

SIKHULEKILE REGINA CHIZORORO (NEE GIYANE)
versus
ENOCK CHIZORORO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 5 July & 26 October 2011

Family Law Court

Trial Cause

A. Muchandiona, for plaintiff
J. Mugwagwa, for defendant

MAWADZE J: The plaintiff and the defendant who are wife and husband respectively married each other in KweKwe on 16 June 1995 in terms of the Marriage Act [*Cap 5:11*]. Prior to that they had had their first child on 25 October 1991 and in 1992 started living together as husband and wife according to customary rites. All in all the parties have been living together for about 19 years as husband and wife.

The plaintiff issued summons out of the court on 20 November 2003 seeking a decree of divorce on the basis of irretrievable breakdown, an order for custody of the two minor children, maintenance for the two minor children, sharing of matrimonial property and costs of suit.

In her declaration the plaintiff outlined the reasons for the breakdown of the marriage relationship and blamed the defendant. The plaintiff stated that the defendant is of violent disposition and has assaulted the plaintiff on several occasions. The plaintiff said the defendant is argumentative, quarrelsome and irresponsible as he has neglected the family. She also accused the defendant of committing adultery. As a result of these marital problems she said the parties first broke up and separated in 1999 but reconciled after few months but separated again since 7 May 2002 to date.

The defendant whilst conceding the fact that the marriage relationship has irretrievably broken down blames the plaintiff for the marital problems alleging that the plaintiff has improperly associated with other men and maliciously deserted the matrimonial home.

The marriage between the parties was blessed with two children namely Kudzai Petronella Chizororo (born on 25 October 1991) and Komborero Leslie Chizororo (born on 20 August 1993). Both children are now majors, aged 20 years and 18 years respectively. The dispute relating to their custody and maintenance therefore falls away on that account.

I would want to point out that although summons were issued out of this court on 20 November 2003 the pre-trial conference at which the matter was referred to trial was only held about 8 years later on 14 February 2011. The plaintiff has attributed this long delay to the defendant's conduct as his legal practitioners of record would renounce agency and thereafter assume such agency on divers occasions. The defendant has not addressed his mind to this delay. As a result of this long delay in dealing with the matter some of the issues which were in dispute and referred to trial fell away at the time the trial commenced on 5 July 2011. Be that as it may I shall refer to the same issues for clarity purposes.

At the pre-trial conference parties resolved the following issues:-

- (a) That the marriage relationship between the parties has irretrievably broken down.
- (b) That Kudzai Petronella the first born child was now a major.
- (c) That the plaintiff should retain custody of Komborerro Leslie Chizororo who was then a minor.

As already explained issues (b) and (c) above are no longer issues before this court.

The following issues were referred to trial for determination.

1. How the parties' two immovable properties namely House No. 7709 Mbizo 4 Extension KweKwe and Flat No. 26 Globe Court KweKwe are to be distributed.
2. The maintenance to be paid by the defendant in respect of Komborero Leslie Chizoro.

At the trial on 5 July 2011 the plaintiff withdrew item (2) above on the basis that Komborero Leslie Chizororo was turning 18 years in about a month's time from then on 20 August 2011. Indeed at the time of writing this judgment Komborero Leslie Chizororo was now 18 years old. The only issue therefore which falls for determination is how the parties' two immovable properties cited above should be distributed. Before I deal with that issue I wish to briefly comment on the breakdown of the marriage relationship between the parties.

It is common cause that the parties are agreed that their marriage relationship has broken down to such an extent that it is beyond resuscitation. Indeed they have been living apart since 2002 to date, a period of about 9 years. As was stated in the case of *Ncube v Ncube* 1993(1) ZLR 39 where parties are consenting to divorce it may be not necessary for a

court to hear evidence solely for purposes of ascribing fault for the breakdown of the marriage.

