

PETER MUTENDA

versus

MEDIA MUTENDA

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 29, 30 January 2009 and 5 August 2010

FAMILY LAW COURT

Divorce Action

V. Muza, for the plaintiff

T. Govere, for the defendant

MUSAKWA J: The parties are agreed that the marriage relationship has irretrievably broken down. They settled ancillary issues on custody, maintenance and sharing of movables. The only outstanding issue is the division of the immovable property at the centre of the dispute.

Although the defendant is the one who initiated the divorce proceedings, she subsequently withdrew her claim. The plaintiff, who had filed a counter-claim, persisted with his suit. It is therefore convenient to refer to the original defendant as the plaintiff and the original plaintiff as the defendant.

The plaintiff testified that they married in 2002. He is a property analyst with Kingdom Financial Holdings. He confirmed that they settled all other issues other than that of the immovable property.

The matrimonial home was purchased when he was a valuer with Beverley Building Society. He obtained a staff mortgage in October 2000. It was a 100% loan that was deducted

from his salary. The interest was concessionary at a rate of 12, 5 % per annum. The plaintiff produced copies of pay slips to show the deductions that were made. Transfer of title was effected in December of the same year.

According to the plaintiff the defendant only started to work in 2001. She got a job as a property negotiator with Eagle Estate Agents. She was not in receipt of a regular salary but was paid a commission based on a concluded sale. She could go for three months without concluding a sale. The few sales she concluded were jointly concluded with other employees. He therefore subsidized the defendant apart from also paying the rates and fending for the family.

The plaintiff further testified that between February and June 2003 the defendant worked for an interior decoration company. She earned a small basic salary and was also to be paid a commission. However, she was said not to have concluded any sale. In August 2003 she got a job with National Social Security Authority. She worked there until February 2004. Thereafter she got a job at the Births and Deaths Registry and was deployed to Concession. Sometimes he had to offer her a car and fuel as her salary was low.

When the defendant was working for Eagle Estate Agents she secured a loan with which she paid a deposit towards the purchase of a stand in Ruwa. The plaintiff made the repayments on her behalf. They subsequently sold the stand. According to the plaintiff the money they realized was not substantial as they used it for payment of school fees and to meet other needs. He was adamant that they disposed of the stand after he had paid off the mortgage.

The mortgage on the house was paid off in December 2004. The plaintiff estimated his contribution at 80%. Currently the plaintiff occupies the main wing whilst the defendant and the children occupy the guest wing.

Although the parties had agreed that the marriage has irretrievably broken down, the plaintiff resuscitated the cause of breakdown. He insisted that the defendant infected him with an incurable sexually transmitted infection in 2004. On this ground he insisted that the defendant could not be awarded an equal share in the house.

The plaintiff also confirmed that since the fallout he has formed a relationship with another woman with whom he has a child. He preferred to be given an option to buy out the defendant's share failing which the house should be sold and the proceeds shared in accordance with his evidence regarding their respective contributions. He stated that he would be able to buy out the defendant's share within twelve months.

The defendant testified that they used to reside in Mutare. When they relocated to Harare she quit her job. She had to look for employment in order to supplement the plaintiff's income as it could not meet all their needs. Although she conceded that whilst at Eagle Estate Agents she did not earn a basic salary, she stated that she did not spend more than three months without concluding a sale. She claimed that she was paid commission at the rate of forty percent. Thus she worked for Eagle Real Estate between 2001 and 2003. She quit because she could no longer secure clients. She then joined Looking Glass where she was in receipt of a basic salary and commission. Her stint with looking Glass was for four months. They combined their earnings.

After Looking Glass the defendant worked in the data capturing department at National Social Security Authority (NASSA). She claimed that she earned a good salary and that her bank book was kept by the plaintiff. In August 2000 she joined the Registrar-General's Office where she worked in The Births And Deaths Registry. At the time of trial she worked for Motor City Ford.

Apart from confirming the various engagements with the different employers as stated by the plaintiff the defendant also told the court she did household chores like cooking, washing, ironing and gardening. This was on account of the size of the house which she said a single maid could not cope with on her own.

