

THOMAS TUNGAMIRAI  
versus  
LORRAINE TUNGAMIRAI

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 27 January, 23 & 24 March, 2009 and 29 July 2010

Divorce Action

FAMILY LAW COURT

Mr. *Nyandoro*, for the plaintiff  
Mr. *M. Chingore*, for the defendant

MUSAKWA J: The plaintiff issued summons seeking a decree of divorce and a division of the matrimonial estate. The defendant in turn, counter-claimed for a decree of divorce and the division of the matrimonial estate of which the major claim is a fifty percent share in house number 5 Rainbrant Close, Strathaven, Harare.

At the pre-trial conference the parties agreed that the defendant's issues be referred for trial. These were-

- (a) What property was acquired during the course of the marriage.
- (b) What is a just and equitable distribution of the property that was acquired during the course of the marriage.
- (c) What is reasonable maintenance for the minor child Julie (born on 29 November, 2005).

The parties had agreed that custody of the minor child be awarded to the defendant. During the course of the trial the issue of maintenance for the minor child was settled. The same applies to the division of the movable property which the plaintiff conceded should all be awarded to the defendant. The only remaining issue is whether house number 5 Rainbrant Close, Strathaven, Harare constitutes matrimonial property and if so, how it should be apportioned.

The parties got married in 2003. The plaintiff testified that problems commenced a few months into the marriage. The parties would separate for a few days until in 2006 when the defendant went away with their child for more than two months.

It was the plaintiff's testimony that as from June 2006 they started living apart although they remained under the same roof. Summons were issued in January 2007 and the defendant moved out during the same month. The plaintiff obtained a loan from his employer in August 2006 and purchased the Strathaven house. He produced all relevant documentation in respect of the purchase and transfer of the immovable property. The agreement of sale shows that the transaction was concluded in August 2006. The loan was serviced from deductions from his salary. It was his evidence that the house was identified through a mutual friend to the parties.

The plaintiff further told the court that prior to their marriage the defendant was employed by Nissan Zimbabwe and subsequent to their marriage she was no longer employed. Prior to the marriage the plaintiff was staying in the United States of America. Three weeks after the wedding they went to stay at his in-laws' place for about two months. Thereafter they moved to his parents' house in Kambanji.

As regards his employment history the plaintiff told the court that he first worked for a company that dealt in satellite technology called Integrated Digital Technology. Thereafter in January 2004 he formed a company dealing in similar business called Trinity Networks. He also worked for a financial services company. As for his earnings he said it was difficult to say. He got employed by the Reserve Bank of Zimbabwe around June/July 2004.

It was during cross-examination that the plaintiff confirmed that they had agreed that each party provides maintenance for the minor child in the sum of US\$275. He also offered to meet half the costs of their child's creche fees. In addition, he confirmed that the defendant could have all the movables.

On the other hand the defendant testified that prior to the marriage she worked for Nissan and left for AMC in 2001. Later she also sold vehicles on behalf of Borrowdale Car Sales as well as Eastlea Motors. Prior to marriage she purchased a Nissan Sunny

vehicle for the plaintiff as well as a cell phone and line. She was engaged in a variety of income generating activities like selling cement, furniture and clothes.

When they rented the Kambanji house from her in-laws she is the one who paid the rent. It was her evidence that she even effected some improvements like the erection of pillars and bird baths. The plaintiff occasionally purchased some groceries. He was said to be given too much drink and had an obsession with buying vehicles for himself.

The defendant testified that she encouraged the plaintiff to secure a loan from the Reserve Bank. She assisted in scouting for a suitable house. As a result they went to view a house in Christon Bank and a stand in Nyanga. She also told her friend Portia and Julie her hairdresser.

Around June or July 2006 the defendant was given the telephone number of Mrs Du Toit. The house that was being rented by Portia through Julie was up for sale. She and plaintiff went to view the house. The defendant then discovered that the plaintiff was having an affair with her former maid of honor.

According to the defendant when summons for divorce were served on her in February 2007 they were now using separate bedrooms. She was adamant that between the purchase of the house and January 2007 they were still living as husband and wife. She had agreed that the house be registered in plaintiff's name. She wants a half share as she looked after the plaintiff before they got married. In addition she claimed that her income went towards the family's subsistence as most of the plaintiff's salary went towards loan repayment.

Julie Zieve also testified to the effect that she has known the defendant since she was twelve years old. She confirmed that a client of hers, Mrs Du Toit indicated that she wanted to sell her mother's Strathaven house. She gave Mrs Du Toit's contact details to the defendant.

In his submissions Mr *Nyandoro* pointed out that by virtue of registered title the house belongs to the plaintiff. In support of this he cited the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC). He further submitted that the defendant did not prove the extent of her indirect contribution. The defendant also did not tender proof of her earnings. In this respect it was Mr *Nyandoro*'s submission that the defendant was not

entitled to a share of the property since the evidence only shows that she took care of the plaintiff for three months before their marriage.

On the other hand Mr *Chingore* submitted that the plaintiff was bound by his pleadings in which he denied owning the house. The claim that the house was acquired when the parties had separated is not part of the plaintiff's pleadings. Hence, he submitted that the defendant made her case and was entitled to a 50% share of the house.