As already explained the parties blame each other for the breakdown of the marriage. However what is pertinent is that Mr *Mugwagwa* for the defendant urged this court to make an adverse finding against the plaintiff in terms of s 7(4) of the Matrimonial Cause Act [*Cap 5:13*] which enjoins the court to pay due regard to the conduct of the parties in distributing matrimonial property. The defendant solely blamed the plaintiff for the breakdown of the marriage. Despite that the issue as regards the breakdown of the marriage was no longer in contention at pre-trial conference stage, Mr *Mugwagwa* for the defendant sought to cross examine the plaintiff on the alleged extra marital affair with one Ndhlovu based on a letter which was found by the defendant written to the plaintiff dated 25 September 1999 by T. Ndhlovu. The plaintiff conceded that T. Ndhlovu was her boyfriend before she married the defendant and that in 1999 when the letter was written the plaintiff and the defendant were on separation and that T. Ndhlovu had got wind of this and wanted to resuscitate the old affair. According to the plaintiff the discovery of this letter did not lead to the breakdown of the marriage as the parties reconciled in 1999 and only separated 3 years later in 2003. In fact the plaintiff pointed out under cross examination that the defendant was to blame for the breakdown of the marriage as he had numerous extra marital affairs which the plaintiff had proof of in form of love letters written to the defendant. Mr *Mugwagwa* for the defendant abandoned this line of cross examination and I believe rightly so. I say so because firstly the parties are agreed that the breakdown of the marriage is no longer an issue for contestation during the trial. Secondly, there is no evidence to suggest that the plaintiff is solely to blame for the breakdown of the marriage as both parties in my view seem to accept that they failed in being faithful to each other during their marriage which is just one of the reasons for the breakdown of the marriage relationship. I can therefore not make adverse finding against the plaintiff in resolving the dispute between the parties in relation to the sharing of the immovable property.

Immovable Property: House No. 7709 Mbizo 4 Extension KweKwe and Flat No 26 Globe Court KweKwe

The dispute between the parties is how the immovable property being House No. 7709 Mbizo 4 Extension KweKwe (hereinafter Mbizo House) and Flat No. 26 Globe Court KweKwe (hereinafter the flat) should be distributed between the parties.

In his written closing submission Mr *Mugwagwa* submitted that the flat in issue is not subject to distribution as it is not part of the matrimonial estate. I am surprised by this submission not only because it is not supported by evidence on record but that it flies in the face of the parties' agreed positions during the pre-trial conference stage and issues referred to trial. I cannot do more than to quote the pre-trial conference minute on that point dated 14 February 2011 (although the pre-trial conference itself was held on 9 February 2011).

“2. Outstanding issues for determination by the trial court

The parties agreed that there are only two outstanding issues referred to trial namely:-

(a) How the parties' two immovable properties namely house No. 7709 Mbizo 4 Extension KweKwe and Flat Number 26 Globe Court KweKwe are to be distributed; and

(b) The maintenance to be paid in respect of Komborero Leslie Chizororo”.

I have no doubt in my mind that the parties as agreed at the pre-trial conference regarded the two immovable properties, the Mbizo house and the flat, as matrimonial property which was subject to distribution in terms of s 7 of the Matrimonial Causes Act [*Cap 5:13*]. There was therefore a meeting of the minds between the parties on the fact that the flat is matrimonial property. I am fortified in this finding by the fact that at the commencement at the trial I sought to confirm the parties' position in relation to the issues referred to trial. It was at that stage that Mr *Muchandiona* for the plaintiff withdrew the claim in relation to maintenance for Komborero Leslie Sibanda. Both counsel agreed that the only issue to be resolved during the trial is item (a) on the pre-trial conference minute. Mr *Mugwagwa* did not seek to amend the issue in order to put into contention the fact as to whether the flat is part of the matrimonial estate and if so how it should be distributed. It is therefore disingenuous in my view for the defendant at this late hour to try and put into issue the status of the flat. During the trial all that the plaintiff was cross examined on was in relation to her contribution towards the acquisition of the flat and not whether it was part of the matrimonial estate. As already said evidence led from the parties is clear that the flat is indeed matrimonial property. The court therefore finds that the flat is part of the matrimonial estate and is subject to distribution in terms of s 7 of the Matrimonial Causes Act [*Cap 5:13*].