The plaintiff sought to make an issue of the defendant's misconduct during the course of marriage. In his pleadings he claimed that the defendant had infected her with an incurable sexually transmitted disease. Despite the parties agreeing that the marriage had irretrievably broken down, the plaintiff took up the issue of infection during trial. He sought to argue that the

defendant should be penalized on account of this act of infidelity. During her testimony the defendant countered that in 2005 she discovered that the plaintiff was having an affair with a certain woman who was enrolled at Mkoba Teachers College. She also claimed that the plaintiff fathered a child with another woman during the course of their marriage.

Although the defendant confirmed that she was diagnosed to be infected with a venereal disease, she denied being the guilty party. When the plaintiff found out that he was infected he demanded that the defendant should go for a medical examination and that is how she discovered that she was infected. However, taking into account the plaintiff's admission of fathering a child with another woman during the course of his marriage to the defendant, it cannot be concluded that the defendant was the source of the sexually transmitted infection. The plaintiff was already having another affair with the woman as evidenced by the offspring he sired. It cannot be mere coincidence that the same woman from Gweru is the one with whom the plaintiff is currently staying following the fallout with the defendant. To put it figuratively, the plaintiff was already staying in a glass house and is seeking to throw stones at the defendant. The maxim caveat fornicator could equally apply to the facts of this case.

In his address Mr *Muza* submitted that since the house is registered in plaintiff's name it is legally his. In support of this submission he cited the case of *Takafuma v Takafuma* 1994 (2) ZLR 94 (SC). He further submitted that the parties should be awarded in terms of their contributions. In this respect he cited the case of *Ncube v Ncube* 1993 (1) ZLR 39(SC).

Although Mr *Muza* conceded that the defendant made non-financial contributions he also pointed out that the parties employed a maid. He submitted that the defendant's evidence on the nature of her contributions was generalized as she did not produce any pay slips or other supporting documentary proof. Mr *Muza* also submitted that the defendant should not benefit from a marriage whose end she precipitated by virtue of the sexually transmitted infection. In his view the defendant should be awarded a twenty percent share. Mr *Muza* also submitted that the court has discretion to order that the plaintiff should provide the defendant with accommodation similar to the one she is currently occupying for the sake of the children.

On the other hand Mr *Govere* submitted that the defendant should be awarded a fifty percent share. He based this on the duration of the marriage as well as the fact that the defendant was gainfully employed and did other domestic chores for the family. He also submitted that the evidence before the court was inconclusive regarding who between the parties was responsible for infecting the other with a venereal disease. Above all Mr *Govere* submitted that the court should apply s 7 (4) of the Matrimonial Causes Act [*Cap 5:13*] in making a determination on the distribution of the house.

The starting point to note is that in determining a division of assets following a divorce the court has a wide discretion by virtue of s 7 (1) of the Matrimonial Causes Act which provides that-

“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.”

On the other hand, to give effect to s 7 (1) ss (4) provides that-

“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.”

There is no doubt that the house in question was solely purchased through a loan obtained by the plaintiff from his employer. The loan was deducted from his salary. The only issue is the extent of the defendant’s indirect contributions.

The first thing to note is that the defendant was not constantly employed during the subsistence of the marriage. She changed jobs frequently. She did not give evidence on what she earned with the various employers. That notwithstanding, she insisted that she is entitled to fifty percent of the house by virtue of her indirect contribution as well as the duration of the marriage. The marriage was of limited duration as it did not last more than four years. From the available evidence the parties have not lived as husband and wife since 2004 when they made accusations and counter-accusations of infidelity against each other.

In view of the parties’ respective occupations and taken that the matrimonial property is registered in the plaintiff’s name, it is clear that the plaintiff has better resources than the defendant. The court should endeavor to place the parties in the position they would have been had a normal marriage relationship continued. In this case the defendant would have continued to enjoy the use and comfort of the matrimonial home. However, in light of the limited duration of the marriage and the lack of direct contribution on the part of the defendant I am satisfied that her share does not amount to fifty percent.

I am mindful that it is not easy to quantify the indirect contribution of a spouse who apart from being formally employed also doubles as wife, counselor and a jack of many trades within the home. But the duration of a marriage is a useful guiding factor. The longer the marriage the greater the value of indirect contribution such that it is unavoidable to award the parties equal shares.

