

CHARLES MAKANI
versus
GERTRUDE SOPHIA HAZVINEYI MAKANI (NEE ZIMONDI)

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 5, 9 OCTOBER, 4, 11 NOVEMBER 2009 & 22 APRIL 2010

FAMILY LAW COURT

Divorce action

M. Motsi, for the plaintiff
J. Zuze, for the defendant

GUVAVA J: The plaintiff and defendant married on 28 June 2002 in Finland. No children were born of this union. In December 2007 the plaintiff moved out of the matrimonial home and on 30 April 2008 he issued summons out of this court seeking a decree of divorce and other ancillary relief. The defendant opposed the claim on the basis that the marriage had not broken down. She also claimed movable property and an immovable property known as Stand 9 Dorset Road, East Avondale Harare. At a pre trial conference held before a judge in chambers the defendant applied to amend her plea by including four other immovable properties and a list of movable property for distribution. She also sought an amendment to her claim to number 9 Dorset Road, East Avondale to an award of any of the properties. This amendment was granted by consent at Pre-Trial Conference by KUDYA J on 6 February 2009. At the hearing it was conceded by the defendant that the marriage between the parties has irretrievably broken down. The issues which were thus before the court for determination were:

1. What constitutes the parties matrimonial estate; and
2. How the property should be distributed.

The issue of the assets was seriously contested and the parties did not agree on anything. The plaintiff's position was that the property was not matrimonial property and in any event defendant had made no contribution towards their purchase. The defendant on the other hand took the view that the property was matrimonial property and she was entitled to a share.

The plaintiff testified that he married the defendant under customary law on 2 February 2002 and registered the marriage in June 2002. He stated that it was a short unhappy marriage characterized by abuse by the defendant of his father and children. He had terminated his first marriage to Maseline Makani on 15 January 1999. He and his ex-wife purchased number 9 Dorset Road for their daughter Diana. The property was purchased in May 2001 and registered in her name on 6 July 2001. This was well before he started dating the defendant. When the plaintiff married the defendant he was living at number 46 Masocha Ndhlovu Road Hatfield. The property is registered in the name of Tarbell Trust which was established in 2001. The beneficiaries of the Trust are the defendant's children. He denied that he owned a property at number 9 Kirsten Borsch Mews in Josiah Chinamano Avenue. He stated that he tried to purchase it but the agreement fell through because he had insufficient funds. Buckingham Gate was acquired in early 2002 and it is registered in the name of Tarbell Trust. Stand 7740 Tynwald was acquired in 1999. He does not have title to the property though the agreement of sale was signed in 2000. Stand 1120 Prospect Township was acquired by the plaintiff in 1997 he purchased it together with his first wife who is now late. It was transferred into his name in 1999.

He denied that any of these properties were purchased with the defendant as at that time she was married to another person. It was the plaintiff's evidence that the property thus did not constitute matrimonial property and was not available to the defendant for distribution. With regard to the movable property plaintiff stated that he bought the furniture for the comfort of his children. He denied that the defendant had contributed in any way towards the purchase of the property listed in the defendant's plea. He however said the defendant could have the bed if she wanted it. He also stated that the Prado was a company vehicle although he had been offered an option to purchase it for the sum of US\$35 000. He stated that the defendant could exercise his option to purchase the Prado if she wanted it. He stated that although he drives the Mercedes Benz it did not belong to him but to a company known as Linridge Trading (Pvt) Ltd. He produced the registration book for the motor vehicle. He stated that it is not part of the matrimonial property as he is not a shareholder of the company concerned. He stated that he merely does consulting work for the company and he drives the motor vehicle as part of his benefits.

The defendant testified that she met the plaintiff in 1996 and they started dating. He married her in accordance with African custom on 17 March 2001. She was living in Finland

at the time and had come home on a visit. She returned to Finland on 17 March 2001. They were supposed to register the marriage in June 2001 but they failed to do so due to some problems. They eventually registered their married in June 2002. In 2001 the plaintiff was staying in Hatfield. He then suggested that they purchase a house. At the time she had received 50 000 Finnish marks which translated to about US\$20 000. She gave the plaintiff US\$10 000 towards the purchase of a house. When she returned to Zimbabwe in January 2003 number 9 Dorset Road had been purchased. She assumed that it had been purchased from some of the money she had given plaintiff. She only learnt later that it was registered in the name of Diana his daughter.