I now proceed to deal with the evidence in relation to the two properties.

The plaintiff is a primary school qualified teacher and was so qualified at the time she started to cohabit with the defendant in 1992 until the solemnisation of their marriage in 1995 to date. She is currently teaching at Lower Gweru Mission in the Midlands. Her evidence was

that at all material times during the subsistence of the marriage she was teaching in rural schools in the Midlands whereas the defendant was based in KweKwe. She would go to Kwe Kwe during some of the weekends and during the school holidays. It is therefore clear that the plaintiff was not just a house wife but a professional woman in her own right who earned a monthly income throughout the marriage. The plaintiff told the court that her salary was however much less at all material times as compared to the defendant's salary. As a result the plaintiff states that she mainly used her income to buy food, groceries and clothes for the family whereas the defendant used his income to acquire and develop the Mbizo house (and to later acquire the flat).

At the time the plaintiff and the defendant married the defendant was a trainee artisan at Ziscosteel KweKwe and qualified as an artisan in 1993. Currently the defendant is employed as a Training Instructor with Zimasco Shurungwi which he joined in 2003. The defendant's monthly income was much higher than the plaintiff's income.

As already pointed out the parties have been married for 19 years which is a fairly long time even taking into account the period the parties have stayed apart from 2002 to date. During the duration of the marriage the parties were able to provide for their two children Kudzai Petronilla who is now 20 years old and about to start University education and Komborero Leslie who is now 18 years old and in lower sixth form. It is important to note that at the time of separation in 2002 the plaintiff took custody of the two children who were minors then. While the defendant would also pay school fees for the children and meet their other requirements it has not been disputed that the plaintiff provided for the day to day needs of the children and had the children in her custody most of the time as compared to the defendant.

I now turn to the evidence on how the two properties were acquired.

The Mbizo House

The plaintiff's evidence is that the defendant bought the stand for the Mbizo house in 1995 and that the parties started to build the house thereafter using their own resources in 1996 up to roof level stage. Thereafter she said the defendant obtained a housing loan from the then Founders Building Society in 1996 to finance the completion of the house. In order to qualify for the housing loan the defendant had to use both his and the plaintiff's pay slips. The plaintiff said the mortgage finance was availed and they completed building the house between 1998-1999. They never stayed at the house as they were staying in the then company flat. The Mbizo house was therefore rented out to tenants since 1998-1999 to date. The

plaintiff said only the defendant has benefited from the rentals from Mbizo house and that currently the Mbizo house is being rented by the manager for Edgars Store in KweKwe. She described the house as a 3 bed room house with a lounge, kitchen, toilet, bathroom and exterior French door. The Mbizo house is under bricks and asbestos and dura walled.

The plaintiff's evidence is that the defendant paid the first mortgage using his salary. In respect of her own contribution to the construction of the Mbizo house the plaintiff said before they obtained mortgage finance she used her own income to buy window frames, bricks, river sand and cement used in the construction of the house. She said she also gave the defendant her pay slip to enable him to obtain mortgage finance from Founders Building Society. In terms of indirect contribution she said since the defendant used almost all his income in building the Mbizo house she in turn used her income to buy food, groceries and clothes for the family in addition to the motherly duties she performed.

Under cross examination the plaintiff refuted that the Mbizo house is incomplete to date but was completed in 1998-1999 and has been rented out since then. She admitted that the roof had not been properly done and had to be redone around 2004. The plaintiff told the court that she is not privy to the reason why the defendant obtained another mortgage loan from Beverly Building Society in relation to the same Mbizo house as they had separated. She estimated her direct contribution at 30% and indirect contribution at 50% which in my view would give an average of 40% as total contribution to the Mbizo house.

