other hand, said that he requires the VCR for study purposes so that he could play his educational tapes. My findings are that it is just for the working television set and the VCR to be given to the plaintiff who is claiming in the interests of their minor children. It is common cause that the removal of such gadgets will affect the welfare of the children and as such the parent who has custody of these children should have them. In any event the defendant did not challenge the plaintiff's testimony that they bought the colour television set and the VCR specifically for the children.

As far as the room divider and book case are concerned I find that it is just that they be given to the defendant. I am informed in this regard by the amount of property given to the plaintiff.

It is ordered that:

1. A decree of divorce is granted.
2. custody of the two minor children –  
Alexio Tawona Zuze (born 18 July 1989),  
Gwyneth Anna Zuze (born 8 June 1993)  
is awarded to the plaintiff.
3. The plaintiff's claim for maintenance is dismissed.
4. Unless otherwise agreed between the parties, the immovable property described as Number 9 Kinnord Court, 10 Wicklaw Road, Avondale, Harare is

to be sold to best advantage and the nett proceeds are to be divided equally between parties, subject to the adjustment that the plaintiff shall be entitled to set off against the defendant's share for half of the \$43 484,72.

5. The movable property is awarded to the parties as follows:

5.1 Awarded to the plaintiff:

- (a) the refrigerator;
- (b) 5 piece bedroom suite;
- (c) double bed and bunk bed;
- (d) a telephone receiver;
- (e) 4-piece lounge suite;
- (f) dining room suite;
- (g) kitchen table with chairs;
- (h) kitchen utensils; and
- (i) working television set with VCR.

5.2 Awarded to the defendant

- (a) An Alfa Romeo 33 motor vehicle;
- (b) radio with two speakers;
- (c) cassette deck with stand;
- (d) amplifier;
- (e) telephone receiver.
- (f) non-working colour television set with VCR;
- (g) room divider; and
- (h) book case.

6. There will be no order as to costs.

*Mkuhlani Chiperesa*, plaintiff's legal practitioners.

*Kawonde & Company*, defendant's legal practitioners.