She stated that the Tynwald property and stand 1120 Prospect were purchased as undeveloped stands. The properties were subsequently developed in 2003 after the parties married. She stated that she assisted by delivering building materials to the stands. The property at number 9 Kirsten Bosch Mews was purchased after they were married. She stated that at some stage they furnished the property as they were letting it out to a tenant. She was however unable to disprove plaintiff's assertions that he did not eventually purchase the property. Buckingham gate was also purchased after they were married but she does not know when it was bought.

With respect to the movable property she stated that they purchased household furniture together with the plaintiff. She stated that they purchased the washing machine, microwave oven, Technics Hifi, two leather lounge suites, two stoves, six television sets, a bedroom suite, three VCR, a DVD player, Dual decoder, a dining room suite, a Prado and a C200 Mercedes Benz. She conceded that she had not contributed financially towards the purchase of these goods but they were purchased during the subsistence of the marriage. She personally purchased the radio in the bedroom, three sewing machines, one over locker, a water purifier dispenser and one corner display. She stated that the chariot Mitsubishi motor vehicle was purchased by the plaintiff for her on her fortieth birthday. She said she would accept the items offered to her by the plaintiff in the declaration though she was of the view that she should be awarded a bigger share.

She further testified that she looked after the plaintiff's father and his children from previous relationships as they did not have children of their own. Plaintiff's work involved a lot of traveling outside the country and at times he would be away for a month whilst she looked after the family. She denied that she had ill-treated the plaintiff's father or his children. She

explained that plaintiff's father was very ill in the last year of his life and the burden of feeding him and changing his diapers fell on her shoulders.

She stated that although she did not contribute directly towards the purchase of the property bought during the marriage she worked as a dressmaker and supplied pyjamas to a Mr Patel. She realized an income of about US\$1 500 to US\$2 000 per month from her sales. She stated that she used her income to look after the family.

The plaintiff gave his evidence well. He gave full explanations both in his evidence in chief and when questioned in cross examination. His evidence was supported by documentary evidence and even where it was not so supported it was plausible and coherent. It was apparent from plaintiff's evidence that he has worked hard in his life and has accumulated considerable wealth. His prime preoccupation appears to safeguard this property for his children. In order to achieve his purpose he established a Trust and he used this as a vehicle to own the immovable property that he has acquired. Although he alleged that the defendant ill treated his children he was unable to give any specific explanation other than that she denied them cereal when he was not there.

The defendant on the other hand did not strike the court as an honest witness. She did not take the court into her confidence at all. She stated in her summary of evidence that she was in possession of the marriage certificate but at the hearing she denied that she had it. She told the court that she could not read English and at some stage in the proceedings sought the services of an interpreter to interpret a document for her but after a few minutes she had forgotten and was reading documents on her own. She told the court that she gave the plaintiff US\$10 000 as her contribution towards the purchase of number 9 Dorset Road Avondale. She however could not produce any proof of transfer of the amount or if she withdrew it in cash any proof of withdrawal.

Most of the information in her testimony was elicited through cross examination as she had provided very little information in her evidence in chief. Her evidence was tainted with so many inconsistencies that I found it difficult to believe her. I will therefore in determining the issues before me accept the plaintiff's evidence over that of the defendant whenever there is a conflict of versions.

It is not in dispute that the marriage between the parties has irretrievably broken down. The defendant in her pleadings had disputed this fact but during the course of the hearing conceded that the marriage had broken down. In the case of *Ncube v Ncube* 1993 ZLR (1) 39

this court stated that where the parties to a divorce are in agreement that their marriage has broken down there is no reason for the court to inquire into the reasons for the breakdown. This follows the promulgation of the Matrimonial Causes Act [*Cap 5:13*] which removed the question of fault in divorce proceedings as part of our law.

It was quite apparent from the evidence that the marriage had broken down. The parties have been living apart since 2007. There is a peace order in existence as between the parties. The plaintiff has moved on and is now living with someone else. It would seem to me that the plaintiff is therefore entitled to a decree of divorce.

The plaintiff submitted that all the movable and immovable property that the parties have was acquired before he married the defendant and therefore does not constitute matrimonial property. He argues that it should therefore not be distributed upon divorce.

Section 7(3) of the matrimonial Causes Act provides as follows:

- "(3) The power of an appropriate court to make an order in terms of para (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".