The defendant told the court that they acquired the Mbizo stand in 1994 and not 1995. He confirmed that they started to build the Mbizo house using their own resources until 1995 when he obtained mortgage finance from Founders Building Society. While he conceded that he asked for the plaintiff's payslip in order to use to obtain the housing loan he said the plaintiff's income was nonetheless not considered on account that the Mbizo stand was not registered in the joint names of the plaintiff and defendant. Instead of being given Zimbabwean \$60 000 he ended up only getting \$35 000 from Founders Building Society. According to the defendant mortgage loan was to finance completion of the house as house was at roof level and there was need to do the roofing and plumbing system. According to the defendant the loan from Founders Building Society was not released directly to the defendant but to the contractor. The defendant said the contractor abused the loan funds and failed to complete the house which was at roof level in 1995. From 1996 to about 2007 he said nothing was happening at the Mbizo house which remained incomplete. The defendant said he then obtained a second mortgage loan from Beverly Building Society in order to complete the

house. He said he has since repaid in full the housing loans and all what is left is the cancellation of the mortgage bond in favour of Beverly Building Society.

The defendant told the court that the plaintiff made no direct contribution in relation to the Mbizo house and refuted that she bought any building materials. He said the plaintiff's contribution was only indirect in form of encouragement and buying food, groceries and clothes for the family. He estimated the plaintiff's contribution in relation to the Mbizo house at 10% and refuted the 40% given by the plaintiff. In his view the plaintiff should be awarded a 10% share of the value of the Mbizo house whose value he puts at US10 000-00.

Under cross examination the defendant was unclear as to the level of construction of the Mbizo house attained using the mortgage finance from Founders Building Society. The defendant was heard to say he only did the foundation (clearing the land trenching, casting and trench brick wall) using his own cash. He then said the contractor he engaged after obtaining the mortgage finance from Founders Building Society only acquired river sand, cement and erected a wall before the contractor died. He said there was no complete house constructed as alleged by the plaintiff until 2007 when he obtained a second mortgage loan from Beverley which he used firstly to pay off the Founders housing loan and to complete the house. In fact the defendant insisted that the Mbizo house is incomplete to date. Under cross examination he was unable to say what major work was outstanding on the house besides saying trenches were still to be dug out, exterior door repaired, piping done in the bathroom and toilets, repairing of leaking chimney and painting a second coating of paint.

In my view that can hardly be evidence that this house is incomplete. In fact the defendant conceded under cross examination that there has been tenants at the Mbizo house from 1998-1999 and that the Manager for Edgars Stores KweKwe has been a tenant at this house since December 2010. The defendant is therefore not being truthful to the court in his assertion that the house is incomplete to date.

The Flat

It is common cause that the parties started to stay in the flat which was owned by the defendant's employers around 1992. The flat was then offered to the defendant to buy as a sitting tenant in 1999.

The plaintiff told the court that the process to buy the flat started before she separated from the defendant. She said the defendant joined the Millenium Housing Cooperative which facilitated the purchase of the flat. In terms of direct contribution the plaintiff said she only paid initial administration fees for the purchase of the flat and produced exh 2 to 4 as proof of

such payment. Exhibit 2 is a receipt dated 20 January 2012 in defendant's name showing payment of Zimbabwe \$300-00 to Millenium Cooperative. Exhibit 3 is a cash deposit slip with Beverley Building Society for Millenium Cooperative for Zimbabwe \$2000-00 paid by the plaintiff dated 7 January 2001. Exhibit 4 is another deposit slip with Beverley Building Society dated 22 January 2002 to Millenium Housing Cooperative for Zimbabwe \$1700-00 paid by the plaintiff. In terms of indirect contribution the plaintiff said she performed all her household duties at this flat from 1992 to 2002 when they separated as they used it as the matrimonial home. She said she also assisted the defendant during that time to extend the rural house in Chivi from three to four rooms. The plaintiff said even when they had separated she at one time gave the defendant some money in 2005 for the defendant to service the Beverley Building Society loan at the defendant's behest. In her view she would rather have this flat awarded to the defendant and she gets the Mbizo house. The plaintiff said she prefers the Mbizo house because she needs a family home with the children. All in all she put her direct contribution for the flat at 6% and indirect contribution at 60% which will be an average of 33%. Nothing really turned on her evidence in relation to the flat during cross examination.