Applying the approach in *Takafuma*'s case the house in issue is that of the plaintiff. That is so notwithstanding that the plaintiff sought to suggest that he does not own it. The evidence available is that the house is registered in his name. Regarding registration of title this is what McNALLY J.A had to say *Takafuma v Takafuma supra* at pp 105-106:

“The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of "real right" in s 2 of the Act. The real right of ownership, or *jus in re propria*, is "the sum total of all the possible rights in a thing" - see Wille's Principles of South African Law 8 ed p 255.”

Notwithstanding the above, that is not the end of the matter because of s 7 of the Matrimonial Causes Act [*Cap 5:13*] which provides that:

“(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) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.

(2) An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection—

(a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;

(b) confer on any trustees of any property which is the subject of the order such powers as appear to the appropriate court to be necessary or expedient.

(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 and 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 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.”

It is also not in doubt that the purchase of the house was funded through the plaintiff’s employer. The loan was deducted from the plaintiff’s salary. What has to be determined is the extent of the defendant’s indirect contributions. It does not really matter whether the house was purchased before or after the parties had separated. This is so because of s 7 of the Matrimonial Causes Act. Suffice though to note from the evidence before me that the defendant’s evidence regarding how the house was purchased was not discredited. The defendant could not have made efforts to negotiate the purchase if the parties were already living apart as the plaintiff wanted the court to believe.

The only shortcoming in the evidence before me is the extent of the defendant's indirect contribution. No proof of her income was tendered. Even proof of the household expenses she incurred was not tendered. The same shortcomings apply to the plaintiff's evidence. For example the plaintiff could not state his earnings prior to joining the Reserve Bank. Even his income at the Reserve Bank was not stated. Nonetheless, the defendant wants a half share without having taken into account the provisions of the Act especially regarding the direct or indirect contributions towards the home and family. However, despite the lack of evidence regarding the extent of the defendant's contribution the court has a wide discretion by virtue of s 7.

The provision in question was given consideration in the case of *Ncube v Ncube* 1993 (1) ZLR 39 (SC) in which KORSAN J.A. had this to say at pp 43-44:

“For the determination of what is a fair and just division, apportionment or distribution, so as to place the spouses in the position they would have been in had a normal marriage relationship continued between them, consideration must be given to all the surrounding circumstances including, but not limited to, the matters specified under s 7(3) of the Act.

Clearly, there is a difference between the phrases "assets of the spouses" and "family assets", which latter phrase the learned MASTER OF THE ROLLS said in *Wachtel v Wachtel supra* "refers to those things which are acquired by one or other or both of the parties, with the intention that they there should be a continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole". The English authorities abundantly establish that in respect of "family assets" a spouse cannot reap where he or she has not sown and that to deserve a share of such assets a spouse must have contributed money or money's worth. See *Wachtel v Wachtel supra* at p 837f.

Notwithstanding this difference between the phrases "assets of the spouses" and "family property", the provision by s 7(3) (d) that, in the distribution of the assets of the spouses, regard must be had to the direct and indirect contribution made by each spouse to the family, seems to me to suggest that it is only in very exceptional circumstances that a spouse may benefit from assets to which he or she has not contributed money or money's worth.

I am in agreement with the learned trial judge that the rationale for taking into consideration the matters specified under s 7(3) of the Act is to empower the courts to prevent a spouse from acquiring a morally indefensible financial advantage from the failed marriage. To achieve this, the court must take an overall view of how justice can best be achieved between the parties. See *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 992D-F; *Archer v Archer* 1989 (2) SA 885 (E) at 894A.”

In making a determination on this issue the court will take into account that the marriage between the parties was of limited duration as it did not last four years. Of those four years the house was purchased towards the end of that marriage. I will take into account that the defendant contributed towards the upkeep of the family although the extent of such contribution is not known as no figures were adduced before the court.

I will also take into account that the parties never lived in the house in question. Both parties are gainfully employed although the plaintiff indicated that his salary is quite low on account of the economic set-up currently prevailing. However, that does not discount the prospects of better earnings in the future. Therefore, in terms of future earning capacity I would say the parties' circumstances are evenly balanced.

However, in terms of resources or assets at the disposal of the parties, the plaintiff would be in a better position by virtue of his ownership of the house. Had the marriage relationship between the parties continued, the defendant would have benefited from the house even if she was not a part-owner. The manner in which she could have benefited would be varied. It could have been from occupation as matrimonial home or from proceeds of rentals if they decided to lease it. However, taking into account the limited duration of the marriage and the unproven extent of the defendant's indirect contribution I would award her a fifteen percent share of the house.

In the result it is ordered as follows-

- a) That a decree of divorce be and is hereby granted.
- b) All movable assets that were in dispute be awarded to the defendant.
- c) Custody of the minor child, Julie Tungamirai (born 29 November 2005) be awarded to the defendant with the plaintiff having reasonable rights of access.
- d) The plaintiff shall provide maintenance for the minor child at the rate of US\$275 per month until the child attains the age of eighteen years or becomes self-supporting, whichever occurs earlier.
- e) The plaintiff shall pay half of their minor child's school fees until the child attains the age of eighteen years or becomes self-supporting, whichever occurs earlier.

- f) The defendant is awarded a 15% share in house number 5 Rainbrant Close, Strathaven, Harare.
- g) Each party shall bear their respective costs.

*Musunga & Associates*, plaintiff's legal practitioners

*Chingore & Associates*, defendant's legal practitioners