It seems to me that a proper interpretation of this provision allows a court, in making an award, to take into account all the property acquired by the parties whether before or during the marriage provided that it does not fall in the exceptions outlined in the section. I take this view because s 7 (4) of the Matrimonial Causes Act does not just look at the question of contributions when a court is called upon to distribute property upon divorce. The court is enjoined to take into account all the factors which are set out in subsection 4 and then make an equitable distribution. Clearly it was the intention of the legislature to include all the property owned by the parties. The whole thrust of s 7 of the Matrimonial Causes Act is to place the parties as far as is reasonable and practical in the position they would have been had the marriage relationship continued between them. A property may only be excluded from consideration if it was inherited, acquired in terms of custom or it is of sentimental value to a party. The plaintiff has not sought to rely on any of these exceptions. His only argument was

that he acquired the property prior to his marriage to the defendant. That in itself is not in my view sufficient and all property proved to belong to the plaintiff would fall for distribution in terms of s 7.

It was apparent from the evidence that some of the immovable property claimed by the defendant did not belong to the plaintiff. House number 9 Dorset Road Avondale was purchased in May 2001. It is registered in the name of Diana Kumbirai Makani who is the plaintiff's daughter. Whilst the defendant was aware that the property was registered in Diana's name she did not seek to join her as a party to the proceedings. The defendant's evidence in relation to how and when she gave the plaintiff the money for the purchase of this property was not convincing and was totally unsubstantiated. I thus accept the plaintiff's evidence that this property does not constitute matrimonial property.

Stand 9 Kirsten Borsch Mews was allegedly purchased during the subsistence of the marriage. However there was no evidence produced to show that this property exists. The defendant stated in her discovery affidavit that she had the title deeds to the property but she failed to produce them at the trial. During her evidence in chief the defendant persisted that the property was purchased and is still owned by the plaintiff. However in cross examination she conceded that she had carried out a search at the deeds registry and had failed to find the property registered either in the plaintiff's or the Trusts name. I thus accept the plaintiff's evidence that he had indeed tried to purchase the property but the negotiations had collapsed after the owner kept increasing the purchase price.

The flat at Buckingham Gate is owned by Tarball Trust. Although the defendant sought to argue that it belonged to the plaintiff there was overwhelming evidence that it was registered in the name of the Trust. There was no evidence that it was ever registered in the name of the plaintiff and that he had transferred ownership to the Trust merely to defeat a claim by the defendant. I thus find that this property does not constitute matrimonial property.

Stand 1120 Prospect Township of Subdivision C of Prospect situate in the District of Salisbury is registered in the name of the plaintiff. The plaintiff stated that he had purchased the property in 1997. He did not dispute the defendant's evidence that it was an undeveloped stand at that time and that it was only developed after he married her. In the absence of any evidence to the contrary I accept the defendant's evidence that she had assisted during the development of this stand. She told the court that she would purchase building material if plaintiff was not present and supervise the builders. She worked as a dressmaker and brought

an income into the household. She stated that although she did not contribute directly into the construction of the stand she gave her time and labour.

Stand 7740 Tynwald was purchased in 1999. The plaintiff stated that he does not have title to this property but accepted that it was owned by him.

In my view stand 1120 Prospect Township and stand 7740 Tynwald and all the movable property would fall for distribution as these are all matrimonial property. It is now settled that in order for the court to achieve an equitable distribution it must take into account all the factors that are set out in s 7 (4) of the Matrimonial Causes Act. In making the award the court must endeavor to place the parties in the position they would have been had the marriage continued. In *Shenje v Shenje* (supra) GILLESPIE J stated that the court must consider all the factors set out in s 7 (4) of the Matrimonial Causes Act. He stated as follows at page 163 of the judgment:

"The factors listed in the subsection deserve a fresh comment. One might form the impression from the decisions of the court that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognize that the legislative intent and the objective of the courts, is more weighed in favour of ensuring that the parties needs are met rather than that their contributions are recouped."

There can be no doubt that all contributions are important in a marriage whether they be material or otherwise. Some contributions are not even tangible as they relate to the moral support given to a husband as he goes about his work and ensuring that he comes to a comfortable and happy home. Although such contributions cannot be quantified in any monetary terms they are no doubt important in the building of a happy marriage. In *Hatendi v Hatendi* (supra) the Supreme Court emphasized the wide discretion accorded to the court in the division of matrimonial assets and stated that the court may take into account factors that are not easily quantified.

Section 7 (4) of the Matrimonial Causes Act obliges the court to look at the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future.