The defendant in his evidence in relation to the flat told the court that he started the process to buy the flat in 1999 and that he has since paid the full purchase price of Zimbabwe \$270 000-00 in 2003 using his terminal benefits from Ziscosteel. He told the court that he is totally unaware of payments made by the plaintiff in exh 2 to exh 4 and said they were made by the plaintiff without his knowledge. Again the defendant is being untruthful. Why would the plaintiff in 2002 make such payments without the defendant's knowledge when in fact they were still together. It is improbable that the plaintiff would get all the relevant banking details without the defendant's knowledge. It would seem the defendant is simply denying such knowledge in order to minimise the plaintiff's contribution.

The defendant told the court that the flat is valued at US\$15000 and should be declared as his sole exclusive property. The defendant said he should in addition be awarded 90% net value of the Mbizo house so as to buy out the plaintiff whose 10% net value contribution he said is simply based on what he called humanitarian grounds. The defendant stated that the plaintiff should not be awarded the Mbizo house to stay with the children because he made more contribution by securing two mortgage loans to finance the acquisition and construction of that house. He said the flat should be awarded to him because he obtained it as a bonus from his erstwhile employer. He said he would want to use the Mbizo house as

his retirement home. Under cross examination the defendant accepted that when the parties separated on 7 May 2002 to date the plaintiff had custody of the two children. He also acknowledged the plaintiff's indirect contribution of looking after the children, paying school fees, providing food and clothes.

In my assessment that the plaintiff gave her evidence very well and was truthful and forthright with the court. She did not seek to exaggerate her contribution to the acquisition of the properties in issue. Although she is a professional woman in her own right she was candid with the court on her exact roles in the marriage set up. I find no reason to disbelieve her evidence most of which remained unchallenged. The same cannot be said of the defendant. He was very unimpressive in his narration of the sequence of events in relation to the Mbizo house. The defendant sought to down play and minimise both direct and indirect contributions made by the plaintiff. In fact the defendant exhibited a very selfish attitude when he sought to be awarded virtually all the properties in issue. As already said I am inclined to accept the plaintiff's evidence.

The Law

Section 7 of the Matrimonial Causes Act [*Cap 5:13*] deals with the division, apportionment or distribution of assets of the spouses upon the dissolution of the marriage. In the case of *Ncube v Ncube* 1993(1) ZLR 39(S) at 40H-41A KORSAN JA had this to say in explaining the provisions of s 7 of the Matrimonial Causes Act:-

“The above provisions, to my mind, do more than furnish broad guidelines for deciding what is a fair order in all circumstances, adjusting property rights if need be, under wide powers bestowed on the court. The determination of strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money is invariably a theoretical exercise for which the courts are indubitably imbued with wide discretion.”

It is clear to my mind that court has wide discretion in deciding on the division, apportionment or distribution of assets of the spouses upon divorce. The relevant guidelines are provided for in s 7 (4)(a) to (g) of the Matrimonial Causes Act [*Cap 5:13*], although the list provided is not exhaustive. This court has had the occasion to comment on how the guidelines so provided should be applied. In the case of *Shenje v Shenje* 2001 (2) ZLR 160 (H) GILLESPIE J at 163 F had this to say:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all possible relevant factors. The

decision as to property division order is an exercise of judicial discretion, based on all the relevant factors; aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.”

