

CALLISTO MUZONGONDI  
versus  
DORICA MUZONGONDI (nee OFFICE)

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 15 March 2010 & 3 February 2011

### **Matrimonial Trial**

*S Simango*, for the plaintiff  
*F.M. Katsande*, for the defendant

CHITAKUNYE J. In the year 1995 plaintiff married defendant in terms of customary law. They had apparently commenced living together prior to the formalization of the union in terms of customary law. On 31 March 2000 their marriage was solemnized in terms of the Marriages Act, [Cap 5:11]. The marriage still subsists. The marriage was not blessed with any child.

On 8 April 2008 the plaintiff filed a suit seeking a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage had irretrievably broken down to such an extent that there were no reasonable prospects of the restoration of a normal marriage relationship between them. He went on to say that during the subsistence of the marriage defendant has-

- a) Treated plaintiff with cruelty and often assaulted plaintiff, threatened to poison plaintiff, attempted to take plaintiff's life using a knife or an axe;
- b) Showed a very violent disposition to plaintiff and his relatives, such as plaintiff's mother, brother and sister who have vowed never to set foot at plaintiff's house again;
- c) Accused plaintiff of nursing an adulterous affair with a certain named woman, a workmate at Kwekwe polytechnic. She ran berserk and assaulted her in front of the students and uttered vulgar words.
- d) The parties are incompatible;
- e) Plaintiff has lost all love and affectionate for the defendant.

Based on the above factors plaintiff believes that the marriage has irretrievably broken down. During the subsistence of the marriage the parties acquired movable and immovable property. The movable property comprised-

- a) Two refrigerators
- b) One three- plate stove
- c) Two kitchen units;
- d) Dining room table and chairs
- e) Display unit;
- f) Cupboard
- g) One VCR and television set;

- h) Decoder and dish
- i) Two beds
- j) Two radios
- k) A set of four sofa seats; and
- l) An F13 motor vehicle.

The immovable property comprised-

- a) House no. 6071 Unit 'J' Seke, Chitungwiza.
- b) Vacant stand in Norton-Adore Gold housing scheme
- c) Vacant stand in Kwekwe Marshlands area.

Out of all the above property he proposed that defendant be awarded-

- a) The vacant stand in Norton
- b) One fridge
- c) Three plate stove
- d) One kitchen unit
- e) Decoder and dish
- f) One bed
- g) One radio and
- h) Kitchen table and four chairs;

With the rest of the property being awarded to the plaintiff.

In her plea the defendant admitted that the marriage had irretrievably broken down and that there were no prospects of restoring a normal marriage relationship. She however contended that the reasons for the breakdown were not as stated by plaintiff. The reason for the breakdown was that plaintiff was involved in an adulterous relationship with a named woman who she has since sued for adultery damages. That adulterous relationship has led to plaintiff denying her love and affection and in fact demeaning and stigmatizing her beyond endurance. As a result she apparently no longer has any love and affection for plaintiff. She would thus agree that a decree of divorce be granted.

Defendant disagreed with the distribution of the matrimonial property as suggested by the plaintiff. She instead, though without making a counter claim, suggested that the property be shared as follows-

For defendant:-

- a) Stand 6071 Unit J Seke, Chitungwiza
- b) the stand in Norton,
- c) The F13 motor vehicle, and
- d) All the movable property.

The plaintiff to be awarded the Kwekwe undeveloped Marshlands Stand.

Defendant also asked to be awarded maintenance in the sum of \$300 per month until she dies or remarries and that plaintiff be ordered to contribute \$150 towards defendant's cost.

At the pre-trial conference the parties agreed on a number of issues. The parties agreed that the marriage had irretrievably broken down and apparently neither party had the intention to restore normal marital relationship.

They also agreed on how the movable property was to be shared except the F13 motor vehicle.

In this regard they agreed that plaintiff be awarded the following movable property-

- a) One upright refrigerator
- b) Dining room table and chairs
- c) Display unit and Cupboard
- d) One bed
- e) One radio, and
- f) One kitchen unit.

The defendant was to be awarded the following movable property-

- a) One refrigerator
- b) Three plate stove
- c) One kitchen unit
- d) Television set and VCR
- e) Decoder and satellite dish
- f) One radio
- g) One bed
- h) A set of sofas.

Other issues agreed upon were that plaintiff to pay maintenance to defendant in the sum of US\$20.00 per month until such time as she dies or remarries and that each party was to pay their own costs.

The issues which the parties could not agree on and which were referred to trial were as follows-

- 1) What is the equitable way in which the parties' immovable assets and F13 pick up truck should be distributed?
- 2) Whether or not vacant stand in Kwekwe-marshlands should not be part of the matrimonial property?

The plaintiff gave evidence after which defendant testified. From the evidence adduced in court the second issue as to whether the vacant stand in Kwekwe marshlands should not be part of the matrimonial property was not easy to comprehend. It was clear from the evidence of both parties that that stand was acquired during the subsistence of the marriage and there was nothing to distinguish it from the other properties save that it had a clause stipulating that it could not be

sold before some development was effected on it. I did not hear either of the parties to say that that clause affected the ownership of the stand or their ability to redistribute the stand as between themselves. In fact the plaintiff clearly said he fully paid for that stand and after that full payment he was given a form which indicated that he now owned the stand. Neither party in their evidence suggested that the stand was not matrimonial property. The point raised by plaintiff was simply that the stand could not be sold without any development being effected on it. Thus in the event of distributing the stands there should be no clause requiring this particular stand to be sold but it is transferable as between the spouses.

The main issue pertains to how the immovable property should be distributed. This is so because defendant in her evidence categorically stated that she was not interested in the motor vehicle. Her main interest was in house no. 6071 Unit J Seke, Chitungwiza.

From the evidence adduced in court it was common cause that the immovable property was all bought by plaintiff using his salary as a lecturer. In 1995 he purchased the Norton stand from his savings. In 1996 he again purchased house no. 6071 Unit J Seke, Chitungwiza from his savings. When as a lecturer he moved to Kwekwe polytechnic college he joined a civil servants housing scheme as a result of which he was allocated stand no. 15521 Marshlands Kwekwe. He fully paid for that stand. In the meantime the Seke house he had bought as a 3 roomed core house was developed to a 7 roomed house. The funds for that development were from his savings.

As regards defendant's contribution in the acquisition of these properties plaintiff said defendant was not able to make any meaningful direct contribution as she was unemployed and had no means of earning any meaningful income. The defendant's contribution to the Seke house was by buying some paint and tiles for the passage and lounge. The notable contribution by defendant was in looking after plaintiff whilst he was going to work. That is the contribution plaintiff feels defendant deserves an award of the Norton stand only. That stand is about 400 square metres in size whilst the Kwekwe stand is about 160 square metres only. All the immovable properties are in plaintiff's names.

In the event that court decided that the properties be sold plaintiff offered 25% to 30% (per cent) to defendant. Asked how he arrived at such a percentage plaintiff said he had looked at defendant's contribution in looking after him when he was going to work, washing and cooking for him. He also considered the paint and tiles she bought for their house.

The defendant on the other hand maintained that she deserved the Seke house whilst plaintiff retained the two residential stands and the F13 motor vehicle. She contended that she

contributed a lot also. Defendant's evidence of her contribution was however contradictory. In her evidence in chief she stated that the money that was used to buy the stands was from savings. When asked about her contribution in those savings she clearly said that she contributed indirectly because she had no money in the savings account. Her contribution was also in that they would plan together. When asked to comment on the plaintiff's assertion that she contributed nothing defendant said that she had a flea market and she did tailoring. She was also involved in cross border trading. In all these ventures she at times realized a lot of money which she utilized at home. At times she would buy clothes for plaintiff. She also bought blankets and kitchen utensils.

Whilst in her evidence-in-chief and under cross examination she tried to give the impression that her dressmaking business generated a lot of money, in her summary of evidence she had clearly indicated that the sewing business was not viable as she had no capital. She thus did not gainfully engage her faculties in that regard. In her summary of evidence the venture that brought her a lot of income was the cross border trade yet in her evidence in court that trade was not given that prominence. Defendant confirmed that when they moved to Kwekwe she did not engage in any income generating activity. She was a fulltime housewife. Plaintiff said he moved to Kwekwe in 1995. So since then defendant has been a fulltime housewife.

It is apparent that in terms of direct contribution defendant had very little input. Most of her contribution was indirect contribution as a house wife.

Section 7(4) of enjoins this court to have regard to all the circumstances of the case in arriving at a proper decision on the distribution of family estate as number of principle factors are enumerated in s 7(4) a to g. These include-

- “(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;
- (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 doing so the court shall endeavor as far as is reasonable and practical 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.”

The above guiding factors make it clear that the indirect contribution must be considered in the distribution of assets between the spouses. The issue might thus be what weight to put on such indirect contribution. This will of course vary from case to case. There may be cases where the indirect contribution is not considerable and also cases where indirect contribution is very significant.

In *Sithole v Sithole and Another* HB 14/94 court held that even if a wife made only indirect contributions, she cannot leave empty-handed merely because she did not contribute financially towards the acquisition and development of the matrimonial home. The wife was awarded a 40% share. Equally in *Muteke v Muteke* S 88/94 the wife made no direct financial contribution except as a housewife but court awarded her a substantial share. The court considered primarily her needs and expectations rather than her contribution.

Another aspect is that of the duration of the marriage. The longer the duration, the more likely that the indirect contribution will be of a greater weight. For instance looking after the home for two years may not be of same significance as looking after the home for twenty years. In *Usayi v Usayi* 2003 (1) ZLR 684 (S) the Supreme Court in upholding a High Court decision to award a 50% share to a non working housewife of many years held that:-

“It is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as wife, mother, counselor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: ‘throughout the marriage she was a housewife. She never worked.’ It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the “direct and 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.”

In that case the parties had been married for a period in excess of 35 years.

In *casu* the marriage lasted about 15 years from when a customary law union was formalized. During that period defendant performed her wifely duties and provided other contributions which plaintiff recognized as worthy to the matrimonial estate. I am of the view that a share in the Seke

house of 30 % plus an award of the Norton stand would be adequate in the circumstances of this case.

The plaintiff will be given the option to buy out defendant within a 6 months period. Should he fail the property will be sold and the net proceeds shared in the ratio 70:30.

Accordingly it is hereby ordered that:-

- 1) A decree of divorce be and is hereby granted.
- 2) The plaintiff is hereby awarded the following movable property:-
  - (i) One upright fridge
  - (ii) Dining room table and chairs
  - (iii) Display Unit and Cupboard
  - (iv) One bed
  - (v) One Radio
  - (vi) One Kitchen Unit
  - (vii) F13 motor vehicle Registration No. AAD 3524.
- 3) The defendant is hereby awarded the following movable property:-
  - (i) One refrigerator
  - (ii) A three plate stove
  - (iii) One Kitchen Unit
  - (iv) A Television set and VCR
  - (v) A Satellite and Decoder
  - (vi) One Radio
  - (vii) One bed
  - (viii) A set of Sofas
- 4) On the immovable property plaintiff is awarded:-
  - (i) Stand No.15521 Marshlands, Kwekwe,
  - (ii) 70% share in Stand 6071 Unit J, Seke, Chitungwiza.
- 5) The defendant is awarded the following :-
  - (i) Stand in Norton under Adore Gold housing scheme
  - (ii) 30% share in Stand 6071 Unit J, Seke, Chitungwiza.
- 6) The plaintiff is hereby directed to effect change of ownership of the Norton stand from his name to that of the defendant within thirty (30) days of the date of this order. Should he fail to do so the deputy Sherriff Harare is hereby authorized to sign all such documents as are necessary to effect the transfer from plaintiff's name to defendant's name. The plaintiff shall meet the costs of such transfer.
- 7) The plaintiff is hereby granted the option to buy off the defendant in respect of her 30% share in Stand 6071 Unit J, Seke, Chitungwiza.

- 8) The parties shall agree on the value of the property within 14 days of the date of this order. If the parties fail to agree on the value they shall appoint a mutually agreed evaluator to evaluate the property within 21 days of the date of this order. If the parties fail to agree on an evaluator, the registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property. The plaintiff shall meet the costs of such evaluation.
- 9) The plaintiff shall pay off defendant her 30% share of the value of the property within six (6) months from the date of receipt of the evaluation report unless the parties agree otherwise. Should the plaintiff fail to pay defendant's share in full within the stipulated period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the registrar of the High Court and the net proceeds there from shall be shared in the ratio 70:30.
- 10) The plaintiff shall pay maintenance to defendant in the sum of twenty (20) United States dollars per month until defendant dies or remarries whichever occurs first.
- 11) Each party to bear their own costs.

*Hungwe & partners*, plaintiff's legal practitioners

*F.M. Katsande & partners*, defendant's legal practitioners.