In my view, taking into account the factors which I have outlined above, the justices of this case would be met by an award of stand 1120 Prospect Township to the defendant. The parties in this case registered their marriage in 2002 and separated in 2007. They thus lived

together for a period a little over five years. In making this award the court strives to place the spouses in the position they would have been had a normal marriage continued between the parties. The defendant would have had a roof over her head and would have the use of some of the movable assets. From the award that I have made it is apparent that the plaintiff retains the bulk of the immovable property whether registered in his name or in the name of Tarbell Trust. The plaintiff is a trustee of the Trust and thus has control over its assets. He is able to safeguard the interests of his children and he also retains some property. Stand 770 Tynwald although not yet registered in his name belongs to him in terms of the agreement of sale.

I now turn to the movable property. The plaintiff in his declaration offered the defendant a list of property which the defendant accepted during her testimony. The offer made by the plaintiff of the movable property however does not take into account that she has been a wife and mother to his children. Although the plaintiff claimed that defendant had abused his children when asked to state the type of abuse all he could say was that she would not give them cereal when he was not there. In my view this is not by any stretch of the imagination an abuse of children. The plaintiff told the court that he had five children from previous relationships and the defendant had looked after at least three of them. The plaintiff stated in his evidence that he had purchased all the property by himself and the defendant had not contributed to their acquisition. However as already discussed above contribution is only but one aspect that a court considers in making an award in terms of section 7 of the Matrimonial Causes Act. The property which was set out in defendant's amended plea is, in my view, matrimonial property and can be distributed at divorce. Taking into account the factors that I have already stated it is my view that it would be just and equitable if the defendant was also awarded, in addition to the items offered in the plaintiff's declaration, the following property: the microwave oven, one leather lounge suite, one television set and one VCR.

In making this award I have taken into account that the plaintiff was the major breadwinner in the family and also that he shall remain with the burden of looking after the children. He should thus be awarded the bulk of the property. I also considered that the Mercedes Benz does not belong to the plaintiff. The parties will thus each remain with a motor vehicle that is, the plaintiff with the Prado and the defendant with the Mitsubishi.

The plaintiff sought for costs on a higher scale against the defendant in his closing submissions these had not been claimed. The general rule is that costs follow the cause. If a

party is successful then that party is entitled to their costs. The plaintiff in this case has been fairly successful and in my view should be awarded his costs.

I accordingly make the following order:

1. A decree of divorce is hereby granted.
2. The movable property set out in Annexure A is hereby awarded to the plaintiff as his sole and exclusive property.
3. The movable property set out in Annexure B is hereby awarded to the defendant as her sole and exclusive property.
4. The immovable property being 460 square meters of land, known as stand 1120 Prospect Township, of Subdivision C of Prospect situate in the district of Salisbury is hereby awarded to the defendant as her sole and exclusive property.
5. The plaintiff shall transfer the property into the defendant's name within 60 days of this Order failing which the Deputy Sheriff is hereby authorized to sign all the necessary papers to effect transfer.
6. The cost of such transfer shall be met by the defendant.
7. The defendant shall pay the plaintiffs costs of suit.

Mabulala & Motsi, plaintiff's legal practitioners

Mtombeni, Mukwasha, Muzawai & Associates, defendant's legal practitioners.

ANNEXURE A

1. WASHING MACHINE
2. 2 LG REFRIDGERATORS
3. PHILLIPS HIFI
4. TECHNICS HIFI
5. ONE LEATHER LOUNGE SUITE
6. 2 X 4 PLATE STOVES
7. 5 TELEVISION SETS
8. ONE BEDROOM SUITE
9. 2 X VCR'S
10. DVD PLAYER DUAL DECODER
11. DINING ROOM SUITE
12. PRADO

ANNEXURE B

1. ONE FOUR PLATE STOVE
2. ONE FAST FRIDGE (IN GARAGE)
3. ALL CUTLARY
4. RADIO (IN MAIN BEDROOM)
5. TWO TELEVISIONS (ONE PHILIPS)
6. ONE DOUBLE BED (MAIN BEDROOM)
7. ALL BED LINEN (MAIN BEDROOM)
8. ONE SOFA AND TWO CHAIRS (MAIN BEDROOM)
9. THREE SEWING MACHINES
10. ONE OVER LOCKER
11. ONE WATER PURIFIER DISPENSER
12. ONE CORNER DISPLAY
13. ONE ELECTRIC KETTLE
14. ONE MICROWAVE OVEN
15. ONE LEATHER LOUNGE SUITE
16. ONE VCR
17. ONE CHARIOT MITSUBISHI MOTOR VEHICLE