When the parties gave evidence they were mostly concerned about the indirect and direct contribution made by each spouse to the family, especially in relation to the acquisition of the two properties in issue, the house in Mbizo and the flat. I have already alluded in detail to the evidence of the parties in that regard. The direct and indirect contribution of the parties is indeed an important factor. In the case of *Masiwa v Masiwa* 2007 (1) ZLR 167 (S) GWAUNZA JA had the occasion to consider what constitutes indirect contribution and how both direct and indirect contribution should be property assessed. The learned judge of appeal had this to say at 172 D:

“It has been generally accepted that indirect contributions made, in particular, by a wife during the marriage include taking care of the household chores like cooking for and feeding the husband and the family, washing, ironing and child minding. Many studies have been conducted locally and internationally and books written about how this type of work is not only unappreciated but under valued as well.”

The views expressed by the learned Judge of Appeal are very apparent from the defendant’s evidence and the closing submission by Mr *Mugwagwa* for the defendant. The defendant in my view is guilty of both undervaluing and un-appreciating the indirect contribution made by the plaintiff.

On how the court should treat the direct and indirect contribution the learned Judge of Appeal in *Masiwa v Masiwa supra* at 172 F had this to say:

“To the extent that the appellant’s claim was premised on both direct and indirect contributions, my view is that the court *a quo* should have combined the assessed value of the two types of contribution made by the appellant, in order to determine her entitlement. This would accord with the spirit of s 7 of the Matrimonial Causes Act which specifically refers to direct and indirect contributions.”

The contributions by the spouses whether direct or indirect should not be the only consideration nor can it be said to be the most important factor. I share the views expressed by GILLESPIE J in the case of *Shenje v Shenje supra* at 163 H – 164 A:

“The factors listed in the subsection (s 7 (4)) deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of

the respective contributions of the parties. That would be an error. The manner of the contributions made to the family is the fifth listed of the seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognise that the legislative intent and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped."

From the evidence adduced it is clear that the defendant made the major direct contribution in the acquisition of both the Mbizo house and the flat. The two properties in issue cannot be awarded to the defendant solely on that basis. The indirect contribution made by the plaintiff has not been challenged. In fact the plaintiff made the major contribution in the upbringing of the children and retained their custody to date even after separation. The parties have been married for about 19 years which is a very long time. The plaintiff is a professional woman whose contribution to the marriage is not only the value of the domestic labour but earned monthly income for the family. In my view the plaintiff (and the children) are entitled to decent accommodation even after the dissolution of the marriage. Although the two children are no longer minors they are still dependant on the parents.

It is my considered view that the defendant's proposal of only awarding the plaintiff 10% of the net value of the Mbizo house lacks justification and is not in line with the spirit of the guidelines provided for in s 7 (4) of the Matrimonial Causes Act [*Cap 5:13*]. What I find to be just and equitable is to award the plaintiff the Mbizo house and the defendant the flat.

Accordingly, it is ordered as follows:

1. A decree of divorce is hereby granted.
2. Each party is awarded as his or her sole exclusive property the movable property in his or her possession.
3. The plaintiff is awarded stand number 7709 Mbizo 4 Extension Kwekwe registered in the defendant's name as her sole and exclusive property.
 - 3.1. The plaintiff shall pay for all the transfer costs of the property number 7709 Mbizo 4 Extension Kwekwe.
 - 3.2. The defendant shall sign all the relevant papers to effect transfer within a month of being notified by the plaintiff failure of which the deputy sheriff is authorised to sign all relevant papers to effect transfer of number 7709 Mbizo 4 Extension Kwekwe into the plaintiff's name.

4. The defendant is awarded as his sole and exclusive property Flat No. 26 Globe Court, Kwekwe.
5. Each party shall bear his/her own costs.

Danzinger & Partners, plaintiff's legal practitioners
Jumo, Mashoko & Partners, defendant's legal practitioners