S 7 (4) was applied in the case of *Usayi v Usayi* 2003 (1) ZLR 684 (S) which both counsels referred to. In that case the parties had been married for thirty nine years. The husband had sold the matrimonial home by the time the divorce was granted. This was despite the husband having been interdicted from disposing of the house pending the outcome of the divorce process. The parties were awarded equal shares of the proceeds of the matrimonial home.

On appeal ZIYAMBI J.A had occasion to comment on s 7 (4) and stated as follows at p 688-

“.....The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for thirty nine years faithfully performed her duties as wife, mother, counselor, domestic worker, housekeeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In light of these many and various duties, how can one say, as is often remarked: “throughout the marriage she was a housewife. She never worked”. In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of ‘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.’ A fair approach is that set out by Professor Ncube in his book *Family Law in Zimbabwe*. At p. 178 he said:

“Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife. As Gray aptly puts it:

‘A just and realistic evaluation of her efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and non-financial contributions to the acquisition of matrimonial assets.’

Thus the evaluation process should not seek to determine how much a house keeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife’s cooking, washing and rearing of children as compared to, say, a government minister’s work. The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family.”

The learned judge adopted this approach. At p 110 of the record, she said:

“This, in my view, is a proper case in which to adopt the approach set out by Professor Ncube in his book whereby it should be presumed that the plaintiff assumed equivalent, though different duties, which were equally beneficial to the welfare of the family. It is she who for many years was left at the communal home as sole custodian of the children, in charge of the family. In that role, she enabled her husband, the defendant, to engage in the academic pursuits abroad which placed him in a position to improve the family’s standard of living. It is her contribution on the domestic front which freed her husband to work outside the home. But for her efforts, the home and family may not have remained intact. Such a contribution cannot be undervalued. She is over 60 years of age and has no income of her own. By virtue of her age and lack of training, she has no prospects of obtaining employment.”

In my view, no basis has been shown for altering the judgment of the High Court. The appeal is therefore dismissed with costs.”

In my view, the above approach is fair as it is not possible to quantify a spouse’s indirect contribution during the course of a marriage. However, in the present case the defendant was also relying on direct financial contributions since she was employed. It is only the nature of her earnings that was not proven. It should have been possible for her to prove her earnings in order to assist the court in assessing how the earnings compared to those of the plaintiff as well as how those earnings, combined with the indirect contributions of a wife and mother compared with those of the plaintiff. Obviously, had the marriage lasted considerably long, the proportion of her share should have increased considerably. Based on the duration of the marriage I am of the view that the defendant is entitled to a thirty percent share of the matrimonial home. I have taken into account that the plaintiff offered to secure alternative accommodation for the children comprising two bedrooms within Waterfalls.

It is therefore ordered as follows-

- a) That a decree of divorce be and is hereby granted.
- b) That custody of the minor children, Chiedza Mutenda (born on 25 July 2000) and Shawn Mutenda (born on 24 July 2005) be and is hereby granted to the defendant with the plaintiff exercising rights of access in terms of the settlement reached prior to trial.
- c) That the plaintiff shall pay the children’s school fees and other school related expenses until the children attain the ages of eighteen years or become self-supporting whichever occurs earlier.

- d) The plaintiff shall provide groceries for the minor children in terms of the deed of settlement dated 3 February 2009.
- e) The plaintiff and the defendant shall share the costs of the children's clothing until the children reach the ages of eighteen years or become self-supporting whichever occurs earlier.
- f) The plaintiff shall secure two bed roomed accommodation for the minor children within the Waterfalls area before they leave the matrimonial home.
- g) The movable assets shall be shared in accordance with a settlement reached by the parties prior to trial.
- h) The plaintiff is awarded a seventy percent share of subdivision A of Lot 20-23 Inclusive Parktown Extension Of Upper Waterfall whilst the defendant is awarded a thirty percent share.
- i) The Registrar shall appoint an estate agent for valuation of the matrimonial home. The costs of valuation shall be borne by the parties in proportion to the shares awarded to them.
- j) The plaintiff is given an option to buy out the defendant's share within twelve months from the granting of this order failing which the property shall be sold to best advantage on the open market with the parties sharing the net proceeds in proportion to the shares awarded to them.
- k) That each party bears their own costs.

Muza & Nyapadi, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners